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 *AD TESTIFICANDUM* ISSUED TO HUMANA, INC. DATED APRIL 10, 2017	)	**June 15, 2017**

ORDER DENYING PETITION TO QUASH SUBPOENA *AD TESTIFICANDUM*

By McSWEENY, Commissioner:

Humana, Inc. ("Humana" or "Petitioner") has filed a petition to quash a subpoena *ad testificandum* issued by the Commission on April 10, 2017. For the reasons stated below, Humana's Petition to Quash ("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.

As part of this investigation, on April 10, 2017, the FTC issued a subpoena *duces tecum* and an 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] The subpoenas seek to understand how Humana constructs its retail pharmacy plans and determines which pharmacies to include in those plans. Humana offers several different plans, including 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, *inter alia*, 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 *ad testificandum* ("subpoena") seeks testimony from one or more Humana corporate representatives regarding the proposed merger and its impact on Medicare Part D plans. Under Section 2.7(h) of the FTC Rules of Practice and Procedure, 16 C.F.R. § 2.7(h), the Commission may obtain the testimony of a corporate entity by describing with "reasonable particularity the matters for examination." The corporate entity then "must designate one or more officers, directors, or managing agents, or designate others who consent, to testify on its behalf." *Id.* Rule 2.7(n) provides a process for taking oral testimony from corporate entities that parallels the process in Fed. R. Civ. P. 30(b)(6). The testimony of the designated witness conveys the collective knowledge of the corporation, not merely that of the individual witness.

The subpoena required Humana's designated witness or witnesses to testify on May 8, 2017, on eight topics: (1) the design and composition of Humana's drug plans; (2) differences among those plans; (3) the plans' usage of mail-order pharmacy services; (4) Humana's negotiations with Walgreens, Rite Aid, and pharmacy benefit managers; (5) Walgreens' proposed acquisition of Rite Aid; (6) proposed divestitures of assets from either Walgreens or Rite Aid; (7) the Humana Walmart Rx Plan; and (8) communications between Humana and the Centers for Medicare & Medicaid Services ("CMS") on the subject of pharmacy access under Humana's Medicare Part D plans.[2] This information will help FTC staff to assess how prescription drug plans built around Walmart or other competitors compare to those built around Walgreens, Rite Aid, or CVS.

---

[1] On June 5, 2017, the Commission denied Humana's separate petition to limit the subpoena *duces tecum*.

[2] In approving prescription drug plans offered to consumers, CMS considers whether the plans (1) provide consumers with sufficient access to participating pharmacies in each geographic area and (2) accurately describe their benefits and coverage.

The FTC served the subpoena on Humana on April 12, 2017. On April 26, Humana asked staff to allow Humana to provide a "written response to a targeted set of questions" in lieu of oral testimony. In response, staff stated that it would consider allowing Humana to provide a sworn declaration in lieu of oral testimony provided that Humana promptly produced the documents required by the accompanying subpoena *duces tecum*. Staff also agreed to reschedule the investigational hearing to May 30. Throughout the meet-and-confer period, Humana did not offer any proposals to limit or clarify the subpoena's topics for examination.

On May 16, Humana told FTC staff that it would not produce certain categories of documents required by the subpoena *duces tecum*. At that time, staff informed Humana that the corporate investigational hearing, as rescheduled on April 26 at Humana's request, would proceed on May 30, or soon thereafter based on the availability of the witness. Staff confirmed that without relevant documents a declaration would not be sufficient. By letter dated May 18, 2017, Humana's counsel stated that the company "do[es] not intend to expend the resources necessary to educate a witness for a deposition scheduled in a compressed timeframe."

On May 23, 2017, Humana filed the petition to quash the subpoena *ad testificandum*, asking the Commission to quash the subpoena in its entirety. Humana argues that many of the topics for examination "have nothing to do with the Proposed Acquisition," Pet., 1, or seek information that either overlaps with prior document requests or is available from another source. Humana further states that several of the topics for examination are vague and call for information that is easier to convey in written submissions than oral testimony. Finally, Humana states that preparing a corporate witness or witnesses to testify on the specified topics would impose undue burden.

II. ANALYSIS

As explained in our ruling on Humana's petition to limit the subpoena *duces tecum*, the Commission has broad authority to compel the production of information relevant to an investigation. FTC compulsory process is proper if the inquiry is within the Commission's authority, the demand is not too indefinite, and the information sought is reasonably relevant to the inquiry, as defined by the 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

---

[3] *See 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.").

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]

Here, the subpoena seeks testimony on subjects that are directly relevant to the FTC's investigation into Walgreens' proposed acquisition of Rite Aid. The testimony will enable FTC staff to assess the degree to which Humana's Walmart Rx Plan—which features Walmart as the sole preferred provider—is attractive to consumers in different geographic areas. The subpoena will also enable FTC staff to learn about Humana's assessment of the potential competitive impact of the proposed merger. This information is largely unavailable from sources other than Humana. Moreover, written responses often do not provide an adequate substitute for live testimony because there is no opportunity to ask follow-up questions or otherwise probe the responses. Humana also has not demonstrated that preparing a corporate witness or witnesses to testify would impose undue burden. For these reasons, we deny Humana's Petition to Quash the subpoena.

A. The Testimony is Relevant to the Investigation and is Unavailable from Other Sources

Humana's contention that several of the subpoena's topics for examination are overly broad or irrelevant to the investigation is counter to established precedent on relevance. In the context of administrative subpoenas, "relevance" is defined broadly and with deference to the agency's determination.[6] In this case, the subpoena's eight topics for testimony, further defined by subtopics, are directly relevant to the Commission's investigation.

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. According to Humana, exploring topics such as the Humana Walmart Rx Plan or Humana's communications with CMS would not benefit the Commission in making this determination. Pet., 7.[7] We disagree. As previously explained, the information will help FTC staff learn the degree to which Humana's Walmart Rx plan is attractive to consumers in need of Medicare Part D coverage in different geographic areas. Humana's communications with CMS

---

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).

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 Humana also makes boilerplate objections to all eight of the subpoena's topics for examination as either "overly broad" or "not relevant to the subject matter of the FTC's investigation." *See* Pet., 10-15. Humana does not support any of these objections or make any specific proposals to narrow the topics for examination.

are central to the same inquiry, given CMS's role in overseeing the Humana Walmart Rx Plan and ensuring consumers sufficient access to pharmacies.

Humana provides no support or detail for its claim that any relevant information about the Walmart Rx Plan or Humana's communications with CMS is "publicly available, or . . . available through CMS." Pet., 8; *see also id.* 10-11, 14-15. The subpoena seeks testimony for which Humana is the best—and only—source. For example, Topic 7 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 "consideration or plans to develop or promote" a network that includes "more pharmacies as preferred . . . than the Humana Walmart Rx Plan." Similarly, while Topic 8 seeks Humana's testimony about its communications with CMS, it also asks for Humana's *internal* analyses of those interactions, including responses to concerns CMS may have raised about the geographic access afforded by Humana's plans.

Moreover, even if such information were available from other sources, it is still appropriate to adduce testimony from Humana to, *inter alia*, verify that information. Indeed, "[b]y its very nature, the discovery process entails asking witnesses questions about matters that have been the subject of other discovery. . . . Thus, the fact that information has been provided . . . concerning a particular category does not, in itself, make that information an impermissible subject of a 30(b)(6) deposition."[8] *See also* Part E, *infra* (explaining why written submissions are no substitute for live testimony in an FTC investigation).

B. The Testimony is Not Duplicative of Prior FTC Document Requests

Humana argues next that it should be excused from testifying because the subject matter would be "duplicative" of document requests "cover[ing] many of the same topics." Pet., 2-3, 7-8. This argument is baseless.

First, as Humana acknowledges, it produced only a handful of the requested documents. *See id.* at 3. Humana's testimony cannot be "duplicative" of information that it has not produced.[9]

---

[8] *Tri-State Hosp. Supply Corp. v. United States*, 226 F.R.D. 118, 126 (D.D.C. 2005).

[9] On January 14, 2016, the Commission issued a CID and subpoena *duces tecum* to Humana seeking, *inter alia*, Humana's analysis of the Walgreens-Rite Aid merger and information regarding Humana's retail pharmacy networks. In response, Humana produced one Excel file and a single PowerPoint slide. Humana claims that the FTC "conceded it did not need" the documents that it failed to produce (Pet., 8), but offers no support for this claim. Even if arguendo this assertion were accurate, over the course of an investigation staff may learn that particular facts have greater importance than was ascertainable at an initial stage.

Second, even if Humana had produced all relevant documents, it would still be appropriate to seek testimony on the same subjects. Courts consistently reject the proposition that producing documents exempts a corporation from the obligation to provide testimony in response to a Rule 30(b)(6) subpoena.[10] Oral testimony conventionally follows document productions because it enables FTC staff to probe the details, explanations, and limitations of the productions. "[A] party who has received written production is entitled to explanations of the information produced, including how the information was gathered, by whom, whether or not the party adopts that information, where the information came from, [and] whether there is some additional information."[11]

C. The Subpoena Describes the Areas for Testimony in Sufficient Detail

Humana states that particular matters for examination in the subpoena[12] "are vague and confusing." Pet., 10. Humana similarly states that the descriptions of three topics[13] do not adequately "inform Humana of the specific areas of inquiry to be addressed in the" investigational hearing. *Id.* As an initial matter, we note that Humana did not raise these contentions during the required meet and confer process. *See* Pet. 3-5; 16 C.F.R. § 2.10(a)(2) (Commission rule requiring petitioner to confer with Commission staff "in an effort in good faith to resolve by agreement the issues raised by the petition"). If Humana had done so, it could have resolved any uncertainties by conferring with Commission staff. To the extent that Humana did not raise these issues with Commission staff, Humana's complaint is not properly before us. 16 C.F.R. § 2.7(k) ("[A]bsent extraordinary circumstances, [Commission] will consider only issues raised during the meet and confer process."). Nonetheless, we address Humana's arguments in the exercise of our discretion.

---

10 *See, e.g.*, *QBE Ins. Corp. v. Jorda Enters., Inc.*, 277 F.R.D. 676, 689 (S.D. Fla. 2012) ("In responding to a Rule 30(b)(6) notice or subpoena, a corporation may not take the position that the documents state the company's position and that a corporate deposition is therefore unnecessary.") (citing *Great Am. Ins. Co. of N.Y. v. Vegas Constr. Co.*, 251 F.R.D. 534, 540 (D. Nev. 2008)).

11 *United States v. Educ. Mgmt. LLC*, No. 2:07-CV-00461, 2014 WL 1391105, at *4 (W.D. Pa. Feb. 24, 2014) (quoting *State Farm Mut. Auto Ins. Co. v. New Horizont, Inc.*, 250 F.R.D. 203, 207 (E.D. Pa. 2008)).

12 Humana's Petition challenges the descriptions of Topic 2 (seeking information about Humana's retail pharmacy networks), Topic 3 (asking about Humana's use of mail-order pharmacy services), Topic 4 (seeking information about negotiations between Humana and Walgreens, Rite Aid, and PBMs regarding retail pharmacy networks), and Topic 8 (asking about communications with CMS regarding benefit designs and preferred cost sharing in particular Humana plans, including the Humana Walmart Rx Plan).

13 Humana identifies Topic 4 (addressing negotiations between Humana and Walgreens, Rite Aid, and PBMs regarding retail pharmacy networks), Topic 5 (seeking information regarding the proposed acquisition of Rite Aid by Walgreens), and Topic 7 (asking for information about the Humana Walmart Rx Plan).

Under Section 2.7(h) of the FTC Rules of Practice and Procedure, a subpoena must "describe with reasonable particularity the matters for examination." 16 C.F.R. § 2.7(h). We find that the subpoena satisfies that standard. Four of the six topics that Humana claims are vague include subparts that provide more detailed information about the expected areas of testimony, better enabling Humana to prepare its witnesses. The remaining topics provide Humana with sufficient notice to prepare a corporate designee. For instance, Topic 5 seeks Humana's position on the proposed merger between Walgreens and Rite Aid. In the context of this investigation, it is clear that the inquiry will address how the proposed merger may affect Humana's negotiations with a combined firm comprised of two of its important partners to create networks to provide prescription drug coverage.

D. The Subpoena's Topics are Not Overbroad and Do Not Impose Undue Burden

Humana asserts that preparing its designated witness (or witnesses) to testify at an FTC investigational hearing would impose an undue burden "in terms of time, expense, and resources." Pet., 8. Humana's arguments lack foundation.

Generally, "[b]roadness alone is not sufficient justification to refuse enforcement of a subpoena."[14] 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."[15] "Thus courts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business."[16] 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.[17] Given that Humana's business operations involve ongoing review of its pharmacy benefits program by other state and federal authorities, responding to an FTC inquiry about key aspects of its business does not appear overly burdensome

Humana also contends that the subpoena is unduly burdensome because it must prepare its witness in a compressed timeframe. Pet., 2, 7. Courts acknowledge that "[p]reparing a . . . designee [to provide a corporation's testimony] may be an onerous and burdensome task, but this consequence is merely an obligation that flows from the privilege of using the corporate form to do business."[18] Despite the burden, courts require the corporation make a conscientious good-

---

14 *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977).

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

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

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

18 *QBE*, 277 F.R.D. at 689 (citations omitted).

faith effort to prepare its designated witnesses so that they can answer fully the questions posed.[19] Thus, the obligation to prepare corporate designees to testify ordinarily provides no basis to excuse the testimony.

Here, the short time frame appears to be a direct result of Humana's actions. In its petition, Humana states that it has not yet started to prepare a corporate designee because it assumed that FTC staff would be willing to accept either a declaration or informal interviews of individual employees in lieu of the investigational hearing. Humana had no basis to make this assumption. Humana was served with the subpoena on April 12, 2017, and at Humana's request on April 26, the date for the investigational hearing of a corporate witness was moved back to May 30, 2017. Throughout the ensuing meet and confer process, FTC staff repeatedly told Humana that any alternative to a corporate investigational hearing was dependent on Humana's timely production of documents pursuant to the subpoena *duces tecum* that issued concurrently with the subpoena. When Humana informed staff that it did not intend to produce documents in response to two Specifications in the subpoena *duces tecum*, FTC staff confirmed that the alternatives proposed by Humana would not satisfy staff's investigation needs. The short period to prepare a corporate witness arises because Humana failed to begin the preparation in a reasonable time period after it received the subpoena on April 12 and further decided not to produce documents. We find that the short time to prepare the corporate designee cannot be considered an undue burden when the truncated period of time for witness preparation is the direct result of Humana's own decisions and actions. The time from the initial issuance of the subpoena on April 12 to the date this Order sets for compliance, June 26, provides ample time for the preparation of a corporate witness or witnesses.

E. Written Responses Are Not Substitutes for a Corporate Designee

Humana contends that, as a third party, it should not be required to produce anything more than a written declaration or the testimony of two knowledgeable individuals who would not testify as corporate representatives. Pet., 8.

Written responses are no substitute for live testimony. When a company offers a prepared response, an investigational hearing allows the investigator to probe the underlying facts and circumstances, often aided by the company's own documents.[20] By contrast, written discovery may include ambiguities and qualifications.[21] This means that the party's responses

---

[19] *See Sprint Commc'ns Co, L.P. v. Theglobe.com, Inc.*, 236 F.R.D. 524, 528 (D. Kan. 2006) (quoting *Prokosch v. Catalina Lighting, Inc.*, 193 F.R.D. 633, 638 (D. Minn. 2000)).

[20] Humana contends that some topics would require Humana to sort data, run reports, and prepare spreadsheets. *See* Pet., 8. An investigational hearing would provide an opportunity to obtain an explanation of the reports and data. *See United States v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996).

[21] *See, e.g., In re Vitamins Antitrust Litig.*, 216 F.R.D. 168, 174 (D.D.C. 2003) (rejecting argument that a Rule 30(b)(6) deposition is unnecessary or duplicative by distinguishing between depositions and document production and stating that "the two forms of discovery are not equivalent"); *Marker v. Union Fid. Life Ins. Co.*, 125 F.R.D. 121, 126 (M.D.N.C. 1989)

are subject to interpretation. In such a situation, the investigator "should be permitted to depose [the party] regarding these qualifications and attempt to clarify these ambiguities."[22] For these reasons, courts have not allowed written responses to excuse the appearance of a properly prepared corporate witness.[23]

III. CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED THAT** Humana, Inc.'s Petition to Quash subpoena *ad testificandum* be, and it hereby is, **DENIED.**

IT IS FURTHER ORDERED THAT Humana, Inc. shall appear to testify on the topics in the subpoena on June 26, 2017, or at such mutually agreeable later date as FTC staff and Humana may designate.

By the Commission.

Donald S. Clark
Secretary

SEAL:
ISSUED: June 15, 2017

("Because of its nature, the deposition process provides a means to obtain more complete information [than a written response to an interrogatory] and is, therefore, favored.").

[22] *Educ. Mgmt.*, 2014 WL 1391105, at *5.

[23] *See In re Vitamins Antitrust Litig.*, 216 F.R.D. at 172 (finding that submission of prepared timeline based on interviews of former employees and review of company documents did not excuse Rule 30(b)(6) deposition).