From: James Kovacs [james.kovacs@dcantitrustlaw.com]
Sent: Wednesday, December 16, 2015 4:35 PM
To: Aetna Hearing; Anthem Hearing
Cc: David Balto
Subject: Comment Regarding Insurance Mergers of Anthem-Cigna and Aetna-Humana
Attachments: Comment to the Florida Office of Insurance Regulation--Anthem-Cigna and Aetna-Humana Mergers.pdf

To whom it may concern,
Please find the attached consumer and union comment regarding the health insurance mergers of Anthem-Cigna and Aetna-Humana (Public hearings on December 7th and 8th). The comment is signed by the following groups: Consumers Union, Florida CHAIN, Florida Rural Health Association, U.S. PIRG, 1199 SEIU United Healthcare Workers East - Florida Region, Consumer Watchdog, Florida Policy Institute, and Florida PIRG.

If you have any questions about the content of this comment, please contact counsel of record:

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Thank you very much.

Sincerely,
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December 16, 2015

Commissioner Kevin McCarty
Florida Office of Insurance Regulation
200 East Gaines Street
Tallahassee, FL 32399

Re: Anthem-Cigna and Aetna-Humana Public Comment

Commissioner McCarty:

The undersigned consumer groups and unions have long been concerned with the competitive landscape within the health care industry. In order to improve health care and better serve patients, there must be competition within different health care markets that offers ample choice, high quality, and transparency. Competition is the key and the driving force to ensure better care at a lower price for all.

We write to you to raise concerns over the proposed consolidation in Florida's health insurance markets. As detailed below, the proposed mergers between Anthem-Cigna and Aetna-Humana will reduce the number of health insurers within Florida and could substantially lessen competition for millions of consumers. Competition between health insurers is vital to ensuring lower premiums, improving quality of care, and promoting access and choice.

We applaud the Commissioner and the Florida Office of Insurance Regulation for holding two separate hearings, one for each merger. Under Florida Law, the Florida Office of Insurance Regulation is empowered to prevent or remedy insurance mergers where the acquisition would substantially lessen competition within the state or would tend to create a monopoly.[1] While we will not offer an opinion if the mergers of Anthem-Cigna and Aetna-Humana would violate Florida Law,[2] we write this comment to raise concerns about these two mergers and health insurance consolidation in general. As detailed throughout the comment, ensuring and increasing competition within health insurance markets is critical to improving care and lowering costs.

[1] *See* Fla. Stat. § 628.461(8).
[2] The National Association of Insurance Commissioners' Model Insurance Holding Company System Regulatory Act provides detailed analysis of the "Competitive Standard" that can be used to investigate if a health insurance merger is anticompetitive. MODEL INS. HOLDING CO. SYS. REGULATORY ACT § 440-1 (Nat'l Ass'n of Ins. Comm'rs 2015)

The below comment will discuss (1) concentration and the impact of both mergers, (2) a merger's impact on consumer costs, (3) the role of efficiencies, (4) network adequacy, (5) entry and potential competition, and (6) the usage of divestitures and other remedies.

I. Florida Market Impact of the Anthem-Cigna and Aetna-Humana Mergers

The merging insurance companies, Anthem, Cigna, Aetna, and Humana, all offer insurance products within the state of Florida. According to data they presented, the merging companies cover a number of commercial lives within the state, with Aetna having 1.3 million, Cigna 1.16 million, Humana 547,888, and Anthem 471,764.[3] As a result of these two mergers, four companies, Florida Blue, UnitedHealth, Aetna, and Anthem would control just under 90 percent of the Florida commercial market, with Aetna having 19.3 and Anthem having 17 percent market share respectively.[4] Along with increasing market share within the general commercial market, the mergers could substantially lessen competition for a number of insurance products.

According to a recent report by Health Affairs relying on data from National Association of Insurance Commissioners ("NAIC"), the mergers could diminish competition within Florida's administrative-services-only ("ASO") market.[5] The ASO market relies on predominantly large employers that assume the responsibility for their employees' health care costs, but purchase administrative services through an insurer. Post-mergers, the NAIC data shows a 47 percent increase in concentration in Florida's Commercial ASO insurance market, the second highest in the country.[6]

Within local metropolitan service areas throughout Florida, post-mergers market shares and concentration for other commercial insurance would also be quite high. Data offered by the American Medical Association shows that a combined Aetna-Humana would presumptively enhance the combined firm's market power for different commercial products in Jacksonville, Sarasota, and Tampa.[7]

Some of the most significant competitive overlap concerns occur within the Medicare Advantage space. According to the non-partisan Kaiser Family Foundation, the dominant Medicare Advantage ("MA") provider in Florida is Humana, covering 37 percent of the nearly 1.6 million Floridians enrolled in a MA plan.[8] Combining Aetna and Humana would further extend Aetna's dominant position in the market and would give the combined entity over half of all Medicare Advantage enrollees in five Florida counties: Broward, Franklin, Palm Beach, Pasco, Volusia.[9] To counter the dominant MA position post-merger, the merging companies have offered data suggesting that traditional Medicare is a substitute for MA plans.[10] However, traditional

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[3] *See* Testimony of Thomas R. McCarthy, Hearing Before the Florida Office of Insurance Regulation (Dec. 7, 2015), *available at* http://goo.gl/WuII6e.
[4] *Id.*
[5] Douglas Hervey, David Muhlestein, & Austin Bordelon, HEALTH AFFS. (Dec. 1, 2015), http://goo.gl/OT70Nl.
[6] *Id.*
[7] *Markets where an Aetna-Humana merger warrants antitrust scrutiny,* AM. MED. ASSOC. (2015).
[8] Gretchen Jacobsen, Anthony Damico, & Tricia Neuman, Data Note: Medicare Advantage Enrollment, by Firm, 2015, KAISER FAMILY FOUND. (July 14, 2015), http://goo.gl/gJ1xnz.
[9] *Id.*
[10] McCarthy, *supra* note 3 (including Traditional Medicare in Medicare enrollment data).

Medicare is not a substitute for consumers seeking access to a MA plan. As noted in two separate Department of Justice ("DOJ") actions, MA plans represent their own "relevant product market," as they offer a series of additional benefits beyond those of traditional Medicare.[11] Therefore, traditional Medicare should not be considered as an alternative when analyzing these mergers.

II. Health Insurance Merger Impact on Consumer Costs

Consumers are concerned that increased market power post-mergers of Anthem-Cigna and Aetna-Humana will lead to rising costs, i.e. higher premiums and out-of-pocket charges. For Floridians, health insurance premiums continue to rise. According to data from the Florida Office of Insurance Regulation, even after rate review conducted by the Office, 2016 premiums within the individual commercial markets will be 9.5 percent higher than in 2015.[12]

There is little dispute that there is a direct correlation between insurance concentration and higher premiums.[13] Mergers between dominant insurers can make matters far worse. According to one health economics expert at the University of Southern California's Schaeffer Center for Health Policy and Economics, "when insurers merge, there's almost always an increase in premiums."[14] Two separate, retrospective economic studies on health insurance mergers found significant premium increases for consumers post-merger.[15] There is also economic evidence that a dominant insurer can increase rates 75 percent higher than smaller insurers within the same state.[16] The insurance mergers could also impact out-of-pocket prices as patients see increases in deductibles or other insurance related costs.[17]

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[11] Competitive Impact Statement, *United States v. UnitedHealth Group Inc. and Sierra Health Servs. Inc.*, 1:08-CV-00322 (D.D.C. Feb. 25, 2008) ("Due in large part to the lower out-of-pocket costs and richer benefits that many Medicare Advantage plans offer seniors traditional Medicare, seniors in Las Vegas area would not likely switch away from Medicare Advantage plans to traditional Medicare"); *see also* Competitive Impact Statement, *United States v. Humana Inc. and Arcadian Mang. Servs., Inc.*, No. 1:12-cv-00464 (D.D.C. March 27, 2012) (when finding MA plans as their own relevant product market noted that MA plans "offer substantially richer benefits at lower costs to enrollees than traditional Medicare does").

[12] Press Release, Florida Office of Insurance Regulation, Office Announces 2016 PPACA Individual Market Health Insurance Plan Rates to Increase 9.5% on Average (Aug. 26, 2015), *available at* http://goo.gl/BoS0XG (Aetna received a 13.9 percent increase for HMO and 15.5 percent for PPO, Cigna received a 13.2 percent increase, and Humana received a 2.3 percent increase).

[13] *See* Leemore Dafny, *Are Health Insurances Markets Competitive?*, 100 AM. ECON. REV. 1399 (2010).

[14] David Lazarus, *As Health insurers merge, consumers' premiums are likely to rise*, L.A. TIMES (July 10, 2015 4:00 AM), http://goo.gl/nF7HRS.

[15] *See* Leemore Dafny *et al.*, *Paying a Premium on Your Premium? Consolidation in the US Health Insurance Industry*, 102 AM. ECON. REV. 1161 (2012) (finding that post-Aetna-Prudential merger, in 139 separate markets, premiums rose by roughly seven percent); *see also* Jose Guardado et al. *The Price Effects of a Large Merger of Health Insurers: A Case Study of United-Sierra*, 1(3) HEALTH MANAGEMENT, POL'Y & INNOVATION 1 (2013) (finding a 13.7 increase in premiums post-merger of UnitedHealth and Sierra).

[16] Eugene Wang and Grace Gee, *Larger Insurers, Larger Premium Increases: Health insurance issuer competition post-ACA*, TECH. SCI. (Aug. 11, 2015), *available at* http://goo.gl/918ULo.

[17] *See generally* Leemore Dafny, Evaluating the Impact of Health Insurance Industry Consolidation: Learning from Experience, COMMONWEALTH FUND (Nov. 20, 2015), http://goo.gl/xRYb5x; *see also* Korin Miller, 6 Ways the Big Health Insurance Mergers Will Affect Your Coverage, YAHOO HEALTH (July 24, 2015), https://goo.gl/qLioCy (noting that "out-of-pocket payments could increase" because insurance coverage could limit certain services or number of visits forcing patients to pay more).

In contrast, there are no economic studies or evidence indicating that insurance mergers lead to lower prices for consumers. However, that has not prevented the merging companies from suggesting that merger will create cost savings which will be passed along to consumers.[18] Much of these supposed savings are attributed to the new merged firm's expected greater buying power, also known as monopsony power. According to proponents of the mergers, a dominant insurer can use monopsony power to lower provider reimbursement rates and pass the savings along to consumers.[19] But, there is no evidence consumers actually recoup any of these potential savings. In fact, Professor Thomas Greaney, a leading health antitrust scholar, has noted that there is actually "little incentive [for an insurer] to pass along the savings to its policyholders."[20] More likely, the now-dominant insurer would exploit its monopsony power to benefit only itself, closing off choices, and pressuring providers to cut corners on quality of care in order to meet its demands – the opposite of what consumers need.[21]

Current market regulations will not deter an insurer from raising consumer costs. Some supporters of these mergers have argued that the medical loss ratio ("MLR") "directly limits the level of insurer profits," thus protecting consumers from price increases.[22] While MLR is an important tool that requires health insurers spend 80 to 85 percent of net premiums on medical services and quality improvements, it will not adequately protect consumers from anticompetitive harm. Along with MLR not applying to self-insured plans, and the potential for MLR to be gamed by insurers to reduce consumer welfare, "MLR does not guarantee that dominant insurers will not raise premiums and as such, it is not a substitute for the pressures toward lower costs and higher quality created by a competitive market."[23]

III. Health Insurance Mergers Efficiencies

A potential benefit of mergers is the enhancement of the new company's ability to compete, by strengthening its capacity to drive down price, improve quality, enhance services, or create new products.[24] The insurers involved in both of these mergers have argued that their merger would

[18] *See* Testimony of Anthem, Hearing Before the Florida Office of Insurance Regulation (Dec. 8, 2015), *available at* http://goo.gl/V2uqFs ("medical cost savings due to the transaction will be passed on to customers").
[19] *See* Victoria R. Fuchs and Peter V. Lee, *A Health Side of Insurer Mega-Mergers*, WALL ST. J. (Aug. 26, 2015, 6:36 PM), http://goo.gl/hMhuzI.
[20] *See* Thomas Greaney, *Examining Implications of Health Insurance Mergers*, HEALTH AFFS. (July 16, 2015), http://goo.gl/ETT1DB.
[21] *See Health Insurance Industry Consolidation: Hearing before the Sen. Comm. on the Judiciary, Subcomm. on Antitrust, Competition Policy, and Consumer Rights*, 114th Cong. (Sept. 22, 2015) (testimony of George Slover, Consumers Union), *available at* http://goo.gl/ojiyge ("[b]ut a dominant insurer could force doctors and hospitals to go beyond trimming costs, to cut costs so far that it begins to degrade the care and service they provide below what consumers value and need").
[22] *E.g., Effects on Competition of Proposed Health Insurer Mergers: Hearing before Comm. on the Judiciary Subcomm. on Regulatory Reform, Commercial and Antitrust Law*, 114th Cong. (Sept. 29, 2015) (testimony of Mark T. Bertolini, Chairman & CEO of Aetna, Inc.), *available at* http://goo.gl/TokebO.
[23] *Effects on Competition of Proposed Health Insurer Mergers: Hearing Before Comm. on the Judiciary Subcomm. on Regulatory Reform, Commercial and Antitrust Law*, 114th Cong. (Sept. 29, 2015) (testimony of Jamie S. King, Professor University of California, Hastings College of Law), *available at* http://goo.gl/Gje3Ci.
[24] U.S. Dep't. of Justice Fed. Trade Comm'n, Horizontal Merger Guidelines at § 6.4 (2010), *available at* https://goo.gl/Hh3dks.

create substantial efficiencies leading to improved health care quality and lower costs.[25] The issue becomes if it is really necessary for the insurers to merge to achieve these efficiencies, and if the stated efficiencies will actually benefit consumers.[26]

One of the more highly touted efficiencies of these mergers is the supposed cost-savings associated with the mergers. According to Aetna, the merger with Humana will create $1.25 billion in "synergy opportunities" and "operating efficiencies."[27] However, while the merging insurers have offered little details about the supposed savings, the bigger question is if consumers would see any benefit themselves from these savings, if they do result, in the form of lower costs. There is no evidence or scholarly studies showing that insurance mergers lead to savings for consumers. In fact, as previously noted, scholarly evidence indicates that health insurance mergers lead to higher consumer costs, not increased consumer savings.[28]

A more abstract argument raised by the merging insurers is that the mergers will allow the merged entities to improve innovation. Innovation within health delivery models is critical. Specifically, there is a need to change health care from the current volume-based system to a patient-oriented, value-based delivery model that incentivizes insurers and providers to improve care and lower costs. But, in Florida, these mergers will create new, dominant insurance entities with little incentive to improve care. When examining these mergers, industry experts have suggested that the mergers could "undercut" the critical innovation efforts needed to improve health care.[29] Such a loss in innovation would harm consumers as insurers compete less with providers to offer new insurance products.

Furthermore, the insurers have not offered sufficient details or analysis demonstrating how innovation will improve post-mergers. In fact, reviewing their testimony and data, Professor Dafny found it speculative to argue that the mergers would enhance the insurers' ability to develop and implement new value-based payment agreements, because there is no evidence a merger is required to carry out such initiatives.[30] Moreover, at a recent conference, Dafny further noted statistical evidence shows that concentrated insurance markets often have less innovative insurance product offerings, meaning mergers between insurers will not likely lead to higher quality or more innovative insurance products.[31]

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[25] *See* Testimony of Anthem, *supra* note 18; see also Testimony of Aetna, Hearing Before Florida Office of Insurance Regulation (Dec. 7, 2015), *available at* http://goo.gl/5bjXRu.
[26] Horizontal Merger Guidelines, *supra* note 24 at § 10 (to rebut a presumption of competitive harm, efficiencies must be merger-specific, cognizable, and substantiated).
[27] Press Release, Aetna, Aetna to Acquire Humana for $37 Billion, Combined Entity to Drive Consumer-Focused, High-Value Health Care (July 3, 2015), *available at* https://goo.gl/dktKof; *see also* Testimony of Aetna, *supra* note 25 ("$1.25 billion in operating cost savings projected, to be fully realized in 2018).
[28] *See* Section II.
[29] *See* Reed Abelson, *With Merging of Insurers, Questions for Patients About Costs and Innovation*, N.Y. TIMES (July 5, 2015), http://goo.gl/NPp38y.
[30] *Health Insurance Industry Consolidation: Hearing before the Sen. Comm. on the Judiciary, Subcomm. on Antitrust, Competition Policy, and Consumer Rights*, 114th Cong. 15 (Sept. 22, 2015) (testimony of Professor Leemore Dafny, Professor Northwestern University), *available at* http://goo.gl/mhExI6.
[31] Leemore Dafny, Comments at The New Health Care Industry: Integration, Consolidation, Competition in the Wake of the Affordable Care Act (Nov. 13, 2015), *available at* https://goo.gl/GNIvVj.

IV. Network Adequacy

As part of part their presentation, the insurers in both mergers have vowed to enhance network access for consumers.[32] While we commend this goal, there is a concern that the opposite could actually occur post-mergers, with consumers being forced into narrow provider networks. In designing a health insurance provider network, there is a careful balance between cost and provider access. A narrow insurance network is designed to give consumers low-price provider options at the cost of limiting the number of providers offered. Offering the *choice* of narrow network options can be consumer-friendly to cost-sensitive individuals. But, if an insurer can *force* consumers into a narrow network of providers and *eliminate* choice, that can be harmful, leaving consumers with less access and potentially lower quality of care.

In Florida, narrow insurance networks are becoming the new norm. A recent study by the Leonard Davis Institute of Health Economics and the Robert Wood Johnson Foundation found that 79 percent of individual plans in Florida use narrow networks that only include 25 percent or fewer of all area providers.[33] In fact, for 2016, no Florida health insurer will offer a preferred provider network plan.[34] According to the Florida Office of Insurance Regulation, these "skinny networks" can drive downs costs but "lead[] to network adequacy concerns."[35] These adequacy concerns can force consumers to drive great distances to seek medical care. A survey from the American College of Emergency Physicians found that 73 percent of respondents noted that narrow networks have caused disruptions in care.[36] We are concerned that these mergers could further restrict consumer access to providers and force consumers into narrow networks. Given the merging companies' stated commitment to improving access throughout Florida, we believe this is an important issue that must be addressed by the Florida Office of Insurance Regulation when analyzing the mergers.

V. Entry by Competitors and Loss of Potential Competition

The prospect of competitive entry into a relevant market "will alleviate concerns about adverse competitive effects."[37] However, entry as a defense to a merger, particularly within health insurance markets, is viewed with skepticism.[38] In their filings, the merging companies argue that there is sufficient competition and entry for a number of insurance products including

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[32] *See* Testimony of Anthem, *supra* note 18 ("Broader network coverage – more providers in network"); *see also* Testimony of Aetna, *supra* note 25 ("Enhance network access in more geographies").
[33] Dana Polsky & Janet Weiner, *State Variation in Narrow Networks on the ACA Marketplaces*, LEONARD DAVIS INST. HEALTH ECON. (Aug. 2015), *available at* http://goo.gl/kkCWAT.
[34] Lynn Hatter, *2016 Florida Healthcare Rates Raise A Question: Where Did The PPOs Go?*, WFSU.ORG (Sept. 11, 2015), http://goo.gl/rNY0aN.
[35] *See* Presentation, *Impacting the Essential Health Benefits Process: Balancing Health Insurance Benefits and Affordability* (Sept. 18, 2015) (Rich Robleto, Dept. Comm'n of Life & Health).
[36] *See* Caitlin Bronson, *Insurance commissioners blast narrow health insurance provider networks*, INSURANCE BUS. (Nov. 11, 2015), http://goo.gl/SdqhtN.
[37] Horizontal Merger Guidelines, *supra* note 24 at § 9.
[38] Christine A. Varney, Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Remarks as Prepared for American Bar Association/American Health Lawyers Association Antitrust Healthcare Conference (May 24, 2010), *available at* http://goo.gl/rzPC0G ("entry defenses in the health insurance industry will be viewed with skepticism and will almost never justify an otherwise anticompetitive merger.").

Medicare Advantage and commercial insurance, including the Health Insurance Exchange operated in Florida.[39]

Recent data suggests that competitive entry by health insurers into Florida has been limited and not improved insurance competition. According to a report by the Kaiser Family Foundation, in 2016, 66 percent of all counties in Florida will now only offer insurance products from one or two insurers on the Health Insurance Exchange, with a total average of 2.6 insurers per county throughout all of Florida.[40] The report further states that "[w]ith fewer than 3 insurers, these counties may not benefit from insurer market competition to hold down premiums or offer plans with better value."[41] And while Medicare Advantage markets have seen some entry by new plans,[42] the vast majority of Florida's MA markets remain highly concentrated.[43]

There is also a significant loss of potential competition due to these two mergers. Entry into a new health insurance market requires "a large provider network to attract customers, but they also need a large number of customers to obtain sufficient price discounts from providers to be competitive with incumbents."[44] This "Catch 22" makes it nearly impossible for new, competitive entry to occur, particularly in markets dominated by incumbent insurers.[45]

However, potential competition could come from national insurers such as Anthem, Cigna, Aetna, and Humana. These national insurers have national footprints and have sufficient economies of scale to enter new insurance markets. By merging, these insurers would be foreclosing the possibility of their own future entry into new markets and improving competition. As noted by Professor Dafny, "consolidation even in non-overlapping markets reduces the number of potential entrants who might attempt to overcome price-increasing (or quality-reducing) consolidation in markets where they do not currently operate."[46] Professor Greaney has further stated that the "lessons of oligopoly are pertinent here: consolidation that would pare the insurance sector down to less than a handful players is likely to chill the enthusiasm for venturing into a neighbor's market... [o]ne need look no further than the airline industry for a cautionary tale."[47]

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[39] *See* Testimony of Cigna, *supra* note 18; *see also* Testimony of Aetna, *supra* note 25.
[40] Cynthia Cox, Gary Claxton & Larry Levitt, *Analysis of Insurer Participation in 2016 Marketplaces*, KAISER FAMILY FOUNDATION (Nov. 3, 2015), http://goo.gl/QcETCd.
[41] *Id.*
[42] Gretchen Jacobsen, Anthony Damico, & Tricia Neuman, W*hat's In and What's Out? Medicare Advantage Market Entries and Exits for 2016*, KAISER FAMILY FOUNDATION (Oct. 2015), http://goo.gl/6ZhW6V (finding that 15 new plans had entered the Florida market).
[43] *See* Brian Biles, Giselle Casillas & Stuart Guterman, *Competition Among Medicare's Private Health Plans: Does It Really Exist?*, COMMONWEALTH FUND at 1 (Aug. 25, 2015), *available at* http://goo.gl/nLcrud (finding that 97 percent of all Medicare Advantage markets are highly concentrated lacking sufficient MA plan competition).
[44] U.S Dep't of Justice & Fed. Trade Comm'n, *Improving Health Care: A Dose of Competition* at 254 (2004), *available at* http://goo.gl/GzIuvL.
[45] *See* Varney, *supra* note 38.
[46] Dafny, *supra* note 30.
[47] *The State of Competition in the Health Care Marketplace: The Patient Protection and Affordable Care Act's Impact on Competition, Comm. on the Judiciary Subcomm. on Regulatory Reform, Commercial and Antitrust Law*, 114th Cong. (Sept. 10, 2015) (testimony by Professor Thomas Greaney, Saint Louis University School of Law), *available at* http://goo.gl/bceVxi (citation omitted).

Lastly, potential entry could also be stifled by the Blue Cross Blue Shield Association "two-thirds" rule.[48] Anthem is a "Blue" mark holder in a number of states and is bound by contract to ensure that two-thirds of their annual revenue must be attributable to the Blue mark. By acquiring Cigna, the combination may prevent the newly merged firm from expanding non-Blue business and may require Cigna to pull out of markets in which another Blue insurer competes. Given that Florida Blue is the largest commercial insurer throughout the state,[49] under the two-thirds rule, it may be necessary that Anthem require Cigna to become less competitive with Florida Blue in markets where the two actively compete.[50]

VI. Divestitures and Other Remedies

In nearly every anticompetitive health insurance matter for the last two decades, the DOJ has exclusively relied on the structural remedy of divestiture.[51] Divestitures require the merging insurance company spin off a number of subscribers to an alternative insurance company to restore competition. In Florida, given the significant overlaps in both commercial insurance and MA plans, the DOJ might, if it approves the merger at all, require a number of divestitures by the merging companies.

However, the sufficiency of divestitures as a suitable remedy has come under significant scrutiny. Economic research by Professor John Kwoka finds that divestitures often fail to restore competition to the marketplace.[52] Indeed that skepticism has led the DOJ, Federal Trade Commission ("FTC"), and the courts to reject divestitures in other merger matters. In their reviews of the proposed mergers of Comcast-Time Warner Cable and Sysco-US Foods, the enforcement agencies rejected the divestitures offered as remedies, and instead blocked the mergers. When Sysco pursued its merger anyway, the court agreed with the FTC and enjoined the merger.[53]

Within health insurance markets, there is little evidence that competition is effectively restored after divestitures. In fact, in the previously cited two retrospective studies on health insurance mergers, both matters involved divestitures of covered lives for different insurance products, but the merged companies were still able to raise premiums by significant margins.[54] Additionally,

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[48] *See* Jacqueline DiChiara, *BCBS Licensing Agreement Questioned in Anthem Acquisition*, REVCYLCEINTELLIGENCE (Aug. 26, 2015), http://goo.gl/NRHoy8.

[49] *See* McCarthy, *supra* note 3.

[50] *See* Bruce Japsen, *Why Blue Cross Hates Anthem's Cigna Deal*, FORBES (July 27, 2015 8:00AM), http://goo.gl/gp9GpK (Noting that Cigna would compete with Florida Blue and stating that "Anthem would have two years after the close of a merger with Cigna to work out licensing issues").

[51] *See* Revised Final Judgment, *United States v. Aetna Inc. and Prudential Insurance Co. of Am.*, No. 3-99-cv-1398-H (N.D. Tex. Dec. 7, 1999); *see also* Final Judgment, *United States v. UnitedHealth Group Inc. and Sierra Health Servs. Inc.*, No: 1:08-cv-00322 (D.D.C. Sept. 24, 2008); *see also* Final Judgment, *United States v. Humana Inc.*, No. 1:12-cv-00464 (D.D.C. March 27, 2012).

[52] John Kwoka, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S POLICY, MIT PRESS (2015).

[53] Press Release, DOJ, Comcast Corporation Abandons Proposed Acquisition of Time Warner Cable After Justice Department and Federal Communications Commissions Informed Parties of Concerns (Apr. 24, 2015), *available at* http://goo.gl/msZq6f; see also Press Release, FTC, Following Sysco's Abandonment of Proposed Merger with US Foods, FTC Closes Case (July 1, 2015), *available at* https://goo.gl/XfwPsW.

[54] Dafny, *supra* note 15; Guardado, *supra* note 15.

for any divestiture in these matters to be successful, the merging companies will have to ensure the purchaser of the assets will have a cost-competitive network of hospitals and physicians requiring scrutiny and continued monitoring from the DOJ.[55] Given the lack of competition within a number of Florida markets and the dominant position of four firms throughout the state, it may be difficult to divest assets to a competitor and genuinely preserve the competitive benefits of the pre-merger market structure.

While the DOJ and Florida Attorney General may be considering divestitures, the Florida Insurance Commissioner is also empowered to develop additional remedies for a health insurance merger. These remedies can be in addition to any such remedies, including divestitures, ordered by the DOJ or Florida Attorney General. For example, in the 2008 acquisition of Sierra Health by UnitedHealth, the DOJ required divestiture of MA plans in Las Vegas,[56] but the Nevada Insurance Commissioner required additional remedies. In order for the merging companies to receive approval from the Commissioner, they had to agree that no acquisition costs would be passed along to consumers or providers, that there would be no premium increases, that there would be no scaling back of benefits, and that UnitedHealth would have to take specified actions to limit the number of uninsured within the state.[57]

Given the scale of these two mergers and the potential for anticompetitive effects, targeted remedies beyond divestitures may play a critical role in ensuring that competition within Florida's health insurance markets remains stable. Should either merger be permitted to go forward, here is a short list of remedies we suggest that the Florida Office of Insurance Regulation consider, among others, that could help limit the competitive harm:

- (1) Requiring premium stability or rate control for a number of years post-merger.
- (2) Requirements ensuring that the merged company cannot scale back plan benefits.
- (3) Improving access to providers throughout the state and within local areas.
- (4) Ensuring that the merged company continues to provide the differentiated insurance products offered previously by the two companies, within the state and local areas, for a number of years.
- (5) Prohibiting the merged company from further restricting network access, and requiring the merged company to increase plan variety and network options for consumers.
- (6) Provisions to ensure that the merged company increase access and improve care within rural and underserved health insurance markets.
- (7) Requiring that the merged company pass along any cost savings associated with the merger to consumers, in the form of lower premiums and deductibles.

We would also be happy to further discuss this important issue with you directly.

[55] *See* Greaney, *supra* note 47.
[56] Final Judgment, UnitedHealth Inc. and Sierra Health Servs., No: 1:08-cv-00322.
[57] *Healthcare Check-Up: The UnitedHealth Group Acquisition of Sierra Health Services*, NEVADA BUS. (Nov. 1, 2007), http://goo.gl/Uztt13.

Conclusion

Our organizations are troubled by the consolidation within the health industry and its impact on price, access, and quality of care. Mergers between four of the five dominant insurers could further eliminate competition within the state of Florida. While the merging companies have argued supposed benefits associated with these mergers, available scholarly evidence suggests that consumers will see limited to no benefits and instead will face higher costs, less innovation, and potentially lower quality of care.

While the DOJ may ultimately seek divestiture as a remedy in local markets throughout Florida, the record of accomplishment on divestures leaves doubts that competition would be restored. For these reasons, we strongly urge the Florida Office of Insurance Regulation to use the remainder of the merger review period to carefully analyze these mergers. We also strongly recommend the Florida Office of Insurance Regulation be ready to consider the usage of other remedies beyond divestitures, should either of these mergers be permitted to go forward.

We would be happy to address any of the points raised in this comment. Please do not hesitate to contact us with any questions.

Respectfully submitted,

Consumers Union
Florida CHAIN
Florida Rural Health Association
U.S. PIRG
1199 SEIU United Healthcare Workers East – Florida Region
Consumer Watchdog
Florida Policy Institute
Consumer Action
Florida PIRG

Counsel of record for this comment is:

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From: Claire McAndrew [CMcAndrew@familiesusa.org]
Sent: Thursday, December 17, 2015 2:29 PM
To: Anthem Hearing; Aetna Hearing
Cc: Joseph Patrick Ditré
Subject: Comments for FLOIR Merger Hearings
Attachments: Families USA Questions on Insurance Mergers for FLOIR.pdf

Attached please find comments from Families USA regarding the proposed health insurance mergers currently under FLOIR's review and open for comment through today, December 17, 2015.

Sincerely,

Claire McAndrew

Claire McAndrew
Private Insurance Program Director
202-628-3030
CMcAndrew@familiesusa.org

FAMILIESUSA
THE VOICE FOR HEALTH CARE CONSUMERS

December 16, 2015

Commissioner Kevin McCarty
Florida Office of Insurance Regulation
200 East Gaines Street
Tallahassee, FL 32399

Families USA is non-profit, nonpartisan organization dedicated to the achievement of high-quality, affordable health coverage and care for all. While we take no position on the proposed health insurance mergers currently under consideration by the Florida Office of Insurance Regulation and the U.S. Department of Justice at this time, we urge the Florida Office of Insurance Regulation to carefully scrutinize the mergers to assess their impact on consumers' health care costs and access to services.

Specifically, we respectfully submit the following list of questions (originally submitted to the Department of Justice, but we believe largely applicable to the review taking place in Florida) and hope FLOIR will consider them when determining a course of action on proposed health insurance mergers. Should you have any questions or need further information, please contact Claire McAndrew at cmcandrew@familiesusa.org or Joe Ditre at jditre@familiesusa.org. Both individuals can also be reached at 202-628-3030.

Sincerely,

Claire McAndrew
Private Insurance Program Director

Joe Ditre
Senior Director of Enterprise and Innovation

FamiliesUSA.org
1201 New York Avenue, NW, Suite 1100
Washington, DC 20005
main 202-628-3030 / fax 202-347-2417

Questions to Consider for Consumer Protection Regarding Proposed Insurance Mergers

1. **Choice of plans and carriers**:
   How will the merger affect the entry of new insurers in each geographic area? Are new entrants likely to be financially viable? Please consider this in light of the fact that federal loans for CO-OP plans are no longer available. What impact, if any, will mergers have on the health insurance marketplaces created under the Affordable Care Act in terms of the number of carriers offering plans and the types of plans offered?
2. **Effect on premiums in each market:**
   How will the merger affect premium prices for individual insurance on the marketplace, small group insurance, large group insurance, and/or Medicare Advantage? In considering this, please keep the following factors in mind:
   a. Medical loss ratios are a helpful tool in the individual and small group markets, but they do not prevent all unreasonable price increases: If insurers increase premiums, they can also increase the dollar amount they retain for administration and profit. Are the merged insurers likely to increase both premiums and profits?
   b. Rate review at the state level can stop unreasonable price increases in the individual and small group markets, provided state law provides this authority. But will a merger create entities that are too powerful for regulators to effectively oversee? How will the proposed merger affect states that do not now review and reject unreasonable premium prices?
   c. What will mitigate against price increases in the large group market, since large group insurance is not subject to rate review requirements?
   d. Prices for Medicare Advantage plans are set through bids. If bids are higher than a federal benchmark, enrollees pay the difference in premium prices; if bids are lower than the benchmark, the federal government keeps part of the money and beneficiaries may also get supplemental benefits. Will a merger of Medicare Advantage plan sponsors likely increase costs to the federal government, increase costs to beneficiaries, or result in a reduction in supplemental benefits to enrollees?
3. **Savings to the consumer:**
   What portion, if any, of projected savings from each of these mergers will actually return to plan enrollees in the form of lower average premiums, lower out-of-pocket costs, or increased benefits or coverage?
   a. In determining the impact of these mergers on premium prices, what information can existing data about health plan premiums provide? Can data on premium prices for carriers that have strong negotiating power with providers currently indicate whether lower reimbursement rates to providers result in lower premiums for consumers?
   b. What evidence do previous health insurance mergers provide about the likelihood that consumers will directly benefit from any merger efficiencies? Can carriers assure that consumers will benefit from efficiencies?
4. **Access to providers:**
   What are the possible effects of these mergers on access to health care providers? Please especially consider whether they could cause a diminution of access to in-network providers that have not generally had strong negotiating power with insurers and to which consumers

often lack access, such as: outpatient mental health providers, pediatric specialists, and hospitals and other providers located in low-income communities.

5. **Post-merger conduct remedies:**
   Will the Department of Justice [or FLOIR] impose post-merger conduct remedies should either merger be approved and result in higher average premiums by plan type? Reduced benefits or coverage by plan type? Reduced number or breadth of provider networks? Blocked market entry?
6. **Consumer protections in a divestiture:**
   If divestitures are sought as a remedy, how will consumers be protected in the divestiture process? Will consumers have to leave their current plans? Will consumers be able to come back into those divested plans if they choose, and if so, how does this ensure that the merging (divested) plan does not have too much power in the market after the merger?
7. **Future health insurance consumer protections:**
   How will the mergers affect future health insurance regulation? State and federal regulators continue to work on rules implementing the Affordable Care Act, as well as other improvements to consumer protections. Will the mergers create entities that are too powerful to regulate?

From: Monica Corbett [monicac@fha.org]
Sent: Thursday, December 17, 2015 3:16 PM
To: Aetna Hearing; Anthem Hearing
Cc: Bill Bell
Subject: Florida Hospital Association Comments
Attachments: FLHospAssn_OIRComments121615.pdf

Good afternoon —

Please see attached comments submitted on behalf of Florida Hospital Association General Counsel William Bell.

Thank you,

Monica Corbett

--
Monica Corbett
Vice President of Public Affairs

Florida Hospital Association
306 East College Avenue, Tallahassee, FL 32301
850.222.9800 p 850.561.6230 f
www.FHA.org

December 16, 2015

Office of Insurance Regulation
200 E. Gaines Street
Tallahassee, FL 32399

Sent by email to: AetnaHearing@floir.com; AnthemHearing@floir.com

The Florida Hospital Association is writing regarding Aetna's proposed acquisition of Humana and Anthem's proposed acquisition of CIGNA. We are concerned about these transactions because, if permitted to proceed, they will have consequences for our entire health care system for many years to come.

While other federal and state agencies will conduct reviews of these transactions, their reviews are not a substitute for the experience and oversight the Office of Insurance Regulation (OIR) can bring to these pending transactions. We therefore ask that your office carefully scrutinize these transactions to determine:

1. Whether the transactions would substantially lessen competition with special attention to those presumptively anticompetitive counties and highly concentrated markets.

2. Whether the acquiring companies have plans to make any material change in corporate structure or management that is unfair to policyholders or contrary to the public interest. In this connection, we ask that you carefully review any change-in-control payments.

3. Whether the transactions would be prejudicial to policyholders or to the insurance buying public. This is a different and much broader standard than the competition standard.

The proposed acquisitions are a risk to the progress that Florida hospitals have made with insurers on care delivery reform models and innovative payment arrangements. There is scant tangible evidence to support insurers' claim that the transactions will allow them to accelerate those efforts. In fact, research shows that "[a]n insurer with stronger market power has less of an incentive to invest in new products" and "no research showing the larger insurers are likelier to innovate."[1] The fact is that providers and non-national insurers are the major source of innovative reform efforts.

Hospitals and other health care providers have every incentive to work together to better coordinate care to ensure that patients are able to get more effective, high quality, convenient care that keeps them healthy. The loss of competition threatened by these transactions will make it even more difficult for providers in our state to find insurer partners willing to work collaboratively on critical delivery system reform efforts.

[1] Testimony of Professor Leemore S. Dafny, Ph.D., Professor of Strategy, Kellogg School of Management Northwestern University, before the Senate Subcommittee on Antitrust, Competition Policy, and Consumer Rights on "Health Insurance Industry Consolidation: What Do We Know From the Past, Is It Relevant in Light of the ACA, and What Should We Ask?" (Dafny Testimony) September 22, 2015 at 3.

Providers in Florida want to, and have, begun to work collaboratively with willing insurer partners to engage in innovative health care delivery and financing reforms to support accessible, high quality, effective and affordable care. Should these proposed insurance transactions be approved, we fear that these efforts to create and sustain collaborative and innovative reform initiatives likely will be hindered. We, therefore, urge state regulators to take an active role in scrutinizing closely these potential acquisitions in order to protect our state's consumers, businesses and providers as the federal regulators simultaneously engage in their own robust review.

Sincerely,

William A. Bell
General Counsel