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ORIGINAL



May 23, 2017

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**BY HAND DELIVERY**

Office of the Secretary  
Federal Trade Commission  
400 7th Street, SW  
Washington, DC 20024

**Re: Humana Inc. Petition to Quash Subpoena *Ad Testificandum*,  
FTC File No. 161-0026**

Dear Sir or Madam:

Enclosed please find an original and thirteen copies of Humana Inc.'s Petition to Quash the Subpoena *Ad Testificandum* issued on April 10, 2017. Please file the original and twelve copies and return one file-stamped copy to the courier for return delivery to my office.

If you should have any questions, please do not hesitate to contact us.

Sincerely,

Richard W. Smith  
Katherine C. Campbell

Enclosures

SEARCHED  
SERIALIZED  
INDEXED  
MAY 23 2017

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

ORIGINAL

In re

Subpoena Ad Testificandum  
dated April 10, 2017

PUBLIC

FTC File No. 161-0026



HUMANA INC.'S PETITION TO QUASH  
SUBPOENA AD TESTIFICANDUM

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Dated: May 23, 2017

*Counsel for Humana Inc.*

## I. INTRODUCTION

Pursuant to 16 C.F.R. §§ 2.7(h) and 2.10, Humana Inc. (“Humana”) petitions the Federal Trade Commission (“FTC”) to quash the subpoena *ad testificandum* (“SAT” or “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, with the full cost of that expedition being foisted upon Humana, a non-party. The Subpoena contains thirty subparts on a series of exceptionally broad topics, many of which have nothing to do with the Proposed Acquisition. Most are not properly tailored; therefore, preparing a witness to testify would be unreasonably burdensome. Moreover, the Subpoena, along with a subpoena *duces tecum* (“SDT”) served concurrently with it, comprises the third set of non-party discovery demands that the FTC has served on Humana alone. And this latest Subpoena covers many of the same topics that the FTC included in the previous demands, but had withdrawn, presumably because they were not needed. To exacerbate the burden, only fourteen days before the deposition, the FTC indicated for the first time that it intended to enforce the Subpoena as written and reversed course from its earlier suggestion that it would withdraw the Subpoena and allow Humana to submit a declaration or depose individuals in lieu of a corporate deposition.

FTC staff has agreed to extend Humana’s deadline to petition to quash the Subpoena until today, but has been unwilling thus far to modify or withdraw the Subpoena. Accordingly, Humana files this petition and requests that the Subpoena be quashed, or alternatively, that the date for compliance (and renewing objections) be extended by thirty days so that the FTC and Humana’s counsel can continue to negotiate in good faith.

## II. BACKGROUND

The FTC served two subpoenas on Humana in connection with the Proposed Acquisition, a subpoena *duces tecum* and a subpoena *ad testificandum*. The subpoena *ad testificandum*, which is the subject of the instant petition, includes eight matters for examination, including thirty subparts, seeking testimony on unreasonably overbroad, and many irrelevant, topics. For example,

- Matter for Examination 1 requires that Humana’s witness know in detail the “retail pharmacy network(s) currently utilized by [Humana],” including the number of pharmacies in the networks, the composition of the networks, the utilization rates of the networks, the design and composition of the retail pharmacy networks, as well as reimbursement rates, fees, and other price-related contractual terms Humana maintains with its providers.
- Matter for Examination 5 requires that Humana’s witness be prepared to testify as to the company’s position on “[t]he proposed acquisition of Rite Aid by Walgreens”—the subject of the FTC’s investigation—without any narrowing details or sub-categories.
- Matter for Examination 7 requires that Humana’s witness be prepared to testify about all manner of details regarding the Humana Walmart Rx Plan—one of Humana’s largest plans.
- Matter for Examination 8 requires that Humana’s witness testify regarding Humana’s communications with the Centers for Medicare and Medicaid Services (“CMS”)—the government entity that regulates Humana and with which Humana communicates on a nearly daily basis. No particularized set of communications are identified.

While all are overly broad, many of these topics focus on data and statistics, making them ill-suited for a corporate deposition. Adding to Humana’s frustration over the burden these topics impose, this is the third set of non-party discovery demands that the FTC has served on Humana already, and many of the topics are identical or closely related to the topics that were identified in prior subpoenas. In response to the previous subpoenas, Humana negotiated very narrow productions and offered interviews of two key personnel. That proposal fully satisfied the FTC at the time, and Humana was led to believe a similar cooperative outcome would be reachable here.

Indeed, Humana has met and conferred with FTC staff on four occasions (April 26, May 1, May 9, and May 16) in an effort to narrow the scope of the Subpoena and to eliminate the need for a deposition if possible. *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); Letter from Richard Smith and Katherine Campbell, Wiley Rein LLP, to Dylan Brown, FTC (May 18, 2017) (attached hereto as Exhibit D). In the initial meet and confer, Humana informed the FTC that Humana did not intend to produce a witness in response to the Subpoena. The topics were too broad, too far afield from the FTC's investigation, and many of the topics were ill-suited for a deposition. Humana told the FTC that it would file a petition to quash the Subpoena if it were not significantly modified. In the spirit of compromise, Humana offered a second interview of the key personnel who the FTC had previously interviewed. Humana also offered a declaration to be drafted by the FTC and Humana, to be signed under oath by a Humana witness.

In response, FTC staff represented that the FTC would consider the proposed alternatives, and that at a minimum, it would likely withdraw the demand for a corporate deposition in favor of deposing the two key individuals in their personal capacities. During these discussions, FTC staff tabled further discussion on the deposition so that the FTC and Humana could focus on the production of documents, which the FTC said it wanted produced before a deposition could take place. The FTC also extended Humana's deadline to quash the subpoena *ad testificandum* until May 23, 2017, and agreed to reschedule the deposition date, to the extent one was to be held, to May 30, 2017. *See* Letter from Dylan Brown, FTC, to Richard Smith, Wiley Rein LLP (May 1, 2017) (attached hereto as Exhibit E).

The FTC and Humana then focused the remainder of their negotiations on the SDT, which is the subject of a separate petition. As to two of the four specifications in the SDT, the parties appear to have negotiated a resolution. But on the remaining two specifications, Humana's several alternative proposals have been rejected, and the parties are deadlocked. Accordingly, Humana has no present intention of producing any documents in response to those specifications.

On May 16, after it had become apparent that the SDT negotiations had stalled and the same day that Humana filed its timely petition to limit the SDT, the FTC for the first time informed Humana that it intended to proceed forward with a corporate deposition on May 30. *See* Ex. D. FTC staff also informed Humana for the first time that it was refusing to modify the original deposition topics. Even as it declared that the corporate deposition would occur, the FTC suggested that it might decide to withdraw the subpoena and serve individual subpoenas instead.

The FTC's course of dealing has left Humana in a difficult position. When Humana initially said it would object to the Subpoena, rather than prepare someone to testify regarding its unduly burdensome topics, the FTC expressed sympathy, extending the deadline to object and strongly indicating that it would choose an alternative approach. But as negotiations over document production stalled, the FTC suddenly reversed course, claiming that the deposition would now proceed and claiming that Humana should have spent its last six weeks spinning its wheels to prepare a witness for an overbroad deposition that the FTC itself suggested—and still suggests—likely will not occur. With respect, Humana, as a non-party, should not be required to waste its time and resources on busy work to no benefit. And the government, at the whim of FTC staff, should not force it to do so.

### III. ARGUMENT

#### A. Legal Standard

The FTC is authorized by statute to subpoena an entity for testimony and to investigate unfair methods of competition. 15 U.S.C. § 45; 16 C.F.R. § 2.7(h). 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).

Here, the Subpoena meets each of the telltale signs of unreasonableness. *First*, it is grossly broad and unduly burdensome. The Subpoena contains thirty discrete subparts about which Humana would need to prepare a witness. The regulation requires that the company's witness "testify about information known or reasonably available to the entity" and the witness's "testimony shall be binding upon the entity." 16 C.F.R. § 2.7(h). Given this standard and the breadth of the topics, Humana will be required to investigate the facts; interview witnesses; run reports; and collect, process, and review documents in order to educate a witness on the company's position. This is an extremely burdensome task in the fourteen days allowed by the FTC. And the task is even more onerous because many of the matters for examination lack specificity such that Humana could not realistically prepare a witness to respond to them. For example, Matter for Examination 5 requires that the corporate witness be prepared to testify as to the company's position on "[t]he proposed acquisition of Rite Aid by Walgreens." This is the entire focus of the FTC's investigation. The Subpoena as drafted places an undue burden on Humana, a non-party.

*Second*, the Subpoena seeks information entirely unrelated to the FTC's investigation. For example, it is difficult to fathom how topics such as the Humana Walmart Rx Plan or Humana's communications with CMS would benefit the FTC's investigation into the Proposed Acquisition, while the burden on Humana to prepare a corporate witness on these expansive topics would be enormous. Further, many of the topics are duplicative of discovery that the FTC has already demanded from Humana. For example, the topics covered in Matters for



Examination 1 and 2 were the subject of the FTC's previous demands, which Humana either satisfied or the FTC 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 most pertinent information sought in Matters for Examination 7 and 8 (with a total of eleven subparts) is already in the possession of the FTC through another party, is publicly available, or is available through CMS and thus is already available to the Government. Indeed, the FTC agrees that much of this information is publicly available.

*Fourth*, the Subpoena served on Humana is an improper vehicle for the FTC to obtain the information it seeks. Many of the matters for examination about which the FTC is most interested are data and fact intensive and thus a written response is more appropriate. For example, Matters for Examination 1 and 2 seek information related to Humana's retail pharmacy networks, including the number of pharmacies in the networks, the composition of the networks, the utilization rates of the networks, the reimbursement rates associated with each network, and a comparison of the networks. To properly respond to this request, Humana would need to evaluate and sort a large volume of data, run reports, and prepare spreadsheets. Likewise, Matter for Examination 8 asks for benefit designs and levels of access for the Humana Walmart Rx Plan, which are data-intensive requests. These matters for examination are ill-suited for a deposition, and it would impose an undue burden on Humana to prepare a corporate witness for such topics. The FTC would be better served with a written response.

Complying with the Subpoena would impose an enormous burden on Humana, a non-party, in terms of time, expense, and resources. Humana should not be forced to expend resources preparing a corporate representative on such broad and irrelevant topics, particularly in

the compressed timeframe allotted by the FTC and [REDACTED]

[REDACTED]

[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 date of compliance as unduly burdensome.

3. Humana objects generally to the location of the deposition in Atlanta, Georgia.

4. Humana objects generally to the Subpoena insofar as it calls for testimony on subjects which were prepared in anticipation of litigation, contain privileged attorney-client information, constitute attorney work product, or are otherwise privileged (collectively, "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 Subpoena as overly broad as it does not include a date limitation on the matters for examination.

8. Humana objects generally to the Subpoena on the grounds that many of the matters for examination are data and fact intensive and thus a written response is more appropriate.

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 generally to the Subpoena's definition of the term "plans" as overly broad, as it includes plans "whether or not finalized or authorized[.]"

12. Humana objects generally to the Subpoena because the matters for examination are not properly tailored so as to inform Humana of the specific areas of inquiry to be addressed in the deposition with reasonable particularity.

13. Humana objects generally to the Subpoena to the extent the matters for examination are vague or confusing.

### **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 matters for examination.

**Matter for Examination No. 1:** The retail pharmacy network(s) currently utilized by the Company. Including:

- a. The number of pharmacies in the network(s) currently utilized by the Company;
- b. The composition of the network(s) that the Company currently utilizes including the inclusion or exclusion of specific chains, pharmacy services administrative organizations ("PSAOs"), and other classes of trade from such networks;
- c. The utilization rates of the network(s) that the Company currently utilizes;
- d. The utilization rates of each of the top fifteen (15) providers of the Relevant Service within each of network(s) that the Company currently utilizes;

e. The inclusion of, or exclusion of, Rite Aid from specific retail pharmacy networks that the Company utilizes;

f. Geographic access standards for network(s) that the Company currently utilizes;

g. Federal and state regulatory requirements for retail pharmacy networks and the impact of those regulations on the Company's evaluation of retail pharmacy networks;

h. The design and composition of the retail pharmacy networks that the Company utilizes;

i. Negotiation of reimbursement rates or any other terms between the Company and any provider of the Relevant Service, whether directly with providers of the Relevant Service or indirectly through a Pharmacy Benefit Manager ("PBM"); and

j. Any differences in reimbursement rates, dispense fees, or any other price-related contractual terms (*e.g.*, the inclusion of brand or generic effective rates) among providers of the Relevant Service.

**Specific Objections:** Humana incorporates herein by reference general objection numbers 4-5, 7-10. Humana specifically objects to Matter for Examination 1 on the grounds that it is overly broad, unduly burdensome, and seeks information that is not relevant to the subject matter of the FTC's investigation. Humana further specifically objects to Matter for Examination 1 on the grounds that it is data and fact intensive and thus a written response is more appropriate. Humana specifically objects to Matters 1(f) and (g) because they seek information that is publicly available to the FTC or readily available to the FTC through another government agency. Humana further objects to Matter for Examination 1 to the extent it seeks Confidential and/or Privileged Information.

**Matter for Examination No. 2:** Differences between the Company's retail pharmacy networks. Including:

a. Composition of retail pharmacy networks;

b. The Company's marketing of retail pharmacy networks to existing and prospective members;

c. Cost savings associated with using limited versus broad/open networks; and

d. Disruption associated with using limited versus broad/open networks.

**Specific Objections:** Humana incorporates herein by reference general objection numbers 4-5, 7-8, 10, 13. Humana specifically objects to Matter for Examination 2 on the grounds that it is overly broad, unduly burdensome, vague, and seeks information that is not relevant to the subject matter of the FTC's investigation. Humana further specifically objects to Matter for Examination 2 on the grounds that it is data and fact intensive and thus a written response is more appropriate. Humana also objects to Matter for Examination 2 to the extent it is duplicative of Matter for Examination 1, the information is publicly available, and it seeks Confidential and/or Privileged Information.

**Matter for Examination No. 3:** The usage of mail-order pharmacy services by the Company, including the utilization rates of mail-order pharmacy services by types of clients (*i.e.*, commercial and Medicare Part D).

**Specific Objections:** Humana incorporates herein by reference general objection numbers 4-7, 10, 13. Humana specifically objects to Matter for Examination 3 on the grounds that it is vague and seeks information that is not relevant to the subject matter of the FTC's investigation. Humana further specifically objects to Matter for Examination 3 to the extent it seeks information outside of Humana's custody, possession, or control and to the extent it seeks Confidential and/or Privileged Information.

**Matter for Examination No. 4:** The Company's evaluation of retail pharmacy networks. Including:

- a. All negotiations between the Company and Walgreens, including any offers to contract, or marketing to the Company by Walgreens for the Relevant Service;
- b. All negotiations between the Company and Rite Aid, including any offers to contract, or marketing to the Company by Rite Aid for the Relevant Service; and
- c. Discussions, negotiations, or correspondence with all PBMs regarding retail pharmacy networks.

**Specific Objections:** Humana incorporates herein by reference general objection numbers 4-7, 12-13. Humana specifically objects to Matter for Examination 4 as not properly

tailored so as to inform Humana of the specific areas of inquiry to be addressed in the deposition with reasonable particularity and to the extent it seeks Confidential and/or Privileged Information. Humana further specifically objects on the grounds that it is overly broad, vague, and seeks information that is not relevant to the subject matter of the FTC's investigation. Humana specifically objects to Matter for Examination 4(c) to the extent it seeks information outside of Humana's custody, possession, or control.

**Matter for Examination No. 5:** The proposed acquisition of Rite Aid by Walgreens ("Proposed Acquisition").

**Specific Objections:** Humana incorporates herein by reference general objection numbers 4, 6-7, 9, 12. Humana specifically objects to Matter for Examination 5 as overly broad, unduly burdensome, not properly tailored so as to inform Humana of the specific areas of inquiry to be addressed in the deposition with reasonable particularity, and to the extent it seeks Privileged Information.

**Matter for Examination No. 6:** Any potential divestiture of assets from Walgreens or Rite Aid to any person in connection with the Proposed Acquisition. Including:

a. The Company's communications 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;

b. The Company's 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 4-7. Humana specifically objects to Matter for Examination 6 as overly broad (*i.e.*, including "communications with any other person"), unduly burdensome, and to the extent it seeks Confidential and/or Privileged Information. Humana further specifically objects to the

extent Matter for Examination 6 seeks information outside of Humana's custody, possession, or control (*i.e.*, seeking information related to a divestiture "to any person").

**Matter for Examination No. 7:** The Humana Walmart Rx Plan retail pharmacy network. Including:

- a. Discussions with Chains, PSAOs, or other providers of the Relevant Service regarding participation in the Humana Walmart Rx Plan, including the terms of such participation;
- b. The Humana Walmart Rx Plan retail pharmacy network's ability to satisfy geographic access requirements of CMS or of current or prospective plan members;
- c. 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. Any consideration or plans to develop or promote 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 4-5, 7-12. Humana specifically objects to Matter for Examination 7 as overly broad, unduly burdensome, and not properly tailored so as to inform Humana of the specific areas of inquiry to be addressed in the deposition with reasonable particularity. Humana further specifically objects to Matter for Examination 7 on the grounds that it seeks information that is not relevant to the subject matter of the FTC's investigation and to the extent it seeks Confidential and/or Privileged Information. Humana specifically objects to Matter for Examination 7(b) because it seeks information that is publicly available to the FTC or readily available to the FTC through another government agency.

**Matter for Examination No. 8:** Communications with CMS regarding:

- 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 too little 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 4-5, 7-13. Humana specifically objects to Matter for Examination 8 as overly broad, unduly burdensome, and not properly tailored so as to inform Humana of the specific areas of inquiry to be addressed in the deposition with reasonable particularity. Humana further specifically objects to Matter for Examination 8 because it seeks information that is publicly available to the FTC or readily available to the FTC through another government agency. Humana also specifically objects to Matter for Examination 8 on the grounds that it seeks information that is not relevant to the subject matter of the FTC's investigation and to the extent it seeks Confidential and/or Privileged Information.

#### **IV. CONCLUSION**

For the reasons set forth above, Humana respectfully requests that the FTC grant the instant petition to quash the Subpoena based on the objections set forth herein, or alternatively that the date for compliance (and renewing objections) be extended by thirty days to allow Humana's counsel additional time to negotiate with FTC staff regarding the scope of the Subpoena.



Dated: May 23, 2017

Respectfully submitted,

**WILEY REIN LLP**

By: 

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*Counsel for Humana Inc.*

## STATEMENT OF CONFERENCE

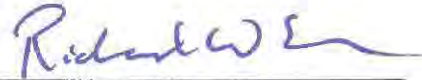
I hereby certify that I, counsel for petitioner Humana Inc., conferred with the FTC on April 26, May 1, May 9, and May 16, 2017, in a good-faith effort to resolve the issues raised in this petition and have been unable to reach agreement on the issues set forth herein.



Richard W. Smith

**CERTIFICATE OF SERVICE**

I hereby certify that on this 23<sup>rd</sup> 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 AD TESTIFICANDUM

RECEIVED  
APR 12 2017  
HUMANA LAW DEPT

1. TO  
Humana Inc.  
c/o Matthew Varzally, Esq., Senior Counsel  
500 West Main Street  
Louisville, KY 40202

2. FROM  
  
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 below (Item 6).

3. LOCATION OF HEARING  
  
Federal Trade Commission  
225 Peachtree Street, NE  
Suite 1500  
Atlanta, GA 30303

4. YOUR APPEARANCE WILL BE BEFORE  
  
Dylan Brown, Esq.

5. DATE AND TIME OF HEARING OR DEPOSITION  
  
May 8, 2017, at 9:00 a.m.

6. SUBJECT OF INVESTIGATION  
  
Walgreens Boots Alliance, Inc. / Rite Aid Corporation, File No. 161-0026. The company is directed, pursuant to Rule 2.7(h), to designate one or more officers, directors, or managing agents, or designate other persons who consent, to testify on its behalf with respect to each of the subjects set forth in Schedule A.

7. RECORDS CUSTODIAN/DEPUTY RECORDS CUSTODIAN  
  
Michael Moiseyev (Custodian)  
Daniel Zach (Deputy Custodian)

8. COMMISSION COUNSEL  
  
Dylan Brown, Esq.  
202-326-3283

DATE ISSUED  
  
4/10/17

COMMISSIONER'S SIGNATURE

### 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 8.

#### 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.

### 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 AD TESTIFICANDUM  
ISSUED TO HUMANA INC.  
FTC File No. 161-0026  
SCHEDULE A**

Pursuant to Commission Rule 2.7(h), 16 C.F.R. § 2.7(h), the Company, as defined below in Definition A, must designate one or more officers, directors, or managing agents, or designate other persons who consent, to testify on its behalf with regard to each of the following matters. Unless a single individual is designated by the Company, the Company must designate in advance and in writing the matters on which each designee will testify. The person(s) designated must testify about information known or reasonably available to the Company and their testimony shall be binding upon the Company.

**MATTERS FOR EXAMINATION**

1. The retail pharmacy network(s) currently utilized by the Company. Including:
  - a. The number of pharmacies in the network(s) currently utilized by the Company;
  - b. The composition of the network(s) that the Company currently utilizes including the inclusion or exclusion of specific chains, pharmacy services administrative organizations ("PSAOs"), and other classes of trade from such networks;
  - c. The utilization rates of the network(s) that the Company currently utilizes;
  - d. The utilization rates of each of the top fifteen (15) providers of the Relevant Service within each of network(s) that the Company currently utilizes;
  - e. The inclusion of, or exclusion of, Rite Aid from specific retail pharmacy networks that the Company utilizes;
  - f. Geographic access standards for network(s) that the Company currently utilizes;
  - g. Federal and state regulatory requirements for retail pharmacy networks and the impact of those regulations on the Company's evaluation of retail pharmacy networks;
  - h. The design and composition of the retail pharmacy networks that the Company utilizes;
  - i. Negotiation of reimbursement rates or any other terms between the Company and any provider of the Relevant Service, whether directly with providers of the Relevant Service or indirectly through a Pharmacy Benefit Manager ("PBM"); and
  - j. Any differences in reimbursement rates, dispense fees, or any other price-related contractual terms (e.g., the inclusion of brand or generic effective rates) among providers of the Relevant Service.
  
2. Differences between the Company's retail pharmacy networks. Including:
  - a. Composition of retail pharmacy networks;
  - b. The Company's marketing of retail pharmacy networks to existing and prospective members;
  - c. Cost savings associated with using limited versus broad/open networks; and
  - d. Disruption associated with using limited versus broad/open networks.

SUBPOENA AD TESTIFICANDUM – Schedule A  
Issued to Humana Inc.

3. The usage of mail-order pharmacy services by the Company, including the utilization rates of mail-order pharmacy services by types of clients (*i.e.*, commercial and Medicare Part D).
4. The Company's evaluation of retail pharmacy networks. Including:
  - a. All negotiations between the Company and Walgreens, including any offers to contract, or marketing to the Company by Walgreens for the Relevant Service;
  - b. All negotiations between the Company and Rite Aid, including any offers to contract, or marketing to the Company by Rite Aid for the Relevant Service; and
  - c. Discussions, negotiations, or correspondence with all PBMs regarding retail pharmacy networks.
5. The proposed acquisition of Rite Aid by Walgreens ("Proposed Acquisition").
6. Any potential divestiture of assets from Walgreens or Rite Aid to any person in connection with the Proposed Acquisition. Including:
  - a. The Company's communications 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;
  - b. The Company's 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.
7. The Humana Walmart Rx Plan retail pharmacy network. Including:
  - a. Discussions with Chains, PSAOs, or other providers of the Relevant Service regarding participation in the Humana Walmart Rx Plan, including the terms of such participation;
  - b. The Humana Walmart Rx Plan retail pharmacy network's ability to satisfy geographic access requirements of CMS or of current or prospective plan members;
  - c. 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. Any consideration or plans to develop or promote 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.
8. Communications with CMS regarding:
  - 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;



**SUBPOENA AD TESTIFICANDUM -- Schedule A**  
**Issued to Humana Inc.**

- d. Any action that CMS may take regarding any plan that offers too little 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 Schedule, 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, its domestic and foreign parents, predecessors, divisions, subsidiaries (including Envision Rx), 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 percent 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 percent or more) or total ownership or control between Walgreens and any other person.
- D. The term “person” includes the Company and means any natural person, corporate entity, partnership, association, joint venture, government entity, or trust.
- E. The term “related to” means in whole or in part constituting, containing, concerning, discussing, describing, analyzing, identifying, or stating.
- F. The terms “and” and “or” have both conjunctive and disjunctive meanings.
- G. The terms “each,” “any,” and “all” mean “each and every.”
- H. The term “entity” means any natural person, corporation, company, partnership, joint venture, association, joint-stock company, trust, estate of a deceased natural person, foundation, fund, institution, society, union, or club, whether incorporated or not, wherever located and of whatever citizenship, or any receiver, trustee in bankruptcy or similar official or any liquidating agent for any of the foregoing, in his or her capacity as such.
- I. 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.

SUBPOENA AD TESTIFICANDUM – Schedule A  
Issued to Humana Inc.

- J. 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.
- K. “CMS” means the Centers for Medicare & Medicaid Services.
- L. “geographic access” means the proximity and geographic accessibility of preferred cost sharing pharmacies to plan beneficiaries in a Limited Network or Preferred Network.
- M. The term “Limited Network” means any retail pharmacy network that excludes certain pharmacies, Chains, or PSAOs from the network.
- N. 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.
- O. The term “prescription pharmaceuticals” means ethical drugs or pharmaceutical products generally dispensed by a licensed pharmacist.
- P. The term “Proposed Acquisition” means Walgreens’ proposed acquisition of Rite Aid.
- Q. 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.

**SUBPOENA AD TESTIFICANDUM -- Schedule A**  
**Issued to Humana Inc.**

- R. The term "Retail Pharmacy Services" means the dispensing of prescription pharmaceuticals, in-person at a brick-and-mortar retail pharmacy.
- S. The term "retail pharmacy" means a retail site or store that dispenses prescription pharmaceuticals and other controlled substances.
- T. The term "Relevant Service" means Retail Pharmacy Services.

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

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

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



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April 28, 2017

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Katherine C. Campbell  
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**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 Eleberry, 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

Dylan Brown  
April 28, 2017  
Page 2

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.



Dylan Brown  
April 28, 2017  
Page 3

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



Dylan Brown  
April 28, 2017  
Page 4

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,

*Kate Campbell*

Richard W. Smith  
Katherine C. Campbell

cc: Matthew R. Varzally (by email)

# Exhibit C



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May 5, 2017

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Katherine C. Campbell  
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**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



Dylan Brown  
May 5, 2017  
Page 2

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.



Dylan Brown  
May 5, 2017  
Page 3

Sincerely,

*Katie Campbell*

Richard W. Smith  
Katherine C. Campbell

cc: Matthew R. Varzally (by email)

# Exhibit D



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May 18, 2017

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**VIA EMAIL**

Dylan G. Brown  
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Washington, DC 20024  
DBrown4@ftc.gov

**Re: Humana Inc. Meet and Confer**

Dear Mr. Brown:

We write to confirm the substance of our May 16 discussions regarding the subpoenas served on Humana Inc. on April 12, 2017, and to respond to your written proposal to modify the same.

**Subpoena Ad Testificandum**

With respect to the subpoena *ad testificandum*, for the first time on May 16, you indicated that the FTC intends to enforce the subpoena as written, and you abandoned your earlier suggestion that you would consider allowing Humana to submit a declaration in lieu of a deposition. Accordingly, you have asked us to agree to a deposition on May 30—less than two weeks from now—and to produce a corporate witness educated on various exceptionally broad topics. The request is unreasonable on its face, if not impossible. Meanwhile, you have entirely ignored the objections we outlined during our initial meet and confer.

Of course, immediately after informing us that the FTC intends to enforce the original subpoena as written, you told us that you may withdraw the subpoena and serve individual subpoenas on Jay Ecleberry and Laura White. Frankly, we are at a loss as to how the FTC intends to proceed with regard to the deposition and do not intend to expend the resources necessary to educate a witness for a deposition scheduled in a compressed timeframe that will not likely even occur.

**Subpoena Duces Tecum**

With respect to Specifications 1 and 2, we confirmed that we have complied with our production agreement. Nevertheless, we further confirmed that we have voluntarily extended our search for documents. We relayed our understanding that the collection of additional documents is expected to take 20 hours to complete.





Dylan Brown  
May 18, 2017  
Page 2

We then will have to process, narrow, review, and prepare those documents for production. We estimated (aggressively) that we could complete that voluntary production in two weeks and further offered to start producing documents on a rolling basis even sooner.

With respect to Specifications 3 and 4, during our previous meet and confer on May 9, you and your colleague Stephen Mohr stated that the FTC is looking for (i) specific feedback from CMS to Humana about whether Humana's plans meet geographic access requirements, particularly in urban areas, and (ii) Humana's internal strategy documents or analyses showing which pharmacies Humana considered in order to satisfy possible changes to CMS requirements. Moreover, you explained that the FTC understood that its subpoena was broad and would be satisfied with only a small subset of documents on these issues.

On May 16, we confirmed that Humana was actively working to locate documents of the nature Mr. Mohr had requested and that we expected to be able to reach agreement on the modification. Because we intended to produce only a small number of targeted documents, we predicted we could produce this subset of documents within ten days.

Given the imminent deadline to file our objections to the subpoena *duces tecum*, we requested a one-week extension of the deadline to file our objections so that we could finalize our discussions. You later offered in writing to extend the deadline to May 30 only if:

- For Specifications 1 and 2, we committed to produce all responsive documents from Jay Ecleberry and Laura White by May 30;
- For Specifications 3 and 4, we committed to produce all of Mr. Ecleberry's and Ms. White's documents reflecting or embodying correspondence with CMS relating to geographic access of Humana's Medicare Part D plans by May 19 (only three days later); and
- For Specifications 3 and 4, we committed to produce all other responsive documents from Mr. Ecleberry's and Ms. White's files by May 30.

This proposal is a massive shift from the FTC's proposal on May 9, and is unreasonable and impracticable. Last week you gave us good cause to believe you would agree to accept a small number of particularized documents. Now you have changed course and are demanding a wide range of documents—and a large subset



Dylan Brown  
May 18, 2017  
Page 3

with only three days' notice. Humana cannot agree to the moving target. Thus, we were forced to file a Petition to Limit the Subpoena *Duces Tecum*, which we served on you on May 16.

Notwithstanding our objections, we remain interested in finding a compromise solution short of litigation, and we look forward to continuing our discussions.

Sincerely,

*Katie Campbell*

Richard W. Smith  
Katherine C. Campbell

cc: Matthew R. Varzally (by email)

# 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.

\*

\*

\*

Richard W. Smith, Esq.  
May 1, 2017  
Page 2

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](mailto:dbrown4@ftc.gov).

Sincerely,



Dylan G. Brown

**APPROVED:**



Michael R. Moiseyev  
Assistant Director  
Mergers Division  
Bureau of Competition