

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**FEDERAL TRADE COMMISSION,**

Petitioner,

v.

**CVS HEALTH CORPORATION,**

Respondent.

**Misc. Case No. 25-3 (JDB)**

**ORDER**

Before the Court is a petition by the Federal Trade Commission (“FTC”) that seeks an order requiring the respondent—CVS and its wholly-owned pharmacy benefits manager, Caremark Rx, LLC (collectively, “CVS”)—to comply with the FTC’s December 2023 civil investigative demand (“CID”). For the following reasons, the Court grants the petition and issues an order requiring CVS to comply.

**Background**

The parties’ briefs explain the history of this CID and CVS’s compliance to date. See generally Mem. Supp. Pet. Enforce CID [ECF No. 1-1] (“Pet.”) at 2–12; Resp’t’s Mem. Opp’n to FTC’s Pet. [ECF No. 9] (“Opp’n”) at 4–15. The Court provides only a short summary as relevant for this order. The FTC has the authority to investigate “unfair methods of competition” and “unfair or deceptive acts or practices” in or affecting commerce. See 15 U.S.C. § 45(a)(2). In December 2023, the FTC issued a CID to investigate whether CVS’s pharmacy-related business practices unlawfully reduce competition or otherwise violate laws that the FTC enforces. See Pet. at 6–7; Decl. of Logan Wilke [ECF No. 1-2 at 2–11] (“Wilke Decl.”) ¶ 6; CID Issued to CVS Health Corp., FTC File No. 2410005 [ECF No. 1-2 at 13–41] (“CID”). The CID is one of the

FTC's numerous ongoing actions or investigations against CVS. See Opp'n at 4; Decl. of Michael Chase on Behalf of CVS Health Corp. [ECF No. 9-1] ("Chase Decl.") ¶¶ 6–8.

Temporally, the CID requires CVS to produce responsive documents from January 1, 2017, through "30 days before the date on which the company provides the [FTC] with its final document submission." See CID at 17 ¶ I.2; Wilke Decl. ¶ 12. The CID requests some information that CVS has previously provided the FTC pursuant to other actions. See Pet. at 7–8; Opp'n at 4–5. The focus of this enforcement petition is CVS's alleged failure to produce "new" responsive documents, or documents that the FTC does not already possess. From approximately February to September 2024, the parties attempted to negotiate the search terms, document custodians, and date range that CVS would use to search for the new responsive documents. See, e.g., Pet. at 8–11. The FTC alleges that CVS missed several deadlines and "delayed agreeing to a list of custodians or search terms," but the parties ultimately agreed on a list of custodians in May and search terms in July 2024. Id. at 9; Wilke Decl. ¶¶ 23–25. The search terms yielded approximately 500,000 results. See Wilke Decl. ¶¶ 24–25.

After months of delays and missed deadlines, the parties agreed to a production schedule for the new documents in August 2024, where CVS would substantially complete production of certain custodial documents by October. See Pet. at 10; Wilke Decl. ¶ 26. CVS produced approximately 1,000 documents in September. See Pet. at 10; Wilke Decl. ¶ 30; Chase Decl. ¶¶ 45–46. A few days later, CVS provided the FTC with a new production schedule that provided for rolling submissions in November and December 2024, with CVS substantially completing productions by February 28, 2025. See Pet. at 10–11; Wilke Decl. ¶ 29; Opp'n at 16–17. CVS also stated that it would not produce any custodial documents created after April 1, 2024. See Pet. at 11; Wilke Decl. ¶ 29; see also Chase Decl. ¶ 47. But see CID at 17 ¶ I.2 (instructing that the CID covers "through 30 days before the date on which the company provides the [FTC] with its

final document submission”). CVS has not produced any documents since September 2024, which CVS contends is due to the FTC’s October issuance of a subpoena ad testificandum, the response to which required CVS to divert resources from the CID. See Pet. at 11; Opp’n at 6–7; Chase Decl. ¶¶ 48, 54. CVS assesses that it is still on track to substantially comply with the CID by February 28, 2025—if it need only produce documents created prior to December 31, 2023. Opp’n at 7; see discussion infra.

In January 2025, the FTC filed a petition to enforce the CID, seeking orders requiring CVS to show cause for its failure to comply and requiring CVS to comply. See Pet. Enforce CID [ECF No. 1]. The Court granted the order to show cause. See Order [ECF No. 3]. Pursuant to that order, CVS filed a response, see Opp’n, and the FTC filed a reply, Reply Mem. Supp. Pet. [ECF No. 11] (“Reply”).<sup>1</sup> The FTC asks the Court to order CVS to produce by February 28, 2025, all responsive documents created on or prior to December 31, 2023, and to produce within another 30 days all responsive documents created between January 1, 2024, and December 31, 2024. See Reply at 9. CVS contends that an enforcement petition is premature because CVS already intends to comply by February 28, 2025, and that any enforcement order should only require CVS to produce responsive documents created prior to December 31, 2023. See Opp’n at 4.

### **Analysis**

Resolving this motion requires answering two questions: whether to grant the FTC’s enforcement petition, i.e., issue an order requiring CVS to comply with the CID; and, if so, with what cutoff date (the date of records through which CVS must search for and produce responsive documents). The Court takes each question in turn. In determining whether to grant an enforcement petition, the Court performs a three-pronged analysis. A CID is “sufficient,” and

---

<sup>1</sup> On February 24, 2025, CVS requested leave to file a surreply, which the Court grants. See Resp’t’s Req. for Leave to File Surreply in Opp’n to Pet. [ECF No. 12]; Resp’t’s Proposed Surreply Mem. Opp’n to Pet. [ECF No. 12-1].

therefore must be enforced, “if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant.” FTC v. Texaco, Inc., 555 F.2d 862, 872 (D.C. Cir. 1977) (quoting United States v. Morton Salt Co., 338 U.S. 632, 652 (1950)). Enforcement proceedings have a “narrow” scope because of the “important governmental interest in the expeditious investigation of possible unlawful activity.” Id. at 872 (quoting FMC v. Port of Seattle, 521 F.2d 431, 433 (9th Cir. 1975)). As such, “enforcement of an agency’s investigatory subpoena will be denied only when there is a patent lack of jurisdiction in an agency to regulate or to investigate.” FTC v. Ken Roberts Co., 276 F.3d 583, 587 (D.C. Cir. 2001) (internal quotation marks omitted).

The FTC argues that it meets each prong of this test, see generally Pet. at 13–19, and CVS does not meaningfully disagree, see Opp’n at 15. The Court will thus address each factor only briefly.<sup>2</sup> First, the CID’s scope—“[w]hether conduct by CVS Health Corporation violates Section 5” and “whether [FTC] action to obtain injunctive relief would be in the public interest,” CID at 1—is plainly within the FTC’s authority. See 18 U.S.C. § 45 (conferring on the FTC the authority to investigate Section 5 offenses). Second, the CID’s demands—43 requests for information, 46 definitions further clarifying those requests, and the time period for the information sought—are sufficiently definite. See CID at 1–15; Pet. at 7, 14–15. And third, the information sought—including information about CVS’s structure, its payments to and from pharmacy entities, its participation in pharmacy networks, and audits and transactions involving pharmacies—is reasonably relevant to a claim of anticompetitive practices in the pharmacy benefits market. See, e.g., Pet. at 15–17; CID at 28 (defining the “[n]ature and [s]cope of [the] [i]nvestigation” as whether parties “have engaged or are engaging in unfair, deceptive, anticompetitive, collusive,

---

<sup>2</sup> The Court has the authority to entertain this petition pursuant to Federal Rule of Civil Procedure 81(a)(5). See also 15 U.S.C. § 57b-1(e) (permitting the FTC to seek a court order mandating CID compliance).

coercive, predatory, exploitative, or exclusionary acts or practices . . . related to healthcare markets,” including “pharmacy benefit managers”).

Although the CID passes this Circuit’s test for enforcement, CVS proffers two reasons why the Court should nonetheless decline to order enforcement. CVS first argues that the petition is premature because CVS has been and intends to remain in compliance with the CID, as shown through CVS’s intent to substantially produce all responsive documents (created on or before December 31, 2023) by February 28—the date by which the FTC seeks enforcement. See Opp’n at 1, 15–20. The FTC disagrees, emphasizing that CVS has “made no meaningful progress toward compliance in the last seven months,” failed to produce a single document since September, “repeatedly offered production target dates and then missed them,” and continues to argue “that it should be exempted from producing any documents from the past year.” Reply at 1; see Pet. at 19. Thus, CVS is not in compliance, and the FTC has no reason to trust its promise of future compliance. See Reply at 1.

CVS’s promise of future compliance is not a reason for this Court to deny an otherwise sound enforcement petition. CVS does not dispute that it did not produce documents in November or December 2024, as its own September 2024 schedule provided, or that it has not produced a single document since September. See Opp’n at 5–7; see also Chase Decl. ¶¶ 47–54. Additionally, there is nothing in this Circuit’s three-pronged inquiry that permits or requires the Court to consider a party’s promised future performance in determining whether to enforce a CID. See Texaco, 555 F.2d at 879–85. The Court will therefore order CVS to comply with the CID.

CVS final argument challenges the scope of an enforcement order.<sup>3</sup> The CID provides that “[u]nless otherwise indicated, each Specification of this CID covers documents and information

---

<sup>3</sup> Both parties request that any enforcement order limit the production to the custodians and search terms as agreed to by the parties in May and July 2024. See Pet. at 12; Opp’n at 17.

from January 1, 2017 through 30 days before the date on which the company provides the Commission with its final document submission.” CID at 17 ¶ I.2. In other words, if CVS provides its final document submission on February 28, 2025, then the CID on its face requires CVS to produce documents and information through January 28, 2025. The FTC asks that the Court order a cutoff date of December 31, 2024, and CVS asks for December 31, 2023. CVS seems to argue that any cutoff date after April 1, 2024—when CVS collected the bulk of the custodial documents thus far—would be unduly burdensome. See Opp’n at 17–18.

A district court has “discretion” “to impose reasonable conditions and restrictions with respect to the [CID] . . . if the demand is unduly burdensome.” Texaco, 555 F.2d at 881. “The burden of showing that the request is unreasonable is on the subpoenaed party” and “is not easily met where, as here, the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose.” Id. at 882. CVS must demonstrate that compliance “threatens to unduly disrupt or seriously hinder normal operations of a business,” id.—a burden that is “difficult . . . to meet,” FTC v. Invention Submission Corp., Misc. A. No. 89-272 (RCL), 1991 WL 47104, at \*3 (D.D.C. Feb. 14, 1991).

CVS has not met this high burden. CVS argues that a December 2024 cutoff date would impose an undue burden because CVS had “collected the bulk of the custodial files for the CID [in early April 2024] in reliance on the FTC’s March 28, 2024 representation that a cut-off date of December 31, 2023 would suffice.” Opp’n at 8–9.<sup>4</sup> Hence, requiring CVS to conduct another

---

<sup>4</sup> CVS also argues that the parties modified the CID’s cutoff date to December 31, 2023, in a March 28, 2024, e-mail. Opp’n at 3 n.4. But that e-mail stated that the FTC offered a “counterproposal” for custodians and search terms and, “[t]o be clear, it does not suggest modifying or limiting our CID as written; rather, it suggests how CVS could respond to [the] CID.” E-mail from Evan J. Cartagena, FTC, to Rani A. Habash, Dechert LLP (Mar. 28, 2024) [ECF No. 9-2] at 1; see also Reply at 4 (noting that CVS rejected the March 28, 2024 proposal and the FTC repeatedly informed CVS through meet-and-confers and a June 2024 letter that the parties had not reached agreement to modify the cutoff date); Wilke Decl. ¶ 28 (noting in August 2024, “CVS—for the first time—requested a formal modification to the CID’s end date for custodial documents” but later rejected the FTC’s proposal). The Court therefore analyzes only whether the December 31, 2024, cutoff date would impose an undue burden on CVS.

custodial search “would impose [a] disproportionately greater burden on CVS” by requiring “multiple months” of additional work costing the company more than \$1 million. Id. at 18. The Court appreciates that CVS is engaging with the FTC on multiple fronts, including a trial scheduled for August 2025, see id. at 9–12, but arguments that “compliance would be extremely costly, labor intensive, and in certain cases, impossible” do not rise to the level of unduly burdensome. Invention Submission Corp., 1991 WL 47104, at \*3. Moreover, the FTC has mitigated the CID’s burdens in other ways. As CVS emphasizes, the FTC has permitted CVS to identify a substantial number of previously produced responsive documents rather than producing those documents anew. See, e.g., Opp’n at 15–16; Chase Decl. ¶¶ 10, 20–29. And the parties also compromised on the custodians and search terms. See, e.g., Opp’n at 6.

Because CVS has failed to demonstrate harm exceeding additional compliance costs, the FTC’s “inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose,” and the FTC has already “significantly lightened [CVS’s] burden of production by modifying several of the specifications,” the Court concludes that a cutoff date of December 31, 2024, is not an undue burden. Invention Submission Corp., 1991 WL 47104, at \*3 (quoting Texaco, 555 F.2d at 882). Instead, any further costs “are simply unavoidable expenses ‘necessary in furtherance of the agency’s legitimate inquiry and the public interest.’” Id. (quoting Texaco, 555 F.2d at 882).<sup>5</sup>

\* \* \* \* \*

For the foregoing reasons, it is hereby

**ORDERED** that CVS’s request for leave to file a surreply is **GRANTED**; it is further

---

<sup>5</sup> CVS also argues briefly that a December 31, 2024, cutoff date would be unreasonably broad because 2024 data does not have “any identified benefit to the FTC.” See Opp’n at 18. But the FTC contends, and the Court agrees, that calendar year 2024 data is relevant to assessing CVS’s current business practices, which is within the proper scope of the CID. See, e.g., CID at 28. Otherwise, the most recent information that CVS provides will be more than one year old.

