UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

IN THE MATTER OF: **SUBPOENA AD TESTIFICANDUM** **ISSUED TO CVS HEALTH CORPORATION**	**File No. 241-0005**

CVS HEALTH CORPORATION'S PETITION TO QUASH SUBPOENA AD TESTIFICANDUM

Pursuant to 16 C.F.R. § 2.10(a), Petitioner CVS Health Corporation ("CVS") requests that the Federal Trade Commission ("FTC" or "Commission") quash the Subpoena Ad Testificandum issued to CVS on October 16, 2024 (the "Subpoena," attached as Exhibit 1) regarding CVS's enormous efforts to comply with a December 8, 2023 FTC Civil Investigative Demand ("December CID"). The Subpoena is the latest salvo in the Commission's misguided and misinformed crusade against CVS's pharmacy benefit management ("PBM") business to achieve an outcome that the three majority Commissioners prejudged repeatedly over the past three years.[1]

The underlying suggestion of the Subpoena that CVS has not undertaken substantial efforts to comply is not credible. Since June 2022, CVS has received and responded to hundreds of requests across fourteen different FTC subpoenas, civil investigative demands ("CIDs"), and 6(b) orders. In response, CVS has produced to the FTC more than 13 million pages, nearly 2 million documents, and several terabytes of data. For the December CID in particular, CVS has produced more than 1.2 million documents across more than 6 million pages requiring more than 180,000

[1] CVS intends to file in short order a motion to disqualify Chair Khan, Commissioner Slaughter, and Commissioner Bedoya from the underlying investigation, FTC Matter No. 241-0005, based on their prior prejudicial and biased statements and actions. This motion would be in addition to the pending motion for disqualification filed on October 8, 2024, by Caremark Rx, L.L.C. and Zinc Health Services, LLC in the insulin proceedings, FTC Docket No. 9437.

hours of work by CVS's e-discovery vendor alone. These statistics could not be achieved through anything other than a substantial commitment of resources by CVS.

The Subpoena is not reasonably relevant to the underlying investigation, is unduly burdensome, was issued for the improper purpose of harassing CVS, and impermissibly seeks privileged information. The Commission should therefore quash the Subpoena.

BACKGROUND AND PROCEDURAL HISTORY[2]

Since June 2022, CVS has worked cooperatively with dozens of FTC attorneys throughout the agency. These attorneys were part of a disconcerted FTC effort to simultaneously "study" and "investigate" the PBM industry, with the first investigations beginning at the same time as the purported study. Over the past 28 months, the FTC has issued to CVS-affiliated entities fourteen different subpoenas, civil investigative demands, and 6(b) study orders related to PBMs. In total across all requests, the FTC has made more than 500 requests (including subparts) and met with CVS dozens of times.

CVS has invested substantial time, money, and resources in working with several different teams within the FTC in parallel. These FTC teams typically did not appear to coordinate closely among each other and treated each request to CVS as if it was entirely independent of requests made by colleagues down their hallway. In total, CVS has produced more than 1.7 million documents spanning 13.3 million pages, and 6 terabytes of data covering more than 9 billion prescriptions and thousands of pharmacy networks. More than 150 CVS employees have been pulled away from their day jobs to assist with the company's compliance with FTC compulsory process. CVS retained outside legal counsel at Dechert LLP to oversee the company's compliance,

[2] The Declaration of Michael Chase on Behalf of CVS Health Corporation attached as Exhibit 2 includes additional information on the facts described in this section.

an e-discovery vendor to manage document collection, processing, review, and production, and an outside economic consulting firm to manage the collection, compilation, and production of massive amounts of data to respond to FTC requests. For the document processes alone, the voluminous FTC requests required more than 200,000 hours of work by the e-discovery vendor. CVS has worked with dozens of different FTC attorneys over the past three years on these matters.

The latest of these matters is the FTC's October 16, 2024 Subpoena, which seeks information on CVS's efforts to comply with the December CID. The December CID sought substantial amounts of information that CVS had or would be producing to the FTC as part of the 6(b) order issued on June 6, 2022. The FTC did not attempt to tailor the 6(b) requests in a reasonable manner that would have substantially streamlined and expedited completion of the productions needed for the study. As a result, the FTC required CVS to produce more than 1 million documents spanning more than 6 million pages along with more than 5 terabytes of data—of which only a miniscule portion was ultimately used in the FTC's Interim Report issued on July 9, 2024. CVS met with the FTC on a weekly basis between February 2023 and October 2023, then biweekly since then, for a total of more than 50 meetings. Due to CVS's immense effort to comply with the 6(b) order, CVS completed its responsive data productions in February 2024 and its document productions in May 2024 (with the exception of a small number of documents). Nevertheless, the FTC issued its Interim Report in July 2024 and suggested that the lack of analytical rigor in the report was supposedly the result of not having sufficient information. Criticism of the FTC's Interim Report has been unprecedented for an FTC 6(b) study, with multiple independent experts and two FTC Commissioners panning the report as lacking sufficient empirical data and analytical rigor to form any meaningful conclusions.[3]

[3] *See, e.g.*, Drug Channels Roundup (July 30, 2024) (Adam Fein, President, Drug Channels Institute: "The plural of anecdote is data. And in my opinion, the FTC didn't pile up enough anecdotes to generate sufficient data . . . These

After the FTC issued the December CID, a new team of FTC attorneys was directed to work with CVS on the investigation. Given the enormous amount of information various FTC teams had already received from CVS, the company requested that the new team review the substantial materials that CVS had already produced to the FTC—several million pages, terabytes of data, and many interrogatory responses—to identify what was "still needed that [was] not already covered or known to the FTC through the other five CIDs and 6(b) orders." Starting on January 8, 2024, CVS began rolling in its first set of responsive materials for the December CID. CVS submitted responsive materials to Specifications 5, 25(b), 26, 32, and 40 in January 2024; Specifications 1, 2, 3, 4, 16, 17, and 18 in February 2024; Specifications 8, 25, 32, 34, and 35 in March 2024; sample data for Specifications 13, 14, and 15 in August 2024; and Specifications 9, 10, 11, 12, 34, and 35 in September 2024. The remaining specifications largely represented requests for custodial documents, of which the FTC had already received more than 1.2 million as of May 2024; certain data, of which the FTC had already received more than 5 terabytes as of February 2024; certain interrogatories that by their nature will be completed when compliance with the December CID is complete; and refreshes of certain data or documents.

Regarding custodial documents, CVS submitted on February 2, 2024, a proposed list of document custodians and search terms to comply with the December CID. The FTC responded to these proposals on March 28, 2024, with counterproposals. Following multiple meetings and additional counterproposals by each side, CVS and the FTC had agreed on nearly all custodians

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omissions should be noticeable to anyone with some economics training. If the FTC ever publishes a final report, I hope it includes a more comprehensive, data-based economic analysis of the PBM market[]."); K. Adams, Marketplace, Why the FTC Is Looking at PBMs and Their Role in Drug Pricing (July 11, 2024) (Ge Bai, John Hopkins Professor: "I do not believe the report has evidence showing PBMs harmed patients and plan sponsors."); Comm'r Holyoak Dissenting Statement (July 9, 2024) ("The standard of these reports has been nothing short of excellence. . . . But today's Report fails to meet that rigorous standard."); Comm'r Ferguson Concurring Statement (July 9, 2024) (The Report "relies, throughout, in large part on public information that was not collected from the PBMs or their affiliates during the 6(b) process. . . . But public comments are rather beside the point of the 6(b) study.").

as of early May 2024. On May 6, 2024, CVS began the process of collecting documents from agreed-upon custodians that had not previously been gathered or produced. On May 31, 2024, CVS and the FTC began to finalize an agreement on custodians, which the FTC confirmed by letter on June 11, 2024. Over the weeks that followed, CVS and the FTC engaged in good faith negotiations to finalize a list of search terms, with the parties reaching a final agreement by the beginning of August 2024. With the search terms finalized, CVS began its review of custodial documents and made its first rolling custodial document production on September 23, 2024.

CVS has met with the FTC multiple times to keep the FTC informed as to the status of its compliance. On August 26, 2024, based on these discussions, the FTC proposed a timeline that would have CVS complete its productions for the December CID by January 31, 2025. By mid-September, CVS had collected the bulk of the custodial documents potentially responsive to the December CID and loaded for review several hundreds of thousands of documents using the agreed upon search terms. Based on this massive volume, on September 26, 2024, CVS provided the FTC with an estimated timeline of when it expected to complete the remaining portions of the December CID response. CVS informed the FTC that, given the volume of documents and data, CVS expected compliance with the December CID to be completed by February 28, 2025—only about one month later than the final January 31, 2025 date in the FTC's proposal.

Without any further engagement, the FTC on October 16, 2024, issued a subpoena to CVS for testimony regarding efforts undertaken to comply with the December CID. CVS's outside counsel at Dechert LLP met with the FTC on October 21, 2024, to discuss the Subpoena and after that meeting notified the FTC that it planned to file a petition to quash on October 24, 2024.

As of October 24, 2024, CVS had produced to the FTC more than 6.2 million pages across more than 1.2 million documents and approximately 5.8 terabytes of data in response to the

December CID and the related June 6, 2022 6(b) order. More than 100 CVS employees assisted with compliance efforts. CVS's outside e-discovery vendor worked more than 180,000 hours, including more than 24,000 hours since December 8, 2023, to comply with the FTC's December CID requests. All the while, CVS continued to comply with many other requests from the FTC on related but separate matters managed by different teams within the FTC.

ARGUMENT

The FTC's "[s]ubpoena enforcement power is not limitless." *FTC v. Ken Roberts Co.*, 276 F.3d 583, 586 (D.C. Cir. 2001). As the Supreme Court has warned, "governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power." *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950). Administrative subpoenas must be "sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome." *See v. Seattle*, 387 U.S. 541, 544 (1967).

The Commission should quash the Subpoena for four independent reasons. *First*, the information sought by the Subpoena is not reasonably relevant to the FTC's investigation of CVS's pharmacy contracting practices. Given CVS's substantial production of responsive information during the investigation, the Subpoena's request for testimony regarding CVS's response is excessive and unreasonable. *Second*, the Subpoena is unduly burdensome. The FTC already has in its possession certain of the information sought by the Subpoena, while the probative value of the remaining information sought by the Subpoena is substantially outweighed by the burden of complying therewith. *Third*, the Subpoena was issued for the improper purpose of harassing CVS—not to determine whether CVS has violated the FTC Act. *Fourth*, the Subpoena

impermissibly seeks information protected by the attorney-client and attorney work product privileges.

I. The Information Sought by the Subpoena Is Not Reasonably Relevant to the FTC's Investigation

To be enforceable, a subpoena must be reasonable in the "nature, purposes, and scope of the inquiry." *Oklahoma Press Publ'g Co. v. Walling*, 327 U.S. 186, 209 (1946). A subpoena is not enforceable if it is not "reasonably relevant" to a legitimate purpose. *Morton Salt*, 338 U.S. at 652-53; *see also FTC v. Anderson*, 631 F.2d 741, 745 (D.C. Cir. 1979) ("The test for the relevancy of an administrative subpoena . . . is whether the information sought is 'reasonably relevant' to the agency's inquiry."); *FTC v. Turner*, 609 F.2d 743, 746 (5th Cir. 1980) (denying enforcement of FTC subpoena where information sought was not reasonably relevant to authorized FTC inquiry).

As explained by the D.C. Circuit Court of Appeals, reasonableness is the touchstone for assessing whether an agency subpoena is sufficiently relevant to the agency's inquiry: "[T]he gist of the protection is in the requirement . . . that the disclosure sought shall not be unreasonable. Correspondingly, the need for moderation in the subpoena's call is a matter of reasonableness." *SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1030 (D.C. Cir. 1978). "The requirement of reasonableness . . . comes down to [whether the] specification of the documents to be produced [is] adequate, *but not excessive*, for the purposes of the relevant inquiry." *Id.* (quoting *Walling*, 327 U.S. at 209).

The FTC's Subpoena seeking an investigational hearing regarding CVS's efforts to respond to the December CID in the underlying investigation is excessive and thus fails this test of reasonableness. CVS has produced a substantial amount of information responsive to the December CID. In doing so, CVS has incurred significant expenses and devoted a substantial amount of its employees' time to such response. To date, more than 100 CVS employees have

assisted with complying with the December CID. Chase Decl. ¶ 53. CVS's outside e-discovery vendor has spent more than 180,000 hours collecting, reviewing, and preparing document productions related to this matter, including more than 24,000 hours since December 8, 2023. *Id.* As a result of these efforts, CVS has produced more than 6.2 million pages across more than 1.2 million documents and approximately 5.8 terabytes of data. *Id.* CVS's efforts to respond to the December CID are continuing to this day. *Id.* ¶ 54.

Under these circumstances, it is not reasonable for Commission staff to pursue an investigational hearing to assess the "[r]esources allocated and efforts undertaken" to respond to the December CID in the underlying investigation. Subpoena, Att. A at 1 (topics 1.a and 1.b).

Further, CVS has produced to the FTC complete document retention policies on at least four occasions in PBM-related matters, including the underlying investigation, between September 2022 and January 2024. Chase Decl. ¶ 57. The policies identify the document retention periods for each category of documents maintained by CVS. *Id.* It is therefore unreasonable for Commission staff to pursue an investigational hearing to assess CVS's "policies and procedures relating to the retention and destruction of documents and data." Subpoena, Att. A at 1 (topic 2).

II. The Subpoena Is Unduly Burdensome Because the Burden of Complying Outweighs the Need for and the Probative Value of the Information Sought

The FTC exceeds its investigative power where it seeks information that is "unduly burdensome or unreasonably broad." *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977). An administrative subpoena is unreasonable when the burden of compliance outweighs the agency's need for the information or the probative value of the information sought. *Dow Chem. Co. v. Allen*, 672 F.2d 1262, 1270 (7th Cir. 1982) (affirming district court's denial of enforcement of administrative subpoena). An administrative subpoena is also improper when the information sought is already within the agency's possession. *See In re Civil Investigative Demand 15-439*,

2016 WL 4275853, at *7 (W.D. Va. 2016) (citing *United States v. Powell*, 379 U.S. 48, 57-58 (1964)).

The Subpoena identifies as one of the topics for the investigational hearing "[t]he Company's policies and procedures relating to the retention and destruction of documents and data." Subpoena, Att. A at 1 (topic 2). However, as noted above, CVS has already produced its document retention policies in effect during the relevant time period covered by the December CID. That is, the information on document retention polices sought by the Subpoena is already within the Commission's possession.

The Subpoena also seeks testimony from CVS regarding its efforts to respond to the December CID. However, given the substantial amount of documents, data, and other information that CVS has produced to the FTC in response to the December CID discussed above, there is no or little probative value in having a CVS representative appear at an investigational hearing to describe those efforts. In any case, any such value would be outweighed by the burden of having to prepare a CVS representative to answer questions during an investigational hearing regarding the extensive, years-long effort CVS undertook to produce information responsive to the December CID.

III. The Subpoena Was Issued for the Improper Purpose of Harassing CVS

The proper purpose for the FTC to issue a subpoena is to investigate whether the law has been violated. Courts will quash agency demands for information that were "issued for an improper purpose, such as to harass the [recipient] or to put pressure on [the recipient] to settle a collateral dispute." *Powell*, 379 U.S. at 58; *see also FTC v. Bisaro*, 2010 WL 3260042, at *6 (D.D.C. 2010)

(granting limited discovery as to purpose of FTC subpoena and whether FTC's enforcement thereof amounted to an abuse of process).

The most likely conclusion one could draw from the facts and circumstances in this matter is that the FTC's Subpoena is designed to harass CVS. There has been no suggestion by FTC staff that CVS has failed to maintain documents or data. Nor has there been any questions even raised about its document retention policy or its document preservation efforts. That the Subpoena may be motivated by harassment rather than truth seeking instead finds substantial support in the many recent public statements by the FTC Chair and her fellow Democratic Commissioners regarding CVS's pharmacy benefit manager, Caremark, and other PBMs. Through numerous prejudicial and incorrect public statements, the three Democratic Commissioners have already decided the primary question at issue in the underlying investigation: whether Caremark and other PBMs have, through anticompetitive conduct, forced independent pharmacies out of business. The Democratic Commissioners have already decided that question by falsely asserting, among other things, that PBMs like Caremark have caused independent pharmacies to "vanish[] at an alarming rate," "lessen[ed] competition among drugstores and pharmacies,"[4] led to "the demise of independent pharmacies,"[5] used their "market dominance" to reduce patient access to prescription drugs at pharmacies,[6] acted in a way that "[w]e all know . . . isn't fair" by developing pharmacy network options for clients looking to save money,[7] "dictate[d] pricing and access to life-saving drugs" for

[4] L. Khan, Chair, Fed. Trade Comm'n, Remarks 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.

[5] R. Slaughter, Comm'r, Fed. Trade Comm'n, Statement Regarding the Use of Compulsory Process and Issuance of 6(b) Orders to Study Contracting Practices of Pharmacy Benefit Managers, at 1 (June 7, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221200PBMSlaughterStatement.pdf.

[6] R. Slaughter, Comm'r, Fed. Trade Comm'n, Statement Regarding the FTC Staff Interim Report: Pharmacy Benefit Managers, at 1 (Aug. 1, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/bks-statement-pbm-interim-report.pdf.

[7] A. Bedoya, Comm'r, Fed. Trade Comm'n, Remarks on "Returning to Fairness" to the Midwest Forum on Fair Markets, at 8 (Sept. 22, 2022),

patients at pharmacies,[8] and chose "who's getting access to access to certain markets, [and] who's not getting access to certain markets," especially in their role as "vertically integrated . . . middlemen" that can "distort the competitive process."[9] These are just a few of the many statements made by the three Democratic Commissioners that demonstrate that they have prejudged the outcome of the underlying investigation.[10] The Subpoena was issued for the improper purpose of harassing CVS and should be quashed.

IV. The Subpoena Impermissibly Seeks Privileged Information

"The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Both FTC regulations, 16 C.F.R. § 2.7(a)(4), and the Federal Rules of Civil Procedure, Fed. R. Civ. P. 26(b)(1), (3), recognize that attorney-client communications and attorney work product can accordingly be withheld from discovery.

The Subpoena seeks testimony on "[r]esources allocated and efforts undertaken to collect, review, and produce responsive documents and data," as well as "[r]esources allocated and efforts undertaken to prepare and produce narrative responses." Subpoena, Att. A at 1 (topics 1.a and 1.b). CVS's responses to the document and data requests and interrogatories in the December CID were prepared at the direction, and with the assistance, of CVS in-house and outside counsel. Inquiry into CVS's efforts to respond to the December CID during an investigational hearing will

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https://www.ftc.gov/system/files/ftc_gov/pdf/returning_to_fairness_prepared_remarks_commissioner_alvaro_bedoya.pdf.

[8] L. Khan, A. Bedoya, R. Slaughter, Fed. Trade Comm'n, Opening Statement before the U.S. House Comm. on the Judiciary, Hearing on Oversight of the Fed. Trade Comm'n, at 2 (July, 13, 2023) https://www.ftc.gov/system/files/ftc_gov/pdf/house-judiciary-hearing-chair-khan-oral-testimony_.pdf.

[9] 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&r=396.

[10] *See supra* note 1.

inevitably implicate privileged attorney-client communications made, and attorney work product created, in the process preparing such response.

At least one court has ruled that a Rule 30(b)(6) request for deposition on the topic of a party's responses to interrogatories and document requests was unenforceable because such inquiry implicated attorney-client privileged communications and attorney work product. *See Smithkline Beecham Corp. v. Apotex Corp.*, 2000 WL 116082, at *9 (N.D. Ill. 2000). The court found that such a "proposed area of inquiry improperly trespasses into areas of work product and attorney-client privilege." *Id.*

The Subpoena impermissibly seeks information that is protected by the attorney-client and attorney work product privileges. As a result, the Commission should quash the Subpoena.

CONCLUSION

For the reasons set forth above, CVS respectfully requests that the Commission quash the Subpoena.

Dated: October 24, 2024

Respectfully Submitted,

/s/ *Mike Cowie*_

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Counsel for CVS Health Corporation

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

IN THE MATTER OF: **SUBPOENA AD TESTIFICANDUM** **ISSUED TO CVS HEALTH CORPORATION**	**File No. 241-0005**

STATEMENT OF COMPLIANCE WITH 16 C.F.R. § 2.10(a)(2)

Pursuant to 16 C.F.R. § 2.10(a)(2), Mike Cowie and Rani Habash from Dechert LLP met and conferred in good faith with FTC attorneys Randall Weinsten and Logan Wilke on October 21, 2024 at 1:30pm via Microsoft Teams. The parties were unable to reach a resolution on the issues raised by the Subpoena Ad Testificandum dated October 16, 2024. Dechert notified Commission Counsel, including Mr. Weinsten and Mr. Wilke, that CVS Health planned to file a Petition to Quash on October 24, 2024.

Dated: October 24, 2024

Respectfully Submitted,

/s/ *Mike Cowie*

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Counsel for CVS Health Corporation

Exhibit 1

SUBPOENA AD TESTIFICANDUM

1. TO

CVS Health Corporation
c/o Rani Habash, Esq.
Dechert LLP
1900 K Street, NW
Washington, DC 20006-1110

2. FROM

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

2a. MATTER NUMBER FTC File No. 2410005

This subpoena requires you to appear and testify at the request of the Federal Trade Commission at a hearing [or deposition] in the proceeding described below (Item 6).

3. LOCATION OF HEARING

IH will occur remotely via telephone or online videoconferencing

*In advance of hearing, please provide email addresses of all participants for invites and links

4. YOUR APPEARANCE WILL BE BEFORE

Maren Haneberg or other designated counsel

5. DATE AND TIME OF HEARING OR DEPOSITION

October 24, 2024, at 9:00 a.m. ET, or at other date and time as agreed upon by FTC counsel and counsel for the witness

6. SUBJECT OF INVESTIGATION

Efforts by CVS Health Corporation to timely comply with the Civil Investigative Demand issued to it on December 8, 2023; and the steps CVS Health Corporation took to preserve documents related to the Civil Investigative Demand. See Attachment A and attached resolution directing use of compulsory process.

7. RECORDS CUSTODIAN/DEPUTY RECORDS CUSTODIAN

Lauren Peay, Records Custodian
Maren Haneberg, Deputy Records Custodian

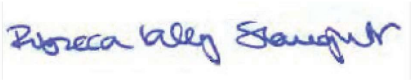
8. COMMISSION COUNSEL

Maren Haneberg, Randall Weinsten, and Logan Wilke

DATE ISSUED

10/16/2024

COMMISSIONER'S SIGNATURE



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 20 days after service, or, if the return date is less than 20 days after service, prior to the return date. 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 8.

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.

TRAVEL EXPENSES

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

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

RETURN OF SERVICE

I hereby certify that a duplicate original of the within subpoena was duly served: *(check the method used)*

○ *in person.*

○ *by registered mail.*

○ *by leaving copy at principal office or place of business, to wit:*

_____

_____

_____

_____

on the person named herein on:

_____
(Month, day, and year)

_____
(Name of person making service)

_____
(Official title)

ATTACHMENT A
SUBPOENA TO TESTIFY AT AN INVESTIGATIONAL HEARING
ISSUED TO CVS HEALTH CORPORATION
FTC FILE NO. 2410005

Pursuant to Commission Rule 2.7(h), 16 C.F.R. § 2.7(h), this Subpoena to Testify at an Investigational Hearing ("Subpoena") requires the Company to designate one or more executives, employees, or managing agents, or designate other Persons who consent, to testify on its behalf with regard to each of the following matters. Unless the Company designates a single individual, the Company must designate in advance and in writing the matters on which each designee will testify. The Person(s) designated must testify about information known or reasonably available to the Company and their testimony shall be binding on the Company. If the Company believes that the required date of testimony would be unduly burdensome, you are encouraged to discuss with the Commission counsel identified in this Subpoena whether there is a mutually agreeable alternative date.

MATTERS FOR EXAMINATION

1. The Company's efforts to timely comply with the CID, including but not limited to:

    a. Resources allocated and efforts undertaken to collect, review, and produce responsive documents and data, including but not limited to when and from whom documents and data were collected;

    b. Resources allocated and efforts undertaken to prepare and produce narrative responses; and

    c. The identities and relevant responsibilities of all people involved in the Company's efforts to comply.

2. The Company's policies and procedures relating to the retention and destruction of documents and data, and the steps the Company took to preserve documents related to the CID.

DEFINITIONS

For the purposes of this Subpoena to Testify at an Investigational Hearing, the following Definitions apply:

D 1. The term "the Company" or "Company" means CVS Health Corporation, its domestic and foreign parents, predecessors, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, principals, employees, agents, and representatives of the foregoing.

D 2. The term "CID" means the Civil Investigative Demand issued by the Federal Trade Commission to the Company on December 8, 2023, in FTC File No. 2410005.

D 3. All Definitions in the Civil Investigative Demand issued to the Company on December 8, 2023 apply to this Subpoena to Testify at an Investigational Hearing.

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Lina M. Khan, Chair**
Noah Joshua Phillips
Rohit Chopra
Rebecca Kelly Slaughter
Christine S. Wilson

RESOLUTION DIRECTING USE OF COMPULSORY PROCESS REGARDING ACTS OR PRACTICES AFFECTING HEALTHCARE MARKETS

File No. P210100

Nature and Scope of Investigation:

To investigate whether any persons, partnerships, corporations, or others have engaged or are engaging in unfair, deceptive, anticompetitive, collusive, coercive, predatory, exploitative, or exclusionary acts or practices in, or affecting commerce related to healthcare markets, including those regarding pharmaceuticals, pharmacies, pharmacy benefit managers, medical devices, hospitals, or other healthcare facilities or services, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended or any statutes or rules enforced by the Commission; and to determine the appropriate action or remedy, including whether monetary relief would be in the public interest.

The Federal Trade Commission hereby resolves and directs that any and all compulsory processes available to it, including subpoenas and orders to file special reports, be used in connection with any inquiry within the nature and scope of this resolution for a period not to exceed ten years. The expiration of this ten-year period shall not limit or terminate the investigation or the legal effect of any compulsory process issued during the ten-year period. The Federal Trade Commission specifically authorizes the filing or continuation of actions to enforce any such compulsory process after the expiration of the ten-year period..

Authority to Conduct Investigation:

Sections 6, 9, 10, and 20 of the Federal Trade Commission Act, 15 U.S.C. §§ 46, 49, 50, and 57b-1, as amended; and FTC Procedures and Rules of Practice, 16 C.F.R. § 1.1 *et seq*., and supplements thereto.

By direction of the Commission.

April J. Tabor
Secretary

Issued: July 1, 2021
Expires: July 1, 2031

Exhibit 2

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

IN THE MATTER OF: **SUBPOENA AD TESTIFICANDUM** **ISSUED TO CVS HEALTH CORPORATION**	**FTC File No. 241-0005**

DECLARATION OF MICHAEL CHASE ON BEHALF OF CVS HEALTH CORPORATION

I, Michael Chase, declare under penalty of perjury as follows:

1. I submit this Declaration in support of CVS Health Corporation's ("CVS") Petition to Quash Subpoena Ad Testificandum issued on October 16, 2024 ("Subpoena") and to provide further information on the topics identified in the Subpoena.

2. I am over 18 years of age and am competent to testify to the matters stated herein.

3. My title is Senior Counsel at CVS Health. My job responsibilities include, among other things, managing antitrust investigations and litigations involving the Federal Trade Commission ("FTC") on behalf of CVS entities.

4. I am personally familiar with the facts set forth herein.

5. Starting in June 2022, CVS began working cooperatively with the FTC for more than two years to get it what it needed in response to fourteen different subpoenas, civil investigative demands ("CIDs"), and 6(b) orders: (i) the FTC issued its Pharmacy Benefit Manager ("PBM") 6(b) Order on June 6, 2022; (ii) the very next day, the FTC issued a CID to CVS regarding insulin prices on June 7, 2022; (iii) the FTC issued a second insulin CID to CVS on August 29, 2022; (iv) the FTC issued a second 6(b) Order to Zinc Health Services, LLC on May 17, 2023; (v) the FTC issued seven subpoenas on May 8, 2023 for investigational hearings occurring in July and

August 2023 related to the insulin investigation;[1] (vi) the FTC issued a third insulin CID to CVS on November 22, 2023; (vi) the FTC issued the CID at issue in this matter on December 8, 2023 relating to pharmacy contracting practices; and (vii) the FTC issued the Subpoena on October 16, 2024 requesting an investigational hearing relating to compliance with the December 8, 2023 CID.

6. CVS has worked diligently with dozens of FTC attorneys in parallel to comply with the first thirteen of these FTC 6(b) orders, subpoenas, and civil investigative demands containing more than 500 requests (including subparts) and requesting millions of pages of documents and terabytes of data. CVS's outside antitrust counsel participated in more than 60 meetings with FTC staff as part of these efforts.

7. In total across all of these FTC requests, CVS has produced more than 1.7 million documents spanning more than 13.3 million pages, and 5.8 terabytes of data covering more than 10 billion prescriptions and thousands of pharmacy networks.

8. At least 150 CVS employees have contributed to compliance efforts with the FTC's many requests, working closely with Dechert LLP antitrust attorneys and CVS's Legal Department. In addition, CVS retained an outside e-discovery vendor and dozens of contract attorneys to manage the document review portions of the FTC requests, which alone has required more than 200,000 hours of work to date to collect, process, review, and produce responsive documents. CVS also retained an outside economic consulting firm to help manage responses to the data requests, which involved terabytes of data.

[1] The FTC later decided to defer two of these investigational hearings.

9. The Subpoena requests information on CVS's efforts to timely comply with the December 8, 2023 CID, including resources allocated and efforts undertaken to comply with document and data requests, requests for narrative responses, the identities and relevant responsibilities of people involved in the company's efforts to comply, and the company's policies and procedures relating to document retention and preservation.

10. The December 8, 2023 CID duplicates several of the requests from the FTC's 6(b) order issued to Caremark Rx, L.L.C. ("Caremark") on June 6, 2022. Therefore, the efforts undertaken to comply with the 6(b) Order outlined below are central to understanding the efforts taken by CVS to comply with the December 8, 2023 CID.

11. Starting in June 2022, Caremark began complying with the FTC's 6(b) Order. The first document was produced to the FTC on June 29, 2022, which included personnel charts, along with a proposed document custodian list. CVS promptly met with FTC staff to quickly resolve all questions about this proposed list.

12. In September 2022, Caremark voluntarily gathered and produced relevant data samples, field dictionaries, and ordinary course of business data reports to help FTC staff understand how CVS's information is stored in the ordinary course of business in order to streamline compliance with the study.

13. In September and October 2022, Caremark voluntarily offered to hold multiple educational sessions with FTC staff to answer questions about the data and discuss potential ways that the requests could be tailored to facilitate expedited productions for the 6(b) study.

14. After six months of relative quiet by the FTC (with the exception of a few questions about the proposed custodian list that CVS quickly answered), staff finally provided CVS with a

document custodian list in late December 2022. CVS began the process of collecting and reviewing millions of documents from these custodians in January 2023.

15. Starting in February 2023, CVS began weekly meetings with FTC staff to provide status updates on compliance with each specification and to answer staff's questions. By October 2023, because CVS had made substantial progress with the June 22, 2022 6(b) Order, CVS began meeting with staff on a biweekly basis and has continued to do so as a courtesy as of the date of this filing.

16. Following multiple meetings with the FTC in September and October 2022 through early 2023 aimed at explaining the limits of CVS's data and figuring out which pieces of CVS's data would provide the FTC with what it needed for its analysis, the FTC waited several months to inform CVS that no modifications or other tailored requests would be granted to better align the requests with the manner in which CVS maintains its data in the ordinary course of business. Nevertheless, CVS diligently sought to fulfill these unnecessarily overbroad and burdensome requests. Due to the lack of reasonable and customary modifications to focus on what was truly needed for the study, however, CVS notified FTC staff that it likely would need substantially longer to comply with the data requests than if the requests had been more tailored.

17. By June 2023, CVS had completed the production of responsive information spanning nearly a million pages, including ordinary course of business documents, personnel charts, board minutes and presentations, descriptions of its contracting practices, a glossary of key terminology used in pharmacy contracts, pharmacy audit data, specialty drug lists, specialty drug reimbursement criteria and policies, plan sponsor contracts, and document retention policies.

18. Between July 2023 and December 2023, CVS continued its collection, review, and production of millions of pages of documents. CVS also continued working with CVS's IT

department and outside economists to collect terabytes of data responsive to multiple burdensome data requests. CVS submitted document and data productions to the FTC on a rolling basis. CVS and the FTC staff worked collaboratively, continuing to meet regularly to discuss open items and respond to questions about data, documents, and interrogatories.

19. As of December 2023, CVS had produced millions of pages of documents, multiple terabytes of data, and a majority of the substantive, non-custodial requests in the 6(b) Order.

20. On December 8, 2023, the FTC issued a CID requesting information on CVS's contracting with clients and pharmacies, among other items. A majority of the specifications repeated in substance those in the FTC's June 6, 2022 6(b) Order, with some minor variations and additions. Although CVS had worked with dozens of other FTC attorneys on the prior CIDs, subpoenas, and 6(b) orders, the FTC assigned a new group of staff attorneys to oversee compliance with the December 8, 2023 CID.

21. On December 22, 2023, for the sake of efficiency and to avoid unnecessary duplication of more than 18 months of work on compliance with hundreds of requests, Dechert requested that the new FTC staff do its best to leverage the prior CVS productions as well as the existing knowledge of dozens of other FTC attorneys and economists that had gained an understanding of CVS's documents and data. Specifically, Dechert wrote to FTC staff in a December 22, 2023 email:

> The FTC has issued more than 600 requests including subparts to CVS over the past 18 months. Together, more than 25 different FTC attorneys/economists have participated in dozens of data/document meetings with CVS to sort through these requests at length. Prior productions have to date totaled more than 10 million pages, several terabytes of data, and dozens of interrogatory responses and white papers. . . .In total, over the past 18 months CVS has received six FTC CIDs or 6(b) orders with substantial overlap. CVS has invested a substantial amount of time and resources to produce responsive materials and worked cooperatively with the FTC to educate staff on its data and systems. Thus, CVS would appreciate it if these

> prior submissions and discussions could be leveraged here so that we're not unnecessarily repeating what has already been accomplished.
>
> . . .
>
> Given the enormous amount of information that the FTC already received from CVS and the enormous amount of information requested in this CID, we would greatly appreciate if this team could review the prior responsive information and learn from colleagues about CVS's databases and systems, then we can discuss what is still needed that is not already covered or known by the FTC through the other five CIDs and 6(b) orders. This will allow CVS to more efficiently prioritize and avoid unnecessary duplication of efforts. These requests collectively have been and continue to be an enormous burden on the company requiring substantial efforts by more than 150 CVS employees over the past 18 months. And given the current number of outstanding requests from the FTC on these and many related topics, we expect it will take a substantial amount of time to collect any additional information you may need. Thus, the more we can narrow the requests in this process and leverage the many prior FTC productions and discussions, the better for all of us rather than starting from scratch. CVS greatly appreciates Staff's consideration and looks forward to continuing to work with you on this CID.

22. CVS continued to invest substantial time and resources to fully comply with the 6(b) Order while also working to accommodate staff's new requests in the December 8, 2023 CID.

23. On January 4, 2024, Dechert met with the FTC to discuss prioritization of documents and data for the December 8, 2023 CID.

24. On January 8, 2024, CVS identified for the FTC more than 1.3 million pages of documents and interrogatory responses, including organizational charts, pharmacy contracts, provider manuals, audit guidelines, audit data, and document retention policies, that the new FTC staff had sought to prioritize. With these productions, CVS complied with Specifications 5, 25(b), 26, 32, and 40 of the December 8, 2023 CID.

25. On January 26, 2024, CVS met with FTC staff to discuss progress on the December 8, 2023 CID and additional priority items.

26. On February 2, 2024, CVS submitted updated legal entity charts in compliance with Specifications 1, 2, 3, and 4 of the December 8, 2023 CID. CVS also submitted a proposed custodian list and proposed search terms for custodial searches.

27. On February 20, 2024, CVS completed the production of all responsive data requested in the 6(b) Order. Shortly thereafter, CVS provided a copy of the final sets of data to the separate FTC team managing the December 8, 2023 CID in response to Specifications 16, 17, and 18.

28. On February 26, 2024, Dechert met with the FTC staff to discuss progress on the December 8, 2023 CID.

29. On March 11, 2024, CVS identified for the FTC staff additional items responsive to Specifications 8, 25, 32, 34, and 35 of the December 8, 2023 CID, including pharmacy contracts, audit data, specialty drug policies and criteria, and specialty drug lists responsive to Specifications.

30. On March 28, 2024, the FTC responded to CVS's February 2, 2024 custodian and search term proposals with its own counterproposals. Among other items, the FTC represented that CVS's "search of custodial files run through December 31, 2023" would comply with the December 8, 2023 CID. CVS relied on this representation in making its subsequent proposals to the FTC.

31. On April 9, 2024, CVS met with the FTC staff to discuss progress on the December 8, 2023 CID, including the FTC's custodian counterproposal.

32. On April 30, 2024, CVS met with the FTC staff to discuss progress on the December 8, 2023 CID.

33. On May 6, 2024, CVS met with FTC staff to discuss progress on the December 8, 2023 CID.

34. On May 8, 2024, CVS began collecting documents from the December 8, 2023 CID custodians for whom CVS and the FTC had reached an agreement.

35. On May 15, 2024, CVS completed the production of all responsive custodial documents requested in the 6(b) Order, with the exception of a small number of documents pending a final privilege review.

36. On May 31, 2024, CVS notified the FTC that it would agree to search practically all of the custodians identified in the FTC's counterproposal for the December 8, 2023 CID.

37. On June 11, 2024, the FTC accepted CVS's May 31, 2024 custodian proposal regarding the December 8, 2023 CID.

38. Between June and August 2024, CVS continued to collect and process documents from custodians within the scope of the December 8, 2023 CID.

39. On July 8, 2024, CVS provided an update to the FTC on the status of document collections, a search term hit report, and a counterproposal on search terms for the December 8, 2023 CID.

40. On July 15, 2024, the FTC responded to CVS's search term counterproposal, with additional proposed changes, for the December 8, 2023 CID.

41. On July 30, 2024, CVS met with the FTC staff to discuss progress on the December 8, 2023 CID, including finalizing the proposed search term list.

42. On August 13, 2024, CVS met with the FTC staff to discuss progress on the December 8, 2023 CID.

43. On August 22, 2024, CVS produced sample data responsive to Specifications 13, 14, and 15, along with questions regarding the December 8, 2023 CID.

44. On August 26, the FTC sent CVS a letter with a proposed timeline of production deadlines for the December 8, 2023 CID. This timeline proposed certain milestone dates for data and document productions, ultimately concluding with CVS certifying compliance with the CID on January 31, 2025. In this letter, the FTC reneged on its prior representation that CVS's search and production of responsive materials through December 31, 2023 would comply with the December 8, 2023 CID.

45. On September 5, 2024, CVS met with FTC staff to discuss the proposed timeline of production deadlines for the December 8, 2023 CID.

46. On September 6, 2024, CVS produced board materials, meeting minutes, and specialty drug information responsive to Specifications 9, 10, 11, 12, 34, and 35 of the December 8, 2023 CID.

47. On September 23, 2024, CVS made its first rolling production of custodial files from four priority custodians identified by the FTC for the December 8, 2023 CID.

48. On September 26, 2024, with the benefit of having collected the bulk of documents from the agreed upon custodians to better understand the potential volume for review, having resolved questions regarding the requested sample data, and in consideration of deadlines for other outstanding and upcoming requests from the FTC, CVS sent the FTC an estimated timeline of productions for the December 8, 2023 CID in response to the FTC's August 26, 2024 proposal. In general, CVS estimated based on this information that most deadlines would require about a month longer than proposed by the FTC, with CVS ultimately completing its compliance with the CID on February 28, 2025 instead of the FTC's preferred January 31, 2025 deadline. Given that the FTC had reneged on its proposed December 31, 2023 end date for custodial files, in the spirit of cooperation and despite having no obligation to do so, CVS proposed April 1, 2024 as a cutoff

date for compliance to align with the approximate dates on which it began updating its custodial collections in response to the December 8, 2023 CID.

49. Since September 26, 2024, CVS continued to collect, review, and prepare rolling productions to the FTC. As of October 15, 2024, CVS was preparing a rolling production of custodial files.

50. On October 16, 2024, the FTC issued a subpoena pursuant to Commission Rule 2.7(h) for testimony regarding efforts undertaken to comply with the December 8, 2023 CID. CVS was forced to reallocate resources to addressing this subpoena.

51. On October 21, 2024, Dechert met and conferred with FTC attorneys regarding the October 16, 2024 subpoena.

52. On October 23, 2024, CVS notified the FTC that it would file on October 24, 2024 a petition to quash the October 16, 2024 subpoena.

53. To date, more than 100 CVS employees have assisted with complying with the December 8, 2023 CID. CVS's outside e-discovery vendor has spent more than 180,000 hours collecting, reviewing, and preparing document productions related to this matter, including more than 24,000 hours since December 8, 2023. As a result of these efforts, CVS has produced more than 6.2 million pages across more than 1.2 million documents and approximately 5.8 terabytes of data.

54. At the time of the October 16, 2024 Subpoena, CVS's efforts to comply with the December 8, 2023 CID were continuing with the goal of meeting the estimated February 2025 completion date. The additional burdens of the October 16, 2024 subpoena, however, may cause delays in meeting certain estimated timelines in CVS's September 26, 2024 letter.

55. For a list of personnel assisting with compliance, please see the Company's response to Specification 38 of the FTC 6(b) Order issued to Caremark Rx, L.L.C., including Exhibit 38-1. As shown, approximately 117 CVS Health employees have assisted with complying with the December 8, 2023 CID and the FTC's 6(b) Order. That number will likely continue to grow.

56. In addition to CVS employees, more than 50 people at CVS's outside e-discovery vendor and more than a dozen Dechert attorneys and paralegals have contributed to complying with the December 8, 2023 CID.

57. Copies of CVS's complete document retention policies have been produced to the FTC at least four times in PBM-related matters: on September 30, 2022; March 24, 2023; May 26, 2024; and January 8, 2024. These policies provide in detail the length of time each category of documents is retained by default.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 24, 2024

_/s/_Michael Chase_____

Michael Chase