IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580,

Petitioner,

v.

HUMANA, INC.
500 West Main Street
Louisville, KY 40202,

Respondent.

Misc. Case No.

EMERGENCY PETITION OF THE FEDERAL TRADE COMMISSION FOR AN ORDER ENFORCING SUBPOENA *DUCES TECUM* ISSUED IN A MERGER INVESTIGATION

Introduction and Statement in Support of Emergency Relief

Pursuant to Sections 9 and 16 of the Federal Trade Commission Act, the Federal Trade Commission seeks emergency relief to enforce a subpoena *duces tecum* ("subpoena") issued as part of an investigation into a merger that is likely to be consummated as soon as July 7, 2017. 15 U.S.C. §§ 49, 56.

The Commission issued the subpoena on April 10, 2017 to Humana, Inc. in an investigation that seeks to determine whether an acquisition of the Rite Aid pharmacy chain by Walgreens would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, or Section 5 of the FTC Act, 15 U.S.C. § 45. Humana made a token initial production of five documents totaling 13 pages, then filed an administrative petition to limit the subpoena by quashing two out of four

requests. The Commission largely denied the petition, but limited the subpoena to require Humana to produce documents from only two custodians, consistent with an offer from FTC staff. Despite these limitations, Humana has not complied.

Absent action by the Commission, Walgreens and Rite Aid are free to consummate the transaction on July 7, 2017. Pet. Exh. 1, ¶ 4. This means, as explained below, that the Commission needs the documents by June 26, 2017. Pet. Exh. 1, ¶ 20. Soon after that day, the Commission must determine whether it believes the transaction is unlawful under either the FTC Act or Clayton Act and must be prepared to institute an action for temporary and preliminary relief. *See* 15 U.S.C. § 53(b). Time is of the essence. Any delay in the resolution of this petition may force the FTC to assess the competitive effects of the transaction with information that is less than comprehensive or to take extraordinary steps to address the merger after it is complete, at which point the prospect of effective relief is far more difficult. Pet. Exh. 1, ¶ 20. For that reason, and in order to obtain the requested materials in a timely manner, the Commission asks the Court to act on an emergency basis.

Accordingly, the Commission asks this Court issue an Order to Show Cause in the form accompanying this Petition, and schedule a hearing thereon as soon as practicable before June 26, 2017. Additionally, the Commission requests that any opposition to this Petition shall be filed with the Clerk and served on counsel for the Commission without delay, and that the Commission's reply (if any), be due and be served by hand or by email promptly after the filing of that opposition.[1]

[1] Contemporaneously with this filing, FTC counsel will inform counsel for Humana that the Commission is seeking enforcement of the subpoena *duces tecum* and will provide a courtesy

Petition Statements

In support of its petition, the Commission states as follows:

1. The Commission is an administrative agency of the United States, organized and existing pursuant to the FTC Act, 15 U.S.C. § 41 et seq. The Commission is authorized and directed by Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), to prohibit unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce. The Commission is also authorized to enforce Section 7 of the Clayton Act, 15 U.S.C. § 18, which prohibits acquisitions where "the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly."

2. Section 9 of the FTC Act, 15 U.S.C. § 49, empowers the Commission to issue subpoenas requiring the production of documentary materials. This Court has jurisdiction over Humana and the authority to enforce the Commission's subpoenas pursuant to Section 9 of the FTC Act, 15 U.S.C. § 49, which provides, in pertinent part, as follows:

> Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, partnership, or corporation issue an order requiring such person, partnership, or corporation to appear before the Commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

15 U.S.C. § 49.

3. The Declaration of Dylan Brown, which verifies the allegations of this petition, is attached hereto as Pet. Exh. 1. Additional exhibits are as follows:

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copy by email.

Pet. Exh. 2 Commission Resolution Authorizing Use of Compulsory Process in Nonpublic Investigation, January 5, 2016 (FTC File No.161-0026);

Pet. Exh. 3 Subpoena *Duces Tecum* to Humana, Inc., April 10, 2017;

Pet. Exh. 4 Humana, Inc.'s Petition to Limit Subpoena *Duces Tecum*, May 16, 2017;

Pet. Exh. 5 Federal Trade Commission Order Denying Petition to Limit Subpoena *Duces Tecum*, June 5, 2017.

4. Humana is a private health care insurance provider, with its principal place of business at 500 West Main Street, Louisville, Kentucky 40202. Humana is the one of the largest providers of Medicare Part D insurance plans, which offer benefits and discounts on the costs of pharmaceuticals and pharmacy services to subscribing consumers. Humana is engaged in, and its business affects, "commerce," as that term is defined in Section 4 of the FTC Act, 15 U.S.C. § 44. Pet. Exh. 1, ¶ 3.

5. On October 27, 2015, Walgreens Boots Alliance ("Walgreens") and Rite Aid Corporation ("Rite Aid") agreed to a merger in which Walgreens would acquire Rite Aid. This merger, which would combine two of the three largest pharmacy chains in the country, was reported to the FTC under the Hart-Scott-Rodino Antitrust Improvements Act of 1976. Following some initial fact-finding, the Commission issued an investigational resolution on January 5, 2016, and undertook a detailed review of the proposed transaction that included compulsory process and a second request for information. *See* Pet. Exh. 1, ¶ 4; Pet. Exh. 2. Walgreens and Rite Aid have stated their intent to consummate the merger on July 7, 2017. Pet. Exh. 1, ¶ 4.

6. As part of its investigation, the FTC is studying the competitive impact of the merger on the retail pharmacy market. The vast majority of retail pharmacy customers are covered by

payers, which are typically either private third parties, like corporate employers or insurance carriers, or government programs, like Medicare Part D and state Medicaid programs. These payers negotiate with retail pharmacies, either directly or through a pharmacy benefits manager ("PBM"), to construct a network of locations to provide pharmacy services to the payer's beneficiaries, *i.e.*, pharmacy customers, at contracted reimbursement rates. When a customer fills a prescription at an in-network pharmacy, the pharmacy dispenses the prescribed medication and submits a claim to the payer or its PBM for payment for the medication based on the reimbursement rate negotiated between the payer and the pharmacy. (The pharmacy may also collect a co-pay from the customer.) Pet. Exh. 1, ¶ 5.

7. The reimbursement rates negotiated between retail pharmacies and the payers and PBMs differ based on (1) the type of retail pharmacy and (2) the type of network the payer desires. The major retail chain pharmacies—Walgreens, Rite Aid, and CVS—typically command the highest reimbursement rates for broad networks because they are usually indispensable to the formation of a viable network. Other pharmacies, including independents and those operated by mass merchants and supermarkets, can often be excluded without materially affecting the network's geographic coverage or attractiveness, so operators of these pharmacies typically receive lower reimbursement rates. Pet. Exh. 1, ¶ 6.

8. The type of pharmacy network also affects the negotiated reimbursement rate. Pharmacy networks fall into one of three basic categories: broad, narrow, or preferred. Broad networks typically include as many retail pharmacies as are willing to participate. Major chain pharmacies are able to negotiate higher reimbursement rates from payers for participation in broad networks because they are critical to the success of these networks. Narrower networks

allow payers to offer lower reimbursement rates, as major retail chain pharmacies are willing to trade lower reimbursement for the additional volume that comes from the exclusion of one or both of their major pharmacy competitors. Preferred networks are a hybrid of broad and narrow networks, in that any pharmacy may participate, but a subset of preferred pharmacies, usually a major retail chain pharmacy, agrees to lower reimbursement rates in exchange for a plan design that incentivizes customers to have their prescriptions filled at its preferred pharmacies. Narrow and preferred networks may be less appealing to customers because they have fewer convenient options to obtain their prescriptions. Pet. Exh. 1, ¶ 7.

9. The Center for Medicare & Medicaid Services ("CMS") approves Medicare Part D plans offered to consumers. This approval involves ensuring that the plans (1) provide their beneficiaries with sufficient access to participating pharmacies in each geographic area, also known as "geo-access," and (2) do not misrepresent the benefits or coverage offered to the beneficiaries. When constructing a plan, a payer such as Humana must ensure that the network is not so restrictive as to make the network unmarketable, or to fall short of meeting CMS-mandated geo-access requirements. Pet. Exh. 1, ¶ 8.

10. Humana, as the leading Medicare Part D provider, offers three preferred plans, including at least one—the "Walmart Rx Plan"—in which Walmart, rather than a major retail chain pharmacy, is the sole preferred provider. Pet. Exh. 1, ¶ 9.

11. Walgreens' proposed acquisition of Rite Aid could tip the balance in these reimbursement rate negotiations in its favor, allowing it to command higher reimbursement rates. Depending on the geographic area where a plan's customers reside, Walgreens could become so significant that it would become a "must have" to meet geo-access requirements or to provide the coverage

that a plan's customers desire. A central question in the investigation, therefore, is whether narrow or preferred networks that exclude the combined entity, or all three major retail pharmacy chains—as Humana's Walmart Rx Plan does—would be viable. Documents called for by the subpoena are directly related to answering this question, and thus are of significant importance to the Commission. Pet. Exh. 1, ¶ 10.

12. As part of its investigation, the Commission on April 10, 2017 issued a subpoena *duces tecum* and accompanying subpoena *ad testificandum* to Humana.2 Pet. Exh. 3. The subpoena *duces tecum* included only four specifications. *See*, *e.g.*, Pet. Exh. 3 at 1-2. Specifications 1 and 2 sought information from Humana relating to the proposed Walgreens-Rite Aid merger and divestiture. Specification 3 sought information regarding the Humana Walmart Rx Plan, for the reasons described above. Specification 4 sought information relating to Humana's communications with CMS. *Id.*; *see also* Pet. Exh. 1, ¶ 11.

13. Humana counsel and FTC staff met and conferred regarding potential narrowing of the scope of the subpoena. In order to reduce Humana's burden of compliance, FTC staff agreed that Humana could initially confine its search for documents responsive to Specifications 1 and 2 to two key custodians, and that the FTC would request documents from additional custodians only if it became necessary. FTC staff twice agreed to extend the deadline for production of documents, first on May 1, 2017 and then again on May 8, 2017, for a final return date of May 16, 2017. On May 9, Humana produced five documents totaling 13 pages responsive to Specifications 1 and 2 and committed to producing additional documents responsive to these Specifications following a collection and review. Pet. Exh. 1, ¶ 12.

2 The subpoena *ad testificandum* is not presently before this Court. Humana separately filed a petition to quash

14. On May 16, 2017, the deadline for production, Humana requested additional time to produce documents or file a petition to limit or quash the subpoena. Staff declined to extend the return dates absent a definitive schedule for production. Humana also requested modifications to Specification 3, concerning the Walmart Rx Plan, and Specification 4, concerning Humana's communications with CMS. Staff offered both to further limit the subpoena by allowing Humana to confine its production for all four specifications to the two key custodians whose files Humana was already reviewing for Specifications 1 and 2 and to relieve Humana of Specification 3's requirement to produce "all documents" regarding the Humana Walmart Rx Plan. Instead, Humana would be required only to produce documents relating to the itemized subparts of Specification 3, each of which concerns the plan's ability to compete effectively.

Pet. Exh. 1, ¶ 13.

15. Humana rejected these offers and, that same day, filed an administrative petition to limit the subpoena by, among other things, quashing specifications 3 and 4 in their entirety. Pet. Exh. 4; *see also* Pet. Exh. 1, ¶ 14. This petition claimed, among others, that the subpoena sought information that was irrelevant to the investigation, unduly burdensome to provide, or available from other sources. Pet. Exh. 4.

16. On June 5, 2017, the Commission denied the petition, finding no basis or support for Humana's objections. Pet. Exh. 5. The Commission, however, formally modified the subpoena in the following respects, consistent with staff's offer of May 16: (1) Humana would only need to search for responsive documents in the possession, custody, or control of only two individual custodians; and (2) the scope of documents responsive to Specification 3 was

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this subpoena, which the Commission denied on June 15, 2017.

narrowed to only those documents falling within specific categories stated in the specification. *Id.* at 9. The Commission set a new deadline for compliance with the subpoena of June 15, 2017. *Id.*; *see also* Pet. Exh. 1, ¶ 15.

17. Despite staff's best efforts, nearly one week elapsed before counsel for Humana made themselves available for a substantive telephone call regarding the Commission's ruling and the new deadline. During that call on June 12, 2017, Humana indicated that it was preparing a "proposal" regarding complying with the subpoena and would present that to staff within a day or so, but that the company was still evaluating whether to comply at all with Specifications 3 and 4. Pet. Exh. 1, ¶ 16.

18. In the afternoon of June 14, 2017, Humana communicated its proposal: Humana would produce documents responsive to Specifications 1 and 2 on June 15 and documents responsive to Specifications 3 and 4 on or around June 22nd, on the condition that the Commission abandon its related subpoena for testimony. Staff rejected Humana's proposal because, without having an opportunity to review the documents, it would be impossible to know whether the required information was included in Humana's documentary production. Staff did offer, however, to reconsider the necessity of testimony after reviewing the documents. Humana rejected that offer on June 15, and communicated that, while it intended to make a timely production of documents responsive to Specifications 1 and 2, it would not comply with Specifications 3 and 4 unless the testimonial subpoena was withdrawn. Humana also offered to consider a declaration, but did not elaborate on the contents of that hypothetical declaration. Pet. Exh. 1, ¶ 17.

19. As of close of business on Thursday, June 15, 2017, Humana has not complied with Specifications 3 and 4 of the subpoena *duces tecum* as modified by the Commission.

Pet. Exh. 1, ¶ 18.

20. Humana's failure to substantially comply with the Commission's information demands has materially impeded the Commission's investigation. It is in the public interest that the investigation no longer be delayed. All documents must be submitted promptly and in sufficient time for FTC staff to complete its investigation and advise the Commission in advance of the consummation of the merger. Specifically, Commission staff will need at least four days to evaluate the sought-after material (an extraordinarily limited amount of time compared to typical FTC merger investigations) and include those evaluations in any recommendation to the Commission on challenging the transaction. As a result, FTC staff needs the sought-after materials by June 26, 2017 to meet those time constraints. Pet. Exh. 1, ¶¶ 19-20.

18. No previous application for the relief sought herein has been made to this or to any other court.

Relief Requested

WHEREFORE, the Commission invokes the aid of this Court and prays:

1. That this Court enter an order directing Humana to show cause, without, why it should not be required to comply with and obey the subpoena;

2. That this Court subsequently enter its own order directing Humana to provide the responsive materials by June 26, 2017; and

3. That the Court grant such other relief as it deems just and proper.

Respectfully submitted,

DAVID C. SHONKA
Acting General Counsel
(D.C. Bar No. 224576)

LESLIE RICE MELMAN
Assistant General Counsel for Litigation
(D.C. Bar No. 266783)
LMelman@ftc.gov

/s/ Burke W. Kappler
BURKE W. KAPPLER
Attorney, Office of General Counsel
(D.C. Bar No. 471936)

BRADLEY D. GROSSMAN
Attorney, Office of General Counsel
(Mass. Bar No. 669368)

FEDERAL TRADE COMMISSION
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580
Tel: (202) 326-2043 (Kappler)
Fax: (202) 326-2477
E-mail: bkappler@ftc.gov

Date: June 19, 2017

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FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580,

Petitioner,

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HUMANA, INC.
500 West Main Street
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Respondent.

Misc. Case No.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF EMERGENCY PETITION OF THE FEDERAL TRADE COMMISSION FOR AN ORDER ENFORCING SUBPOENA *DUCES TECUM* ISSUED IN A MERGER INVESTIGATION

The Federal Trade Commission asks this Court to consider this summary enforcement matter on an emergency basis. This matter involves an FTC investigation of a proposed merger between Walgreens Boots Alliance ("Walgreens") and Rite Aid Corporation ("Rite Aid"), two major pharmacy chains, currently scheduled for consummation as soon as July 7, 2017. To understand the competitive impact of this merger, the Commission issued a subpoena *duces tecum* to Humana, Inc. ("Humana"), but Humana has refused to comply with two of the four Specifications of the subpoena, even after the Commission, in response to Humana's administrative petition to quash, modified the subpoena and directed it to produce the requested materials no later than June 15, 2017. To allow FTC staff sufficient time to review these materials and take them into consideration in its recommendation concerning a possible challenge to the merger prior to its consummation, FTC staff will need the required materials no

later than June 26, 2017. The Commission will evaluate these materials, along with all of the other materials gathered in the course of this investigation, in determining whether to seek temporary and preliminary relief from a United States district court. *See* 15 U.S.C. § 53(b). Once that merger occurs, the Commission's ability to obtain effective relief in this matter, if the transaction is later held unlawful, is much more difficult. Pet. Exh. 1, ¶ 20.

Preliminary Statement

This case involves the merger of two of the three largest pharmacy chains in the United States, Walgreens and Rite Aid. The Federal Trade Commission is conducting an investigation to determine whether the transaction violates either the Federal Trade Commission Act or the Clayton Act and would result in decreased competition between pharmacy chains for participation in insurers' retail pharmacy networks, which could, in turn, lead to higher rates for health plans and increased insurance premiums for consumers. Although the FTC has sought information directly from Walgreens and Rite Aid, the Commission also seeks to understand the competitive impact of the merger by issuing a subpoena *duces tecum* to Humana, one of the nation's largest providers of health insurance plans, including Medicare Part D plans. Of particular significance is Humana's Walmart Rx Plan, in which members pay reduced co-pays when filling prescriptions at Walmart, but not when filling prescriptions at other pharmacy chains, including Walgreens, Rite Aid, or CVS (a third major pharmacy chain). The Commission seeks to understand whether a retail pharmacy network that features Walmart as the sole "preferred" provider—like Humana's Walmart Rx Plan—is a viable and attractive option for plan sponsors in any geographic areas, and if so, which geographic areas. Specifications 3 and 4, with which Humana refuses to comply, are the ones that seek documents related to the Humana Walmart Rx Plan. *See, e.g.*, Pet. Exh. 1, ¶¶ 5-11.

Humana has refused to cooperate with the Commission's subpoena. By May 16, five weeks after the subpoena issued, it had made only a token production of five documents, comprising 13 pages, after which it filed a petition to limit in their entirety two of the four specifications. Pet. Exh. 1, ¶ 12. Although the Commission determined that the request for relief was not well founded, it agreed to modify the subpoena to limit Humana's production obligations to two custodians. Pet. Exh. 5 at 9. Despite these efforts to resolve the matter without litigation, Humana did not meet the Commission's June 15, 2017 deadline for documents responsive to Specifications 3 and 4. On that date, Humana stated that it would not produce them at all, despite Humana's acknowledgement that it was able to produce them by June 22, 2017. Pet. Exh. 1, ¶¶ 17-18. Accordingly, the Commission petitions this Court, pursuant to Section 9 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 49 for an order requiring Humana to produce the documents and other materials sought by the Commission's subpoena.

JURISDICTION AND VENUE

The FTC Act empowers the Commission to issue subpoenas in aid of the Commission's authority.[1] If a subpoena recipient fails to comply, the Commission may petition the district court "within the jurisdiction of which such inquiry is carried on" for an order requiring compliance. *See* 15 U.S.C. § 49. The current investigation, including review of the proposed transaction by the Commission's economists and lawyers, is nationwide in scope but is being directed and carried on within this judicial district at the FTC's headquarters office in Washington, D.C. Pet. Exh. 1, ¶ 1; *see also NLRB v. Cooper Tire & Rubber Co.*, 438 F.3d

[1] Section 9 of the FTC Act, 15 U.S.C. § 49, grants the Commission authority to issue subpoenas seeking the testimony of a witness and the production of documents.

1198, 1202 (D.C. Cir. 2006) (holding that location of investigating office "may well be the most reasonable [venue] choice for purposes of subpoena enforcement"); *United States Intern. Trade Comm'n v. ASAT, Inc.*, 411 F.3d 245, 249 (D.C. Cir. 2005). Accordingly, this Court should issue a show cause order requiring Humana to comply with the Commission's process.

STATEMENT

On October 27, 2015, Walgreens and Rite Aid announced a proposed merger that would combine two of the largest retail pharmacy chains. As a reportable merger under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 and its implementing rules, the parties informed the Commission, which promptly began seeking information from the parties and then issued an investigational resolution in January 2016. *See* Pet. Exh. 2.

As part of this investigation, on April 10, 2017, the FTC issued a subpoena *duces tecum* and subpoena *ad testificandum* to Humana seeking information regarding Humana's analysis of the merger and the company's prescription drug plans. (This subpoena *ad testificandum* is not before the Court at this time.) A principal purpose of those requests is to understand the potential impact of a Walgreens-Rite Aid merger on the retail pharmacy market, specifically, whether insurance plans that offer narrow or preferred retail pharmacy networks that exclude the combined entity, or all three major retail pharmacy chains, would be viable. *See, e.g.*, Pet. Exh. 1, ¶¶ 5-10.

The subpoena *duces tecum* at issue is tailored to this purpose and includes only four specifications. The first two specifications seek documents and information from Humana relating to the proposed Walgreens-Rite Aid merger, including a proposed divestiture to a third party buyer. The third specification asks for information about the Humana Walmart Rx Plan. The fourth specification requests information about Humana's communications with the Centers

for Medicare & Medicaid Services ("CMS"). CMS approves Medicare Part D plans offered to consumers, which involves ensuring that the plans (1) provide plan beneficiaries with sufficient access to participating pharmacies in each geographic area and (2) do not misrepresent the benefits or coverage offered to plan beneficiaries. Pet. Exh. 1, ¶¶ 8, 11.

Humana and FTC staff met and conferred several times and FTC staff twice extended the deadline for a response. In turn, Humana made a token production of 13 pages in response to Specifications 1 and 2. Pet. Exh. 1, ¶ 12. As of the final deadline of May 16, 2017, however, Humana had not produced information in response to Specifications 3 and 4 and requested an additional extension of time. Staff denied this request, but offered other limitations, all of which Humana rejected. Humana then filed an administrative petition to limit the subpoena that same day. Pet. Exh. 1, ¶¶ 13-14; *see also* Pet. Exh. 4.

Although styled as a petition to "limit," the petition asked the Commission to quash Specifications 3 and 4 in their entirety on several grounds, including relevance, burden, and the claim that the materials sought were available from other sources, such as CMS itself. On June 5, 2017, the Commission issued an order denying the petition. Pet. Exh. 5. The Commission rejected each of Humana's arguments, finding that the information sought was relevant to the FTC's investigation, that the company had not sufficiently supported its claims of burden, and that the information sought was not reasonably available from other sources. *Id.* The Commission, as an exercise of its discretion, nonetheless limited the subpoena to require Humana to comply by producing documents from only two individual custodians and limited the scope of Specification 3 by relieving Humana of the requirement to produce "all" responsive documents and instead requiring it to produce only the documents responsive to the specific subparts listed in the specification, consistent with staff's offer of May 16. After doing so, the

Commission set a new deadline of June 15, 2017 for the production of responsive documents. *Id.* at 9. On June 15, Humana communicated that it would make a timely production of documents responsive to Specifications 1 and 2, but that it would not produce documents responsive to Specifications 3 and 4 of the subpoena. Pet. Exh. 1, ¶¶ 17-18.

ARGUMENT

Humana has refused to produce the information specified, even after the Commission substantially narrowed the subpoena and directed Humana to comply. For the reasons stated below, the FTC is entitled to enforcement of its subpoena and this Court should order Humana to comply. The FTC respectfully requests that the Court treat this Petition as an emergency in order to ensure that FTC staff obtains the information prior to completion of the merger. Without swift judicial action, the FTC may be hampered in deciding whether to challenge the Walgreens-Rite Aid transaction and to seek temporary and preliminary relief in advance of the July 7, 2017, merger date. The Commission would face the difficult choice of proceeding with less than comprehensive information, or electing to delay any action and risking potentially anticompetitive impacts from the completed merger.

I. Standards for Enforcement of Agency Process

The standards for the judicial enforcement of administrative compulsory process have long been settled in this Circuit: "[T]he court's role in a proceeding to enforce an administrative subpoena is a strictly limited one." *FTC v. Texaco, Inc.*, 555 F.2d 862, 871-72 (D.C. Cir. 1977) (*en banc*) (citing *Endicott Johnson v. Perkins*, 317 U.S. 501, 509 (1943)); *see also Oklahoma Press Publ'g Co. v. Walling*, 327 U.S. 186, 209 (1946); *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950). And "while the court's function is 'neither minor nor ministerial,' the scope of issues which may be litigated in an enforcement proceeding must be narrow, because of

the important governmental interest in the expeditious investigation of possible unlawful activity." *Id.* at 872 (quoting *Oklahoma Press Publ'g*, 327 U.S. at 217 n.57); *accord*, *FTC v. Anderson*, 631 F.2d 741, 744-45 (D.C. Cir. 1979).

Thus, a district court must enforce agency investigative process so long as "the inquiry is within the authority of the agency, the demand is not too indefinite, and the information sought is reasonably relevant. *See Texaco*, 555 F.2d at 872 (quoting *Morton Salt*, 338 U.S. at 652). In making this determination, the agency's own appraisal of relevancy must be accepted so long as it is not "obviously wrong." *FTC v. Invention Submission* Corp., 965 F.2d 1086, 1089 (D.C. Cir. 1992) (citing *FTC v. Carter*, 636 F.2d 781, 787-88 (D.C. Cir. 1980)). Furthermore, proceedings to enforce administrative investigative subpoenas and CIDs are entitled to summary disposition. They are special statutory matters cognizable under Fed. R. Civ. P. 81(a)(5), and are properly instituted by a petition and order to show cause (rather than by complaint and summons). *See, e.g.*, *FTC v. MacArthur*, 532 F.2d 1135, 1141-42 (D.C. Cir. 1976). And they are summary in nature: "'discovery is improper in a summary subpoena enforcement proceeding.'" *Carter*, 636 F.2d at 789 (quoting *United States v. Exxon Corp.*, 628 F.2d 70, 77 n.7 (D.C. Cir. 1980)); *accord*, *Invention Submission*, 965 F.2d at 1091.

II. The Subpoena is Lawful, Seeks Relevant Documents, and Is Not Unduly Burdensome

The subpoena *duces tecum* satisfies all the standards governing enforcement of FTC compulsory process. The Commission lawfully issued the subpoena; the information and documents being sought plainly are relevant to the Commission's investigation; and compliance with the subpoena does not impose an undue burden.

A. The Subpoena Is Lawful

The Commission properly issued the subpoena as part of an investigation concerning possible violations of Section 5 of the FTC Act, 15 U.S.C. § 45,[2] and Section 7 of the Clayton Act, 15 U.S.C. § 18.[3] The Commission initiated the investigation formally by issuing its investigational Resolution in January 2016. Pet. Exh. 2. This resolution authorizes the Commission to use compulsory process to determine whether the Walgreens-Rite Aid merger would have an unlawful anticompetitive effect. *Id.* Further, Section 9 of the FTC Act grants the Commission the authority to investigate the transaction and to issue subpoenas directing any "witnesses" to produce "all such documentary evidence relating to any matter under investigation." *See* 15 U.S.C. § 49; *see also* 15 U.S.C. § 46 (authorizing the Commission to investigate corporations); 16 C.F.R. § 2.7(a) (authorizing Commissioners to issue subpoenas).

B. The Responsive Documents and Information Are Reasonably Relevant to the Commission's Investigation

The standard for judging relevancy in an investigatory proceeding is more relaxed than in

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[2] Section 5 provides in relevant part:

> (a)(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.
>
> (2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce . . . .

[3] Section 7 provides in relevant part:

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or part of the assets of another person . . . where in any line of commerce . . . the effect of such acquisition may be substantially to lessen competition . . . .

an adjudication. In an investigatory proceeding, the Commission merely seeks to learn whether there is reason to believe that the law is being violated and, if so, whether issuance of a complaint would be in the public interest. *See Texaco*, 555 F.2d at 872. The requested materials, therefore, need only be relevant to the investigation – the boundary of which may be defined by the agency quite generally. *See Carter*, 636 F.2d at 787-88; *Texaco*, 555 F.2d at 874 & n.26. Indeed, "a court must respect the agency's 'power of inquisition' and interpret relevance broadly." *FTC v. Invention Submission Corp.*, 1991 U.S. Dist. LEXIS 5523 at *5 (D.D.C. Feb. 14, 1991) (quoting *Morton Salt*, 338 U.S. at 642), *aff'd*, 965 F.2d 1086. As the D.C. Circuit has explained, "in the pre-complaint stage, an investigating agency is under no obligation to propound a narrowly focused theory of a possible future case." *Texaco*, 555 F.2d at 874.

In the present investigation, the Commission seeks to assess the competitive impact of the proposed Walgreens-Rite Aid merger by, among other things, determining whether a retail pharmacy network which, like Humana's Walmart Rx Plan, includes only Walmart as a preferred provider, presents a viable and attractive alternative to networks featuring a combined Walgreens-Rite Aid entity. Pet. Exh. 1, ¶¶ 5-10. The documents and material requested by the subpoenas are plainly relevant to that inquiry because each of the specifications relates either to Humana's assessment of the merger and its competitive impact or to the Humana Walmart Rx Plan and its viability as an option for consumers of retail pharmacy services.

Indeed, although Humana claimed in its petition to limit that the information sought by Specifications 3 and 4 of the subpoena was irrelevant, the Commission rejected this argument and explained why this information was directly relevant to staff's investigation: information about the Humana Walmart Rx Plan enabled FTC staff "to determine the degree to which Humana's Walmart Rx Plan is attractive to consumers in need of Medicare Part D coverage in

different geographic areas, which, in turn, will facilitate the FTC staff's analysis of the importance of competition between the merging parties in different geographic areas." Pet. Exh. 5 at 4.

C. Compliance With the Subpoena Is Not Unduly Burdensome

Nor does the subpoena present an undue burden. To establish this, Humana would have to show that compliance would threaten to disrupt its business unduly, or otherwise seriously hinder its operations. *See, e.g., Texaco,* 555 F.2d at 882; *Invention Submission Corp.*, 965 F.2d at 1090; *FTC v. Rockefeller*, 591 F.2d 182, 190 (2d. Cir. 1979). Humana cannot make such a showing here. The Commission already found that Humana had not supported its claim and in fact offered "nothing" more than "conclusory and unattributed statements" that were insufficient to establish undue burden, particularly in light of the company's size, resources, and business practices, which included responding to government inquiries and oversight. Pet. Exh. 5 at 5-7. Humana's claim of burden is even less persuasive now, after the Commission modified the subpoena to require Humana to search for and produce documents and materials from only *two individual custodians*. Humana—a major insurance provider that routinely responds to government inquiries—cannot establish that reviewing and producing this information will unduly disrupt or seriously hinder its business operations, as required by *Texaco* and other authorities. Indeed, at one point Humana offered to produce the materials responsive to Specifications 3 and 4 on June 22, confirming that such production was not unduly burdensome. Pet. Exh. 1, ¶ 17.

Humana's contention that the requested information is available from other sources, including CMS, also must fail because the specifications of the subpoena are not limited to materials available from third parties. Pet. Exh. 5 at 5. For example, Specification 4 seeks not

only CMS's communications with Humana regarding the Humana Walmart Rx Plan, but also "Humana's communications with other third parties as well as Humana's internal analyses of its interactions with CMS, including its responses to any concerns CMS raised about Humana's plans related to pharmacy access[,]" documents to which "only Humana would have access." *Id.* (also concluding that information responsive to Specification 3 was not reasonably available from other sources).[4]

III. Humana Should Be Ordered to Comply Immediately to Protect the Commission's Ability to Obtain Effective Relief Were It to Challenge the Transaction

The Commission asks the Court to treat this matter as an emergency. Walgreens and Rite Aid have announced their intention to merge as early as July 7, 2017, which is only days away. Between now and then, the Commission must be prepared to determine whether it has reason to believe that the transaction is unlawful under either the FTC or Clayton Acts and, if necessary, initiate an action to challenge the acquisition on a highly accelerated schedule. As a result, time is of the essence. FTC staff sought to require Humana to produce documents promptly, particularly certain key types of documents and data, so that staff could analyze them and complete the investigation expeditiously. FTC projects that they will need at least four days to review the sought-after materials once they are produced in order to incorporate them into a recommendation to the Commission. Consequently, Commission staff will need the documents by June 26, 2017. Pet. Exh. 1, ¶ 20.

Any delay in the resolution of the petition may limit the Commission's ability to conduct

[4] The Commission also concluded that even if the responsive documents were available from other sources, it was not obligated to seek documents from each separate source if Humana served as a single source that was "more convenient, less burdensome [and] less expensive." Pet. Exh. 5 at 5 & n.11 (citing *In re Exxon Valdez*, 142 F.R.D. 380, 382-83 (D.D.C. 1992)).

a comprehensive evaluation of the transaction. Humana's unexplained refusal to comply with the Commission's subpoena hampers the Commission's ability to evaluate the proposed transaction and determine what action is in the public interest.

CONCLUSION

The Commission's petition to enforce the subpoena should be granted, and the Court should enter its own order requiring Respondents to provide the requested materials no later than June 26, 2017.

Respectfully submitted,

DAVID C. SHONKA
Acting General Counsel
(D.C. Bar No. 224576)

LESLIE RICE MELMAN
Assistant General Counsel for Litigation
(D.C. Bar No. 266783)
LMelman@ftc.gov

/s/ Burke W. Kappler
BURKE W. KAPPLER
Attorney, Office of General Counsel
(D.C. Bar No. 471936)

BRADLEY D. GROSSMAN
Attorney, Office of General Counsel
(Mass. Bar No. 669358)

FEDERAL TRADE COMMISSION
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580
Tel: (202) 326-2043 (Kappler)
Fax: (202) 326-2477
E-mail: bkappler@ftc.gov

Date: June 19, 2017

Petition Exhibit 1

Declaration of Dylan Brown, June 19, 2017

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION 600 Pennsylvania Avenue, N.W. Washington, D.C. 20580, Petitioner, v. **HUMANA, INC.** 500 West Main Street Louisville, KY 40202, Respondent.	Misc. Case No.

DECLARATION OF DYLAN BROWN

Pursuant to 28 U.S.C. § 1746, I declare as follows:

1. I am an attorney employed by the U.S. Federal Trade Commission ("FTC" or "Commission"), in Washington, D.C., in the Mergers 1 division of the Bureau of Competition. I am assigned to the FTC's investigation of the proposed merger between Walgreens Boots Alliance ("Walgreens") and Rite Aid Corporation ("Rite Aid") (FTC File No. 161-0026). This investigation is nationwide in scope and is being conducted by FTC staff attorneys, economists, and other employees at FTC headquarters in Washington, D.C. The purpose of the investigation is to determine whether this proposed merger of major retail pharmacy chains would violate Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, which prohibits "unfair methods of competition" or Section 7 of the Clayton Act, 15 U.S.C. § 18, which prohibits acquisitions that "lessen competition, or . . . tend to create a monopoly."

2. I am authorized to execute a declaration verifying the facts that are set forth in the Emergency Petition of the Federal Trade Commission for an Order Enforcing Subpoena *Duces Tecum* Issued in a Merger Investigation. I have read the petition and exhibits thereto (hereinafter referred to as Pet. Exh.), and verify that Pet. Exh. 1 through Pet. Exh. 5 are true and correct copies of the original documents. The facts set forth herein are based on my personal knowledge or information made known to me in the course of my official duties.

3. Humana is a private healthcare insurance provider, with its principal place of business at 500 West Main Street, Louisville, Kentucky 40202. Humana is the one of the largest providers of Medicare Part D insurance plans, which offer benefits and discounts on the costs of pharmaceuticals and pharmacy services for subscribing consumers. Humana is engaged in, and its business affects, "commerce," as that term is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

4. On October 27, 2015, Walgreens and Rite Aid agreed to a merger in which Walgreens would acquire Rite Aid. This merger, which would combine two of the largest pharmacy chains in the country, was reported to the FTC under the Hart-Scott-Rodino Antitrust Improvements Act of 1976. Following some initial fact-finding, the Commission issued an investigational resolution on January 5, 2016, and undertook a detailed review of the proposed transaction that included compulsory process and a second request for information. *See* Pet. Exh. 2. Absent Commission action to block the merger, the parties may consummate the merger on July 7, 2017.

5. As part of its investigation, the FTC is studying the competitive impact of the merger on the retail pharmacy market. The vast majority of retail pharmacy customers are covered by payers, which are typically either private third parties, like corporate employers or insurance

carriers, or government programs, like Medicare Part D and state Medicaid programs. These payers negotiate with retail pharmacies, either directly or through a pharmacy benefits manager ("PBM"), to construct a network of locations to provide pharmacy services to the payer's beneficiaries, *i.e.*, pharmacy customers, at contracted reimbursement rates. When a customer fills a prescription at an in-network pharmacy, the pharmacy dispenses the prescribed medication and submits a claim to the payer or its PBM for payment for the medication based on the reimbursement rate negotiated between the payer and the pharmacy. (The pharmacy may also collect a co-pay from the customer.)

6. The reimbursement rates negotiated between retail pharmacies and the payers and PBMs differ based on (1) the type of retail pharmacy and (2) the type of network the payer desires. The major retail chain pharmacies—Walgreens, Rite Aid, and CVS—typically command the highest reimbursement rates for broad networks because they are usually indispensable to the formation of a viable network. Other pharmacies, including independents and those operated by mass merchants and supermarkets, can often be excluded without materially affecting the network's geographic coverage or attractiveness, so operators of these pharmacies typically receive lower reimbursement rates.

7. The type of pharmacy network also affects the negotiated reimbursement rate. Pharmacy networks fall into one of three basic categories: broad, narrow, or preferred. Broad networks typically include as many retail pharmacies as are willing to participate. Major chain pharmacies are able to negotiate higher reimbursement rates from payers for participation in broad networks because they are critical to the success of these networks. Narrower networks allow payers to offer lower reimbursement rates, as major retail chain pharmacies are willing to trade lower

reimbursement for the additional volume that comes from the exclusion of one or both of their major pharmacy competitors. Preferred networks are a hybrid of broad and narrow networks, in that any pharmacy may participate, but a subset of preferred pharmacies, usually a major retail chain pharmacy, agrees to lower reimbursement rates in exchange for a plan design that incentivizes customers to have their prescriptions filled at its preferred pharmacies. Narrow and preferred networks may be less appealing to customers because they have fewer convenient options to obtain their prescriptions.

8. The Center for Medicare & Medicaid Services ("CMS") approves Medicare Part D plans offered to consumers. This approval involves ensuring that the plans (1) provide their beneficiaries with sufficient access to participating pharmacies in each geographic area, also known as "geo-access," and (2) do not misrepresent the benefits or coverage offered to the beneficiaries. When constructing a plan, a payer such as Humana must ensure that the network is not so restrictive as to make the network unmarketable, or to fall short of meeting CMS-mandated geo-access requirements.

9. Humana, as the leading Medicare Part D provider, offers three preferred plans, including at least one—the "Walmart Rx Plan"—in which Walmart, rather than a major retail chain pharmacy, is the sole preferred provider.

10. Walgreens' proposed acquisition of Rite Aid could tip the balance in these reimbursement rate negotiations in its favor, allowing it to command higher reimbursement rates. Depending on the geographic area where a plan's customers reside, Walgreens could become so significant that it would become a "must have" to meet geo-access requirements or to provide the coverage that a plan's customers desire. A central question in the investigation, therefore, is

whether narrow or preferred networks that exclude the combined entity, or all three major retail pharmacy chains—as Humana's Walmart Rx Plan does—would be viable. Documents called for by the subpoena are directly related to answering this question, and thus are of significant importance to the Commission.

11. As part of its investigation, the Commission on April 10, 2017 issued a subpoena *duces tecum* and accompanying subpoena *ad testificandum* to Humana.1 Pet. Exh. 3. The subpoena *duces tecum* included only four specifications. *See, e.g.*, Pet. Exh. 3 at 1-2. Specifications 1 and 2 sought information from Humana relating to the proposed Walgreens-Rite Aid merger and divestiture. Specification 3 sought information regarding the Humana Walmart Rx Plan, for the reasons described above. Specification 4 sought information relating to Humana's communications with CMS.

12. Humana counsel and FTC staff met and conferred regarding potential narrowing of the scope of the subpoena. In order to reduce Humana's burden of compliance, FTC staff agreed that Humana could initially confine its search for documents responsive to Specifications 1 and 2 to two key custodians, and that the FTC would request documents from additional custodians only if it became necessary. FTC staff twice agreed to extend the deadline for production of documents, first on May 1, 2017 and then again on May 8, 2017, for a final return date of May 16, 2017. On May 9, Humana produced five documents totaling 13 pages responsive to Specifications 1 and 2 and committed to producing additional documents responsive to these Specifications following a collection and review.

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1 The subpoena *ad testificandum* is not presently before this Court. Humana separately filed a petition to quash this subpoena, which the Commission denied on June 15, 2017.

13. On May 16, 2017, the deadline for production, Humana requested additional time to produce documents or file a petition to limit or quash the subpoena. Staff declined to extend the return dates absent a definitive schedule for production. Humana also requested modifications to Specification 3, concerning the Walmart Rx Plan, and Specification 4, concerning Humana's communications with CMS. Staff offered both to further limit the subpoena by allowing Humana to confine its production for all four specifications to the two key custodians whose files Humana was already reviewing for Specifications 1 and 2 and to relieve Humana of Specification 3's requirement to produce "all documents" regarding the Humana Walmart Rx Plan. Instead, Humana would be required only to produce documents relating to the itemized subparts of Specification 3, each of which concerns the plan's ability to compete effectively.

14. Humana rejected these offers and, that same day, filed an administrative petition to limit the subpoena by, among others, quashing specifications 3 and 4 in their entirety. Pet. Exh. 4.

15. On June 5, 2017, the Commission ruled and denied the petition, finding no basis or support for Humana's objections. Pet. Exh. 5. The Commission, however, formally modified the subpoena in the following respects, consistent with staff's offer of May 16: (1) Humana needed to search for responsive documents in the possession, custody or control of only two individual custodians; and (2) the scope of documents responsive to Specification 3 was narrowed to only those documents falling within specific categories stated in the specification. *Id.* at 9. The Commission set a new deadline for compliance with the subpoena of June 15, 2017. *Id.*

16. Despite staff's best efforts, nearly one week elapsed before counsel for Humana made themselves available for a substantive telephone call regarding the Commission's ruling and the

new deadline. During that call on June 12, 2017, Humana indicated that it was preparing a "proposal" regarding complying with the subpoena and would present that to staff within a day or so, but that the company was still evaluating whether to comply at all with Specifications 3 and 4.

17. In the afternoon of June 14, 2017, Humana communicated its proposal: Humana would produce documents responsive to Specifications 1 and 2 on June 15 and documents responsive to Specifications 3 and 4 on or around June 22nd, on the condition that the Commission abandon its related subpoena for testimony. Staff rejected Humana's proposal because, without having an opportunity to review the documents, it would be impossible to know whether the required information was included in Humana's documentary production. Staff did offer, however, to reconsider the necessity of testimony after reviewing the documents. Humana rejected that offer on June 15, and communicated that, while it intended to make a timely production of documents responsive to Specifications 1 and 2, it would not comply with Specifications 3 and 4 unless the testimonial subpoena was withdrawn. Humana also offered to consider a declaration, but did not elaborate on the contents of that hypothetical declaration.

18. As of close of business on Thursday, June 15, 2017, Humana has not complied with Specifications 3 and 4 of the subpoena *duces tecum* as modified by the Commission.

19. Humana's non-compliance with the subpoena has burdened, delayed, and impeded the Commission's investigation.

20. Should the Court order Humana to comply, staff requires the documents no later than June 26, 2017 in order to evaluate this information and prepare a recommendation for the Commission sufficiently prior to the expected consummation of the merger on July 7, 2017. We

require this information in order to recommend Commission action before consummation because our experience has shown that actions to challenge mergers after consummation are difficult and much less likely to be successful in obtaining effective relief.

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

Executed on June 19, 2017

Dylan Brown
Staff Attorney, Mergers 1 Division
Bureau of Competition
Federal Trade Commission

Petition Exhibit 2

Commission Resolution Authorizing Use of Compulsory Process in Nonpublic Investigation, January 5, 2016 (FTC File No. 161-0026)

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Edith Ramirez, Chairwoman**
Julie Brill
Maureen K. Ohlhausen
Terrell McSweeny

RESOLUTION AUTHORIZING USE OF COMPULSORY PROCESS IN NONPUBLIC INVESTIGATION

File No. 161-0026

Nature and Scope of Investigation:

To determine whether the proposed acquisition of Rite Aid Corporation by Walgreens Boots Alliance, Inc. violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended; to determine whether the aforesaid proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, or Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended; and to determine whether the requirements of Section 7A of the Clayton Act, 15 U.S.C. § 18a, have been or will be fulfilled with respect to the proposed transaction.

The Federal Trade Commission hereby resolves and directs that any and all compulsory processes available to it be used in connection with this investigation.

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; FTC Procedures and Rules of Practice, 16 C.F.R. § 1.1, *et seq.* and supplements thereto.

By direction of the Commission.

Donald S. Clark
Secretary

Issued: January 5, 2016

Petition Exhibit 3

Subpoena *Duces Tecum* to Humana, Inc., April 10, 2017

SUBPOENA DUCES TECUM

1. TO	2. FROM
Humana Inc. c/o Matthew Varzally, Esq., Senior Counsel, Litigation & Investigations Group 500 West Main Street Louisville, KY 40202	UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION

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 in Item 6.

3. LOCATION OF HEARING	4. YOUR APPEARANCE WILL BE BEFORE
Federal Trade Commission 400 7th St. SW Washington, DC 20024	Dylan Brown, Esq.
	5. DATE AND TIME OF HEARING OR DEPOSITION May 2, 2017*

6. SUBJECT OF INVESTIGATION

Walgreens Boots Alliance, Inc.'s proposed acquisition of Rite Aid Corporation, File No. 161-0026.

See attached Resolution directing use of compulsory process.

7. RECORDS YOU MUST BRING WITH YOU

See attached Definitions, Instructions, and Specifications.

*In lieu of a personal appearance, please submit the requested materials along with a certification to the completeness and accuracy of the return by May 2, 2017.

8. RECORDS CUSTODIAN/DEPUTY RECORDS CUSTODIAN	9. COMMISSION COUNSEL
Michael Moiseyev (Custodian) Daniel Zach (Deputy Custodian)	Dylan Brown, Esq. Federal Trade Commission 400 7th Street, S.W. Washington, DC 20024 202-326-3283

DATE ISSUED	COMMISSIONER'S SIGNATURE
4/10/17	Maureen K. Ohlhausen

GENERAL INSTRUCTIONS

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.

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 ten copies of the petition must be filed with the Secretary of the Federal Trade Commission. Send one copy to the Commission Counsel named in Item 9.

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/FTCRulesofPractice. Paper copies are available upon request.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

FTC Form 68-B (rev. 9/92)

Petition Exhibit 3

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)

SUBPOENA *DUCES TECUM*
ISSUED TO HUMANA INC.
FTC File No. 161-0026

Unless modified by agreement with the staff of the Federal Trade Commission (the "Commission" or the "FTC"), each Specification of this Subpoena *Duces Tecum* ("SDT") requires a complete search of the Company as defined in the Definitions, which appear after the following Specifications. Pursuant to the Commission's Rules of Practice, 16 C.F.R. § 2.7(k), a Company representatives must confer with the Commission representative identified in the final Instruction of this SDT within 14 days after receipt of this SDT. If the Company believes that the required search or any other part of this SDT can be narrowed in any way that is consistent with the Commission's need for information, you are encouraged to discuss such questions and possible modifications with the Commission representative. All modifications to this SDT must be agreed to in writing pursuant to the Commission's Rules of Practice, 16 C.F.R. § 2.7(1).

SPECIFICATIONS

1. Submit all documents relating to the Proposed Acquisition, including, but not limited to, documents relating to effects of the Proposed Acquisition, Company plans to respond, adapt, or react to the Proposed Acquisition, and potential efficiencies or cost savings that may result from the Proposed Acquisition, including all underlying data, analysis, and calculations.

2. Submit all documents relating to the potential divestiture of assets from Walgreens or Rite Aid to any person in connection with the Proposed Acquisition, including, but not limited to,

    a. Correspondence with any other person, including, but not limited to, Walgreens, Rite Aid, or any potential buyer of divested assets from Walgreens or Rite Aid in connection with the Proposed Acquisition; and

    b. Documents relating to any review, evaluation, or analysis of any potential divestiture of assets from Walgreens or Rite Aid to any other person, including, but not limited to, the impact of such a divestiture on retail pharmacy network offerings, composition, and reimbursement rates.

3. Submit all documents relating to the Humana Walmart Rx Plan retail pharmacy network, including, but not limited to,

    a. Correspondence with, or documents otherwise related to discussions with, Chains, PSAOs, or other providers of the Relevant Service regarding participation in the Humana Walmart Rx Plan and the terms of such participation;

    b. Documents relating to the Humana Walmart Rx Plan retail pharmacy network's ability to satisfy geographic access requirements of CMS or of current or

prospective plan members, including communications with plan sponsors or insured individuals;

c. Documents relating to any consideration or plans to alter the composition or benefit structure of the Humana Walmart Rx Plan retail pharmacy network, such as the inclusion of additional preferred cost-sharing pharmacies to provide the Relevant Service; and

d. Documents relating to the actual or considered development or promotion of a Preferred Network with a benefit structure including more pharmacies as preferred cost-sharing pharmacies than the Humana Walmart Rx Plan, in response to CMS feedback, scrutiny, or concern regarding access to pharmacies offering preferred cost sharing.

4. Submit all documents reflecting or otherwise relating to communications with CMS regarding the following:

a. Benefit designs or levels of access of any of the Humana Medicare PDP Plans' retail pharmacy networks;

b. The benefit design or levels of access to pharmacies offering preferred cost sharing in the Humana Walmart Rx Plan;

c. Beneficiary access to pharmacies offering preferred cost sharing in the Humana Walmart Rx Plan;

d. Any action that CMS may take regarding any plan that offers insufficient meaningful access to pharmacies offering preferred cost-sharing;

e. Findings, questions, concern, or warnings by CMS that the Humana Walmart Rx Plan may be offering access to preferred cost-sharing pharmacies in a way that may be misleading to beneficiaries;

f. Findings, questions, concern, or warnings by CMS that Humana may be influencing beneficiaries to enroll in PDP plans in which beneficiaries do not have meaningful and/or convenient access to preferred cost-sharing pharmacies; and

g. Findings, questions, concern, or warnings that the Humana Walmart Rx Plan retail pharmacy network, or the networks of any other Humana Medicare PDP plans, may offer an inadequate level of access to preferred cost sharing pharmacies.

DEFINITIONS

For the purposes of this SDT, the following definitions apply:

A. The term "the Company" or "Humana" means Humana Inc., its domestic and foreign parents, predecessors, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, principals, employees, agents, and representatives of the foregoing. The terms "subsidiary," "affiliate," and "joint venture" refer to any person in which there is partial (25% of more) or total ownership or control between the Company and any other person.

B. The term "Rite Aid" means Rite Aid Corporation and all of its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing. The terms "subsidiary," "affiliate," and "joint venture" refer to any person in which there is partial (25% or more) or total ownership or control between Rite Aid and any other person.

C. The term "Walgreens" means Walgreens Boots Alliance, Inc., its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing. The terms "subsidiary," "affiliate," and "joint venture" refer to any person in which there is partial (25% or more) or total ownership or control between Walgreens and any other person.

D. The term "documents" means any information, on paper or electronic format, including written, recorded, and graphic materials of every kind in the possession, custody, or control of the Company. The term "documents" includes, without limitation: electronic mail messages; audio files, instant messages, drafts of documents; metadata and other bibliographic or historical data describing or relating to documents created, revised, or distributed electronically; copies of documents that are not identical duplicates of the originals in that person's files; and copies of documents the originals of which are not in the possession, custody, or control of the Company.

1. Unless otherwise specified, the term "documents" excludes:

    a. bills of lading, invoices, purchase orders, customs declarations, and other similar documents of a purely transactional nature;

    b. architectural plans and engineering blueprints; and

    c. documents solely relating to environmental, tax, human resources, OSHA, or ERISA issues.

2. The term "computer files" includes information stored in, or accessible through, computer or other information retrieval systems. Thus, the Company should produce documents that exist in machine-readable form, including documents stored in personal computers, portable computers, workstations, minicomputers, mainframes, servers, backup disks and tapes, archive disks and tapes, and other forms of offline storage, whether on or off Company premises. If the Company believes that the required search of backup disks and tapes and archive disks and tapes can be narrowed in any way that is consistent with the Commission's need for documents and information, you are encouraged to discuss a possible modification to this instruction with the Commission representatives identified on the last page of this SDT. The Commission representative will consider modifying this instruction to:

    a. exclude the search and production of files from backup disks and tapes and archive disks and tapes unless it appears that files are missing from files that exist in personal computers, portable computers, workstations, minicomputers, mainframes, and servers searched by the Company;

    b. limit the portion of backup disks and tapes and archive disks and tapes that needs to be searched and produced to certain key individuals, or certain time periods or certain Specifications identified by Commission representatives; or

    c. include other proposals consistent with Commission policy and the facts of the case.

E. The term "person" includes the Company and means any natural person, corporate entity, partnership, association, joint venture, government entity, or trust.

F. The term "relating to" means in whole or in part constituting, containing, concerning, discussing, describing, analyzing, identifying, or stating.

G. The terms "and" and "or" have both conjunctive and disjunctive meanings.

H. The term "plans" means tentative and preliminary proposals, recommendations, or considerations, whether or not finalized or authorized, as well as those that have been adopted.

I. The term "Chain" means any corporation that owns 50 or more pharmacy locations nationwide, either under a single banner or multiple banners, including but not limited to, Walgreens Boots Alliance, Inc., CVS Pharmacy, Wal-Mart Stores, Inc., Rite Aid, Inc., Ahold U.S.A., Inc., Albertsons Companies, Associated Food Stores, Inc., Aurora Health Care, Bartell Drug Co., Bashas' Grocery Stores, Bi Mart Corporation, Brookshire Brothers, Brookshire Grocery Company, CARE Pharmacies, Cerberus Capital

Management, Costco Wholesale Corporation, Delhaize America, Inc., Discount Drug Mart, Inc., Fred's Inc., Giant Eagle, Inc., The Golub Corporation, The Great Atlantic & Pacific Tea Company, LP, Haggen, Inc., Hy Vee, Inc., Ingles Markets Inc., K-VA-T Food Stores, Inc., Kinney Drugs, Inc., The Kroger Company, Lone Star Funds, Medicap Pharmacy, The Medicine Shoppe Pharmacy, Meijer, Inc., Publix Super Markets, Inc., Raley's Supermarkets, Roundy's Supermarkets, Inc., Sav-Mor Drug Stores, Inc., Save Mart Supermarkets, Inc., Schnuck Markets, Inc., ShopKo Stores Operating Co., LLC, Spartan Stores, Target Corporation, Top Markets, Inc., United Drug Cooperative, Wakefern Food Corporation, Wegmans Food Markets, Inc., and Weis Markets, Inc.

J. "CMS" means the Centers for Medicare & Medicaid Services.

K. "geographic access" means the proximity and geographic accessibility of preferred cost sharing pharmacies to plan beneficiaries in a Limited Network or Preferred Network.

L. The term "Limited Network" means any retail pharmacy network that excludes certain pharmacies, Chains, or PSAOs from the network.

M. The term "Preferred Network" means any retail pharmacy network where a group of pharmacies, Chains, or PSAOs designated as preferred pharmacies offer lower co-payments or other cost-saving structures to plan beneficiaries that non-preferred pharmacies do not provide.

N. The term "prescription pharmaceuticals" means ethical drugs or pharmaceutical products generally dispensed by a licensed pharmacist.

O. The term "Proposed Acquisition" means Walgreens' proposed acquisition of Rite Aid.

P. The term "Pharmacy Services Administrative Organizations" or "PSAO" means any buying group, comprised of at least 50 independent pharmacies, that represents independent retail pharmacies in contract negotiations with PBMs and other third-party payers. The term PSAO may include, but is not limited to, Good Neighbor Pharmacy Provider Network, Access Health, LeaderNET, EPIC Pharmacy Network, Inc., Third Party Station, United Drugs, MHA Long Term Care Pharmacy Network, Third Party Network, American Pharmacy Network Solutions, TriNet Third Party Network, RxPr1de / Managed Pharmacy Care, Managed Care Connection, Medicine Shoppe International, and RxSelect Pharmacy Network.

Q. The term "Retail Pharmacy Services" means the dispensing of prescription pharmaceuticals, in-person at a brick-and-mortar retail pharmacy.

R. The term "retail pharmacy" means a retail site or store that dispenses prescription pharmaceuticals and other controlled substances.

S. The term "Relevant Service" means Retail Pharmacy Services.

INSTRUCTIONS

For purposes of this SDT, the following instructions apply:

I. All references to year refer to calendar year. Unless otherwise specified, each of the Specifications calls for documents for each of the years from January 1, 2014 to the present.

II. This SDT shall be deemed continuing in nature so as to require production of all documents responsive to any Specification included in this SDT produced or obtained by the Company up to 45 calendar days prior to the date of the Company's full compliance with this SDT.

III. Do not produce any Sensitive Personally Identifiable Information ("Sensitive PII") prior to discussing the information with a Commission representative. If any document responsive to a particular Specification contains unresponsive Sensitive PII, redact the unresponsive Sensitive PII prior to producing the document.

The term "Sensitive Personally Identifiable Information" means an individual's Social Security Number alone; or an individual's name, address, or phone number in combination with one or more of the following:

- date of birth
- driver's license number or other state identification number, or a foreign country equivalent
- passport number
- financial account number
- credit or debit card number

IV. Forms of Production: The Company shall submit documents as instructed below absent written consent signed by an Assistant Director.

a) Documents stored in electronic or hard copy formats in the ordinary course of business shall be submitted in electronic format provided that such copies are true, correct, and complete copies of the original documents:

i. Submit Microsoft Access, Excel, and PowerPoint in native format with extracted text and metadata;

ii. Submit all documents other than those provided pursuant to subparts (a)(i) or (a)(iii) in image format with extracted text and metadata; and

iii. Submit all hard copy documents in image format accompanied by OCR.

b) For each document submitted electronically, include the following metadata fields

and information:

i. For loose electronic files other than email: beginning Bates or document identification number, ending Bates or document identification number, page count, custodian, creation date and time, modification date and time, last accessed date and time, size, location or path file name, and SHA Hash value;

ii. For emails: beginning Bates or document identification number, ending Bates or document identification number, page count, custodian, to, from, CC, BCC, subject, date and time sent, child records (the beginning Bates or document identification number of attachments delimited by a semicolon);

iii. For email attachments: beginning Bates or document identification number, ending Bates or document identification number, page count, custodian, creation date and time, modification date and time, last accessed date and time, size, location or path file name, parent record (beginning Bates or document identification number of parent email), and SHA Hash value; and

iv. For hard copy documents: beginning Bates or document identification number, ending Bates or document identification number, page count, and custodian.

c) If the Company intends to utilize any de-duplication or email threading software or services when collecting or reviewing information that is stored in the Company's computer systems or electronic storage media in response to this SDT, or if the Company's computer systems contain or utilize such software, the Company must contact a Commission representative to determine, with the assistance of the appropriate government technical officials, whether and in what manner the Company may use such software or services when producing materials in response to this SDT.

d) For each Specification marked with an asterisk (*), and to the extent any other responsive data exists electronically, provide such data in Excel spreadsheet with all underlying data un-redacted and all underlying formulas and algorithms intact.

e) Submit electronic files and data as follows:

i. For any production over 10 gigabytes, use IDE and EIDE hard disk drives, formatted in Microsoft Windows-compatible, uncompressed data in a USB 2.0 external enclosure; and

ii. For productions under 10 gigabytes, CD-R CD-ROM and DVD-ROM for Windows-compatible personal computers, and USB 2.0 Flash Drives are also acceptable storage formats.

iii. **All documents produced in electronic format shall be scanned for and free of viruses. The Commission will return any infected media for replacement, which may affect the timing of the Company's compliance with this SDT.**

V. All documents responsive to this SDT, regardless of format or form and regardless of whether submitted in paper or electronic form:

a) Shall be produced in complete form, un-redacted unless privileged, and in the order in which they appear in the Company's files and shall not be shuffled or otherwise rearranged. For example:

i. If in their original condition papers were stapled, clipped, or otherwise fastened together or maintained in file folders, binders, covers, or containers, they shall be produced in such form, and any documents that must be removed from their original folders, binders, covers, or containers in order to be produced shall be identified in a manner so as to clearly specify the folder, binder, cover, or container from which such documents came; and

ii. If in their original condition electronic documents were maintained in folders or otherwise organized, they shall be produced in such form and information shall be produced so as to clearly specify the folder or organization format.

b) If written in a language other than English, shall be translated into English, with the English translation attached to the foreign language document;

c) Shall be produced in color where necessary to interpret the document;

d) Shall be marked on each page with corporate identification and consecutive document control numbers;

e) Shall be accompanied by an affidavit of an officer of the Company stating that the copies are true, correct, and complete copies of the original documents; and

f) Shall be accompanied by an index that identifies: (i) the name of each person from whom responsive documents are submitted; and (ii) the corresponding consecutive document control number(s) used to identify that person's documents, and if submitted in paper form, the box number containing such documents. If the index exists as a computer file(s), provide the index both as a printed hard copy and in machine readable form (provided that Commission representatives determine prior to submission that the machine readable form would be in a format that allows the agency to use the computer files). The Commission representative will provide a sample index upon request.

VI. If any material called for by this SDT is withheld based on a claim of protected status, 16

C.F.R. § 2.7(a)(4), the claim must be asserted no later than the return date of this SDT. In addition, pursuant to 16 C.F.R. § 2.11(a)(1), submit, together with the claim, a detailed log of the items withheld. The information in the log shall be of sufficient detail to enable the Commission staff to assess the validity of the claim for each document, including attachments, without disclosing the protected information. Unless modified by the Commission representative identified on the last page of this SDT, submit the log in a searchable and sortable electronic format, and, for each document, including attachments, provide:

a) Document control number(s)

b) The full title (if the withheld material is a document) and the full file name (if the withheld material is in electronic form);

c) A description of the material withheld (for example, a letter, memorandum, or email), including any attachments;

d) The date the material was created;

e) The date the material was sent to each recipient (if different from the date the material was created);

f) The email addresses, if any, or other electronic contact information to the extent used in the document, from which and to which each document was sent;

g) The names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all authors;

h) The names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all recipients of the material;

i) The names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all persons copied on the material;

j) The factual basis supporting the claim that the material is protected; and

k) Any other pertinent information necessary to support the assertion of protected status by operation of law.

In the log, identify by an asterisk each attorney who is an author, recipient, or person copied on the material. The titles, business addresses, email addresses, and relevant affiliations of all authors, recipients, and persons copied on the material may be provided in a legend appended to the log. However, provide in the log the information required by Instruction VI(f). The lead attorney or attorney responsible for supervising the review of the material and who made the determination to assert the claim of protected status must attest, in writing, to the log.

A document, including all attachments, may be withheld or redacted only to the extent

necessary to preserve any claim of protected status. Unless otherwise provided in the instructions accompanying this SDT, and except for information and material subject to a valid claim of protected status, all responsive information and material shall be produced without redaction.

VII. If the Company is unable to answer any questions fully, supply such information as is available. Explain why such answer is incomplete, the efforts made by the Company to obtain the information, and the source from which the complete answer may be obtained. If books and records that provide accurate answers are not available, enter best estimates and describe how the estimates were derived, including the sources or bases of such estimates. Estimated data should be followed by the notation "est." If there is no reasonable way for the Company to make an estimate, provide an explanation.

VIII. If documents responsive to a particular Specification no longer exist for reasons other than the ordinary course of business or the implementation of the Company's document retention policy, but the Company has reason to believe have been in existence, state the circumstances under which they were lost or destroyed, describe the documents to the fullest extent possible, state the Specification(s) to which they are responsive, and identify persons having knowledge of the content of such documents. In order for the Company's response to this SDT to be complete, the attached certification form must be executed by the official supervising compliance with this SDT, notarized, and submitted along with the responsive materials.

Any questions you have relating to the scope or meaning of anything in this SDT or suggestions for possible modifications thereto should be directed to Dylan Brown at (202) 326-3283. The response to the SDT shall be addressed to the attention of Dylan Brown and delivered between 8:30 a.m. and 5:00 p.m. on any business day on or before **April 31, 2017** to Federal Trade Commission, 400 7th Street, SW, Washington, DC 20024. If you wish to submit your response by United States mail, please call one of the staff listed above for mailing instructions.

SUBPOENA *DUCES TECUM*
Issued to Humana Inc.
FTC File No. 161-0026

CERTIFICATION

This response to the *Subpoena Duces Tecum* issued by the Federal Trade Commission, together with any and all appendices and attachments thereto, was prepared and assembled under my supervision in accordance with instructions issued by the Federal Trade Commission. The information is, to the best of my knowledge, true, correct, and complete, subject to the recognition that where books and records do not provide the required data, reasonable estimates have been made. Where responses contain estimates, this is so stated in the response.

Where copies rather than original documents have been submitted, the copies are true, correct and complete. If the Commission uses such copies in any court or administrative proceeding, the Company will not object based on the Commission not offering the original document.

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

_____
TYPE OR PRINT NAME AND TITLE

_____
(Signature)

Subscribed and sworn to before me at the City of _____,

State of _____, this _____ day of _____, 20__.

_____
(Notary Public)

My Commission expires:

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Edith Ramirez, Chairwoman**
Julie Brill
Maureen K. Ohlhausen
Terrell McSweeny

RESOLUTION AUTHORIZING USE OF COMPULSORY PROCESS IN NONPUBLIC INVESTIGATION

File No. 161-0026

Nature and Scope of Investigation:

To determine whether the proposed acquisition of Rite Aid Corporation by Walgreens Boots Alliance, Inc. violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended; to determine whether the aforesaid proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, or Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended; and to determine whether the requirements of Section 7A of the Clayton Act, 15 U.S.C. § 18a, have been or will be fulfilled with respect to the proposed transaction.

The Federal Trade Commission hereby resolves and directs that any and all compulsory processes available to it be used in connection with this investigation.

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; FTC Procedures and Rules of Practice, 16 C.F.R. § 1.1, *et seq.* and supplements thereto.

By direction of the Commission.

Donald S. Clark
Secretary

Issued: January 5, 2016

Petition Exhibit 4

Humana, Inc.'s Petition to Limit Subpoena *Duces Tecum*,
May 16, 2017

Stamp and Return

PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In re	**PUBLIC**
Subpoena Duces Tecum dated April 10, 2017	FTC File No. 161-0026

HUMANA INC.'S PETITION TO LIMIT
SUBPOENA *DUCES TECUM*

Richard W. Smith
Katherine C. Campbell
Wiley Rein LLP
1776 K Street, NW
Washington, DC 20006
Telephone: (202) 719-7000
Facsimile: (202) 719-7049
rwsmith@wileyrein.com
kcampbell@wileyrein.com

Dated: May 16, 2017

Counsel for Humana Inc.

I. INTRODUCTION

Pursuant to 16 C.F.R. §§ 2.7(c) and 2.10, Humana Inc. petitions the Federal Trade Commission to limit the subpoena *duces tecum* ("Subpoena") served on Humana on April 12, 2017. Humana is not the subject of any known investigation, but was instead subpoenaed as a non-party in connection with the FTC's investigation into the proposed acquisition of Rite Aid Corporation by Walgreens Boots Alliance, Inc. ("Proposed Acquisition"). The Subpoena, attached hereto as Exhibit A, is a quintessential example of a fishing expedition by the government for irrelevant documents, with the full cost of that expedition being foisted upon Humana, a non-party. The Subpoena is grossly overbroad, and many of the specifications are entirely unrelated to the FTC's investigation of the Proposed Acquisition. Moreover, this is the third set of non-party discovery demands that the FTC has served on Humana alone. And in this latest set of demands, the FTC is asking for many of the same documents that they had previously included in their prior subpoenas, but had withdrawn, presumably because they were not needed. To exacerbate the burden, the FTC also has served a subpoena *ad testificandum* on Humana, in which it has demanded that Humana prepare a corporate deponent to testify on a series of exceptionally broad topics, many of which have little to do with the Proposed Acquisition.[1]

The costs that Humana, a non-party, will be forced to endure in an effort to isolate, collect, process, search for, review, and produce the documents demanded by the FTC are enormous, while the benefit to the FTC, if any, is paltry. Most of the sought-after documents are irrelevant, and to make matters worse, the FTC has conceded that many of them are either already in the possession of the agency from other sources, are publicly available, or could be

[1] The deadline for filing objections to the separate subpoena *ad testificandum* has been extended.

more readily obtained from another government agency, the Centers for Medicare and Medicaid Services ("CMS").

Humana has fully cooperated with the FTC both before the Subpoena was issued and after. The FTC issued a Civil Investigative Demand ("CID") and subpoena *duces tecum* to Humana on January 14, 2016, and then issued another CID to Humana on March 7, 2017. Humana fully cooperated with the FTC in response to these requests, making its employees available to the FTC for interviews and producing responsive documents.

With respect to the instant Subpoena, counsel for Humana has conferred with FTC staff on four occasions pursuant to 16 C.F.R. § 2.7(k) in an effort to identify particular documents that would be most helpful to the FTC's investigation and to determine a reasonable timeline for production. To date, Humana and FTC staff have reached an agreement with respect to Specifications 1 and 2, but have been unable to reach an agreement regarding Specifications 3 and 4. Even with respect to Specifications 1 and 2, the FTC has not released Humana from further demands, but instead has reserved its right to request additional documents beyond those that the parties have currently agreed shall be produced.

Particularly considering Humana's status as a non-party to the investigation, the FTC should limit the Subpoena to eliminate Specifications 3 and 4, which are grossly overbroad and irrelevant to, and outside the scope of, the subject matter of the investigation. To ensure that no objections are waived, Humana has set forth herein its full set of objections to all four of the Subpoena's specifications.

II. BACKGROUND

The FTC is investigating whether the proposed acquisition of Rite Aid Corporation by Walgreens Boots Alliance, Inc. violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, or Section 7 of the Clayton Act, 15 U.S.C. § 18, and whether that proposal meets

the requirements of Section 7A of the Clayton Act, 15 U.S.C. § 18a. *See* Ex. A at 14. In connection with this investigation, the FTC served a subpoena on Humana with four unreasonably overbroad specifications seeking (i) "all documents relating to the Proposed Acquisition"; (ii) "all documents relating to the potential divestiture of assets from Walgreens or Rite Aid to any person in connection with the Proposed Acquisition"; (iii) "all documents relating to the Humana Walmart Rx Plan"; and (iv) "all documents reflecting or otherwise relating to communications with CMS" on seven broad topics.

Humana met and conferred with FTC staff on four occasions (April 26, May 1, May 9, and May 16) in an effort to identify documents most helpful for the FTC's investigation and to determine whether such documents are readily available—without imposing an undue burden on Humana—to satisfy the FTC's stated needs. *See* Letter from Richard Smith and Katherine Campbell, Wiley Rein LLP, to Dylan Brown, FTC (Apr. 28, 2017) (attached hereto as Exhibit B); Letter from Richard Smith and Katherine Campbell, Wiley Rein LLP, to Dylan Brown, FTC (May 5, 2017) (attached hereto as Exhibit C). Regarding Specifications 1 and 2, Humana and FTC staff agreed that Humana would produce documents self-collected by two key Humana custodians related to the Proposed Merger and any potential divestiture. The FTC reserved the right to seek a broader production at a later time. *See* Ex. C. Humana produced the non-privileged documents that those two custodians self-collected on May 9. *See* Letter from Richard Smith and Katherine Campbell, Wiley Rein LLP, to Dylan Brown, FTC (May 9, 2017) (attached hereto as Exhibit D).

In a good-faith effort to provide the FTC with the documents it requested, and even though doing so was not required under the terms of the agreement Humana reached with the FTC as to Specifications 1 and 2, Humana has taken the voluntary step of formally collecting

documents from the two key custodians. Humana intends to produce additional non-privileged documents in response to Specifications 1 and 2 after those additional documents are fully processed and reviewed. Accordingly, Humana files this petition to limit with respect to Specifications 1 and 2 out of an abundance of caution and solely to preserve its objections pursuant to the Commission's Rules. *See* 16 C.F.R. § 2.10.

As of the date of this filing, Humana and FTC staff continue to work on resolving their dispute, but have been unable to reach agreement regarding Specifications 3 and 4. With respect to Specification 3, Humana offered (i) to produce slides describing the structure of Humana's prescription drug plans, (ii) to prepare an annotated chronology describing in some detail the history of Walgreens' participation or non-participation in those plans and its preferred/non-preferred status in those plans, and (iii) welcomed the Commission's input into the content of such a summary. The Commission, however, rejected that approach. *See* Ex. C. With respect to Specification 4, Humana notified the FTC staff that the central documents were publicly available to the FTC. Humana offered nonetheless (i) to produce any letters CMS sent to Humana concluding that the Humana plans were outliers with regard to geographic access and (ii) to identify with specificity the public reports prepared by CMS which describe each plan's access levels to preferred cost sharing pharmacies by geographic area. The Commission again rejected that approach. *See* Ex. C. Because Humana and the FTC have failed to reach an agreement regarding Specifications 3 and 4, Humana is forced to file the instant petition to limit the Subpoena.

By letters dated May 1 and 8, 2017, the FTC extended Humana's deadline to respond to the Subpoena, and the corresponding deadline to file a petition to limit or quash, until May 16, 2017; and to quash the subpoena *ad testificandum* until May 23, 2017. *See* Letter from Dylan

Brown, FTC, to Richard Smith, Wiley Rein LLP (May 1, 2017) (attached hereto as Exhibit E); Letter from Dylan Brown, FTC, to Richard Smith, Wiley Rein LLP (May 8, 2017) (attached hereto as Exhibit F). The FTC also agreed to reschedule the deposition date, to the extent one is held, to May 30, 2017. *See* Ex. E. With respect to Specifications 1 and 2, Humana and FTC staff agreed that Humana will produce documents from two key custodians related to the proposed merger and any potential divestiture, and Humana has already begun producing such documents. However, the FTC left open the possibility that it could require a broader collection. Thus, Humana is forced to file its petition to limit or quash Specifications 1 and 2 in order to avoid waiver of its objections. Humana and FTC staff continue to engage in discussions regarding Specifications 3 and 4, but as of the date of this filing, have been unable to reach an agreement. On May 16, 2017, Humana communicated with the FTC requesting another extension, so that the parties could continue to engage in negotiations. The FTC failed to extend the deadline, so Humana is forced to file this petition to limit the Subpoena.

III. ARGUMENT

A. Standard

The FTC is authorized by statute to issue subpoenas and to investigate unfair methods of competition. 15 U.S.C. § 45; 16 C.F.R. § 2.7(c). However, the FTC's "[s]ubpoena enforcement power is not limitless[.]" *F.T.C. v. Ken Roberts Co.*, 276 F.3d 583, 586 (D.C. Cir. 2001). As the U.S. 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). Particularly when discovery is sought from a non-party, the subpoena must be reasonable. *See Dow Chem. Co. v. Allen*, 672 F.2d 1262, 1267, 1277 (7th Cir. 1982) (affirming district court's denial of enforcement of administrative subpoena against non-party); *F.T.C. v. Bowman*, 149 F. Supp.

624, 629-30 (N.D. Ill. 1957), *aff'd*, 248 F.2d 456 (7th Cir. 1957) ("the imposition of a heavy burden upon a witness not a party to that proceeding should be avoided").

A subpoena that is "unduly burdensome or unreasonably broad" is not reasonable. *F.T.C. v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977); *see also F.T.C. v. Turner*, 609 F.2d 743, 744 (5th Cir. 1980) (explaining demand must not be "too indefinite"). Thus, "disclosure of subpoenaed information may be restricted where compliance would force an unreasonable burden on the party from whom production is sought." *Dow Chem. Co.*, 672 F.2d at 1269. Further, 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. *Id.* at 1270. 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. Aug. 12, 2016) (citing *United States v. Powell*, 379 U.S. 48, 57-58 (1964)). Finally, an agency subpoena is improper if it seeks irrelevant information. *See Morton Salt Co.*, 338 U.S. at 652 (warning that agency subpoena is improper if it is too indefinite or irrelevant); *see also Turner*, 609 F.2d at 746 (denying enforcement of FTC subpoena where information was not reasonably relevant to authorized FTC inquiry). The FTC's own Staff Manual recognizes this principle. *See* FTC Staff Manual § 3.6.7.5.2(1) ("Care should be taken in describing documents [in a subpoena *duces tecum*] to avoid return of irrelevant or redundant materials.").

Here, the Subpoena meets each of the telltale signs of unreasonableness. *First*, it is grossly broad and unduly burdensome by requesting that Humana, a non-party, produce "all documents" related to four extremely broad subjects. Complying with the Subpoena as drafted would force Humana to review and produce hundreds of thousands of documents.

Second, the Subpoena seeks information entirely unrelated to the FTC's investigation, and is duplicative of discovery that the FTC has already demanded from Humana—and which it previously conceded it did not need. Therefore, the burden of compliance substantially outweighs any probative value of the information sought or the agency's need for such information.

Third, the documents that the FTC seeks in Specifications 3 and 4 are already in the possession of the FTC through another party, are publicly available, or are available through CMS and thus are already available to the Government. Nevertheless, in the spirit of compromise, Humana has offered to identify with specificity the publicly available reports prepared by CMS which describe Humana plans' access levels to preferred cost sharing pharmacies by geographic area. Humana has likewise offered to prepare an annotated chronology setting forth the information about which the FTC has stated it is most interested. The Commission has rejected both of these compromise approaches. The FTC has represented that [redacted] All of this information is publicly available, and any internal Humana discussions on the subject, which are not privileged, are irrelevant and beyond the scope of the FTC's investigation. Moreover, what Humana may or may not have internally speculated about what CMS might or might not do or conclude is entirely irrelevant to the FTC's investigation of Walgreens and Rite Aid and is beyond the bounds of what the FTC should be able to require from Humana. It is difficult to fathom how any of these documents would benefit the FTC's investigation.

Complying with the Subpoena would impose an enormous burden on Humana, a non-party, in terms of time, expense, and resources. Humana should not have to shoulder the burden of collecting and reviewing thousands—if not more—irrelevant documents, [redacted]

B. General Objections

1. Humana objects generally to the Subpoena to the extent the specifications are duplicative of the January 14, 2016 CID; the January 14, 2016 subpoena *duces tecum*; or the March 7, 2017 CID.

2. Humana objects generally to the Subpoena's return date as unduly burdensome.

3. Humana objects generally to the Subpoena's instruction to respond on or before April 31, 2017, as confusing because no such date exists.

4. Humana objects generally to the Subpoena insofar as it seeks privileged attorney-client communications or attorney work product material ("Privileged Information").

5. Humana objects generally to the Subpoena insofar as it seeks confidential or proprietary information ("Confidential Information").

6. Humana objects generally to the Subpoena to the extent it seeks information that is outside of Humana's custody, possession, or control.

7. Humana objects generally to the date range of the Subpoena as overly broad. The proposed acquisition was announced on October 27, 2015, yet the subpoena requests documents from January 1, 2014, to the present.

8. Humana objects generally to the Subpoena on the grounds of overbreadth and undue burden to the extent it seeks information or documents that are not obtainable through a reasonably diligent search by Humana.

9. Humana objects generally to the Subpoena on the grounds that it seeks information that is publicly available, or readily available to the government through another agency.

10. Humana objects generally to the Subpoena to the extent it seeks information that is irrelevant to, and outside the scope of, the subject matter of this investigation, the authorization for the subpoena, and the use of the FTC's investigatory compulsory process.

11. Humana objects to the Subpoena's definition of "computer files" to the extent it includes backup disks and tapes.

12. Humana objects generally to Subpoena Instruction(V)(a) to the extent it conflicts with Subpoena Instruction IV.

C. Specific Objections

Subject to and without waiver of the general objections set forth above, which are incorporated below as if set forth in response to each specification, Humana specifically objects to each of the specifications.

Specification 1: Submit all documents relating to the Proposed Acquisition, including, but not limited to, documents relating to effects of the Proposed Acquisition, Company plans to respond, adapt, or react to the Proposed Acquisition, and potential efficiencies or cost savings that may result from the Proposed Acquisition, including all underlying data, analysis, and calculations.

Specific Objections: Humana incorporates herein by reference general objection numbers 1-2, 4-5, 7-8. Humana specifically objects to this specification as overly broad, unduly

burdensome, and not narrowly tailored (*i.e.*, seeking "all documents"). Humana further specifically objects to the extent the specification seeks Privileged or Confidential Information.

Response: Subject to and without waiver of its objections, Humana and the FTC agreed that two key custodians would self-collect documents related to the proposed acquisition, and Humana produced these documents on May 9. Humana has also begun a formal collection of these two custodians' documents and will produce non-privileged documents related to the proposed acquisition after a privilege review. Humana and the FTC agreed that no further documents will be needed at this time.

Specification 2: Submit all documents relating to the potential divestiture of assets from Walgreens or Rite Aid to any person in connection with the Proposed Acquisition, including, but not limited to

a. Correspondence with any other person, including, but not limited to, Walgreens, Rite Aid, or any potential buyer of divested assets from Walgreens or Rite Aid in connection with the Proposed Acquisition; and

b. Documents relating to any review, evaluation, or analysis of any potential divestiture of assets from Walgreens or Rite Aid to any other person, including, but not limited to, the impact of such a divestiture on retail pharmacy network offerings, composition, and reimbursement rates.

Specific Objections: Humana incorporates herein by reference general objection numbers 1-2, 4-8. Humana objects to this specification as overly broad, unduly burdensome, and not narrowly tailored (*i.e.*, seeking "all documents"). Humana further objects to the extent the specification seeks Privileged or Confidential Information.

Response: Subject to and without waiver of its objections, Humana and the FTC agreed that two key custodians would self-collect documents related to a potential divestiture, and Humana produced these documents on May 9. Humana has also begun a formal collection of these two custodians' documents and will produce non-privileged documents related to a

potential divestiture after a privilege review. Humana and the FTC agreed that no further documents will be needed at this time.

Specification 3: Submit all documents relating to the Humana Walmart Rx Plan retail pharmacy network, including, but not limited to,

a. Correspondence with, or documents otherwise related to discussions with, Chains, PSAOs, or other providers of the Relevant Service regarding participation in the Humana Walmart Rx Plan and the terms of such participation;

b. Documents relating to the Humana Walmart Rx Plan retail pharmacy network's ability to satisfy geographic access requirements of CMS or of current or prospective plan members, including communications with plan sponsors or insured individuals;

c. Documents relating to any consideration or plans to alter the composition or benefit structure of the Humana Walmart Rx Plan retail pharmacy network, such as the inclusion of additional preferred cost-sharing pharmacies to provide the Relevant Service; and

d. Documents relating to the actual or considered development or promotion of a Preferred Network with a benefit structure including more pharmacies as preferred cost-sharing pharmacies than the Humana Walmart Rx Plan, in response to CMS feedback, scrutiny, or concern regarding access to pharmacies offering preferred cost sharing.

Specific Objections: Humana incorporates herein by reference general objection numbers 1-2, 4-10. Humana specifically objects to this specification as overly broad and unduly burdensome. Humana further specifically objects to this specification because it seeks documents that are irrelevant to, and outside the scope of, the subject matter of this investigation, the authorization for the subpoena, and the use of the FTC's investigatory compulsory process. Humana also specifically objects to this specification because it seeks documents that are publicly available to the FTC or readily available to the FTC through another government agency. Humana also specifically objects to the extent the specification seeks Privileged or Confidential Information.

Specification 4: Submit all documents reflecting or otherwise relating to communications with CMS regarding the following:

a. Benefit designs or levels of access of any of the Humana Medicare PDP Plans' retail pharmacy networks;

b. The benefit design or levels of access to pharmacies offering preferred cost sharing in the Humana Walmart Rx Plan;

c. Beneficiary access to pharmacies offering preferred cost sharing in the Humana Walmart Rx Plan;

d. Any action that CMS may take regarding any plan that offers insufficient meaningful access to pharmacies offering preferred cost-sharing;

e. Findings, questions, concern, or warnings by CMS that the Humana Walmart Rx Plan may be offering access to preferred cost-sharing pharmacies in a way that may be misleading to beneficiaries;

f. Findings, questions, concern, or warnings by CMS that Humana may be influencing beneficiaries to enroll in PDP plans in which beneficiaries do not have meaningful and/or convenient access to preferred cost-sharing pharmacies; and

g. Findings, questions, concern, or warnings that the Humana Walmart Rx Plan retail pharmacy network, or the networks of any other Humana Medicare PDP plans, may offer an inadequate level of access to preferred cost sharing pharmacies.

Specific Objections: Humana incorporates herein by reference general objection numbers 1-2, 4-10. Humana specifically objects to this specification as overly broad and unduly burdensome. Humana further specifically objects to this specification because it seeks documents that are irrelevant to, and outside the scope of, the subject matter of this investigation, the authorization for the subpoena, and the use of the FTC's investigatory compulsory process. Humana also specifically objects to this specification because it seeks documents that are publicly available to the FTC or readily available to the FTC through another government agency. Humana further specifically objects to the extent the specification seeks Privileged or Confidential Information.

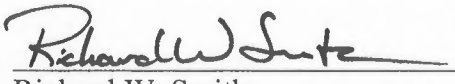
IV. CONCLUSION

For the reasons set forth above, Humana respectfully requests that the FTC grant the instant petition to limit the Subpoena based on the objections set forth herein.

Dated: May 16, 2017

Respectfully submitted,

WILEY REIN LLP

By: 

Richard W. Smith
Katherine C. Campbell
Wiley Rein LLP
1776 K Street, NW
Washington, DC 20006
Telephone: (202) 719-7000
Facsimile: (202) 719-7049
rwsmith@wileyrein.com
kcampbell@wileyrein.com

Counsel for Humana Inc.

STATEMENT OF CONFERENCE

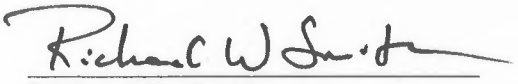
I hereby certify that I, counsel for petitioner Humana Inc., conferred with the FTC on April 26, May 1, May 9, and May 16, 2017, in a good-faith effort to resolve the issues raised in this petition and have been unable to reach agreement on the issues set forth herein. Regarding Specifications 1 and 2, Humana and the FTC agreed that two key custodians would self-collect documents related to the proposed acquisition and a potential divestiture, and Humana produced these documents on May 9. Though not required to do so, Humana has also begun a voluntary formal collection of these two custodians' documents and will produce additional non-privileged documents related to the proposed acquisition and potential divestiture after a privilege review. Humana and the FTC have been unable to reach an agreement with respect to Specifications 3 and 4.

Richard W. Smith

PUBLIC

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of May, 2017, I caused the original and 12 copies of the foregoing document and all attachments to be hand delivered to the Federal Trade Commission, Office of the Secretary, 400 7th Street, SW, Washington, DC 20024.



Richard W. Smith

Exhibit A

SUBPOENA DUCES TECUM

1. TO	2. FROM
Humana Inc. c/o Matthew Varzally, Esq., Senior Counsel, Litigation & Investigations Group 500 West Main Street Louisville, KY 40202	UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION

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 in Item 6.

3. LOCATION OF HEARING	4. YOUR APPEARANCE WILL BE BEFORE
Federal Trade Commission 400 7th St. SW Washington, DC 20024	Dylan Brown, Esq.
	5. DATE AND TIME OF HEARING OR DEPOSITION May 2, 2017*

6. SUBJECT OF INVESTIGATION

Walgreens Boots Alliance, Inc.'s proposed acquisition of Rite Aid Corporation, File No. 161-0026.

See attached Resolution directing use of compulsory process.

7. RECORDS YOU MUST BRING WITH YOU

See attached Definitions, Instructions, and Specifications.

*In lieu of a personal appearance, please submit the requested materials along with a certification to the completeness and accuracy of the return by May 2, 2017.

8. RECORDS CUSTODIAN/DEPUTY RECORDS CUSTODIAN	9. COMMISSION COUNSEL
Michael Moiseyev (Custodian) Daniel Zach (Deputy Custodian)	Dylan Brown, Esq. Federal Trade Commission 400 7th Street, S.W. Washington, DC 20024 202-326-3283

DATE ISSUED	COMMISSIONER'S SIGNATURE
4/10/17	Donna K. Owen

GENERAL INSTRUCTIONS

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.

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 ten copies of the petition must be filed with the Secretary of the Federal Trade Commission. Send one copy to the Commission Counsel named in Item 9.

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/FTCRulesofPractice. Paper copies are available upon request.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

FTC Form 68-B (rev. 9/92)

Petition Exhibit 4

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)

SUBPOENA *DUCES TECUM*
ISSUED TO HUMANA INC.
FTC File No. 161-0026

Unless modified by agreement with the staff of the Federal Trade Commission (the "Commission" or the "FTC"), each Specification of this Subpoena *Duces Tecum* ("SDT") requires a complete search of the Company as defined in the Definitions, which appear after the following Specifications. Pursuant to the Commission's Rules of Practice, 16 C.F.R. § 2.7(k), a Company representatives must confer with the Commission representative identified in the final Instruction of this SDT within 14 days after receipt of this SDT. If the Company believes that the required search or any other part of this SDT can be narrowed in any way that is consistent with the Commission's need for information, you are encouraged to discuss such questions and possible modifications with the Commission representative. All modifications to this SDT must be agreed to in writing pursuant to the Commission's Rules of Practice, 16 C.F.R. § 2.7(1).

SPECIFICATIONS

1. Submit all documents relating to the Proposed Acquisition, including, but not limited to, documents relating to effects of the Proposed Acquisition, Company plans to respond, adapt, or react to the Proposed Acquisition, and potential efficiencies or cost savings that may result from the Proposed Acquisition, including all underlying data, analysis, and calculations.

2. Submit all documents relating to the potential divestiture of assets from Walgreens or Rite Aid to any person in connection with the Proposed Acquisition, including, but not limited to,

    a. Correspondence with any other person, including, but not limited to, Walgreens, Rite Aid, or any potential buyer of divested assets from Walgreens or Rite Aid in connection with the Proposed Acquisition; and

    b. Documents relating to any review, evaluation, or analysis of any potential divestiture of assets from Walgreens or Rite Aid to any other person, including, but not limited to, the impact of such a divestiture on retail pharmacy network offerings, composition, and reimbursement rates.

3. Submit all documents relating to the Humana Walmart Rx Plan retail pharmacy network, including, but not limited to,

    a. Correspondence with, or documents otherwise related to discussions with, Chains, PSAOs, or other providers of the Relevant Service regarding participation in the Humana Walmart Rx Plan and the terms of such participation;

    b. Documents relating to the Humana Walmart Rx Plan retail pharmacy network's ability to satisfy geographic access requirements of CMS or of current or

prospective plan members, including communications with plan sponsors or insured individuals;

c. Documents relating to any consideration or plans to alter the composition or benefit structure of the Humana Walmart Rx Plan retail pharmacy network, such as the inclusion of additional preferred cost-sharing pharmacies to provide the Relevant Service; and

d. Documents relating to the actual or considered development or promotion of a Preferred Network with a benefit structure including more pharmacies as preferred cost-sharing pharmacies than the Humana Walmart Rx Plan, in response to CMS feedback, scrutiny, or concern regarding access to pharmacies offering preferred cost sharing.

4. Submit all documents reflecting or otherwise relating to communications with CMS regarding the following:

a. Benefit designs or levels of access of any of the Humana Medicare PDP Plans' retail pharmacy networks;

b. The benefit design or levels of access to pharmacies offering preferred cost sharing in the Humana Walmart Rx Plan;

c. Beneficiary access to pharmacies offering preferred cost sharing in the Humana Walmart Rx Plan;

d. Any action that CMS may take regarding any plan that offers insufficient meaningful access to pharmacies offering preferred cost-sharing;

e. Findings, questions, concern, or warnings by CMS that the Humana Walmart Rx Plan may be offering access to preferred cost-sharing pharmacies in a way that may be misleading to beneficiaries;

f. Findings, questions, concern, or warnings by CMS that Humana may be influencing beneficiaries to enroll in PDP plans in which beneficiaries do not have meaningful and/or convenient access to preferred cost-sharing pharmacies; and

g. Findings, questions, concern, or warnings that the Humana Walmart Rx Plan retail pharmacy network, or the networks of any other Humana Medicare PDP plans, may offer an inadequate level of access to preferred cost sharing pharmacies.

DEFINITIONS

For the purposes of this SDT, the following definitions apply:

A. The term "the Company" or "Humana" means Humana Inc., its domestic and foreign parents, predecessors, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, principals, employees, agents, and representatives of the foregoing. The terms "subsidiary," "affiliate," and "joint venture" refer to any person in which there is partial (25% of more) or total ownership or control between the Company and any other person.

B. The term "Rite Aid" means Rite Aid Corporation and all of its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing. The terms "subsidiary," "affiliate," and "joint venture" refer to any person in which there is partial (25% or more) or total ownership or control between Rite Aid and any other person.

C. The term "Walgreens" means Walgreens Boots Alliance, Inc., its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing. The terms "subsidiary," "affiliate," and "joint venture" refer to any person in which there is partial (25% or more) or total ownership or control between Walgreens and any other person.

D. The term "documents" means any information, on paper or electronic format, including written, recorded, and graphic materials of every kind in the possession, custody, or control of the Company. The term "documents" includes, without limitation: electronic mail messages; audio files, instant messages, drafts of documents; metadata and other bibliographic or historical data describing or relating to documents created, revised, or distributed electronically; copies of documents that are not identical duplicates of the originals in that person's files; and copies of documents the originals of which are not in the possession, custody, or control of the Company.

1. Unless otherwise specified, the term "documents" excludes:

    a. bills of lading, invoices, purchase orders, customs declarations, and other similar documents of a purely transactional nature;

    b. architectural plans and engineering blueprints; and

    c. documents solely relating to environmental, tax, human resources, OSHA, or ERISA issues.

2. The term "computer files" includes information stored in, or accessible through, computer or other information retrieval systems. Thus, the Company should produce documents that exist in machine-readable form, including documents stored in personal computers, portable computers, workstations, minicomputers, mainframes, servers, backup disks and tapes, archive disks and tapes, and other forms of offline storage, whether on or off Company premises. If the Company believes that the required search of backup disks and tapes and archive disks and tapes can be narrowed in any way that is consistent with the Commission's need for documents and information, you are encouraged to discuss a possible modification to this instruction with the Commission representatives identified on the last page of this SDT. The Commission representative will consider modifying this instruction to:

    a. exclude the search and production of files from backup disks and tapes and archive disks and tapes unless it appears that files are missing from files that exist in personal computers, portable computers, workstations, minicomputers, mainframes, and servers searched by the Company;

    b. limit the portion of backup disks and tapes and archive disks and tapes that needs to be searched and produced to certain key individuals, or certain time periods or certain Specifications identified by Commission representatives; or

    c. include other proposals consistent with Commission policy and the facts of the case.

E. The term "person" includes the Company and means any natural person, corporate entity, partnership, association, joint venture, government entity, or trust.

F. The term "relating to" means in whole or in part constituting, containing, concerning, discussing, describing, analyzing, identifying, or stating.

G. The terms "and" and "or" have both conjunctive and disjunctive meanings.

H. The term "plans" means tentative and preliminary proposals, recommendations, or considerations, whether or not finalized or authorized, as well as those that have been adopted.

I. The term "Chain" means any corporation that owns 50 or more pharmacy locations nationwide, either under a single banner or multiple banners, including but not limited to, Walgreens Boots Alliance, Inc., CVS Pharmacy, Wal-Mart Stores, Inc., Rite Aid, Inc., Ahold U.S.A., Inc., Albertsons Companies, Associated Food Stores, Inc., Aurora Health Care, Bartell Drug Co., Bashas' Grocery Stores, Bi Mart Corporation, Brookshire Brothers, Brookshire Grocery Company, CARE Pharmacies, Cerberus Capital

Management, Costco Wholesale Corporation, Delhaize America, Inc., Discount Drug Mart, Inc., Fred's Inc., Giant Eagle, Inc., The Golub Corporation, The Great Atlantic & Pacific Tea Company, LP, Haggen, Inc., Hy Vee, Inc., Ingles Markets Inc., K-VA-T Food Stores, Inc., Kinney Drugs, Inc., The Kroger Company, Lone Star Funds, Medicap Pharmacy, The Medicine Shoppe Pharmacy, Meijer, Inc., Publix Super Markets, Inc., Raley's Supermarkets, Roundy's Supermarkets, Inc., Sav-Mor Drug Stores, Inc., Save Mart Supermarkets, Inc., Schnuck Markets, Inc., ShopKo Stores Operating Co., LLC, Spartan Stores, Target Corporation, Top Markets, Inc., United Drug Cooperative, Wakefern Food Corporation, Wegmans Food Markets, Inc., and Weis Markets, Inc.

J. "CMS" means the Centers for Medicare & Medicaid Services.

K. "geographic access" means the proximity and geographic accessibility of preferred cost sharing pharmacies to plan beneficiaries in a Limited Network or Preferred Network.

L. The term "Limited Network" means any retail pharmacy network that excludes certain pharmacies, Chains, or PSAOs from the network.

M. The term "Preferred Network" means any retail pharmacy network where a group of pharmacies, Chains, or PSAOs designated as preferred pharmacies offer lower co-payments or other cost-saving structures to plan beneficiaries that non-preferred pharmacies do not provide.

N. The term "prescription pharmaceuticals" means ethical drugs or pharmaceutical products generally dispensed by a licensed pharmacist.

O. The term "Proposed Acquisition" means Walgreens' proposed acquisition of Rite Aid.

P. The term "Pharmacy Services Administrative Organizations" or "PSAO" means any buying group, comprised of at least 50 independent pharmacies, that represents independent retail pharmacies in contract negotiations with PBMs and other third-party payers. The term PSAO may include, but is not limited to, Good Neighbor Pharmacy Provider Network, Access Health, LeaderNET, EPIC Pharmacy Network, Inc., Third Party Station, United Drugs, MHA Long Term Care Pharmacy Network, Third Party Network, American Pharmacy Network Solutions, TriNet Third Party Network, RxPr1de / Managed Pharmacy Care, Managed Care Connection, Medicine Shoppe International, and RxSelect Pharmacy Network.

Q. The term "Retail Pharmacy Services" means the dispensing of prescription pharmaceuticals, in-person at a brick-and-mortar retail pharmacy.

R. The term "retail pharmacy" means a retail site or store that dispenses prescription pharmaceuticals and other controlled substances.

S. The term "Relevant Service" means Retail Pharmacy Services.

INSTRUCTIONS

For purposes of this SDT, the following instructions apply:

I. All references to year refer to calendar year. Unless otherwise specified, each of the Specifications calls for documents for each of the years from January 1, 2014 to the present.

II. This SDT shall be deemed continuing in nature so as to require production of all documents responsive to any Specification included in this SDT produced or obtained by the Company up to 45 calendar days prior to the date of the Company's full compliance with this SDT.

III. Do not produce any Sensitive Personally Identifiable Information ("Sensitive PII") prior to discussing the information with a Commission representative. If any document responsive to a particular Specification contains unresponsive Sensitive PII, redact the unresponsive Sensitive PII prior to producing the document.

The term "Sensitive Personally Identifiable Information" means an individual's Social Security Number alone; or an individual's name, address, or phone number in combination with one or more of the following:

- date of birth
- driver's license number or other state identification number, or a foreign country equivalent
- passport number
- financial account number
- credit or debit card number

IV. Forms of Production: The Company shall submit documents as instructed below absent written consent signed by an Assistant Director.

a) Documents stored in electronic or hard copy formats in the ordinary course of business shall be submitted in electronic format provided that such copies are true, correct, and complete copies of the original documents:

i. Submit Microsoft Access, Excel, and PowerPoint in native format with extracted text and metadata;

ii. Submit all documents other than those provided pursuant to subparts (a)(i) or (a)(iii) in image format with extracted text and metadata; and

iii. Submit all hard copy documents in image format accompanied by OCR.

b) For each document submitted electronically, include the following metadata fields

and information:

i. For loose electronic files other than email: beginning Bates or document identification number, ending Bates or document identification number, page count, custodian, creation date and time, modification date and time, last accessed date and time, size, location or path file name, and SHA Hash value;

ii. For emails: beginning Bates or document identification number, ending Bates or document identification number, page count, custodian, to, from, CC, BCC, subject, date and time sent, child records (the beginning Bates or document identification number of attachments delimited by a semicolon);

iii. For email attachments: beginning Bates or document identification number, ending Bates or document identification number, page count, custodian, creation date and time, modification date and time, last accessed date and time, size, location or path file name, parent record (beginning Bates or document identification number of parent email), and SHA Hash value; and

iv. For hard copy documents: beginning Bates or document identification number, ending Bates or document identification number, page count, and custodian.

c) If the Company intends to utilize any de-duplication or email threading software or services when collecting or reviewing information that is stored in the Company's computer systems or electronic storage media in response to this SDT, or if the Company's computer systems contain or utilize such software, the Company must contact a Commission representative to determine, with the assistance of the appropriate government technical officials, whether and in what manner the Company may use such software or services when producing materials in response to this SDT.

d) For each Specification marked with an asterisk (*), and to the extent any other responsive data exists electronically, provide such data in Excel spreadsheet with all underlying data un-redacted and all underlying formulas and algorithms intact.

e) Submit electronic files and data as follows:

i. For any production over 10 gigabytes, use IDE and EIDE hard disk drives, formatted in Microsoft Windows-compatible, uncompressed data in a USB 2.0 external enclosure; and

ii. For productions under 10 gigabytes, CD-R CD-ROM and DVD-ROM for Windows-compatible personal computers, and USB 2.0 Flash Drives are also acceptable storage formats.

iii. **All documents produced in electronic format shall be scanned for and free of viruses. The Commission will return any infected media for replacement, which may affect the timing of the Company's compliance with this SDT.**

V. All documents responsive to this SDT, regardless of format or form and regardless of whether submitted in paper or electronic form:

a) Shall be produced in complete form, un-redacted unless privileged, and in the order in which they appear in the Company's files and shall not be shuffled or otherwise rearranged. For example:

i. If in their original condition papers were stapled, clipped, or otherwise fastened together or maintained in file folders, binders, covers, or containers, they shall be produced in such form, and any documents that must be removed from their original folders, binders, covers, or containers in order to be produced shall be identified in a manner so as to clearly specify the folder, binder, cover, or container from which such documents came; and

ii. If in their original condition electronic documents were maintained in folders or otherwise organized, they shall be produced in such form and information shall be produced so as to clearly specify the folder or organization format.

b) If written in a language other than English, shall be translated into English, with the English translation attached to the foreign language document;

c) Shall be produced in color where necessary to interpret the document;

d) Shall be marked on each page with corporate identification and consecutive document control numbers;

e) Shall be accompanied by an affidavit of an officer of the Company stating that the copies are true, correct, and complete copies of the original documents; and

f) Shall be accompanied by an index that identifies: (i) the name of each person from whom responsive documents are submitted; and (ii) the corresponding consecutive document control number(s) used to identify that person's documents, and if submitted in paper form, the box number containing such documents. If the index exists as a computer file(s), provide the index both as a printed hard copy and in machine readable form (provided that Commission representatives determine prior to submission that the machine readable form would be in a format that allows the agency to use the computer files). The Commission representative will provide a sample index upon request.

VI. If any material called for by this SDT is withheld based on a claim of protected status, 16

C.F.R. § 2.7(a)(4), the claim must be asserted no later than the return date of this SDT. In addition, pursuant to 16 C.F.R. § 2.11(a)(1), submit, together with the claim, a detailed log of the items withheld. The information in the log shall be of sufficient detail to enable the Commission staff to assess the validity of the claim for each document, including attachments, without disclosing the protected information. Unless modified by the Commission representative identified on the last page of this SDT, submit the log in a searchable and sortable electronic format, and, for each document, including attachments, provide:

a) Document control number(s)

b) The full title (if the withheld material is a document) and the full file name (if the withheld material is in electronic form);

c) A description of the material withheld (for example, a letter, memorandum, or email), including any attachments;

d) The date the material was created;

e) The date the material was sent to each recipient (if different from the date the material was created);

f) The email addresses, if any, or other electronic contact information to the extent used in the document, from which and to which each document was sent;

g) The names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all authors;

h) The names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all recipients of the material;

i) The names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all persons copied on the material;

j) The factual basis supporting the claim that the material is protected; and

k) Any other pertinent information necessary to support the assertion of protected status by operation of law.

In the log, identify by an asterisk each attorney who is an author, recipient, or person copied on the material. The titles, business addresses, email addresses, and relevant affiliations of all authors, recipients, and persons copied on the material may be provided in a legend appended to the log. However, provide in the log the information required by Instruction VI(f). The lead attorney or attorney responsible for supervising the review of the material and who made the determination to assert the claim of protected status must attest, in writing, to the log.

A document, including all attachments, may be withheld or redacted only to the extent

necessary to preserve any claim of protected status. Unless otherwise provided in the instructions accompanying this SDT, and except for information and material subject to a valid claim of protected status, all responsive information and material shall be produced without redaction.

VII. If the Company is unable to answer any questions fully, supply such information as is available. Explain why such answer is incomplete, the efforts made by the Company to obtain the information, and the source from which the complete answer may be obtained. If books and records that provide accurate answers are not available, enter best estimates and describe how the estimates were derived, including the sources or bases of such estimates. Estimated data should be followed by the notation "est." If there is no reasonable way for the Company to make an estimate, provide an explanation.

VIII. If documents responsive to a particular Specification no longer exist for reasons other than the ordinary course of business or the implementation of the Company's document retention policy, but the Company has reason to believe have been in existence, state the circumstances under which they were lost or destroyed, describe the documents to the fullest extent possible, state the Specification(s) to which they are responsive, and identify persons having knowledge of the content of such documents. In order for the Company's response to this SDT to be complete, the attached certification form must be executed by the official supervising compliance with this SDT, notarized, and submitted along with the responsive materials.

Any questions you have relating to the scope or meaning of anything in this SDT or suggestions for possible modifications thereto should be directed to Dylan Brown at (202) 326-3283. The response to the SDT shall be addressed to the attention of Dylan Brown and delivered between 8:30 a.m. and 5:00 p.m. on any business day on or before **April 31, 2017** to Federal Trade Commission, 400 7th Street, SW, Washington, DC 20024. If you wish to submit your response by United States mail, please call one of the staff listed above for mailing instructions.

SUBPOENA *DUCES TECUM*
Issued to Humana Inc.
FTC File No. 161-0026

CERTIFICATION

This response to the *Subpoena Duces Tecum* issued by the Federal Trade Commission, together with any and all appendices and attachments thereto, was prepared and assembled under my supervision in accordance with instructions issued by the Federal Trade Commission. The information is, to the best of my knowledge, true, correct, and complete, subject to the recognition that where books and records do not provide the required data, reasonable estimates have been made. Where responses contain estimates, this is so stated in the response.

Where copies rather than original documents have been submitted, the copies are true, correct and complete. If the Commission uses such copies in any court or administrative proceeding, the Company will not object based on the Commission not offering the original document.

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

_____
TYPE OR PRINT NAME AND TITLE

_____
(Signature)

Subscribed and sworn to before me at the City of _____,

State of _____, this _____ day of _____, 20__.

_____
(Notary Public)

My Commission expires:

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Edith Ramirez, Chairwoman**
Julie Brill
Maureen K. Ohlhausen
Terrell McSweeny

RESOLUTION AUTHORIZING USE OF COMPULSORY PROCESS IN NONPUBLIC INVESTIGATION

File No. 161-0026

Nature and Scope of Investigation:

To determine whether the proposed acquisition of Rite Aid Corporation by Walgreens Boots Alliance, Inc. violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended; to determine whether the aforesaid proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, or Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended; and to determine whether the requirements of Section 7A of the Clayton Act, 15 U.S.C. § 18a, have been or will be fulfilled with respect to the proposed transaction.

The Federal Trade Commission hereby resolves and directs that any and all compulsory processes available to it be used in connection with this investigation.

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; FTC Procedures and Rules of Practice, 16 C.F.R. § 1.1, *et seq.* and supplements thereto.

By direction of the Commission.

Donald S. Clark
Secretary

Issued: January 5, 2016

Exhibit B

Wiley Rein LLP

1776 K STREET NW
WASHINGTON, DC 20006
PHONE 202.719.7000

www.wileyrein.com

April 28, 2017

Richard W. Smith
202.719.7468
rwsmith@wileyrein.com

Katherine C. Campbell
202.719.7583
kcampbell@wileyrein.com

VIA EMAIL

Dylan Brown
Federal Trade Commission
400 7th Street, SW
Washington, DC 20024
DBrown4@ftc.gov

Re: Humana Inc. Meet and Confer

Dear Mr. Brown:

We write to confirm the substance of the meet and confer we held April 26 regarding the subpoena *duces tecum* and subpoena *ad testificandum* served on Humana Inc. ("Humana") on April 12, 2017.

Objections

With respect to the subpoena *duces tecum*, we objected to the requests as overly broad, unduly burdensome, and irrelevant to, and outside the scope of, the subject matter of the investigation. We further objected to producing documents protected by the attorney-client privilege or attorney work product protection. Additionally, we mentioned that many of the responsive documents contain proprietary and/or confidential information, and we sought assurances that the Federal Trade Commission ("FTC") would take steps to protect such information. You agreed to send us a letter detailing how the FTC handles proprietary information, which we have now received.

With respect to the subpoena *ad testificandum*, we objected on the grounds of relevance and overbreadth. Many of the matters for examination are overly broad and lack specificity such that we could not realistically prepare a witness to respond to them, or doing so would be unduly burdensome.

Subpoena *Duces Tecum*

Regarding Specifications 1 and 2, we proposed narrowing our search and production to two key custodians: Jay Ecleberry, Director of Humana Pharmacy Solutions, and Laura White, a strategic consultant for Humana Pharmacy Solutions. Subject to confirmation with your supervisors, you stated that you would agree to limit the specifications to these two custodians, without prejudice to requesting a

Wiley Rein LLP

more expansive search if a review of those documents revealed other critical custodians.

Regarding Specification 3, we objected to this request as overly broad and irrelevant to the subject matter of the investigation. You explained that the FTC expects Walgreens and Rite Aid to point to the Humana Walmart Rx Plan as an example of a plan in which none of the major three pharmacy chains are a cost-shared provider. You predicted that the FTC may respond to that example by questioning the plan's ability to satisfy geographic access requirements. And we advised that CMS has definitively approved the plan as meeting those requirements, reiterating that a Walgreens and Rite Aid merger would be "plan neutral" with respect to the Humana offering.

You ultimately proposed that we provide documents describing the design of the Humana plans, the preferred/non-preferred status of the pharmacy chains within those plans, and the history of Walgreens' participation or non-participation in those plans. We agreed to discuss with Humana whether this narrowed approach was practicable, and to return to you for further discussion as soon as possible. Indeed, in the time since our call concluded, we have been working diligently with Humana to determine whether such documents are readily available, or could be created, to satisfy your stated needs.

Regarding Specification 4, we objected on the grounds that the request is overly broad and unduly burdensome. Moreover, we relayed our understanding that the most pertinent documents related to plan design are publicly available. While you agreed with us that some documents are public, you asked us for a written response clearly identifying the public location of the documents. We had some discussion about other non-public documents, and we said that some would certainly be privileged, while others would be unduly burdensome to produce given the public documents and their lack of relevance to the investigation. Finally, you mentioned that the FTC is not seeking all communications with CMS and documents related to CMS (you specifically mentioned marketing documents as unnecessary), but is most interested in documents related to plan design, geographic access, and the involvement of Walgreens. Again, we agreed to discuss your suggestions with our client to determine whether they are meaningful in light of the expected number of documents we would be required to search and produce, and we have working diligently with our client since then to make that determination.

Wiley Rein LLP

Finally, with respect to each of the specifications, you explained that the FTC is not contemplating requiring Humana to provide a certificate of compliance. Instead, you requested that we disclose the steps we take to search for and to produce the documents most central to the investigation. Also, with respect to each of the specifications, you seemed amenable to a phased approach, as we have employed in the past, that would have us make an initial good faith production of selected, immediately available documents, without prejudice to further requests going forward.

Subpoena *Ad Testificandum*

The deposition is currently scheduled for May 8, 2017. We confirmed that we have a trial scheduled that week, now potentially starting that day given the Court's emerging scheduling conflict, and you confirmed that the FTC will not require production of a witness on that date, especially given that it would want the documents in hand prior to the deposition.

As for the substance, many of the matters for examination are data and fact intensive, and we said at the outset that we believed Humana could provide a more helpful response in writing. As a result, we proposed several options in lieu of a deposition, including providing a written response to a targeted set of questions or providing Laura White and/or Jay Ecleberry for an informal telephone call. You agreed to consider those alternatives and appeared most amenable to a written response to a targeted set of questions. You also suggested that the FTC may withdraw the subpoena and instead seek the deposition of either Ms. White or Mr. Ecleberry in their personal capacities. We agreed to continue to work together on these issues, but to focus attention for now on the documents.

We should also mention that in further discussions with Humana since the meet and confer, we have learned that Mr. Ecleberry would be the appropriate person, as a Director-level employee, to respond to your inquiries, and would no longer suggest Ms. White as the best person with knowledge of your specifications.

Petition to Limit or Quash

Our deadline to file a petition to limit or quash is Monday. We mentioned that Humana has instructed us to preserve its rights by filing a petition to limit or quash, unless we can agree to a modest extension of the deadline to allow for further negotiations. You suggested that you would consider such an extension, but would

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need more information about our proposed timeline for producing documents. We described for you the time-consuming and expensive process we would be forced to undertake to respond to the subpoena, and said that we did not foresee any scenario under which we could complete a production next week, without significant narrowing, and that we could not accurately predict a deadline without understanding the full scope of documents that we would mutually agree would be produced in an initial phase. Nevertheless, we committed to discussing this request with our client and returning to you for further discussions. We expect to be able to provide a more informed response on Monday.

* * *

Dylan, we appreciate your taking the time to meet and confer with us on these important issues. As we mentioned on the phone, Humana is committed to assisting the FTC in every reasonable way and is well along the path to doing so. We sincerely hope we can reach agreement on Monday before the deadline for filing arrives.

Sincerely,

Katie Campbell

Richard W. Smith
Katherine C. Campbell

cc: Matthew R. Varzally (by email)

Exhibit C

Wiley Rein LLP

1776 K STREET NW
WASHINGTON, DC 20006
PHONE 202.719.7000

www.wileyrein.com

May 5, 2017

Richard W. Smith
202.719.7468
rwsmith@wileyrein.com

Katherine C. Campbell
202.719.7583
kcampbell@wileyrein.com

VIA EMAIL

Dylan G. Brown
Federal Trade Commission
400 7th Street, SW
Washington, DC 20024
DBrown4@ftc.gov

Re: Humana Inc. Meet and Confer

Dear Mr. Brown:

We write to confirm the substance of our May 1 discussions regarding the subpoena *duces tecum* and subpoena *ad testificandum* served on Humana Inc. ("Humana") on April 12, 2017.

Regarding Specifications 1 and 2, we agreed that Jay Ecleberry, Director of Humana Pharmacy Solutions, and Laura White, a strategic consultant for Humana Pharmacy Solutions, will self-collect documents and communications related to the proposed merger and any potential divestiture. We represented that we expect to produce these documents by May 9, with the caveat that we do not yet know the volume of such documents. You agreed that no further documents will be needed at this time from other custodians, although you reserved the right to seek a broader production at a later time.

With respect to Specification 3, you have indicated that the Commission is most interested in documents related to the history of Walgreens' inclusion and exclusion from the Humana Medicare plans. We have denied the relevance of such documents, and have pointed to the extraordinary burden such a production would entail. In the spirit of compromise, however, we offered to produce slides describing the structure of Humana's prescription drug plans, as well as to prepare an annotated chronology describing the history of Walgreens' participation or non-participation in those plans and its preferred/non-preferred status in those plans. We welcomed the Commission's input into the content of such a summary, but the Commission rejected that approach. We agreed to continue to consider whether additional "middle ground" compromises are possible, as did you, but none have been agreed to.

With respect to Specification 4, you have said that the focus is on geographic access and on Humana's internal debates about CMS's statements of concern, if any. We

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have pointed to public sources of external communications, statements, and data and denied the relevance of the request. In the spirit of compromise, however, we offered to provide any letters CMS sent to Humana concluding that the Humana plans were outliers with regard to geographic access. We further offered to identify with specificity the public report prepared by CMS which describes each plan's access levels to preferred cost sharing pharmacies by geographic area. But the Commission rejected that approach. Again, we both agreed to consider additional areas of common ground, but have found none.

With respect to the subpoena *ad testificandum*, you agreed to consider strongly allowing Humana to submit a declaration as a substitute for a deposition. We agreed to continue to work together on this issue, but to focus attention for now on the documents.

We voiced concern that we had an imminent deadline to file our objections to the subpoenas, and you agreed that the FTC would extend Humana's deadline to respond to Specifications 1 and 2 until May 9, 2017; to Specifications 3 and 4 until May 16, 2017; and to quash the subpoena *ad testificandum* until May 23, 2017. You also agreed to reschedule the deposition date, to the extent one is held, to May 30, 2017. We have received written confirmation of these extensions from you separately.

Although we have thus far been unable to reach an agreement regarding Specifications 3 and 4, we still hope to find a compromise solution in lieu of litigating. But as we have stated during our multiple calls, Humana does not believe that it – as a non-party – should be forced to respond to requests that appear to us to be only tangentially relevant to the scope of the investigation. The requests, as we have explained, would cost Humana enormously in terms of time, expense, and resources to comply with, and seem to be of comparatively little to no benefit to the FTC. Moreover, to the extent any of these topics is relevant, you have already stated that you have documents related to them from other parties, and we have identified public and government sources where the FTC can obtain them more readily.

We look forward to continuing our discussions.

Wiley Rein LLP

Sincerely,

Katie Campbell

Richard W. Smith
Katherine C. Campbell

cc: Matthew R. Varzally (by email)

Exhibit D

Wiley Rein LLP

1776 K STREET NW
WASHINGTON, DC 20006
PHONE 202.719.7000

www.wileyrein.com

May 9, 2017

Richard W. Smith
202.719.7468
rwsmith@wileyrein.com

Katherine C. Campbell
202.719.7583
kcampbell@wileyrein.com

VIA HAND DELIVERY

Dylan G. Brown
Federal Trade Commission
400 7th Street, SW
Washington, DC 20024

Re: Humana Inc. Subpoenas

Dear Mr. Brown:

On behalf of our client Humana Inc., we enclose a disk containing documents numbered HUMANA0000001 – HUMANA0000013, which comprise the set of self-collected documents that Humana agreed to produce, pursuant to the subpoena *duces tecum* served on it by the Federal Trade Commission on April 12, 2017, and our subsequent narrowing discussions. Humana makes the enclosed production without waiver of or prejudice to any of its objections.

Because of the sensitive nature of the documents enclosed herein (including but not limited to the fact that some of these materials fall within the scope of a Non-Disclosure Agreement, which is itself confidential), all of the produced documents shall be accorded confidential treatment under all governing statutes and the Commission's Rules, as confirmed by your April 27, 2017 letter.

Sincerely,

Katie Campbell

Richard W. Smith
Katherine C. Campbell

Enclosure

cc: Matthew R. Varzally (by email, without enclosure)

Exhibit E

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Dylan G. Brown
Attorney, Mergers I
Bureau of Competition
(202) 326-3283
dbrown4@ftc.gov

May 1, 2017

VIA ELECTRONIC MAIL

Richard W. Smith, Esq.
Wiley Rein LLP
1776 K Street NW
Washington, DC 20006
Email: rwsmith@wileyrein.com

Re: Proposed Acquisition of Rite Aid Corporation by Walgreens Boots Alliance, Inc., File No. 161-0026

Dear Richard:

Pursuant to Commission Rule 2.7(l), this letter modifies the Subpoena *Duces Tecum* ("SDT") and Subpoena *Ad Testificandum* ("SAT") that the Federal Trade Commission issued to Humana Inc. ("the Company") on April 10, 2017. Our agreement to modify the SDT and SAT is based on the accuracy and completeness of the information we have received from the Company to date. If such information is inaccurate or incomplete, we reserve the right to reexamine any issue affected by the modification described below. All terms in this letter are used in accordance with the Definitions and Instructions in the SDT and SAT.

We agree to the following deadline extensions:

- **SDT**:
  - For Specifications 1 and 2, the deadline to respond, and deadline to file petition to limit or quash, are extended to May 9, 2017.
  - For Specifications 3 and 4, the deadline to respond, and deadline to file petition to limit or quash, are extended to May 16, 2017.

- **SAT**: The date of the hearing (item #5 of the SAT) is changed to state "May 30, 2017 at 9:30am". The deadline to file petition to limit or quash is extended to May 23, 2017.

* * *

Thank you for your cooperation with our ongoing investigation. If you have any questions, please feel free to contact me by phone at (202) 326-3283 or via e-mail at dbrown4@ftc.gov.

Sincerely,

Dylan G. Brown

APPROVED:

Michael R. Moiseyev
Assistant Director
Mergers I Division
Bureau of Competition

Exhibit F

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Dylan G. Brown
Attorney, Mergers I
Bureau of Competition
(202) 326-3283
dbrown4@ftc.gov

May 8, 2017

VIA ELECTRONIC MAIL

Richard W. Smith, Esq.
Wiley Rein LLP
1776 K Street NW
Washington, DC 20006
Email: rwsmith@wileyrein.com

Re: Proposed Acquisition of Rite Aid Corporation by Walgreens Boots Alliance, Inc., File No. 161-0026

Dear Richard:

Pursuant to Commission Rule 2.7(l), this letter modifies the Subpoena *Duces Tecum* ("SDT") that the Federal Trade Commission issued to Humana Inc. ("the Company") on April 10, 2017. Our agreement to modify the SDT is based on the accuracy and completeness of the information we have received from the Company to date – specifically, Humana's representation that it is collecting for production additional documents relevant to the specifications below which were not part of the company's initial collection. If such information is inaccurate or incomplete, we reserve the right to reexamine any issue affected by the modification described below. All terms in this letter are used in accordance with the Definitions and Instructions in the SDT.

We agree to the following deadline extension: For Specifications 1 and 2, the deadline to respond, and deadline to file petition to limit or quash, is extended to May 16, 2017.

Thank you for your cooperation with our ongoing investigation. If you have any questions, please feel free to contact me by phone at (202) 326-3283 or via e-mail at dbrown4@ftc.gov.

Sincerely,

Dylan G. Brown

APPROVED:

Michael R. Moiseyev
Assistant Director
Mergers I Division
Bureau of Competition

Petition Exhibit 5

Federal Trade Commission Order Denying Petition to Limit Subpoena *Duces Tecum*, June 5, 2017

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Maureen K. Ohlhausen, Acting Chairman**
Terrell McSweeny

In the Matter of	)	
	)	**File No. 161-0026**
SUBPOENA *DUCES TECUM* ISSUED TO HUMANA, INC. DATED APRIL 10, 2017	)	**June 5, 2017**

ORDER DENYING PETITION TO LIMIT SUBPOENA *DUCES TECUM*

By McSWEENY, Commissioner:

Humana, Inc. ("Humana" or "Petitioner") has filed a petition to limit a subpoena *duces tecum* issued by the Commission on April 17, 2017. For the reasons stated below, the petition to limit ("Petition") is denied.

I. BACKGROUND

On October 27, 2015, Walgreens Boots Alliance ("Walgreens") announced its intent to acquire Rite Aid Corporation, one of Walgreens' major retail pharmacy competitors. As a result, the FTC opened an investigation to determine whether there is reason to believe that the proposed acquisition violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, or Section 7 of the Clayton Act, 15 U.S.C. § 18, and whether that proposal meets the requirements of Section 7A of the Clayton Act, 15 U.S.C. § 18a.

At their most basic, most retail pharmacy purchases involve three types of actors: (1) consumers, who buy pharmaceuticals; (2) pharmacies, who sell pharmaceuticals; and (3) payers, usually insurance providers, who receive premiums from consumers and develop plans to provide discounts on the costs of certain drugs. In order to develop insurance plans attractive to consumers and thereby build their customer base, insurers often seek to recruit pharmacies that consumers perceive as desirable (*i.e.*, lower-cost or more conveniently located) by providing them with increased reimbursements for the costs of the pharmaceuticals. The more desirable a retail pharmacy chain is to consumers, the greater the amount of reimbursement from payers it can demand, creating the risk that payers will pass these costs on to their customers in the form of higher premiums. Some insurers' plans use a "preferred" model, in which a "preferred" pharmacy agrees to accept lower reimbursements in exchange for the plan steering customers to the pharmacy by offering greater discounts. The Centers for Medicare & Medicaid Services ("CMS") approves these plans offered to consumers, part of which involves ensuring that the plans (1) provide consumers with sufficient access to participating pharmacies in each geographic area and (2) do not misrepresent the benefits or coverage offered to consumers.

As part of this investigation, on April 10, 2017, the FTC issued a subpoena *duces tecum* and accompanying subpoena *ad testificandum* to Humana, Inc., a payer that is one of the nation's largest providers of Medicare Part D prescription drug plans.[1] Humana offers the Humana Walmart Rx Plan, in which Walmart is the designated "preferred" provider. The Humana Walmart Rx Plan is nearly unique, in that it is one of the only Medicare Part D prescription drug plans in which neither Walgreens, Rite Aid, nor CVS is a "preferred" provider. As such, FTC staff seeks to determine whether a retail pharmacy network that features Walmart as the sole "preferred" provider is a viable and attractive option for Medicare Part D plans seeking to attract beneficiaries in any geographic areas, and if so, which geographic areas. If evidence indicated that beneficiaries in certain geographic areas do not view the Humana Walmart Rx Plan as attractive (for example, because Walmart lacks a significant presence in those areas), this would be useful to assess whether—from the perspective of Medicare Part D plan sponsors in different areas of the country—Walmart-only preferred networks are meaningful substitutes for networks that designate Walgreens, Rite Aid, and/or CVS as preferred.

The subpoena *duces tecum* ("subpoena") seeks documents concerning Humana's analysis of the proposed merger and any potential divestitures of assets by either Walgreens or Rite Aid (specifications 1 and 2); Humana's Walmart Rx Plan (specification 3); and Humana's communications with CMS concerning whether its Medicare plans, including the Walmart Rx Plan, offer sufficiently meaningful access to pharmacies across geographic areas (specification 4). This information enables staff to assess the attractiveness of Humana's Walmart Rx Plan to beneficiaries in different geographic areas, based on Humana's own documents and documents related to CMS's oversight of the plan.

The FTC served the subpoena on Humana on April 12, 2017. In response, counsel for Humana claimed that the subpoena was "overly broad, unduly burdensome, and irrelevant" to the investigation, although counsel did not provide specific or detailed reasons supporting these objections. Nonetheless, Humana counsel and FTC staff met and conferred regarding potential narrowing of the scope of the subpoena. Staff agreed that Humana could initially confine its search for documents responsive to Specifications 1 and 2 to two key custodians, and that the FTC would request documents from additional custodians only if it became necessary. FTC staff twice agreed to extend the deadline for production of documents, first on May 1, 2017 and then again on May 8, 2017, for a final return date of May 16, 2017. On May 9, Humana produced five documents totaling 13 pages responsive to Specifications 1 and 2.

On May 16, 2017, the deadline for production, Humana requested additional time to produce documents or file a petition to limit or quash the subpoena. In response, staff declined to extend the return dates absent a definitive schedule for production. Humana also requested modifications to Specification 3, concerning the Walmart Rx Plan, and Specification 4, concerning Humana's communications with CMS. In response, staff offered to further limit the subpoena by allowing Humana to confine its production for those specifications to the two key custodians whose files Humana was already reviewing for Specifications 1 and 2. Staff also offered to relieve Humana of Specification 3's requirement to produce "all documents" regarding the Humana Walmart Rx Plan. Instead, Humana would be required to answer only the itemized

[1] Humana filed a petition to quash the subpoena *ad testificandum* on May 23, 2017.

subparts of Specification 3, each of which concerns the plan's ability to compete effectively. Humana rejected these offers and filed the instant petition to limit.

Humana's petition asks the Commission to quash Specifications 3 and 4 in their entirety. Humana claims that the information sought is not relevant to the present merger investigation and, in any event, that it is publicly available from other sources, including other government agencies. Humana also contends that these specifications are overly broad and unduly burdensome, particularly given Humana's status as a non-party.[2] Finally, Humana raises several general objections to the subpoena as a whole.

II. ANALYSIS

Agency compulsory process is proper if the inquiry is within the authority of the agency, the demand is not too indefinite, and the information sought is reasonably relevant to the inquiry, as defined by the Commission's investigatory resolution.[3] Agencies have wide latitude to determine what information is relevant to their law enforcement investigations.[4] As the D.C. Circuit has explained, "[t]he standard for judging relevancy in an investigatory proceeding is more relaxed than in an adjudicatory one . . . . The requested material, therefore, need only be relevant to the *investigation* – the boundary of which may be defined quite generally."[5]

The documents requested by the subpoena are directly relevant to the FTC's investigation into Walgreens' proposed acquisition of Rite Aid. These documents enable FTC staff to assess the degree to which Humana's Walmart Rx Plan—which features Walmart as its sole preferred provider—is attractive to consumers in different geographic areas. This information is largely unavailable from sources other than Humana and only in part through its regulator, CMS. Humana also fails to support its claim that complying with the subpoena would cause undue burden.

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[2] In addition, Humana objects to Specifications 1 and 2 "out of an abundance of caution and solely to preserve its objections pursuant to the Commission's rules." It "intends to produce additional non-privileged documents in response to" those specifications once they "are fully processed and reviewed." Pet., at 4.

[3] *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089-90 (D.C. Cir. 1992); *FTC v. Texaco, Inc.*, 555 F.2d 862, 872-74 (D.C. Cir. 1977).

[4] *See, e.g.*, *Morton Salt*, 338 U.S. at 642-43 ("[Administrative agencies have] a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.").

[5] *Invention Submission*, 965 F.2d at 1090 (emphasis in original, internal citations omitted) (citing *FTC v. Carter*, 636 F.2d 781, 787-88 (D.C. Cir. 1980), and *Texaco*, 555 F.3d at 874 & n.26).

A. The Subpoena is Narrowly Tailored and Seeks Information Directly Relevant to the Investigation.

There is no merit to Humana's claims that the subpoena is overly broad and requests irrelevant information. In the context of administrative subpoenas, "relevance" is defined broadly and with deference to an agency's determination.[6] An administrative agency is accorded "extreme breadth" in conducting an investigation.[7] As the D.C. Circuit has stated, the standard for judging relevance in an administrative investigation is "more relaxed" than in an adjudicatory proceeding.[8] As a result, a CID recipient must demonstrate that the agency's determination is "obviously wrong," or the documents are "plainly irrelevant" to the investigation's purpose as defined by the investigational resolution.[9] Thus, a subpoena request is overbroad only where it is "out of proportion to the ends sought," and "of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power."[10]

In this case, the Commission's resolution authorizes an investigation "[t]o determine whether the proposed acquisition of Rite Aid . . . by Walgreens" would violate the FTC Act because it would amount to an unfair method of competition or would violate the Clayton Act because the acquisition would "substantially . . . lessen competition, or . . . tend to create a monopoly." *See* 15 U.S.C. §§ 18, 45. Humana fails to support its claim that the subpoena requests—two of which relate directly to the proposed acquisition and two of which relate to the competitive landscape for retail pharmacy services—have no bearing on the competitive significance of the proposed merger. To the contrary, the two specifications at issue, Specifications 3 and 4, are directly relevant to assessing the impact of the merger on competition. As discussed above, FTC staff seeks to determine the degree to which Humana's Walmart Rx Plan is attractive to consumers in need of Medicare Part D coverage in different geographic areas, which, in turn, will facilitate the FTC staff's analysis of the importance of competition between the merging parties in different geographic areas. Specification 3 seeks to obtain Humana's own documents regarding its experiences in developing and administering the Humana Walmart Rx Plan, while Specification 4 seeks documents relating to CMS's oversight of the Humana Walmart Rx Plan, and similar plans. As such, this information is highly relevant to staff's investigation. Moreover, the fact that staff has tailored the subpoena to this plan, and to those types of documents mostly likely to shed light on its competitiveness, confirms that the subpoena is not overly broad.

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6 *FTC v. Church & Dwight Co.*, 665 F.3d 1312, 1315-16 (D.C. Cir. 2011); *FTC v. Ken Roberts Co.*, 276 F.3d 583, 586 (D.C. Cir. 2001).

7 *Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. RTC*, 5 F.3d 1508, 1517 (D.C. Cir. 1993).

8 *Invention Submission*, 965 F.2d at 1090.

9 *Id.* at 1089; *Carter*, 636 F.2d at 788.

10 *U.S. v. Wyatt*, 637 F.2d 293, 302 (5th Cir. 1981) (quoting, *inter alia*, *Morton Salt*, 338 U.S. at 652).

B. The Information Sought is Not Readily Available to the FTC from Other Sources.

Humana claims that Specifications 3 and 4 are improper because they "seek[] documents that are publicly available to the FTC or readily available to the FTC through another government agency." Pet., 11-12.

There is no basis for this assertion. Humana asserts generally that the documents are "publicly available," ignoring the fact that many of the documents sought are by their nature not public, including internal documents for which Humana is the best—and only—source. For example, Specification 3 expressly calls for (1) Humana's analysis of "the Humana Walmart Rx Plan retail pharmacy network's ability to satisfy geographic access requirements of CMS"; (2) Humana's "consideration or plans to alter the composition or benefit structure of the Humana Walmart Rx Plan retail pharmacy network"; and (3) Humana's "actual or considered development or promotion of a Preferred Network with a benefit structure including more pharmacies as preferred cost-sharing pharmacies than the Humana Walmart Rx Plan." While Specification 4 seeks documents relating to Humana's communications with CMS, that request is not limited to direct communications with CMS. It also covers Humana's communications with other third parties as well as Humana's *internal* analyses of its interactions with CMS, including its responses to any concerns CMS raised about Humana's plans related to pharmacy access. Again, only Humana would have access to these internal analyses.

The subpoena seeks certain non-internal documents, including communications between Humana and CMS. Humana provides no support for its suggestion that these documents are "publicly available." Humana also speculates that these documents are "readily available to the FTC" through other sources. Even if Humana were somehow correct that all or some documents were available from other sources, the Commission is not obliged to seek records from multiple sources that are readily available from a single source. Instead, the Commission may issue process to a single source likely to have all of the necessary information, as it did here.[11]

C. The Subpoena is Not Unduly Burdensome

Humana also claims that Specifications 3 and 4 (and more generally, the subpoena as a whole) are unreasonable and unduly burdensome, particularly given its status as a non-party. Pet., 5-6. Humana does not offer any support for this contention other than the conclusory and

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[11] In *In re Exxon Valdez*, the district court approved just such an approach, allowing a plaintiff to obtain from a nonparty trade association documents that were also available from each of the association's members because this was "more convenient, less burdensome [and] less expensive." 142 F.R.D. 380, 382-83 (D.D.C. 1992); *cf. Software Rights Archive, LLC v. Google Inc.*, No. 2:07-CV-511, 2009 WL 1438249, at *2 (D. Del. May 21, 2009) ("[T]here is no absolute rule prohibiting a party from seeking to obtain the same documents from a non-party as can be obtained from a party, nor is there an absolute rule providing that the party must first seek those documents from an opposing party before seeking them from a non-party.")(quotation omitted); *Viacom Int'l, Inc. v. YouTube, Inc.*, No. C 08–80129 SI, 2008 WL 3876142, at *2-*3 (N.D. Cal. Aug.18, 2008) (same).

unattributed statements that compliance would require it to review and produce "thousands" or possibly "hundreds of thousands" of documents. *Id.*, 6, 8.

Where possible, FTC staff routinely work with subpoena recipients to limit the burdens imposed on them. Nonetheless, the standard for enforcement of administrative compulsory process is the same whether the subpoenaed entity is a target of the investigation or a third party. The statute authorizing the Commission to issue subpoenas specifically empowers the Commission to obtain from third-party "witnesses" "*all* such documentary evidence *relating to any matter under investigation*."[12] Indeed, an important and effective tool in investigations involves comparing, contrasting, and supplementing information and materials obtained from targets with that obtained from third parties. Thus, whether an administrative subpoena is issued to a target or a third party, it is not unduly burdensome unless the recipient shows that "compliance threatens to unduly disrupt or seriously hinder normal operations of a business."[13] This test is "not easily met."[14]

Nothing in Humana's cited cases supports its assertion that these standards are more relaxed for third parties. Pet., 5-6. The first, *Dow Chemical Co. v. Allen*, involved an administrative *trial* subpoena, not an *investigative* subpoena, and the court specifically acknowledged that investigative subpoenas may be broader in scope.[15] In addition, the type of burden at issue was completely different: the requests infringed nonparties' First Amendment academic freedoms by seeking unpublished data from ongoing and incomplete university research studies.[16] Indeed, the *Dow* court quoted from *FTC v. Dresser Industries, Inc.*, a case in which the court held that "one who opposes an agency's subpoena necessarily must bear a heavy burden. That burden is essentially the same *even if the subpoena is directed to a third party*."[17] Similarly, in *FTC v. Bowman*, the district court affirmed the Commission's authority to issue subpoenas to nonparties and enforced the subpoena, subject only to minor limitations on the

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12 15 U.S.C. § 49 (emphasis added).

13 *See, e.g.*, *Invention Submission*, 965 F.2d at 1090 (citing *Texaco*, 555 F.2d at 882). *See also FTC v. Dresser Indus., Inc.*, 1977-1 Trade Cas. ¶ 61,400, 1977 WL 461238 (D.D.C. 1977) (holding that this test applies to a subpoena issued to a nonparty). *Accord Commission Order Affirming June 18, 2012 Ruling Denying Petition of Samsung Telecommunications America, LLC to Limit Subpoena Duces Tecum*, File No. 111-0163 (September 7, 2012), https://www.ftc.gov/enforcement/cases-proceedings/petitions-quash/google-inc (investigative subpoena issued on nonparty) (citing *FTC v. Rockefeller*, 441 F. Supp. 234, 240-42 (S.D.N.Y. 1977)); *In the Matter of Evanston Northwestern Healthcare Corp.*, No. 9315, 2004 WL 2380507, at *2 (Sept. 28, 2004) (citation omitted) (process issued to nonparties in administrative adjudicative proceeding); *FTC v. Ernstthal*, Misc. No. 78-0064, 1978 WL 1375 (D.D.C. May 30, 1978, *aff'd*, 607 F.2d 488, 489 n.1 (D.C. Cir. 1979) (rejecting burden, definiteness, and relevance challenges to administrative subpoena issued to nonparty in adjudicative hearing).

14 *Texaco*, 555 F.2d at 882.

15 *Dow Chemical Co. v. Allen*, 672 F.2d 1262, 1267-68 (7th Cir. 1982).

16 *See id.* at 1266, 1273-77.

17 *See id.* at 1277 (quoting *Dresser Indus.*, 1977 WL 461238) (emphasis added).

scope of documents sought.[18] Indeed, *Dresser* cited *Bowman* for its holding that nonparties bear the same burden as targets of an investigation.[19]

Further, Humana offers nothing to support its assertion that compliance with the subpoena would require it to review and produce "thousands," or even "hundreds of thousands," of documents. A recipient of agency process must demonstrate that the burden of compliance is undue.[20] "Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest."[21] Thus, Humana must show the "measure of [its] grievance rather than [asking the court] to assume it."[22]

But even assuming that responsive documents number in the thousands or hundreds of thousands, that fact alone would not be sufficient to demonstrate undue burden given Humana's size, resources, and the availability of advanced search techniques. Indeed, Humana's most recent annual report notes that its current and past business practices are subject to ongoing review by various state and federal authorities, who regularly scrutinize numerous facets of Humana's business, including its pharmacy benefits.[23] Humana cannot claim that responding to the FTC's subpoena "seriously disrupts or unduly hinders" its normal business operations when those operations expressly involve government oversight and reporting.

In short, there is no basis for Humana's claim that the burden imposed by the subpoena is undue. Staff's offer to allow Humana to produce documents from only two custodians (which we adopt herein) will further temper any burden Humana must bear.

D. Humana's General Objections Provide No Basis for Limiting or Quashing the Subpoena

Humana also lists a number of general objections, most of which merely restate its objections to particular subpoena specifications, lack accompanying argument or support, or have no bearing on disposition of the present petition. We address the remaining objections below.

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18 *FTC v. Bowman*, 149 F. Supp. 624, 629-30 (N.D. Ill. 1957), *aff'd*, 248 F.2d 456 (7th Cir. 1957).

19 *Dresser Indus.*, 1977 WL 461238.

20 *In the Matter of January 16, 2014 Civil Investigative Demand Issued to the College Network, Inc.*, File No. 1323236, 2014 FTC LEXIS 90, at *5 (April 21, 2014) (citing, *inter alia*, *Texaco*, 555 F.2d at 882).

21 *Texaco*, 555 F.2d at 882.

22 *Morton Salt*, 338 U.S. at 654.

23 *See* Humana, Inc., Annual Report (Form 10-K) at 129. This report further indicates that the company has substantial financial resources, having received over $54 billion in revenue and paid over $52 billion in operating expenses in fiscal year 2016. *See id.* at 38.

General Objection 1: Duplicative to earlier information requests. Humana objects that the requests in the subpoena are duplicative of three other requests issued to the company by the Commission: a Civil Investigative Demand ("CID") and subpoena *duces tecum* on January 14, 2016, and a CID issued on March 7, 2017. Pet., 1-2, 7-8.[24] This objection is baseless.

Although FTC staff *requested* some of the same documents in 2016, Humana did not produce those documents. The Commission issued compulsory process to Humana and the CID and subpoena issued on January 14, 2016 sought information that overlaps with the current subpoena at issue, including requests for Humana's analysis of the Walgreens-Rite Aid merger, and information regarding Humana's retail pharmacy networks. Humana produced one Excel file and a single PowerPoint slide in response.

Nor is there any duplication to the CID issued on March 3, 2017. That CID contained only one specification that sought Humana's annual purchases of retail pharmacy services by line of business and by pharmacy chain. This specification does not overlap with the current subpoena, but even if it did, this would also not be duplicative for the same reasons as above: Humana did not produce documents or data in response to this CID but rather provided only a brief factual proffer in lieu of a full production of information.

General Objection 4: Privileged information. Humana objects to the subpoena to the extent it seeks privileged information. The Commission does not seek privileged material. The Commission's Rules of Practice instruct a subpoena recipient how to assert claims of privilege, *see* Rule 2.11, 16 C.F.R. § 2.11, and that Rule is restated in the subpoena's instructions. This objection is therefore without merit.

General Objection 5: Confidential information. Humana also objects to the subpoena to the extent it seeks confidential commercial information. That is not a proper basis for objecting to a subpoena. The Commission's Rules of Practice and relevant statutory provisions provide ample protection for documents and information—including proprietary business and sensitive customer information—obtained by the Commission through compulsory process.[25] Courts have consistently held that these provisions provide adequate protection and that the Commission has a full right to access even the most highly sensitive information including trade secrets.[26] This objection is therefore without merit.

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[24] Humana also claims that the current subpoena includes requests for information that the FTC "previously conceded it did not need." Pet., 7. Again, Humana offers no support for this claim. Even if arguendo this assertion were accurate, over the course of a years-long investigation, staff may learn that particular facts have greater importance than was ascertainable at an initial stage.

[25] *See* 15 U.S.C. §§ 46(f), 57b-2; 16 C.F.R. § 4.10(a).

[26] *See, e.g., FTC* v. *Invention Submission Corp.*, No. 89-272, 1991 WL 47104, at *4 (D.D.C. 1991), *aff'd*, 965 F.2d 1086, 1089 (D.C. Cir. 1992); *In re Subpoena Duces Tecum*, 228 F.3d 341, 351 (4th Cir. 2000) (enforcing subpoena requesting sensitive health care information in light of statutory protections).

IV. CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED THAT** Humana, Inc.'s Petition to Limit Subpoena *Duces Tecum* be, and it hereby is, **DENIED.**

We understand, however, that FTC staff consents to modifications to the subpoena. Accordingly, **IT IS FURTHER ORDERED THAT** the subpoena *duces tecum* be **MODIFIED** as follows:

a. Specifications 1, 2, 3, and 4 are modified to require Petitioner Humana to search for and produce responsive documents in the possession, custody, or control of custodians Jay Ecleberry and Laura White; and

b. Specification 3 is revised to replace the text "Submit all documents relating to the Humana Walmart Rx Plan retail pharmacy network, including, but not limited to," with "Submit the following documents:".

IT IS FURTHER ORDERED THAT Petitioner Humana, Inc. shall comply with the Commission's modified subpoena *duces tecum* on or before June 15, 2017.

By the Commission.

Donald S. Clark
Secretary

SEAL:
ISSUED: June 5, 2017

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580,

Petitioner,

v.

HUMANA, INC.
500 West Main Street
Louisville, KY 40202,

Respondent.

Misc. Case No.

[PROPOSED] ORDER TO SHOW CAUSE

Pursuant to the authority conferred by Sections 9 and 16 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 49, 56, Petitioner, the Federal Trade Commission ("FTC" or "Commission"), has invoked the aid of this Court, pursuant to Fed. R. Civ. P. 81(a)(5), for an order requiring Respondent Humana, Inc. to comply in full with the April 10, 2017 subpoena *duces tecum* issued to it in a merger investigation being conducted by the Commission (FTC File No. 161-0026).

The Court has considered the Emergency Petition of the Federal Trade Commission for an Order Enforcing Subpoena *Duces Tecum* Issued in a Merger Investigation and the papers filed in support thereof; and it appears to the Court that Petitioner has shown good cause for the entry of this Order. It is by this Court hereby

ORDERED that Respondent Humana, Inc. appear at _____ a.m. / p.m. on June ____, 2017, in Courtroom No. _____ of the United States Courthouse in Washington, D.C., and show cause, if any there be, why this Court should not grant said Petition and enter an Order enforcing the subpoena issued to Respondent and directing it to produce, no later than June 26 2017, all responsive materials. Unless the Court determines otherwise, notwithstanding the filing or pendency of any procedural or other motions, all issues raised by the Petition and supporting papers, and any opposition to the Petition, will be considered at the hearing on the Petition, and the allegations of said Petition shall be deemed admitted unless controverted by a specific factual showing.

IT IS FURTHER ORDERED that, if Respondent believes it necessary for the Court to hear live testimony, they must file an affidavit reflecting such testimony (or, if a proposed witness is not available to provide such an affidavit, a specific description of the witness's proposed testimony) and explain why Respondent believes live testimony is required.

IT IS FURTHER ORDERED that, if Respondent intends to file pleadings, affidavits, exhibits, motions, or other papers in opposition to said Petition or to the entry of the Order requested therein, such papers must be filed with the Clerk, and served by hand or by email on Petitioner's counsel, no later than _____ a.m. / p.m. on June ____, 2017. Any reply by Petitioner shall be filed with the Court, and served by email or by hand on Respondent's counsel, no later than _____ a.m. / p.m. on June ____, 2017.

IT IS FURTHER ORDERED, pursuant to Fed. R. Civ. P. 81(a)(5), that this is a summary proceeding and that no party shall be entitled to discovery without further order of the Court upon a specific showing of need; and that the dates for a hearing and the filing of papers

established by this Order shall not be altered without prior order of the Court upon good cause shown; and

IT IS FURTHER ORDERED that, pursuant to Fed. R. Civ. P. 81(a)(5) and its advisory committee note (1946), a copy of this Order and copies of said Petition and exhibits filed therewith, shall be served forthwith by Petitioner upon Respondent or its counsel, using as expeditious means as practicable.

SO ORDERED:

_____
United States District Judge

Dated: _____, Washington, D.C.