AAI AMERICAN ANTITRUST INSTITUTE

September 4, 2026

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
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Washington, DC 20580

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

Re: ***In the Matter of Caremark Rx, Zinc Health Services, et al.*** **(Dkt. No. 9437)**

To Whom It May Concern:

The American Antitrust Institute (AAI) respectfully submits the following comments on the proposed consent agreement with Caremark Rx, L.L.C. and Zinc Health Services, LLC (collectively, Caremark) in the matter captioned *In the Matter of Caremark Rx, Zinc Health Services, et al.* (Dkt. No. 9437) — including the Agreement Containing Consent Order ("Consent Agreement"), the unissued Decision and Order ("Proposed Order"), and the Analysis of Agreement Containing Consent Order to Aid Public Comment ("Analysis"). 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 previously commented in March on the proposed order with Express Scripts, Inc. (ESI) in the same docket.[1] As we noted then, 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. If implemented effectively, many of the substantive terms in the two proposed orders, such as limiting out-of-pocket costs to no more than the unit net price and delinking PBM compensation from drug list prices, would be important steps to addressing the

[1]Comments of the American Antitrust Institute on the Proposed Express Scripts Order, Dkt. No. 9437 (Mar. 16, 2026) [hereinafter "AAI ESI Comments"]. That order has not been finalized.

anticompetitive effects described in the FTC's complaint.[2] Moreover, some provisions of this Proposed Order are real improvements over the earlier ESI proposed order:

- Section I ties the drug-shortage exception to an objective, publicly verifiable source rather than to the respondent's own assessment.[3]

- Section IV establishes a Copay Certainty Program with hard dollar caps on member out-of-pocket costs for insulin and requires a participating product in each of the rapid-acting, short-acting, and long-acting categories.[4]

The Proposed Order, however, like the ESI proposed order, falls short of protecting consumers by leaving open means for Caremark to contract around the Proposed Order's protections. For every Plan Sponsor other than Aetna's Fully Insured Health Plans, the Proposed Order's central prohibitions are still limited to Caremark's "Standard Offering," and Section XII permits a Plan Sponsor and Caremark to negotiate terms that differ from it.[5] AAI explained in its ESI Comments why that structure depends on an assumption that does not hold uniformly: it works only where the Plan Sponsor represents the interests of its members, and a Plan Sponsor may find it more profitable to divide the gains from the prohibited practices with the PBM than to pass them to the patients who bear the costs.[6]

AAI does not re-argue that point here. We note only that the efficacy of this settlement continues to rest on the judgment of entities whose incentives the Commission has not addressed. Given that tension, as well as the unusual posture of having the settlement reviewed by a single Commissioner, public comment has a particularly important role that should be facilitated by a complete and thorough record. Although AAI raised similar transparency concerns with respect to the ESI proposed order, certain aspects of this new Proposed Order make the concerns even more acute.

A consent order is an exercise of public enforcement authority that resolves allegations the Commission has made on the public's behalf. The parties are not the best source of accountability, as they have every incentive to accept the terms they negotiated. Accountability is instead through public disclosure. Congress reached the same conclusion about a broad range of government

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[2] *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).
[3] Proposed Order § I.
[4] Proposed Order § IV. The category requirement is significant: a cap that applied to a single insulin category would leave many patients unprotected.
[5] Analysis of Proposed Agreement Containing Consent Order to Aid Public Comment, 91 Fed. Reg. 50535 (Aug. 5, 2026) [hereinafter "Analysis"]. The Analysis states the point in two ways, at 50537 ("does not apply to the requirements that Aetna fully insured health plans adopt the patient protections in Section II") and at 50538 ("Aetna's fully-insured health plans are excluded from Section XII's 'meeting competition' exception").
[6] AAI ESI Comments, *supra* note 1, at 5-6.

antitrust settlements in 1974, finding that the information then publicly available did not always permit meaningful evaluation of a proposed decree.[7]

The Commission has itself repeatedly described the importance of the record when a proposed consent order is presented for public comment. In a joint submission with the Department of Justice to the Organisation for Economic Co-operation and Development, the Commission explained that substance and process in antitrust investigations go hand in hand, and that concerns about process create the impression that substantive results are flawed regardless of the outcome. The Commission noted the need for a full and transparent record in the settlement context because "a fair, predictable, and transparent process bolsters the legitimacy of the enforcement outcome."[8] Referring to its own procedures, the Commission singled out the importance of the Analysis to Aid Public Comment because it "facilitate[s] input by the public" by "explain[ing] in lay terms the violations alleged and proposed remedies."[9] The Analysis, it explained, "is intended to disclose information sufficient to educate the public about the facts and underlying rationale of the proposed consent agreement, and describe the competitive harm addressed, the nature and extent of the evidence involved, the nature of the proposed remedy vis-à-vis the harm identified, and the consumer impact of the competitive harm."[10] A more recent OECD submission similarly notes the Commission's position that the Analysis must explain the case and how the law has been violated "in order to assist the public in understanding and commenting meaningfully."[11] As the Commission explained, exposing enforcement actions, including settlements, to scrutiny in this way helps the agencies get the facts, the economics, and the law right, so that transparency of this kind "is not only fair to parties but also leads to better enforcement."[12]

Measured against that standard, the Analysis in this matter falls short in three respects. It does not disclose or explain the existence of an investigation of Aetna Inc. that the settlement releases, much less explain the conduct at issue. It does not disclose or explain a commitment that appears to limit how the Commission can refer to Caremark's conduct in the agency's own future reports. And it describes an operative prohibition of the settlement in terms broader than the Proposed Order actually imposes. AAI accordingly asks the Commission to publish a supplemental Analysis addressing these matters and to reopen the comment period before making the Proposed

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[7] S. Rep. No. 93-298, at 5–6 (1973).

[8] Org. for Econ. Co-operation & Dev., Roundtable on Procedural Fairness: Transparency Issues in Civil and Administrative Proceedings — United States, DAF/COMP/WP3/WD(2010)24, ¶ 1 (Feb. 12, 2010) [hereinafter "2010 U.S. Submission"] (joint submission of the Department of Justice and the Federal Trade Commission), https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/transparency_us.pdf.

[9] 2010 U.S. Submission, *supra* note 8, ¶ 30. *See also* 16 C.F.R. § 2.34(c) ("the Commission will place on the public record an explanation of the provisions of the order and the relief to be obtained thereby and any other information that it believes may help interested persons understand the order").

[10] *Id.*

[11] Org. for Econ. Co-operation & Dev., Commitment Decisions in Antitrust Cases — Note by the United States, DAF/COMP/WD(2016)23, ¶ 14 (June 2, 2016), https://one.oecd.org/document/DAF/COMP/WD(2016)23/en/pdf. The same submission states that "[t]here must be a close, logical nexus between the remedy and the theory of harm." *Id.* ¶ 17.

[12] 2010 U.S. Submission, *supra* note 8, ¶ 35.

Order final; at a minimum, the Commission should explain each of them in the statement it issues in response to comments. We also renew the request AAI made in its ESI Comments: that the Commission close the contracting-around route by making clear that no Plan Sponsor may contract around the protections in Sections II and V.

The settlement releases an investigation of Aetna that the public record does not describe.

The Proposed Order gives Aetna, the insurance affiliate of Caremark, a key role. Its domestic Fully Insured Health Plans must adopt the out-of-pocket protections in Section II, and they alone among all Plan Sponsors are denied the flexibility Section XII affords everyone else. The Analysis describes that treatment in two places.[13]

But while the Analysis describes Aetna's obligations, it fails to address what Aetna receives in exchange for undertaking them. The Consent Agreement, in ¶14, provides that the Proposed Order settles and releases all claims arising from three matters: this administrative action; the Commission's investigation of Caremark relating to a civil investigative demand issued to CVS Health Corporation in FTC File No. 2410005; and "the Commission's investigation of Aetna Inc." relating to a civil investigative demand issued to CVS Health Corporation in FTC File No. 2210114.[14] The Aetna investigation is disclosed nowhere else. It is not mentioned in the Analysis, in the Proposed Order, or in the Commission's press release. Nothing in the public record indicates what conduct it concerned, what the evidence showed, or why it is being resolved now. Adding to the uncertainty about the scope of the release, CVS has stated, without further detail, that the "global settlement" resolves "all outstanding FTC litigation and investigations," including the Commission's otherwise unidentified "vertical integration" concerns.[15]

Instead of a full explanation of the release, particularly with respect to the non-party Aetna, the Analysis states only that the Consent Agreement settles two things: the charges in this litigation and "the separate Commission investigation ('PBM Investigation')." Footnote 1 then describes the release as a global settlement resolving the Commission's current concerns "to the extent reflected in the Decision and Order," before listing what the release does not bar.[16] The Proposed Order reflects neither the existence of the release nor the basis of the Aetna investigation; Aetna appears there only as an entity whose fully insured health plans must adopt Section II. A commenter reviewing these documents would not even be aware of the release, let alone have any basis to evaluate it.

The Consent Agreement, the only document that discloses the release, does not help to clarify the scope or the role of Aetna. Aetna is not a respondent, does not appear in the caption, is not charged in the complaint, and did not sign; the signature page includes neither an Aetna entity

[13]Analysis, *supra* note 5, 91 Fed. Reg. at 50537-38.
[14]Consent Agreement ¶ 14.
[15]Press Release, CVS Health Corp., *CVS Caremark Announces Agreement with FTC to Further Advance Industry-Leading Approaches to Transparency and Affordability* (July 14, 2026), https://www.cvshealth.com/news/company-news/cvs-caremark-announces-agreement-with-ftc.html.
[16]Analysis, *supra* note 5, 91 Fed. Reg. at 50536 & n.1.

nor the parent CVS Health Corporation.[17] Caremark represents in ¶ 11.b that affiliates necessary to effectuate the full relief are parties bound as if they had signed or are "within the control of parties," but Caremark and Aetna are sister subsidiaries beneath CVS Health Corporation, and Caremark does not control Aetna.[18]

The informational gaps lead back to a common issue: the Commission's consent procedures presuppose a complaint that was never issued as to two of the three released matters. Complaint Counsel and the Caremark respondents moved jointly under Rules 3.25(b) and (c) to withdraw the matter so the Commission could consider the proposed agreement.[19] Rule 3.25 is drafted throughout with reference to an existing complaint: subsection (b) requires the motion to specify "the portions of the matter [under adjudication] that the proposal would resolve"; subsection (c) requires the agreement to conform to Rule 2.32, governing agreements "in settlement of a Commission complaint"; and subsection (f) provides that an accepted agreement is disposed of under Rule 2.34.[20] Rule 2.32 similarly assumes a public complaint, specifying that the "complaint may be used in construing the terms of the order." Rule 2.34, in turn, specifies unambiguously that the complaint is a required part of the record for public comment.[21] The underlying assumption is that every operative term is tethered to charged conduct. Nothing in the rules contemplates resolving separate investigations that have never been the subject of a complaint.

The Commission has followed a different, more transparent path in similar proceedings. In the Commission's enforcement actions against the private equity firm, Welsh Carson, and U.S. Anesthesia Partners, the portfolio company the firm once controlled, a federal court dismissed the case as to Welsh Carson on Section 13(b) grounds. When the Commission later reached a settlement with the now non-party, Welsh Carson, the Commission issued a new administrative complaint alongside the settlement, so that the conduct being resolved was charged, identified, and placed before the public.[22]

That is what the Commission's standard requires here. The Commission must describe "the nature and extent of the evidence involved" and "the nature of the proposed remedy vis-à-vis the harm identified."[23] Where the harm is never identified, the fit between remedy and harm cannot be assessed at all. A commenter cannot argue that relief is too narrow, too broad, or mismatched, because the conduct against which relief would be measured has not been disclosed. The release forecloses claims while withholding the information needed to evaluate what was given up in

[17]Consent Agreement at 4.
[18]Consent Agreement ¶ 11.b.
[19]Complaint Counsel's and Caremark Respondents' Joint Motion to Withdraw Matter from Adjudication, Dkt. No. 9437 (filed Mar. 23, 2026).
[20]16 C.F.R. § 3.25(b), (c), (f); *see id.* §§ 2.32, 2.34.
[21]*See id.* § 2.34(c) ("Promptly after its acceptance of the consent agreement, the Commission will place the order contained in the consent agreement, the complaint, and the consent agreement on the public record for a period of 30 days, or such other period as the Commission may specify, for the receipt of comments or views from any interested person.").
[22]Compl., *In the Matter of Welsh, Carson, Anderson & Stowe*, File No. 2010031 (Jan. 16, 2025); Analysis of Agreement Containing Consent Order to Aid Public Comment, 90 Fed. Reg. 9723 (Feb. 18, 2025).
[23]2010 U.S. Submission, *supra* note 8, ¶ 30.

exchange. As the AAI ESI Comments previously noted, this is a bargain that in other settings courts decline to approve without exactly that information.[24]

The Consent Agreement contains an undisclosed commitment governing the Commission's own future reports.

Paragraph 16 of the Consent Agreement provides that Counsel for the Bureaus "agree to take action to ensure" that any future report arising from the Orders to File a Special Report in FTC Matter No. 221200, the Commission's 6(b) study of PBM practices, will include a statement summarizing this Consent Agreement and will represent that any conduct or data of Caremark described in such a report predates the Agreement and therefore does not reflect the changes the Order requires.[25] Whatever its merits, this is a negotiated term governing how the agency will characterize a respondent in its own research output, and the 6(b) study is among the principal sources of public information about the industry this settlement concerns.

No explanation of the provision appears in the Analysis. In this respect, Paragraphs 14 and 16 are two instances of the same pattern: commitments undertaken in the Consent Agreement that shape what the public will later be told, but without the explanation the public needs to evaluate it. Under the standard the agencies articulated to the OECD, a term of this kind falls squarely within "the facts and underlying rationale of the proposed consent agreement" that the Analysis exists to disclose.[26] AAI takes no position in these comments on whether the Commission should have agreed to it. We cannot do so because public information about the significance of the terms is plainly insufficient to permit any assessment at all, and that itself is the problem.

In other respects the published record does not track the operative documents.

The Analysis falls short of its goals in other ways, too. Most notably, the Analysis describes a prohibition broader than the one the Order imposes. It reports that the Standard Offering must "[n]ot provide to plan sponsors rebate guarantees or other guarantees of pre-determined amounts of compensation," and then notes that Section V is subject to the Section XII meeting-competition exemption.[27] This fails to describe a second carve-out in the Order. Section V.B provides that Caremark "shall not be deemed in violation of this Paragraph V.B by continuing to offer to Plan Sponsors: (i) TrueCost; or (ii) net cost guarantees using per-member-per-month pricing," and TrueCost is a defined Caremark program providing drug-level net pricing guarantees.[28] It may be that the proviso is simply a clarification rather than an exception, but that is not explained to the

[24] *See* Fed. R. Civ. P. 23(e). As AAI observed in its comments on the ESI order, a court asked to approve a class settlement may withhold approval to protect the interests of absent persons. AAI ESI Comments, *supra* note 1, at 7-8.
[25] Consent Agreement ¶ 16. The Special Report orders referenced were directed to Caremark Rx, L.L.C. (June 6, 2022) and to Zinc (May 17, 2023).
[26] 2010 U.S. Submission, *supra* note 8, ¶ 30.
[27] Analysis, *supra* note 5, 91 Fed. Reg. at 50538.
[28] Proposed Order § V.B. "TrueCost" is a defined term, meaning "a Caremark program available to Plan Sponsors that provides drug-level net pricing guarantees." *Id.* at 6 (definition II).

public. A commenter reading only the Analysis would not know the proviso exists and would not know how to evaluate it.

We note, in fairness, that the Analysis is imprecise in the other direction as well. Its description of Section IV omits the requirement that the Copay Certainty Program include a participating product in each of the rapid-acting, short-acting, and long-acting categories — a requirement that makes the provision considerably more valuable to patients than the Analysis suggests.[29] Our concern is not that the Commission has shaded its account in one direction. It is that the Analysis is not a reliable guide to the Order, which defeats the purpose the agencies have said it serves.

These omissions matter more than they ordinarily would, because the usual internal check is absent. The Commission's vote to accept the Consent Agreement for public comment was 1-0-1, with Commissioner Meador recused.[30] Whatever deliberation ordinarily produces a concurring or dissenting statement, and whatever refinement of the public explanation that process yields, was not available here. The comment record is the only remaining input before this Order becomes final. That is a reason for the Analysis to be more complete than usual, not less.

Requested action.

A consent order derives its legitimacy from the public process that precedes it. Where the operative agreement releases an investigation the public knows nothing about, commits the agency to characterize a respondent in its own future reports, and potentially creates an unexplained exception to conduct the published analysis describes as prohibited, that process has not worked as the Commission has said it should. AAI respectfully asks the Commission to take the following steps before making the Proposed Order final.

Publish a supplemental Analysis and reopen the comment period.[31] The supplemental Analysis should disclose the existence and subject matter of the Aetna investigation released by Consent Agreement ¶ 14, including the conduct it concerned and the nature and extent of the evidence developed; state whether ¶ 14 operates as a release by the Commission or as an undertaking by Bureau counsel; disclose and explain the commitment in Consent Agreement ¶ 16; and describe Section V.B as the Order actually writes it, including the TrueCost and per-member-per-month proviso. Because the comment period ran without any of this information, an account furnished after the fact would not restore the opportunity to comment on it, and a further period for comment should follow.

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[29] Analysis, *supra* note 5, 91 Fed. Reg. at 50537; *cf.* Proposed Order § IV.

[30] Press Release, Fed. Trade Comm'n, *FTC Secures Major Settlement with Caremark, Resolving Antitrust Case Against Second Drug Middleman* (July 14, 2026), https://www.ftc.gov/news-events/news/press-releases/2026/07/ftc-secures-major-settlement-caremark-resolving-antitrust-case-against-second-drug-middleman.

[31] The Commission has taken a similar step before. In *In re Uber Technologies, Inc.*, File No. 152 3054, 83 Fed. Reg. 18061 (Apr. 25, 2018), the Commission published a second Analysis to Aid Public Comment and opened a new comment period.

At a minimum, address these matters in the statement issued in response to comments. If the Commission concludes that reopening is unwarranted, it should at least explain each of the above when it responds to the comments it receives. We note that such an explanation would substantially cure the Section V.B problem, since a reader would then know what the Order does. It would not cure the ¶ 14 and ¶ 16 problems, because a description furnished after the record closes cannot supply the basis for comment that the Commission's own account of this process contemplates.

Close the contracting-around route. The Commission should clarify that no Plan Sponsor may contract around the protections in Sections II and V. AAI recognizes that the affiliate relationship distinguishes Aetna from an unaffiliated Plan Sponsor. But the incentive problem AAI identified in March is not limited to affiliates, and the Commission has identified no procompetitive benefits from allowing Plan Sponsors to contract around the important protections at the heart of the Proposed Order.

AAI raises these concerns in the spirit in which the comment process is designed to operate. AAI wants to see the protections offered patients and consumers by the settlements in force. It is because those provisions matter that the record supporting them should be complete and the public given the opportunity to comment fully on their effectiveness and enforceability.

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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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