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 COMMISSIONER SLAUGHTER

On October 8, 2024, Respondents Express Scripts, Inc., Evernorth Health, Inc., Medco Health Services, Inc., Ascent Health Services LLC (collectively "ESI Respondents"), Caremark Rx, LLC ("Caremark") and Zinc Health Services, LLC ("Zinc") (collectively, "Caremark/Zinc Respondents"), Optum Rx, Inc., OptumRx Holdings, LLC (together, "Optum Rx"), and Emisar Pharma Services LLC ("Emisar") (collectively, "Optum/Emisar Respondents") moved to

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

I. The PBM Study

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

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

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

[2] Respondents' parallel requests to disqualify Commissioner Bedoya and Chair Khan are addressed in separate orders. Commissioners Holyoak and Ferguson are recused from this matter.

The Caremark/Zinc Respondents 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. The ESI and Caremark/Zinc Respondents 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.

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. According to the Complaint, PBMs' strategy of seeking high rebates has influenced insulin

[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.

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 Commissioner Slaughter. 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 Commissioner Slaughter's continued participation in this proceeding would violate standards of ethics applicable to federal employees and federal judges, respectively.[9]

The Respondents' Motions challenge statements Commissioner Slaughter, made before the Commission instituted this proceeding, and her vote to authorize the release of the Section

[9] ESI Motion 7–8 & nn.11 (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).

6(b) study Interim Staff Report. Respondents assert that Commissioner Slaughter has shown prejudgment against the PBMs, or an unacceptable appearance thereof. *See, e.g.,* Caremark/Zinc Motion 6–9. Respondents further assert that Commissioner Slaughter'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 5–8; Optum/Emisar Motion 3–4, 6–7; 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, Commissioner Slaughter declined to recuse herself from participation in the matter.[10] The Commission, without the participation of Commissioner Slaughter, 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 the most extreme of cases would disqualification on [a bias or prejudice] basis be constitutionally

[10] Commissioner Slaughter's statement ("Slaughter Statement") is hereby placed on the public record as Attachment A to this Order.

required."). The test for disqualification may be stated in terms of whether the adjudicator's mind is "'irrevocably closed' on the issues as they arise in the context of the specific case." *S. Pac. Commc'ns Co. v. Am. Tel. & Tel. Co.*, 740 F.2d 980, 991 (D.C. Cir. 1984) (quoting *FTC v. Cement Inst.*, 333 U.S. 683, 701 (1948)); *see also Metro. Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1165 (D.C. Cir. 1995) (A Commissioner's decision not to recuse himself is set aside "only where he has demonstrably made up his mind about important and specific factual questions and is impervious to contrary evidence." (cleaned up)). A "comment is disqualifying only if it connotes a fixed opinion—'a closed mind on the merits of the case.'" *United States v. Haldeman*, 559 F.2d 31, 136 (D.C. Cir. 1976) (en banc) (per curiam) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966)).[11]

VI. Analysis

Respondents' asserted bases for disqualification may be aggregated into several categories, discussed herein. None provides a basis for disqualification.

a. May 28, 2021 Statement Expressing Views on Policy, Market Functioning, or Law

Respondents challenge portions of a May 28, 2021 written statement by then-Acting Chairwoman Slaughter regarding so-called "rebate walls" ("May 2021 Statement") in which she commented on a Commission report to Congress on that topic.[12] We find the statement contains permissible expressions of general opinion about the functioning of the pharmaceutical market and about related policy issues. The statement does not prejudge the outcome of this case and does not require disqualification of Commissioner Slaughter.

First, several times, Respondents quote the May 2021 Statement selectively or take it out of context; benign interpretations become apparent when the quotations are viewed in their full setting. For example, the Optum/Emisar Respondents assert that the May 2021 Statement "brand[ed] PBMs by association with 'illegal anticompetitive practices.'" Optum/Emisar Motion 2. But Commissioner Slaughter's statement did not "brand" PBMs or single them out. Quoted more fully, the statement notes that "[f]or decades, the FTC has challenged a number of illegal anticompetitive practices in the pharmaceutical industry" and urges the Commission to "consider" ways to build on this work by addressing practices that have the "potential" to harm consumers. Such qualified observations and broad-gauged calls for law enforcement do not show

[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.e.

[12] *See, e.g.,* Optum/Emisar Motion 2 & n.3; Caremark/Zinc Motion 6 & n.19 (partially quoting Statement of Acting Chairwoman Rebecca Kelly Slaughter, Statement Regarding the Federal Trade Comm'n Report to Congress on Rebate Walls (May 28, 2021), https://www.ftc.gov/system/files/documents/public_statements/1590532/statement_of_acting_chairwoman_slaughter_regarding_the_ftc_rebate_wall_report_to_congress.pdf); *see also Fed. Trade Comm'n Report on Rebate Walls* (May 2021), https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-report-rebate-walls/federal_trade_commission_report_on_rebate_walls_.pdf.

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

Other instances that Respondents cite reflect permissible, general observations about market conditions, law, and/or policy. For example, the May 2021 Statement included the observation that:

> Fairness in drug pricing is undermined by a complex system of rebates, which manufacturers offer to middlemen in order to increase the use of their products. But these secretive rebates—which are sometimes quite large and represent a significant source of revenue for drug middlemen—favor larger competitors who can offer or demand bigger rebates and incumbents because of the challenges with switching patients to different drugs. This is not the way competition is supposed to work.

May 2021 Statement at 1. Especially in conjunction with a report to Congress which states that rebating practices by pharmaceutical manufacturers can violate the law "[d]epending on

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[13] *Cf. FTC v. Facebook, Inc.*, 581 F. Supp. 3d 34, 65 (D.D.C. 2022) (Although Chair Khan expressed views about market functioning prior to her selection as chair, this did not disqualify her from voting to pursue a case; she was presumably chosen because of such views.).

[14] As the underlying report itself cautions, "[T]his Report discusses the antitrust analysis of [rebating] practices generally and should not be interpreted as reflecting conclusions about any particular matter under investigation." *Fed. Trade Comm'n Report on Rebate Walls*, *supra* note 12, at 1.

[15] The Caremark/Zinc Respondents also assert that Commissioner Slaughter "called PBMs' 'rebating practices' an 'anticompetitive exploitation of market power.'" Caremark/Zinc Motion at 8 & n.31 (partially quoting May 2021 Statement at 1). This alleged statement was part of a more general call by Commissioner Slaughter to the Commission to "carefully scrutinize anticompetitive exploitation of market power throughout the pharmaceutical supply and payment chains, including the rebating practices described in the Commission report." Calling for scrutiny or investigation of certain conduct, years before the filing of any complaint, does not indicate a closed mind on the merits of an adjudication. It is not disqualifying for an adjudicator to have views about whether certain practices may violate the law. *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"). In any case, the "rebating practices" in the report refer to when "a dominant pharmaceutical manufacturer uses rebate strategies," Report at 1, and do not necessarily single out PBMs. Indeed, nothing in the report or Commissioner Slaughter's May 2021 Statement mentions insulin or these Respondents.

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

The Supreme Court's decision in *FTC v. Cement Institute* is on point here. In that case, the Commission had issued reports to Congress concluding that a certain type of basing point pricing system used by the cement industry violated the Sherman Act. The Court held that the Commissioners need not be disqualified: "the fact that the Commission had entertained [certain] views as the result of its prior ex parte investigations did not necessarily mean that the minds of its members were irrevocably closed on the subject . . . ." *Cement Inst.*, 333 U.S. at 701. Moreover, the respondents would have an opportunity to submit their own evidence and argument to defend their pricing system in the adjudication, an opportunity not presented with respect to the report. *Id.* Commissioner Slaughter's May 2021 Statement provides even less support for disqualification than did the report in *Cement Institute*, because she drew no firm conclusions regarding PBMs or the lawfulness of their conduct, let alone with respect to insulin. "[A] mere showing that an official has taken a public position, or has expressed strong views, or holds an underlying philosophy with respect to an issue in dispute" is not a basis for disqualification. *Nuclear Info. & Res. Serv. v. NRC*, 509 F.3d 562, 571 (D.C. Cir. 2007) (quotation and quotation marks omitted).[17]

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[16] *Fed. Trade Comm'n Report on Rebate Walls*, *supra* note 12, at 3.

[17] The Optum/Emisar Motion also claims that the 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 Commissioners' prejudgment of the Section 5 claims in the present matter.

b. Statements Explaining Commission Scrutiny of PBM Practices

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

On June 7, 2022, Commissioner Slaughter issued a statement about the Commission's vote to authorize the Section 6(b) study of PBMs.[18] Citing excerpts from that statement, Respondents argue it demonstrates bias and prejudgment. Respondents accuse Commissioner Slaughter of calling PBMs themselves, their rebating practices, and/or their alleged market distortions "disturbing[]," "unacceptable," and "rotten." Caremark/Zinc Motion 2, 3–4; Optum/Emisar Motion 1, 2. They assert that she has already concluded that insured insulin consumers are forced to pay for branded drugs because lower-cost alternatives are unavailable under their formularies, which leads to rationing and grave consequences. Caremark/Zinc Motion 7; Optum/Emisar Motion 6. A review of the full text of Commissioner Slaughter's statement, however, reveals that Respondents have once again taken her words out of context and have misconstrued them.

Commissioner Slaughter did not describe PBMs, their rebating practices, or their market distortions as "rotten." In a remark alluding to a line from Shakespeare's *Hamlet*, Commissioner Slaughter explained that the vote to authorize the Section 6(b) study "underscores the consensus echoed by patients, independent pharmacies, and myriad other stakeholders: something is rotten in the state of the U.S. pharmaceutical market, and it warrants serious investigation."[19] This statement merely conveys a complaint voiced by various third parties and explains why the Commission was launching its Section 6(b) study. It does not demonstrate "a closed mind on the merits of the case." *Haldeman*, 559 F.2d at 136 (quotation omitted).

Commissioner Slaughter also did not use the terms "disturbing" or "unacceptable" to describe PBMs or their practices. What she said was "disturbing[]" and "unacceptable" was that problems in insulin markets exacerbate disparities in health equity, "because diabetes disproportionately affects lower income communities and communities of color."[20] Nothing in this statement suggests that Commissioner Slaughter is biased against Respondents or has irrevocably made up her mind on the specific facts of this case.

Nor does Commissioner Slaughter's statement indicate that she has already determined that Respondent PBMs exclude lower-cost alternatives, forcing consumers to pay more for branded drugs and ration insulin. The statement did not express any established conclusions but described the concerns she had heard from patients and the problems they had encountered in

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[18] Rebecca Kelly 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.

[19] *Id.*

[20] *Id.*

accessing and paying for insulin, which "the 6(b) study [would] investigate."[21] Commissioner Slaughter explained that patients had complained to the FTC, "[a]t open meetings and listening fora . . . and at other venues," about the "cripplingly high cost of insulin," with some consumers being forced to pay for branded drugs because lower-cost alternatives were not covered under their formularies.[22] She then stated that "[t]he grave consequences of these apparent distortions in insulin markets subject patients to insulin rationing and can lead to permanent, even fatal consequences."[23] Recounting the complaints received from patients about the price of insulin, and recognizing that high prices and rationing of medication can have a serious effect on patient health, does not disqualify Commissioner Slaughter from adjudicating this matter. Disqualification is not warranted merely because "an official has taken a public position, or has expressed strong views, or holds an underlying philosophy with respect to an issue in dispute." *Nuclear Info. & Res. Serv.*, 509 F.3d at 571 (quotation omitted). It is also not disqualifying to characterize market events, complained of by patients, as "apparent" market distortions. "[A]dvance views on important economic matters in issue" are not a basis for disqualification. *Skelly Oil Co.*, 375 F.2d at 18; *see also 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"). Moreover, the Commission is "specifically authorized to make public information acquired by it," including "suspected violations of the law." *FTC v. Cinderella Career & Finishing Schs., Inc*. ("*Cinderella I*"), 404 F.2d 1308, 1314 (D.C. Cir. 1968).

None of these statements shows that Commissioner Slaughter had "demonstrably made up [her] mind about important and specific factual questions and [was] impervious to contrary evidence." *Metro. Council of NAACP Branches*, 46 F.3d at 1165 (quotation omitted). Indeed, Commissioner Slaughter actually signaled her openness to considering factual contentions. She specifically noted that "[n]ot all PBMs exclude cheaper alternatives to branded insulin from their formularies" and stated that she hoped that the study would "incentivize more PBMs to increase consumers' choices to include cheaper alternatives to branded insulins."[24] Commissioner Slaughter's statement does not reach any conclusions about Respondents or the merits and specific facts of this case; it merely sets out the reasons why she supported the Commission "using [its] Section 6(b) authority to evaluate whether and how PBMs contribute to competitive distortions in pharmaceutical markets."[25]

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[21] *Id.*; *see also* Slaughter Statement 2 n.7.

[22] Rebecca Kelly 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.

[23] *Id*.

[24] *Id.* at 1 n.1.

[25] *Id.* at 1.

To the extent any of Commissioner Slaughter's statements could be characterized as expressions of her views about PBM conduct with respect to insulin, 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, and as noted above, "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. Commissioner Slaughter's statements explaining the basis for Commission action provide no basis to disqualify her from the case at hand.

Similarly, contrary to Respondents' contentions, *see* Caremark/Zinc Motion 8-9, the Commission's statement to a Senate Judiciary subcommittee does not show prejudgment by Commissioner Slaughter.[26] The statement notes that the Section 6(b) study "will shine a light on the opaque operations of these large pharmacy middlemen who can dictate the pricing and access to life-saving drugs for so many Americans."[27] It explains why the Commission authorized the Section 6(b) study and reflects not a conclusive assessment of the insulin market or the merits of this case but an initial, tentative observation about how PBMs "can" influence drug pricing and access.

2. Statements Regarding Reliance on Prior Advocacy and Reports

Respondents argue that bias and prejudgment can also be gleaned from Commissioner Slaughter's statement that accompanied the Commission's statement cautioning against reliance on prior PBM-related advocacy and reports that no longer reflected market realities. Specifically, Respondents point to the following excerpt from Commissioner Slaughter's discussion of more recent changes in the pharmaceutical industry:

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[26] *See* Prepared Statement of the Federal Trade Comm'n Before the U.S. Sen. Comm. on the Judiciary Subcomm. on Antitrust, Competition Policy and Consumer Rights, "Oversight of the Enforcement of the Antitrust Laws," at 14 (Sept. 20, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P210100SenateAntitrustTestimony09202022.pdf.

[27] *Id.*

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

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

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

The Optum/Emisar Respondents suggest that the Commission's issuance of its statement cautioning against reliance on outdated advocacy and reports also shows Commissioner Slaughter's prejudgment in the present matter. Optum/Emisar Motion 8. We disagree. The Commission issued its cautionary statement in light of the ongoing Section 6(b) study and significant changes in the PBM industry over the prior two decades.[29] The Commission's statement contains no opinions or conclusions about insulin or the charges against Respondents, and it does not indicate that Commissioner Slaughter has a closed mind on the merits in this matter.

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[28] Rebecca Kelly Slaughter, Comm'r, Fed. Trade Comm'n, Statement Regarding the Comm'n Statement on 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/finalbksremarksonftcstatementagainstrelianceonpriorpbmadvocacy7202023.pdf (quoted in Caremark/Zinc Motion 6, 8; Optum/Emisar Motion 7; ESI Motion 2).

[29] *See* Fed. Trade Comm'n Statement Concerning Reliance on Prior PBM-Related Advocacy Statements and Reports That No Longer Reflect Current Market Realities, at 2–3 (July 20, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/CLEANPBMStatement7182023%28OPPFinalRevisionsnoon%29.pdf.

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

Respondents allege that Commissioner Slaughter should be disqualified based on the issuance and content of the Interim Staff Report from the Section 6(b) study of PBMs, as well as statements issued in connection with the report's release. 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." Optum/Emisar Motion 3–4. They also aver that the Interim Staff Report's preliminary findings suggest prejudgment in this case. *Id.* at 8. And they argue that prejudgment may be gleaned from Commissioner Slaughter's joining Chair Khan's July 9, 2024 statement regarding the release of the Interim Staff Report as well as from Commissioner Slaughter's own August 1, 2024 statement on the subject.[30] ESI Motion 3.

Nothing in the Interim Staff Report, or in the recounting of its preliminary findings in Commissioner Slaughter's and Chair Khan's statements, indicates that Commissioner Slaughter has prejudged this matter. *Cement Institute* is squarely on point. There, the Supreme Court held that the Commission's reports under Section 6(b) condemning the industry-wide use of a basing point pricing system, and individual Commissioners' congressional testimony along the same lines, did not disqualify the Commissioners from an administrative adjudication involving the same practice. 333 U.S. at 700–01. That the Commissioners entertained certain views as the result of their prior ex parte investigation did not indicate an irrevocably closed mind on the respondents' practices in the administrative case. *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,[31] does not indicate that Commissioner Slaughter has a closed mind on the merits and should be precluded from adjudicating this case.

The Optum/Emisar Respondents suggest that there is something improper about releasing an *interim* report. Optum/Emisar Motion 3–4, 8. Authorizing release of an Interim Staff Report before conclusion of the study, however, does not show bias or prejudgment. In January of 2024, a bipartisan group of Senators sent Chair Khan a letter urging her to expedite the study and provide an interim progress report.[32] The study had been delayed by the slow pace of document

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

[31] *See* Khan Statement 10 & n.33.

[32] 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.

and data production by the companies in response to the Section 6(b) compulsory orders.[33] Notwithstanding those delays, the Commission had enough information to provide the public with a material update on the study, and therefore authorized release of the Interim Staff Report.

The ESI Respondents assert that Commissioner Slaughter demonstrated bias in her August 1, 2024 statement, prepared for delivery at the FTC Open Commission Meeting, regarding the Interim Staff Report. In the course of describing the preliminary findings of that staff report, she stated that the "market dominance" of large PBMs that have vertically integrated upstream, midstream, and downstream "allows these entities to wield substantial power over drug pricing and availability. Exercise of this power by this small number of PBMs raises acute concerns for patients because PBMs have become inescapable intermediaries between prescription drug manufacturers and patients who simply need access to their medicines."[34] This statement does not show a closed mind on the merits of the case at hand. It does not mention insulin but merely reflects some initial staff findings, predating the Complaint, about the influence of large PBMs on the pharmaceutical industry. There is also no bias or prejudgment evident in Commissioner Slaughter's observation that the exercise of market power by a small number of firms raises concerns for patients. It conveys the concerns of consumers, and in any case, as already discussed, "advance views on important economic matters in issue" are not a basis for disqualification. *Skelly Oil Co.*, 375 F.2d at 18.[35]

d. 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 Commissioner Slaughter should be disqualified here. However, Commissioner Slaughter's past statements are demonstrably different in substance and context from the statements and conduct of Chairman Dixon in the *Texaco*, *Cinderella Career and Finishing Schools*, and *American Cyanamid* cases that Respondents cite.

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[33] 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.

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

[35] The Optum/Emisar and Caremark/Zinc Respondents allege that the Commissioners must be disqualified because they have attended events they believe reflect an anti-PBM viewpoint. Optum/Emisar Motion 3, 10 ("[T]he Commissioners have spoken numerous times before a trade association and lobbying group that is openly hostile to PBMs."); Caremark/Zinc Motion 4 ("The Three Commissioners often make such disparaging statements at one-sided events hosted by anti-PBM special interest groups."). However, they do not point to any specific event attended by Commissioner Slaughter. *See* Slaughter Statement 3. In any case, mere attendance at an event does not show that Commissioner Slaughter's mind is irrevocably closed as to the merits of this case. *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"); *In re Aguinda*, 241 F.3d 194, 204 (2d Cir. 2001) (stating that disqualification was not appropriate even if, among other factors, an event attended by a judge presumably favored one viewpoint).

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.* Respondents cite no comments made by Commissioner Slaughter during the pendency of the action, nor did she identify by name the PBMs who are now respondents or link individual Respondents to specific charged practices. *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.[36] Again, Respondents do not allege that Commissioner Slaughter spoke on an adjudication then pending before her at the FTC regarding PBMs or any other relevant topic. *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*, Commissioner Slaughter 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

[36] 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, Commissioner Slaughter 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.

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

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

The ESI Respondents claim that government ethics regulations and/or the code of judicial conduct require Commissioner Slaughter to recuse herself from this proceeding.[38] However, neither of those sources of authority changes our view that Commissioner Slaughter may properly participate in the adjudication here. The government ethics regulation at 5 C.F.R. § 2635.501(a) is intended to ensure that an employee takes appropriate steps to avoid participating in particular matters involving specific parties that may cause a reasonable person with knowledge of the relevant facts to question their impartiality. Section § 2635.502(a) of the government ethics regulations addresses (1) financial interests of members of the employee's household, and (2) matters involving persons with whom the employee is in a covered relationship, such as persons with whom the employee seeks a business or financial relationship. No one alleges any financial interest of any member of Commissioner Slaughter's household in this proceeding, nor any covered relationship with any party involved in the matter, so these parts of the rule are not pertinent. To the extent Respondents raise an issue under the final, catch-all clause, which covers other circumstances that raise questions regarding impartiality, 5 C.F.R. §§ 2635.501(a), 2635.502(a)(3), Commissioner Slaughter concluded that there is no appearance of impropriety, *see* Attachment A, and we find no basis for her disqualification. As we have explained above, a reasonable person would not question Commissioner Slaughter's ability to judge the proceeding impartially based merely on her factual statements about the Commission's activities and her statements about the PBM industry that do not judge particular claims or parties, including statements relaying the concerns that other stakeholders have raised with the Commission. *Supra* at Sections VI.a-c. Respondents have failed to demonstrate that Commissioner Slaughter's mind is closed or that a reasonable person would perceive it to be. *See FTC v. Facebook, Inc.*, 581 F. Supp. 3d at 65.[39]

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[37] 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.

[38] ESI Motion 7–8 (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).

[39] 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).

Further, the ESI Respondents' citation to the code of conduct applicable to federal judges is inapposite. As noted above, the statutory standards that govern the disqualification of federal judges are not designed to, and do not, precisely mirror the due process standard that applies to administrative adjudicators. The latter standard is more flexible, such that a comment that would not disqualify a federal judge would necessarily also not disqualify an administrative adjudicator. *See S. Pac. Commc'ns*, 740 F.2d at 990 n.9 (explaining that, because the statutory requirements for disqualification of federal judges establish a broader basis for disqualification than applies in ensuring the right to a fair trial guaranteed by the due process clause, a determination that a judge is not disqualified for bias "necessarily includes a determination that the right to a fair trial is not violated by the judge's presiding over the case"); *see also N.Y. State Inspection, Sec. & L. Enf't Emps., Dist. Council 82 v. N.Y. State Pub. Emp. Rels. Bd*., 629 F. Supp. 33, 48 (N.D.N.Y. 1984) ("Instead of transplanting standards from the judicial to the administrative context, the court finds that it must evaluate the procedures allegedly employed by the defendants against a more flexible touchstone derived from *Withrow* and its progeny . . . ."); Order Den. Mot. to Disqualify, *In re Intuit Inc.*, No. 9408, 2023 WL 7104051, at *2 n.3 (F.T.C. Oct. 19, 2023); Order Den. Pet. For Recusal, *In re Meta Platforms, Inc.*, No. 9411, 2023 WL 1861224, at *4 (F.T.C. Feb. 1, 2023).

VII. Conclusion

For the foregoing reasons, we find no basis to disqualify Commissioner Slaughter from participating in this proceeding.

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

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

April J. Tabor
Secretary

SEAL:
ISSUED: January 14, 2025

Attachment A

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

Office of Commissioner
Rebecca Kelly Slaughter

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

Commission File No. D09437
December 18, 2024

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

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

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

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

The material that the PBM respondents claim requires my disqualification does not meet either the due process or federal ethics standards for disqualification. Their arguments are premised on a series of public statements I made about the pharmaceutical industry, most of which are selectively quoted in their petition and presented without the relevant context.[7] While various of these statements suggest that the pharmaceutical industry merits close scrutiny by the FTC, none amount to a conclusion that any particular party has violated any particular law. Considering

[6] 5 C.F.R. § 2635.502(a)-(b). The catch-all provision appears in the context of the rule about financial conflicts of interest, and all of the cited examples involve financial conflicts of interest, so the best reading of the rule would understand it as referring to other, non-specified potential categories of financial interest that may create an appearance of impropriety. Nonetheless, because some might try to read this catch-all provision as applying to any circumstances whatsoever that would be "likely to raise a question in the mind of a reasonable person" about my impartiality, I have also assessed this standard as applying to potential prejudgment bias.

[7] In 2021, I issued a statement about the Commission's report to Congress on Rebate Walls. In this statement, I did not prejudge any company's conduct as illegal but rather identified areas we should further "scrutinize." Acting Chair Rebecca Kelly Slaughter, Fed. Trade Comm'n, Statement Regarding the Federal Trade Commission's Report to Congress on Rebate Walls 1 (May 28, 2021), https://www.ftc.gov/system/files/documents/public_statements/1590532/statement_of_acting_chairwoman_slaughter_regarding_the_ftc_rebate_wall_report_to_congress.pdf. In 2022, I issued a statement about the Commission's vote to begin a section 6(b) study of PBMs, in which I reviewed the comments from insulin patients heard at "open meetings," "listening fora," and other venues—not my own personal views; I also described market conditions by referring to the pharmaceutical industry in general, not any particular company or even PBMs specifically. Comm'r Rebecca Kelly Slaughter, 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 1 (June 7, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221200PBMSlaughterStatement.pdf. In a bipartisan, unanimous decision, the Commission issued an enforcement policy statement shortly thereafter stating that the FTC would enforce the law against any parties engaging in illegal conduct. Neither the statement nor the accompanying press release prejudged whether any parties were engaged in that illegal conduct. Fed. Trade Comm'n, Policy Statement on Rebates and Fees in Exchange for Excluding Lower-Cost Drug Products (June 16, 2022), https://www.ftc.gov/legal-library/browse/policy-statement-federal-trade-commission-rebates-fees-exchange-excluding-lower-cost-drug-products. In 2023, I supported the Commission's statement regarding prior PBM-related advocacy and reports, and I published my own accompanying statement. Neither of these statements included or evidenced any prejudgment of the facts or law in any specific case. Instead, they simply stated that the prior advocacy and reports should no longer be relied upon because they no longer reflected market realities, and they reiterated the goal of the section 6(b) study to learn more about the role of PBMs in our healthcare markets. *See* Comm'r Rebecca Kelly Slaughter, Fed. Trade Comm'n, Statement Regarding the Commission Statement on 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/finalbksremarksonftcstatementagainstrelianceonpriorpbmadvocacy7202023.pdf; 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.

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

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

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

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

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[8] In 2024, I signed onto a statement of Chair Khan regarding the PBM Interim Staff Report. (July 9, 2024) https://www.ftc.gov/system/files/ftc_gov/pdf/Khan-Bedoya-Slaughter-Statement-Pharmacy-Benefit-Managers-Report.pdf. In that statement, we discussed the findings of the report. Respondent Express Scripts incorrectly attributes a quote from Chair Khan to our joint statement, but even if I had signed onto her quote, it too describes the findings of the report rather than personal views. Further, at an open meeting of the Commission, I gave a statement regarding the same interim staff report. The quotes highlighted by respondents PBMs are from my description of the findings of the report. See Comm'r Rebecca Kelly Slaughter, Statement Regarding FTC Staff Interim Report: Pharmacy Benefit Managers 1–2 (Aug. 1, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/bks-statement-pbm-interim-report.pdf.

[9] *See generally Cement Inst.*, 333 U.S. at 700–03.

[10] As Commissioner Ferguson pointed out in his concurrence to the issuance of the interim staff report, the report "is not a statement or report of the Commission. It is instead the staff's report to the Commission about how it understands our complex healthcare markets in light of the information it has thus far received..." Comm'r Andrew Ferguson, Fed. Trade Comm'n, Concurring Statement Regarding the Pharmacy Benefit Managers Interim Staff Report, (July 9, 2024) https://www.ftc.gov/system/files/ftc_gov/pdf/Ferguson-Statement-Pharmacy-Benefit-Managers-Report.pdf.

[11] *See Cement Institute* at 701–02 ("Yet, if [defendant] is right, the Commission, by making studies and filing reports in obedience to congressional command, completely immunized the practices investigated, even though they are 'unfair,' from any cease and desist order by the Commission or any other governmental agency. There is no warrant in the Act for reaching a conclusion which would thus frustrate its purposes.").

meetings, they would not require disqualification. Commissioners not only can but should be receptive to hearing perspectives from market participants, including complaints about and defenses of market conduct. Considering such input is not evidence of bias, it is evidence of responsible discharge of Commission duties.

Having carefully reviewed all the statements raised by the PBM respondents, it is my determination that, using the due process standards, no "disinterested observer" could conclude that I have "in some measure adjudged the facts as well as the law of a particular case in advance of hearing it."[12] Although my statements have been sliced and diced in these motions to make them appear biased, reading the actual statements themselves in full context makes clear that they are not.[13]

Further, federal ethics rules do not indicate that my disqualification is appropriate here. No member of my household has a financial interest related to the PBM respondents. I have no covered relationships with the PBM respondents or anyone who represents them. Further, there is no appearance of impropriety here. There are no indications that my views on this matter stem from impermissible factors. Rather, I have expressed general concern about the industry and an interest that the Commission scrutinize its practices to determine whether law violations may have occurred.

I take motions for disqualification extremely seriously because it is essential that the work of the Commission be done fairly and without conflicts of interest. I also take seriously our obligation to do our work transparently and consistent with Congressional direction. Commissioners should be transparent with the public about the work we are doing. The Commission should study industries using our section 6(b) authority as Congress has instructed us to do. Those studies should not preclude enforcement action, when appropriate, in that same industry. In doing this important work of the Commission, I have not prejudged or developed an impermissible bias against these respondents. I have no financial interest and have not created an appearance of impropriety. As a result, I will not recuse. I look forward to continuing to adjudicate this matter.

[12] *Cinderella Career Coll. & Finishing Schs.*, 425 F.2d at 591.
[13] *See supra* note 7 (collecting statements).