AAI AMERICAN ANTITRUST INSTITUTE

March 16, 2026

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Mail Stop H-144 (Annex I)
Washington, DC 20580

Submitted via: https://www.regulations.gov/

**Re: Express Scripts; Docket No. 9437**

To Whom It May Concern:

The American Antitrust Institute (AAI) respectfully submits the following comments on the Proposed Consent Agreement with Express Scripts, Inc. and its corporate affiliates in the matter captioned *In the Matter of Caremark Rx, Zinc Health Services, et al.* (Dkt. No. 9437) (Proposed Order). AAI is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. *See* https://www.antitrustinstitute.org.

AAI applauds the Federal Trade Commission (FTC) for its administrative action against the three largest pharmacy benefit managers (PBMs) for violating Section 5 of the FTC Act.[1] The PBMs' alleged anticompetitive conduct in insulin pricing causes precisely the kind of anticompetitive harm Section 5 was designed to address. As the FTC's complaint explains, PBMs have for years engaged in pricing and rebate strategies that benefit the PBMs at the cost of patients, who pay higher out-of-pocket costs for insulin and other drugs as a result.[2]

On February 4, 2026, the FTC announced that it was settling its case with one of the Respondents, Express Scripts, Inc.[3] According to press reports, the FTC is also in settlement

[1] *See generally*, Fed. Trade Comm'n, Revised Part 3 Administrative Complaint, *In the Matter of Caremark Rx, Zinc Health Services, et. al.* (Dkt. No. 9437) (filed Nov. 26, 2024) [hereinafter "Revised Complaint"].
[2] *Id.* ¶¶ 221-23.
[3] Fed. Trade Comm'n, *FTC Secures Landmark Settlement with Express Scripts to Lower Drug Costs for American Patients* (Feb. 4, 2026), https://www.ftc.gov/news-events/news/press-releases/2026/02/ftc-secures-landmark-settlement-express-scripts-lower-drug-costs-

talks with the remaining two PBMs named as Respondents. The Proposed Order requires that Express Scripts (1) change its business practice of preferencing drugs with high list prices over cheaper equivalents for standard formularies; (2) establish a "Standard Offering" for its "Plan Sponsor" customers that (a) bases patients' out-of-pocket costs for drugs like insulin on net costs rather than list prices and (b) moves away from reliance on rebates and spread pricing in their pharmacy benefit offerings, and (3) establish a Standard Offering for "Retail Community Pharmacies," defined as an unaffiliated retail pharmacy business with three or fewer retail stores. The Proposed Order also provides that patient payments through the TrumpRx platform will be credited against deductibles and that Express Scripts will reshore its group purchasing organization from Switzerland back to the United States.

In its Analysis of Agreement Containing Consent Order to Aid Public Comment, the FTC describes the purpose of the Proposed Order as protecting the public from anticompetitive conduct and deterring others from engaging in similar conduct.[4] The analysis suggests that the Proposed Order eliminates the problematic conduct by narrowing the use of harmful rebating and pricing practices, thereby opening the door for lower cost versions of drug treatments. We respectfully disagree.

AAI believes the Proposed Order is structured in ways that limit its effectiveness in at least three ways. First, its key prohibitions apply only to Express Scripts' Standard Offering. For reasons explained below, this limitation creates loopholes for Express Scripts to evade the Proposed Order's restrictions on harmful rebating and pricing practices. Second, key remedial provisions in the Proposed Order provide for enforcement by Plan Sponsors, which ignores two serious incentive problems. One is that Cigna Healthcare, a large Plan Sponsor, is vertically integrated with Express Scripts, such that the two share a common motive to extract monopoly rents.[5] The other is that many unintegrated insurers are Plan Sponsors and will find it more profitable to split anticompetitive profits with Express Scripts rather than pass on cost savings to patients. Third, the Proposed Order includes terms that impose costs on Express Scripts in exchange for benefits unrelated to the complaint allegations, raising questions about whether the FTC sacrificed concessions that would have better redressed the conduct's harms. Together, these issues threaten the efficacy and credibility of the settlement and compromise its long-term viability.

To avoid these problems and strengthen the Proposed Order, we ask the FTC to modify it in the following ways:

(1) make the prohibitions in Sections II and V mandatory for all Express Scripts plans, not just its Standard Offering, or at a minimum clarify that neither Cigna nor any other Plan Sponsor may permissibly contract around the prohibitions; and

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[4] Fed. Trade Comm'n, Analysis of Agreement Containing Consent Order to Aid Public Comment, *In the Matter of Caremark Rx, Zinc Health Services, et al.* at 1, Dkt. No. 9437 (Feb. 4, 2026) (hereinafter "Analysis to Aid Public Comment").

[5] The other two PBMs named as Respondents are also vertically integrated with large Plan Sponsors.

(2) remove provisions that are not reasonably related to the harm alleged in the complaint and negotiate instead for alternative relief tailored to protecting or promoting competition and redressing patients' injuries.

We also request that the FTC expand its public analysis to explain why the terms of the Proposed Order are not inferior to the relief sought in the complaint.

***Limiting prohibitions to the Standard Offering leaves open loopholes that undermine the effectiveness of the Proposed Order.***

Any remedy, whether through settlement or judgment, must anticipate alternative pathways to achieving the anticompetitive outcomes alleged in the complaint. This is especially true when the incentives to continue highly profitable anticompetitive conduct remain. A remedy that is limited to only one kind of offering, and that allows respondents to negotiate around it using customized alternatives, raises significant concerns about effectiveness.

Here, the Proposed Order incorporates several provisions that, if applied broadly and effectively, could promote competition and increase drug affordability for patients, including:

(1) mandated non-discrimination between high and low-WAC versions of drugs (Section I);

(2) prohibitions on plans in which (a) patient out-of-pocket costs exceed the post-discount and rebate cost to the PBM, or (b) out-of-pocket costs are based on artificially inflated list prices (Section II); and

(3) requirements that (a) ensure patients benefit from any rebates, (b) eliminate guarantees of drug manufacturer compensation, and (c) prohibit spread pricing (Section V).

But in each case these provisions apply only to Express Scripts' Standard Offering. A "Meeting Competition" carve-out allows Plan Sponsors (*i.e.*, insurance companies or employers who self-fund their health benefit plans) to create a "customized" plan that does not comply with these requirements so long as the sponsor acknowledges in writing that it has been presented the terms of the Standard Offering (Section XI).

Neither the Proposed Order nor the Analysis to Aid Public Comment explains why this provision is needed to meet competition, nor does either suggest how widely it may be used. AAI submits that the provision fundamentally endangers the effectiveness of the settlement. Most obviously, it does not sufficiently address the conflicts created when Cigna, which is vertically integrated with Express Scripts, is the Plan Sponsor. But in addition, by permitting negotiated customization of the Standard Offering, it facilitates gamesmanship by any unaffiliated Plan Sponsor whose interests do not align with its members' interests in more affordable drugs.

***The Proposed Order does not adequately address the incentives of affiliated Plan Sponsors to profit from anti-competitive rebates.***

Most significantly, the Proposed Order does not sufficiently account for a key issue prompting the initial PBM investigation: the vertical integration of PBMs and insurance providers.[6] It is a striking aspect of the industry, the FTC's complaint notes, that "the PBMs are integrated with private drug labelers, pharmacies, health care providers, GPOs, and insurance companies."[7] The complaint explains that "this vertical integration has allowed the PBMs and their affiliates to leverage their power along every link in the pharmaceutical supply chain."[8] And yet, the Proposed Order does not address why that matters here.

As currently designed, the Proposed Order relies on the Plan Sponsor as the "proxy enforcer" for patients as to the pricing aspects of the settlement. The meeting-competition carve-out leaves it to the discretion of the Plan Sponsor to determine whether its members will enjoy the protections applicable to the Standard Offering or if instead those protections will be jettisoned in favor of a negotiated custom offering that suits the Plan Sponsor and Express Scripts. This structure only works if the Plan Sponsor represents the interests of its members. Unfortunately, history suggests it will not. This is a major design flaw in the settlement.

Most obviously, a Plan Sponsor that is an affiliate of a PBM, as Cigna is to Express Scripts, cannot be expected to represent members' interests over the interests of its corporate family. Far from providing a check on the PBMs' profit incentives, affiliated Plan Sponsors share them.[9] The Cigna Group, the parent of both Cigna and Express Scripts, has long profited from Express Scripts' alleged unfair methods of competition at the expense of patients, including those that are members of its plans. To make its insurance arm an enforcer of the consent order is to let the proverbial fox guard the hen house.

The Proposed Order seems to make some efforts to address this problem, but it does not go far enough. The meeting-competition carve-out in Section XI allows Plan Sponsors to opt out of the settlement's protections, but it does not appear to apply to Cigna's fully insured plans, at least with respect to the "Out-of-Pocket" cost provisions in Section II. It is less clear whether it allows Cigna plans to opt-out of the "Compensation and Rebates" protections in Section V. No reason for the distinction is offered.

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[6] *See* Federal Trade Commission. *Pharmacy Benefit Managers: The Powerful Middlemen Inflating Drug Costs and Squeezing Main Street Pharmacies: Interim Staff Report* (July 2024), p. 24 (noting that five of the top 6 PBMs are vertically integrated with health insurers).

[7] Revised Complaint, *supra* n. 1, at ¶30

[8] *Id.*

[9] Antitrust law has long recognized this dynamic. As the Supreme Court has noted, "[w]ith or without a formal 'agreement,' the subsidiary acts for the benefit of the parent. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one." *Copperweld Corp. v. Independence Tube Corp.,* 467 U.S. 752, 771 (1984).

Ambiguous language in Section II of the Proposed Order states that "Respondent shall not offer a Plan Sponsor […] terms that deviate from the Standard Offering […] unless Respondent complies with the provisions of Section XI." Section XI, in turn, ostensibly allows Plan Sponsors to request in writing terms not in the Standard Offering so long as those terms have been disclosed. Confusingly, however, this provision states that it "shall not apply with respect to Cigna Healthcare's Fully Insured Health Plans." Although the carve-out may be intended to limit Cigna's fully insured health plans' ability to contract around the consent order's requirements, the language does not accomplish this goal on its face. It is open to the interpretation that Cigna's health plans need not follow the procedure laid out in Section XI at all. Given Cigna's incentives to maintain Express Scripts' lucrative anticompetitive conduct, any ambiguity should be unacceptable to the FTC.

***The Proposed Order does not adequately address the mixed incentives of unaffiliated Plan Sponsors.***

Nothing in the Proposed Order itself or the Analysis to Aid Public Comment explains why unaffiliated Plan Sponsors should be expected to serve as trusted representatives of patients' interests either. The FTC's decades of experience with the Hatch-Waxman Act of 1986 provides a cautionary tale about relying on sophisticated market actors with mixed incentives to protect patient interests. Hatch-Waxman created a system of constructive patent challenges intended to prompt generic drug manufacturers to test weak patents that preserved brand-name monopoly profits.[10] The theory was that generic companies would act as proxy enforcers for patients, bringing challenges that would hasten entry and expand competition.

But experience revealed that generic firms' incentives did not always align with patients' interests, as the drafters of the act had planned. As the Supreme Court recognized in *Actavis,* generic companies quickly realized their own profit incentives diverged from patients' interests.[11] Because the profits a brand company could earn without generic competition often far exceeded the risk-adjusted cost of a successful Hatch-Waxman challenge culminating in generic entry, brands and generics began striking agreements whereby the brand promised to pay a share of its monopoly profit to the generic in exchange for the generic agreeing to drop its Hatch-Waxman challenge and forego entry. A clear ruling that this violated the antitrust laws took 27 years. Consumers lost out on decades of price competition as a result.

A similar dynamic can already be seen among PBMs and unaffiliated Plan Sponsors. A growing number of private lawsuits allege that unaffiliated Plan Sponsors have breached their fiduciary duties to monitor PBM performance and provide members with reasonable

[10] 21 U.S.C. 355(j)(2)(A)(viii)(IV).

[11] *FTC v. Actavis, Inc.,* 570 U.S. 136, 155 (2013) (noting that Hatch-Waxman's framework "no doubt unintentionally, ha[s] created special incentives for collusion").

drug prices.[12] Complaints in those cases describe, for example, Plan Sponsors paying $749.30 for a drug widely available at retail pharmacies for under $40.[13]

The problem is not that unaffiliated Plan Sponsors have been unaware of PBMs' practices. Several have long been participants in industry groups that regularly warned against them. *See, e.g., JPMorgan*, *supra* note 12, slip op. at 6 (noting that industry trade association Health Transfer Alliance issued such warnings). In 2022, the FTC identified the practices in a Request for Public Comment that drew over 1,000 responses.[14] It also launched an investigation and ordered each of the six largest PBMs—accounting for nearly 95 percent of all prescriptions filled in the United States—to file a Special Report responding to 38 information and document requests.[15] And in 2024, the agency published an interim report on the PBMs' practices, which Plan Sponsors could not have failed to notice.[16] As the FTC's complaint and the aforementioned private suits note, many Plan Sponsors knew about PBMs' practices and did nothing to stop them. A settlement relying almost solely on disclosure of the practices thus cannot be expected to change that dynamic.

The Plan Sponsor's incentive problem goes deeper than simply overlooking the negative effects of the PBMs' conduct. According to the FTC's complaint, sponsors are "addicted to rebates" because they can share directly in the anticompetitive profits PBMs reap from elevated drug prices, just as generics were able to share directly in the anticompetitive profits brands reaped from the abandonment of Hatch-Waxman challenges.[17] The complaint alleges that Plan Sponsors are often given rebate guarantees or other pre-determined compensation levels as part of their PBM contracts, and those savings have rarely been passed down to members.[18]

Private cases allege an even more direct quid pro quo. In the *JPMorgan* case, for example, there are allegations that the defendant agreed to PBM contracts with terms unfavorable to its employees to secure potentially lucrative business with the PBM's

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[12] *See, e.g., Seth Sterne v. JPMorgan Chase,* No. 25-cv-02097 (S.D.N.Y. March 9, 2026); *Navarro et al. v. Wells Fargo & Co. et al*, No. 24-cv-03043 (D. Minn. March 3, 2026); *Lewandowski et al. v. Johnson & Johnson et al*, (D.N.J. Jan. 16, 2026).

[13] *JPMorgan Chase, supra* note 12, slip op. at 4.

[14] Fed. Trade Comm'n, *Solicitation for Public Comments on the Impact of Pharmacy Benefit Managers' Business Practices and Their Impact on Independent Pharmacies and Consumers,* Dkt. FTC-2022-0015 (2022), https://www.regulations.gov/docket/FTC-2022-0015.

[15] Fed. Trade Comm'n, *FTC Launches Inquiry Into Prescription Drug Middlemen Industry* (June 7, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-launches-inquiry-prescription-drug-middlemen-industry; *see* Fed. Trade Comm'n, Order to File a Special Report, FTC File No. (June 7, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221200PBMModelOrder.pdf

[16] Fed. Trade Comm'n, *FTC Releases Interim Staff Report on Prescription Drug Middlemen* (July 9, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/07/ftc-releases-interim-staff-report-prescription-drug-middlemen.

[17] Revised Complaint, *supra* note 1, ¶¶ 220-221.

[18] *Id.* ¶ 221.

corporate affiliates.[19] Why should JPMorgan and other large Plan Sponsors be expected to change course simply because the settlement provides Standard Offering terms that they are free to negotiate around? Neither the Proposed Order nor the Analysis to Aid Public Comment provides an answer.

The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq*., provides for private actions designed to hold employers accountable for administering benefit programs as fiduciaries for their employees, but that safeguard too has been ineffectual. In just the past few weeks, ERISA cases brought by classes of employee members alleging poor negotiation and insufficient monitoring of PBM contracts have been met with mixed and inconsistent results. Two such cases, in the District of New Jersey and in the District of Minnesota, were dismissed entirely on Article III standing grounds, and a third, in the Southern District of New York, was dismissed in part.[20] Given the current uncertainty, the FTC's settlement cannot rely on private ERISA claims to fill the evident gap between Plan Sponsor and member incentives.

The FTC should consider the lessons from Hatch Waxman as it reevaluates the Proposed Order and considers additional negotiated settlements with other PBMs in this case. Leaving enforcement of the settlement to unaffiliated Plan Sponsors is a recipe for failure because PBMs and Plan Sponsors are both better off splitting the PBMs' monopoly rents. The Proposed Order relies entirely on Plan Sponsors as proxy enforcers but provides no safeguards that would align their incentives with the interests of their members.

AAI respectfully asks the FTC to consider whether the original relief sought in the case—an outright ban on the challenged rebate and pricing practices—remains a cleaner and less risky option. This is especially important because neither the Proposed Order nor the Analysis to Aid Public Comment describes any procompetitive benefit from the PBM rebate programs. In the absence of efficiency justifications, there is no reason to settle for a more complicated and harder to enforce remedy that risks compromising patient benefits. Without compelling new evidence of procompetitive rationales for the challenged PBM practices, the FTC should continue to insist on complete relief.

***Including unrelated provisions in the Proposed Order undermines transparency and raises questions as to whether remedies for harmed consumers were compromised***.

Another problem with the Proposed Order is the inclusion of terms not logically connected to the harm alleged in the FTC's complaint. This includes the provisions mandating that Express Scripts' Standard Offering attribute patient payments through the newly launched TrumpRX platform to patient deductibles (Section III), and the agreement to "re-shore" the Respondent's group purchasing organization, currently headquartered in Switzerland (Section X).

It has long been DOJ and FTC policy that the terms of any settlement should address the competitive harm alleged in the complaint and benefit those harmed by it. As

[19] *JPMorgan Chase, supra* note 12, slip op. at 5.
[20] *See* cases cited *supra* at note 12.

one policy guide explained, "[c]arefully tailoring the remedy to the theory of the violation is the best way to ensure that the relief obtained cures the competitive harm."[21] In this case, the terms described in Sections III and X were not part of the original relief requested by the FTC. If there is a more subtle connection between these terms and Express Scripts' alleged anticompetitive conduct, it is not apparent. And strikingly, the Analysis to Aid Public Comment makes no attempt to explain any link. The discussion of the reshoring commitment is notably sparse. While explanations are provided for the other provisions in the Proposed Order, and the explanations affirmatively identify which allegations they are meant to address or how they support enforcement of the other settlement provisions, there is no explanation at all for Section X. There is only a declarative statement that "ESI will move its GPO, Ascent, from Switzerland to the United States."

The DOJ and FTC policy of tailoring the remedy to the harm is pragmatic. Settlement terms aimed at issues that are tangential, if not entirely unrelated to the alleged harm suggest a kind of trade-off that neither agencies nor courts should countenance. When benefits to one group of consumers are, for example, traded off for benefits to another group of consumers or businesses who are not part of the case, transparency is lost and trust in the settlement process is compromised. Assuming the terms come at some cost for the Respondent, they also beg the question of what alternative concessions were left on the table.

When a settlement purports to protect a large group of harmed consumers, even the appearance of unexplained and unjustified trade-offs can undermine its credibility. This is why, for example, in the class action context, the changes to the Federal Rules of Civil Procedure under the Class Action Fairness Act provide special scrutiny of any "side deals" between opposing counsel.[22] All settlement provisions that do not directly benefit injured class members must be disclosed and evaluated by the district court to ensure that the interests of those harmed by the illegal actions have not been compromised. When there is evidence of a side deal, the district court has "a special 'obligat[ion] to assure itself" that the beneficiary has not negotiated for the side deal by making "an economically beneficial concession with regard to the merits provisions."[23] For if it has, it follows that the beneficiary will have obtained less relief for the injured victims than it otherwise could have obtained.[24] In such cases, a district court may withhold settlement approval to protect the interests of absent class members.

The FTC should hold itself to no lower a standard. While one cannot tell based on publicly available information whether Express Scripts obtained an "economically beneficial concession with regard to the merits" in exchange for the settlement provisions unrelated to harms alleged in the complaint, there is nothing to rule it out either. As far as the

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[21] U.S. Dept. of Justice, Antitrust Div., *Policy Guide to Merger Remedies* 3 (Oct. 2004) (superseded).
[22] *See* Fed. R. Civ. Pro. 23 (e)(3)(requiring disclosure of agreements made in connection with settlement proposal) and (e)(2)(C)(iv)(requiring court to consider such agreements as part of approval process).
[23] *Staton v. Boeing Co.*, 327 F.3d 938, 965 (9th Cir. 2003).
[24] *Id.* at 964.

settlement's integrity and credibility are concerned, this is just as much of a problem. In the interests of transparency and to assure patients that their interests have not been compromised, we recommend that the FTC eliminate Sections III and X of the Proposed Order and negotiate instead for alternative relief that addresses the harms alleged in the complaint, or else that the FTC provide a clear explanation for how these provisions could plausibly do so.

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Thank you for considering the views of the American Antitrust Institute. Questions or comments regarding this submission may be directed to its author, AAI Vice President and Director of Legal Advocacy Kathleen Bradish, at kbradish@antitrustinstitute.org.

Sincerely,

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