

June 22, 2016

The Honorable Renata Hesse
Principal Deputy Assistant Attorney General, Antitrust Division
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

RE: Proposed Aetna-Humana and Anthem-Cigna Mergers

Dear Assistant Attorney General Hesse:

As you know, the proposed Aetna-Humana and Anthem-Cigna mergers are currently undergoing review by the Department of Justice (“DOJ”). We are deeply concerned by the detrimental impact that both of these mergers would have on premium prices, jobs and health care costs for consumers and businesses.

Vigorous competition in any market yields the best products for consumers at the lowest price. Yet, these mergers would occur against a landscape of a health insurance industry that is already highly concentrated. After a number of mergers in recent years, the three largest insurers hold 80 percent or more of the market share in almost two-thirds of states.¹ This trend toward consolidation in the health insurance market has resulted in these few, large insurers having significant leverage – and with it, the potential for market power abuse.

Careful consideration of the impact of even more consolidation and market power concentration if the Aetna-Humana and Anthem-Cigna mergers are approved indicates that no divestitures or behavioral remedies can fully replace the lost competition. Therefore, we urge the DOJ to challenge these mergers from proceeding and to prevent the damage they would cause to competition and consumers. Highly concentrated markets rarely benefit consumers, and we believe that merging four of the five largest national health insurers will likely increase premium prices and health care costs to consumers and businesses, diminish competition and choice, and decrease access to quality health care.

I. Both mergers—or either standing alone—would substantially harm competition.

History demonstrates that consolidation of this kind drives up prices for consumers. Past mergers have led to significant premium increases for customers of the merging companies. After the Aetna-Prudential merger, for example, premiums rose by 7% and health insurance costs to consumers increased by approximately \$34 billion.² Consolidation also generates troubling spillover effects, such as

¹ Government Accountability Office, *Private Health Insurance: Concentration of Enrollees Among Individual, Small Group, and Large Group Health Insurers from 2010-2013*, at 4 (2014), available at <http://www.gao.gov/assets/670/667245.pdf>.

² Letter from Am. Antitrust Inst. to Asst. Att’y Gen. William J. Baer, *Re: Antitrust Review of the Aetna-Humana and Anthem-Cigna Mergers* 4-5 (Jan. 11, 2016) [hereinafter AAI Letter to DOJ], available at

significantly higher premiums demanded by non-merging firms.³ Beyond price effects, consolidation is linked to lower-quality insurance products, chilled innovation, and even increased patient mortality rates.⁴

These mergers would make an already concentrated market significantly less competitive. Dr. Leemore Dafny recently testified before the Senate Judiciary Subcommittee on Antitrust that the four largest insurers already capture an estimated 83% of the private insurance market.⁵ Should these mergers be approved, just three firms would control 91% of the national market.⁶ Aetna-Humana would serve 33 million patients, and Anthem-Cigna would surpass United Healthcare to become the largest health insurer in the U.S., with 53 million patients.⁷

A more localized analysis also demonstrates the dangers these mergers pose to competition. Should the mergers be approved, competition would be reduced in 126 of 388 metropolitan statistical areas (“MSAs”) in the country.⁸ Moreover, aside from their impact on markets in which the merging companies currently compete, the proposed mergers would diminish the merging companies’ incentive to expand into new markets.⁹ The impact of this loss of potential new competition could be particularly harmful to consumers who purchase health insurance through the numerous health exchanges set up by the Affordable Care Act (“ACA”). Recent studies have corroborated the link between more competition and lower premiums in the ACA marketplaces, finding that the inclusion of just one additional insurer has helped to drive down prices.¹⁰

The merging companies argue that they will use their enhanced market power to secure better deals for consumers by negotiating lower costs and higher quality patient care.¹¹ However, the evidence

http://www.antitrustinstitute.org/sites/default/files/Health%20Insurance%20Ltr_1.11.16.pdf; Leemore Dafny et al., *Paying a Premium on Your Premium? Consolidation in the US Health Insurance Industry*, 102 AM. ECON. REV. 1161, 1163 (2012).

³ Dafny et al., *supra* note 2, at 1179.

⁴ AAI Letter to DOJ, *supra* note 1, at 5. See also Leemore Dafny & Christopher Ody, *New Health Care Symposium: No Evidence That Insurance Market Consolidation Leads to Greater Innovation*, Health Affairs Blog (Feb. 24, 2016), <http://healthaffairs.org/blog/2016/02/24/no-evidence-that-insurance-market-consolidation-leads-to-greater-innovation>.

⁵ *Examining Consolidation in the Health Insurance Industry and its Impact on Consumers Before the S. Comm. on the Judiciary*, 114 Cong. 5 (2015) (testimony of Leemore Dafny), available at <http://www.judiciary.senate.gov/imo/media/doc/09-22-15%20Dafny%20Testimony%20Updated.pdf>.

⁶ Anthem, Inc., *Anthem-Cigna: A Compelling Combination* (Form 8-K, EX-99.2), at 13 (June 22, 2015), available at <http://services.corporate-ir.net/SEC.Enhanced/SecCapsule.aspx?c=130104&fid=10185841>.

⁷ Press Release, Aetna, *Aetna to Acquire Humana for \$37 Billion, Combined Entity to Drive Consumer-Focused, High-Value Health Care* (July 3, 2015), <https://news.aetna.com/news-releases/aetna-to-acquire-humana-for-37-billion-combined-entity-to-drive-consumer-focused-high-value-health-care>; Press Release, Anthem & Cigna, *Anthem Announces Definitive Agreement to Acquire Cigna Corporation* (July 24, 2015), http://betterhealthcaretogether.com/content/uploads/2015/10/Better-Healthcare-Together_Press-Release.pdf.

⁸ Letter from Consumer Fed’n of Am. to The Honorable Michael S. Lee, *Re: The Anthem-Cigna and Aetna-Humana Mergers* (Sept. 21, 2015) [hereinafter CFA Letter to Lee], <http://consumerfed.org/testimonial/6205>.

⁹ AAI Letter to DOJ, *supra* note 1, at 7-8.

¹⁰ E.g., Topher Spiro et al., *Bigger Is Not Better: Proposed Insurer Mergers Are Likely to Harm Consumers and Taxpayers*, CENTER FOR AM. PROGRESS 4 (Jan. 21, 2016) [hereinafter CAP Study], available at <https://cdn.americanprogress.org/wp-content/uploads/2016/01/20122028/InsuranceMergers-brief3.pdf>.

¹¹ *Examining Consolidation in the Health Insurance Industry and its Impact on Consumers Before the S. Comm. on the Judiciary*, 114 Cong. 8 (2015) (testimony of Mark T. Bertolini, Chairman & CEO, Aetna), available at <http://www.judiciary.senate.gov/imo/media/doc/09-22-15%20Bertolini%20Testimony.pdf>; *Examining Consolidation in the Health Insurance Industry and its Impact on Consumers Before the S. Comm. on the Judiciary*, 114 Cong. 4 (2015) (testimony of Joseph Swedish, President & CEO, Anthem), available at <http://www.judiciary.senate.gov/imo/media/doc/09-22-15%20Swedish%20Testimony.pdf>.

overwhelmingly suggests that few if any cost savings secured by the merging firms through the exercise of market power will be passed on to consumers.¹² More troubling is that the exercise of buyer power by the merged firms may exert a “waterbed effect,” forcing providers to increase costs charged to other non-dominant insurers.¹³ Like the DOJ, we are skeptical of the “power buyer” defense.¹⁴ And our misgivings were not allayed at the Senate Judiciary Subcommittee on Antitrust hearing, where the acquiring firms repeatedly deflected questions regarding whether savings would be passed on to consumers.¹⁵

II. The Aetna-Humana merger would particularly harm competition in the Medicare Advantage market.

We are not persuaded by the merging firms’ claim that Aetna-Humana would comprise only 8% of the Medicare market. Since consumers do not view Medicare and Medicare Advantage (MA) as meaningful substitutes, they comprise distinct product markets. The DOJ has already defined MA as a product market distinct from Medicare, because a sufficient number of MA enrollees are unlikely to switch to Medicare in response to a small but significant and non-transitory increase in price (“SSNIP”) in their MA plan. This conclusion is consistent with independent research showing that enrollees of an eliminated MA plan tend to select another MA plan rather than defaulting to traditional Medicare.

These anti-competitive outcomes would be exacerbated by Aetna and Humana’s significant shares of the MA market, where 97% of counties are already highly concentrated.¹⁶ The merged firms would capture 26% of the MA market and enhance their market power in 58 MSAs.¹⁷ According to one study, premiums could increase by up to \$302 for current Aetna customers and by \$43 for current Humana customers in their 562 overlapping counties.¹⁸

We are also unconvinced by Aetna’s claim that its commercial insurance capabilities and Humana’s MA capabilities are purely “complementary.” After all, while Aetna serves the commercial market, MA contracts still account for 26% of the insurer’s business. And while Humana serves the MA market,

¹² AAI Letter to DOJ, *supra* note 1, at 9; Thomas Greaney, *New Health Care Symposium: Dubious Health Care Merger Justifications—The Sumo Wrestler And ‘Government Made Me Do It’ Defenses*, Health Affairs Blog (Feb. 24, 2016), <http://healthaffairs.org/blog/2016/02/24/dubious-health-care-merger-justifications-the-sumo-wrestler-and-government-made-me-do-it-defenses>.

¹³ See CFA Letter to Lee, *supra* note 7; *Examining Consolidation in the Health Insurance Industry and its Impact on Consumers* Before the S. Comm. on the Judiciary, 114 Cong. 5 (2015) (spoken testimony of George Slover, Consumers Union), “Some say giving insurers more market power will offset market power of hospitals and doctor groups. But the answer is not to give insurers their own market power, and then hope they’ll use it to protect us. That’s the sumo-wrestler theory; adding market power at one place in the supply chain to stand up to it somewhere else. But the result is more market power. The two sumo wrestlers end up shaking hands, finding a path to enrich them both. And then everyone else -- consumers, and smaller hospitals, local clinics, and medical practices -- gets tossed around and flattened.”; See, e.g., Greaney, *supra* note 8 (discussing the notorious “handshake that made history” between Partners HealthCare and Blue Cross Blue Shield of Massachusetts).

¹⁴ Greaney, *supra* note 8.

¹⁵ Anna Wilde Mathews & Brent Kendall, *Health Insurers Aetna, Anthem Defend Deals, Say Markets Will Stay Competitive*, WALL STREET JOURNAL (Sep. 22, 2015), <http://www.wsj.com/articles/aetna-anthem-defend-insurance-deals-contend-markets-will-remain-competitive-1442938512>; Robert Pear, *Health Insurers Seeking Mergers Play Down Antitrust Concerns*, NEW YORK TIMES (Sept. 22, 2015), <http://www.nytimes.com/2015/09/23/business/aetna-anthem-congress-health-insurers-mergers.html>.

¹⁶ AAI Letter to DOJ, *supra* note 1, at 6.

¹⁷ *Id.* at 2, 6.

¹⁸ CAP Study, *supra* note 5, at 2, 7.

commercial/administrative contracts nevertheless account for 24% of its business.¹⁹ Given the proven capabilities of both firms to serve both commercial and MA markets, we are deeply concerned that a merger would foreclose many opportunities for Aetna to compete in Humana's current MA markets and for Humana to compete in Aetna's current commercial markets.

III. The Anthem-Cigna merger would drastically reduce competition across both Blue and non-Blue markets.

The Anthem-Cigna merger also raises serious anticompetitive concerns. The merger would increase the total number of covered lives under Blue Cross Blue Shield ("the Blue system") to 120 million, and it would directly eliminate competition in the national market where Cigna has 3.76 million national accounts.²⁰ If allowed, this transaction would enhance market power in 10 states,²¹ and according to the American Hospital Association it would be presumed likely to enhance market power in 600 MSAs and rural counties in the United States²² – including three states where the commonly accepted measure of market concentration vastly exceeds the DOJ's Horizontal Merger Guidelines.²³ A larger, more powerful Anthem-Cigna could have greater ability and incentive to engage in well-documented anticompetitive tactics, such as paying a new entrant to stop competing or using most favored nation (MFNs) contracts with providers to raise costs for rival insurers.²⁴

Although Anthem claims that its primarily national accounts do not overlap with Cigna's primarily local accounts, a merger would severely reduce competition not only in markets where they both compete, but also in *any* local market where Cigna currently competes or could compete.²⁵ With only 64.6% of its members enrolled in Blue plans, Anthem-Cigna would violate the Blue system's "two-thirds rule," which requires a Blue entity to generate at least two-thirds of its revenue from its Blue plans.²⁶ Anthem-Cigna might attempt to comply with the two-thirds rule by expanding its Blue business or by converting some Cigna plans to Blue plans. But, the Blue system's non-compete rule prohibits it from offering Blue plans outside of its assigned service areas, which could limit expansion.²⁷ As a result of these tensions, a merged Anthem-Cigna's strategy might be to slow the growth of its non-Blue business. This could take the form of offsetting growth in a non-Blue market by withdrawing from another non-Blue market.²⁸ As a result, it would be exceedingly difficult for Cigna to vigorously compete against Blue or non-Blue rivals in *any* local market.²⁹

¹⁹ Melanie Evans, *An insurer's transformation: Humana's evolution into Medicare powerhouse offers strong lure to Aetna*, Modern Healthcare (Jul. 11, 2015) <http://www.modernhealthcare.com/article/20150711/MAGAZINE/307119981>.

²⁰ Letter from WhatleyKallas, LLP, to The Honorable William Baer, *Untitled 3-4* (Aug. 13, 2015) [hereinafter WhatleyKallas Letter to Baer], available at www.changinglandscape.org/content/dojanthemcignamerger.pdf; Letter from Am. Hosp. Ass'n. to The Honorable William Baer, *Untitled 2-3* (Feb. 29, 2016) [hereinafter AHA Letter to Baer 2.9.16], available at <http://www.aha.org/advocacy-issues/letter/2016/160229-let-hatton-baer.pdf>.

²¹ David McLaughlin, *Anthem, Aetna Deals Threaten Competition Across U.S., AMA Says*, Bloomberg (Sept. 8, 2015), <http://www.bloomberg.com/news/articles/2015-09-08/anthem-aetna-deals-threaten-competition-across-u-s-ama-says>.

²² AAI Letter to DOJ, *supra* note 1, at 2.

²³ *Markets where an Anthem-Cigna merger warrants antitrust scrutiny*, AM. MEDICAL ASS'N. 3 (Sept. 8, 2015) [hereinafter AMA Anthem-Cigna Study], available at <http://www.ama-assn.org/resources/doc/washington-x-pub/competition-anthem-cigna-merger-full.pdf>.

²⁴ AHA Letter to Baer 2.9.16, *supra* note 23, at 14, 16.

²⁵ WhatleyKallas Letter to Baer, *supra* note 23, at 2.

²⁶ *Id.* (noting that the two-thirds rule excludes revenue generated from Medicare and Medicaid members).

²⁷ *Id.* at 1-2.

²⁸ *Id.* at 2-3.

²⁹ AHA Letter to Baer 2.9.16, *supra* note 23, at 13.

IV. Divestiture would not be an effective remedy for either merger.

Divestitures have proven to be an ineffective remedy for restoring competition. Recent high-profile failures of divestitures include the Safeway-Albertsons and Hertz-Dollar Thrifty transactions, where the mergers were consummated but the remedies failed to restore competition. Relatedly, the inability to craft an effective remedy led, in part, to the decisions to challenge the Sysco-US Foods and Staples-Office Depot mergers. In each case, problems with finding viable buyers for divested assets have presented significant problems.³⁰ Divestitures designed to restore competition in the health care industry run an especially high risk of failure.

While the merging parties claim that insurance solvency requirements and licensing regulations distinguish their transactions from non-insurance mergers, their own divestiture histories strongly suggest otherwise:

- For example, Aetna increased premiums by an average of 7% after acquiring Prudential in 1999, despite complying fully with divestiture requirements.³¹
- Similarly, Humana made divestitures to three separate buyers—including Cigna—in order to acquire Arcadian in 2012.³² In less than three years, Cigna had exited 56% of its acquired markets, and, as of January 2016, remains suspended by the Centers for Medicare & Medicaid Services (“CMS”) for “widespread and systematic failures impacting [its] enrollees’ ability to access medical services.”³³ Likewise, WellCare Health Plans lost 50% of its acquired membership in less than two years and exited all of its acquired markets in January 2015.³⁴ Only one of the three buyers, Vantage Health Plan, has managed to remain viable, even though all three buyers had been identified by the DOJ as “long-term, viable competitor[s] capable of preserving competition in the relevant markets.”³⁵

History suggests that restoring competition is especially difficult in the health insurance industry. Divesting to an incumbent buyer may actually worsen competitive conditions³⁶ and a de novo entrant lacks the economies of scale to compete effectively against entrenched larger incumbents, increasing the likelihood of failure. We are not convinced that any divestitures required of the merging parties will succeed today, given that they have so clearly failed in the recent past.

Finally, in addition to the antitrust legal standard, a critical point to note is the harmful impact these mergers could have on job cuts, wage stagnation, higher health care prices, and the nation’s overall economy. History shows that mergers can frequently cause job losses as the firms eliminate supposedly redundant positions and consolidate operations. Economists are also increasingly warning that excess monopoly power concentrates profits and power in fewer hands at the expense of wage and job growth.³⁷ The fact that these mergers are occurring in a rapidly consolidating health insurance industry

³⁰ AAI Letter to DOJ, *supra* note 2, at 14.

³¹ *Id.* at 14.

³² *Aetna/Humana: A Closer Look at DOJ’s Most Recent Medicare Advantage Merger Enforcement Action—Substantial Member Losses, Rapid Market Exits, CMS Sanctions Raise Questions about Divestiture Solutions’ Viability*, THE CAPITOL FORUM 1 (Feb. 3, 2016), available at <https://thecapitolforum.com/wp-content/uploads/2013/12/Aetna-Humana-2016.02.03.pdf>.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 1-2.

³⁶ *Id.* at 15.

³⁷ Paul Krugman, *Robber Baron Recessions*, N.Y. TIMES (April 18, 2016), available at <http://www.nytimes.com/2016/04/18/opinion/robber-baron-recessions.html?smid=pl-share>.

is particularly troubling, as it raises the specter of higher health costs for small and medium sized businesses, making it more difficult to expand and hire more workers. Families facing higher premiums may similarly be harder pressed to spend household income in their local economies.

For all of the above reasons, we urge you to challenge the proposed mergers of Aetna-Humana and Anthem-Cigna.

Sincerely,



RICHARD BLUMENTHAL
United States Senator



AL FRANKEN
United States Senator



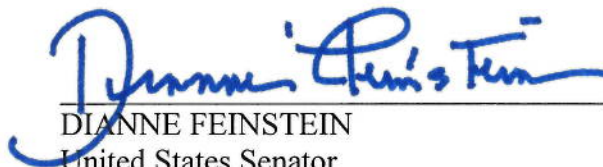
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