



March 15, 2026

VIA ELECTRONIC SUBMISSION TO

<https://www.regulations.gov>

Federal Trade Commission

Office of the Secretary

600 Pennsylvania Avenue NW, Mail

Stop H-144 (Annex I)

Washington, DC 20580

Re: Comments of American Pharmacies to *Express Scripts, Inc., et al.; Analysis of Agreement Containing Consent Order To Aid Public Comment* (Express Scripts; Docket No. 9437)

Dear Federal Trade Commission:

I am writing on behalf of American Pharmacies, a national cooperative of over 700 independent pharmacies across the country. American Pharmacies is submitting these comments in response to the above-referenced proposed settlement with Express Scripts, Inc., Evernorth Health, Inc., Medco Health Services, Inc. and Ascent Health Services LLC (collectively “ESI”). Our comments are solely directed at Section VIII of the proposed order concerning the Standard Offering to Retail Community Pharmacies (“SORCP”).

A. The FTC Has Recognized That ESI Directly Competes Against Non-Affiliated Pharmacies and Has Used Its Market Power to Discriminate Against Non-Affiliated Pharmacies

ESI is a vertically integrated entity that, together with CIGNA, operates one of the largest insurers and pharmacy benefit managers (“PBMs”) in the United States. ESI also operates the third largest pharmacy in the country collecting one tenth of all prescription revenue in the U.S.¹ As a vertically integrated pharmacy, the Federal Trade Commission (“FTC”) has recognized that ESI directly competes with pharmacies that are not affiliated to ESI and that ESI can abuse its market power to the detriment of its competing non-affiliated pharmacies by:

- Steering patients to affiliated pharmacies and away from non-affiliated pharmacies;
- Engaging in opaque and detrimental reimbursement practices with non-affiliated pharmacies;
- Paying affiliated pharmacies more than non-affiliated pharmacies for the same drugs;
- Pushing competing non-affiliated pharmacies out of the market; and
- Paying non-affiliated pharmacies below their cost to acquire the dispensed drugs.²

Because of ESI’s history of abusive practices against non-affiliated pharmacies with whom ESI directly competes, American Pharmacies is concerned with several elements of the Standard Offering to Retail

¹ Drug Channels, *The Top 15 U.S. Pharmacies of 2024: Market Shares and Revenues at the Biggest Chains, PBMs, and Specialty Pharmacies*, March 11, 2025 <https://www.drugchannels.net/2025/03/the-top-15-us-pharmacies-of-2024-market.html>

² U.S. Fed. Trade Comm’n Office of Policy Planning, *Pharmacy Benefit Managers: The Powerful Middlemen Inflating Drug Costs and Squeezing Main Street Pharmacies*, Interim Staff Report July 2024, p. 3-4, 50, 53-59.

Community Pharmacies found in Section VIII of the proposed order.

B. American Pharmacies' Concerns With Section VIII of the Proposed Order

1. The Key Element of the SORCP Requires Retail Community Pharmacies to Give Their Confidential Acquisition Cost Information to their Direct Competitor

Below cost reimbursement is a typical and harmful practice of the three largest PBMs, including ESI. Remediating that practice is key to reforming the market for prescription drugs. However, the remedy chosen in the proposed order requires non-affiliated retail community pharmacies to hand over their confidential acquisition price information to ESI. ESI will achieve an unfair competitive advantage over them as a result.

In fact, the SORCP requires the Retail Community Pharmacy to hand over *all* of its acquisition cost information quarterly for all drugs, not just on drugs that are reimbursed below cost. In other words, in order just to be reimbursed at acquisition cost on those drugs it is currently reimbursed below cost, the pharmacy must tender *all of its acquisition cost information on all of the drugs* it purchases. Therefore, if a pharmacy submits to ESI all of its drug acquisition cost information, then on any drug where ESI had, in the past, reimbursed above acquisition cost, the reimbursement will be lowered to acquisition cost. Again, this will provide ESI with a tremendous unfair competitive advantage in both the pharmacy and PBM markets.

Finally, the proposed order permits ESI to be the arbiter of whether the pharmacy has provided the “data necessary and sufficient to validate its cost of acquiring prescription drugs.” It is in ESI’s interest to claim that it has not been provided sufficient information by the pharmacy which will permit ESI to (1) accuse the pharmacy of violating the obligation to turn over all information and thus permit termination from the network, (2) obtain more and more of the pharmacy’s confidential information, and (3) claw back past reimbursements based on audits claiming additional information should have been provided.

A superior remedy would be to instead require that ESI be required to increase reimbursements on those instances where a pharmacy claims under-reimbursement, with an independent third party validating the pharmacy’s asserted acquisition cost. This appeal and validation procedure is in place in many states already. Further, Myers & Stauffer, which validates National Average Drug Acquisition Cost (“NADAC”) prices, is proficient in handling appeals. It or another independent third party could conduct the validations needed.

2. The Proposed Order Provides No Meaningful Guardrails Where the Pharmacy Refuses to Provide Its Competitor the Pharmacy’s Confidential Acquisition Cost Information

In the event that a Retail Community Pharmacy justifiably is reticent to provide its competitor with all of its confidential drug acquisition cost information and subject itself to audits, network termination and clawbacks, then the proposed order permits ESI simply to disclose to that Retail Community Pharmacy “the methodology [ESI] used to approximate that Retail Community Pharmacy’s cost of acquiring prescription drugs.” Unfortunately, there are no meaningful guardrails in this instance. ESI simply needs to come up with its own methodology and claim that it sufficiently approximates the anticipated cost of acquisition. This is precisely the leeway ESI currently exercises in its reimbursement practices which the FTC has found to be opaque and troubling, such as the use of Maximum Allowable Cost lists.³

A superior remedy would be to mandate that ESI utilize NADAC pricing, or if not available, Wholesale

³ U.S. Fed. Trade Comm’n Office of Policy Planning, *Pharmacy Benefit Managers: The Powerful Middlemen Inflating Drug Costs and Squeezing Main Street Pharmacies*, Interim Staff Report July 2024, p. 57-59.

Acquisition Cost (“WAC”) pricing in the event that the pharmacy does not turn over the ESI its confidential pricing files. NADAC has been utilized for decades including in virtually all state Medicaid programs. It is the independently maintained formulation that most closely tracks pharmacy acquisition costs.

3. The Required Dispensing Fee Must Be Established With More Certainty

The logic of the SORCP is to pay the pharmacy no more or less than the pharmacy’s cost to acquire the drugs dispensed. In other words, there is no allowance for an amount to cover the pharmacy’s cost of dispensing, let alone for any profit. Therefore, under the methodology of the SORCP, the only opportunity for a Retail Community Pharmacy to obtain revenue to cover its cost of dispensing is the dispensing fee. However, while the SORCP mandates that ESI pay “a dispensing fee,” there is no guidance for the amount of the dispensing fee or how it might be established. “A dispensing fee” is anything from one penny or more. Currently, PBMs set dispensing fees as low as \$0.00 (zero dollars). ESI will be in compliance with the proposed order if it simply pays a one cent dispensing fee, an amount woefully insufficient to cover a pharmacy’s cost of dispensing.

A superior remedy would be to mandate that ESI’s dispensing fee be paid in the amount of the fee-for-service Medicaid dispensing fee for the state where the Retail Community Pharmacy is located. At the very least, the proposed order should mandate that ESI set its dispensing fee in an amount that takes into account the cost of dispensing factors set forth in Chapter 5, Section 20.7 of the Medicare Prescription Drug Benefit Manual (e.g., salaries, time associated with checking for coverage, filling the container, packaging, and overhead (including information technology), etc.).⁴

4. Require That ESI Obtain Pharmacies’ Affirmative Opt-In to the SORCP

ESI’s contracting practices include sending out contract updates by facsimile with short deadlines for a pharmacy to opt-out or else be deemed to have automatically accepted the contract. The FTC has noted the problematic nature of these “passive contracts.”⁵ The SORCP should not be permitted to be disseminated and adopted in this manner. Retail Community Pharmacies should be offered the opportunity to opt-in to the SORCP.

Therefore, we recommend that the proposed order require ESI to obtain an opt-in from the Retail Community Pharmacy after a reasonable and sufficient opportunity to review it (at least 30 days) rather than being disseminated as a passive contract.

5. The Proposed Order’s Definition of Retail Community Pharmacy Is Too Narrow

The proposed order establishes the SORCP as a standard offering ESI must provide to all Retail Community Pharmacies. The proposed order defines a “Retail Community Pharmacy” as a business with “three or fewer” retail stores. This number creates an arbitrary cutoff not associated with the remedy the proposed order is attempting to achieve. All independent pharmacies in the United States suffer from insufficient reimbursements by ESI. Many independent pharmacies have more than three store locations.

We recommend either eliminating the qualification of the number of stores from the definition or setting the store number at ten (10) or more.

⁴ Medicare Prescription Drug Benefit Manual – Chapter 5, Section 20.7 https://www.cms.gov/medicare/prescription-drug-coverage/prescriptiondrugcovcontra/downloads/memopdbmanualchapter5_093011.pdf

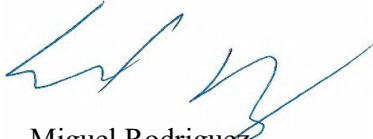
⁵ U.S. Fed. Trade Comm’n Office of Policy Planning, *Pharmacy Benefit Managers: The Powerful Middlemen Inflating Drug Costs and Squeezing Main Street Pharmacies*, Interim Staff Report July 2024, p. 50.

C. Conclusion

American Pharmacies recognizes the goal that the FTC is attempting to achieve through Section VIII of the proposed order. However, based on the comments above, we are concerned that the current language creates unintended new problems and/or leaves sufficient leeway for ESI to continue its abusive practices. Therefore, we encourage the FTC to adopt the recommendations in this letter.

Thank you for the opportunity to present these comments.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Miguel Rodriguez', is positioned above the typed name.

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