



February 10, 2016

The Honorable Mary Taylor  
Lieutenant Governor/Director  
Ohio Department of Insurance  
50 West Town Street  
Third Floor, Suite 300  
Columbus, Ohio 43215

Re: Hearings for the Anthem-Cigna and Aetna-Humana Mergers

Dear Lieutenant Governor/Director Taylor:

The undersigned consumer groups and unions have long been concerned with the competitive landscape within the health care industry. Competition within different health care markets that offers ample choice, high quality, and transparency is vital to ensuring accessible and affordable care to employers and consumers. Competition between health insurers is essential to ensuring lower premiums, improving quality of care, and promoting access and choice.

We write to raise concerns over the proposed consolidation in Ohio's health insurance markets – the proposed mergers between Anthem-Cigna and Aetna-Humana. The proposed mergers between these dominant insurers could substantially lessen competition for millions of consumers in Ohio. We write to ask that the Ohio Department of Insurance (“ODI”) utilize all of its powers, including conducting public hearings, to thoroughly evaluate the impact of these mergers.

Under Ohio law, the Director is empowered to review health insurance mergers and acquisitions within the state.<sup>1</sup> As part of this review, the Director must consider four different factors, including if “[t]he effect of the merger or other acquisition of control would be substantially to lessen competition in insurance in this state or tend to create a monopoly.”<sup>2</sup>

We urge the ODI and Director to carefully review the potential adverse effects of the Anthem-Cigna and Aetna-Humana mergers,<sup>3</sup> to hold public hearings, and to take appropriate action under

---

<sup>1</sup> OHIO ANN. CODE § 3901.321(F) (“the [Director] shall approve any merger or other acquisition of control described in division (B)(1) of this section *unless, after a public hearing, the [Director] finds that any of the following apply*”) (emphasis added).

<sup>2</sup> *Id.* at § 3901.321(F)(1)(b).

<sup>3</sup> 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

ODI's authority to protect competition and consumers. We submit these comments to document the compelling reasons why a thorough review and public hearings are necessary for ODI to fulfill its statutory mandate to determine if these mergers are in the public interest. As detailed throughout the comment, ensuring and increasing competition within health insurance markets is critical to improving care and lowering costs.

Our comments discuss: (1) why public hearings are necessary, (2) the high concentration and potential anticompetitive impact of both mergers, (3) why the mergers could lead to higher premiums and out of pocket costs, (4) the potential adverse effects on network adequacy, (5) why new entry is unlikely to alleviate these concerns, (6) why any efficiencies will not outweigh these harms, and (7) whether there are any remedies that can adequately protect consumers and the public interest if these mergers go forward.

## **I. The Ohio Department of Insurance Should Hold Public Hearings for the Two Mergers**

The State of Ohio has granted the Ohio Department of Insurance extensive powers to block mergers between insurers that are either “unfair and unreasonable to policyholders of the domestic insurer and not in the public interest.”<sup>4</sup> This is wholly consistent with the standards adopted by the National Association of Insurance Commissioners (“NAIC”) under the Model Act.<sup>5</sup> This authority is in addition to, and goes beyond, the authority of federal and state antitrust enforcers.

Ohio law gives the ODI and the Director broad powers to fully investigate an insurance merger. As a starting point, the ODI is empowered to hold public hearings *to assess competitive impact* of a health insurance merger.<sup>6</sup> The exact language of the statute is as follows: “The [Director] shall approve any merger or other acquisition of control described in division (B)(1) of this section *unless, after a public hearing*, the [Director] finds that any of the following apply.”<sup>7</sup> Therefore, under Ohio law, public hearings are an essential facet of assessing competitive harm in a health insurance merger.

Public hearings not only offer the merging companies an opportunity to defend the merger, but also allow third parties and the public to air any concerns and enable the ODI to gather critical information in an open forum. Hearings would also provide additional useful information for federal and state antitrust investigators. Along with hearings, the ODI is authorized to retain experts including economists “to assist the [Director’s] staff as may be reasonably necessary to assist... in reviewing the proposed acquisition of control.”<sup>8</sup> Given the complex nature of these insurance mergers, the ODI might make use of antitrust legal experts and economists. These individuals could also participate in public hearings and offer testimony on their findings.

---

merger is anticompetitive. MODEL INS. HOLDING CO. SYS. REGULATORY ACT § 440-1 (Nat’l Ass’n of Ins. Comm’rs 2015).

<sup>4</sup> OHIO ANN. CODE § 3901.321(F)(1)(d).

<sup>5</sup> See generally Model Holding Act, *supra* note 3.

<sup>6</sup> See OHIO ANN. CODE § 3901.321(F)(1).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at § 3901.321(F)(2)(e)(3).

The ODI's process adds importantly to that of the federal and state antitrust enforcers in a number of respects. Along with considering if a health insurer merger substantially lessens competition or tends to create a monopoly, the ODI has the broad mandate to ensure the mergers are in the "public interest,"<sup>9</sup> while the antitrust enforcers have a more limited review that focuses solely on whether there is a reduction of competition under antitrust law precedents. Second, the ODI as the key regulator of health insurance brings specific and extensive expertise in insurance markets. Third, the ODI's proceedings are public and ensure a significant level of transparency and community participation, and the creation of a public record; antitrust investigations are confidential, with limited opportunities for public input. Finally, the ODI has broader powers to fashion and monitor remedies to protect consumers from the harms these proposed mergers could cause.<sup>10</sup>

The mergers of Anthem-Cigna and Aetna-Humana would combine four of the nation's five largest insurers.<sup>11</sup> Because of the substantial potential competitive concerns related to these mergers in Ohio as detailed further below, we request that the Ohio Department of Insurance *hold two public hearings* – a separate one for each merger – to analyze the impacts and potential harms.

## **II. The Mergers of Anthem-Cigna and Aetna-Humana Will Have a Significant Impact on Ohio Health Insurance Markets**

All four insurers, Anthem, Cigna, Aetna, and Humana, offer various insurance products within the State of Ohio. Prior to the announcement of these mergers, the vast majority of insurance markets within Ohio were already highly concentrated leaving limited options for consumers and employers. A 2014 report by the United States Government Accountability Office found that the three largest commercial insurers for individual, small group, and large group enrolled 84 percent of all Ohioans.<sup>12</sup> According to data from the NAIC, Anthem Blue Cross Blue Shield, formerly known as WellPoint, is the largest insurer in the state.<sup>13</sup>

Data from numerous sources analyzing market share data and concentration levels show that the mergers of Anthem-Cigna and Aetna-Humana raise serious concerns under both federal antitrust law and the standards under Ohio's antitrust and insurance statutes. Along with lessening competition statewide, the Anthem-Cigna transaction alone could eliminate competition for different commercial insurance products in metropolitan statistical areas of Weirton-Steubville, Cincinnati-Middletown, Columbus, Lima, Dayton, and Sandusky.<sup>14</sup>

---

<sup>9</sup> *Id.* at § 3901.321(F)(1)(d).

<sup>10</sup> We further discuss remedial provisions in Section VII.

<sup>11</sup> UnitedHealthcare is the fifth national insurer and currently the largest health insurer in the United States. Post-merger, Anthem would surpass United as the largest insurer in the United States.

<sup>12</sup> United States Government Accountability Office, *Private Health Insurance: Concentration of Enrollees among Individual, Small Group, and Large Group Insurers from 2010 through 2013* (Dec. 1, 2014), available at <http://goo.gl/eYS4Ir>.

<sup>13</sup> See generally National Association of Insurance Commissioners, *2014 Market Share Reports* (2015), available at <http://goo.gl/1OhhOu>.

<sup>14</sup> American Medical Association, *Markets where an Anthem-Cigna merger warrants antitrust scrutiny* (Sept. 8, 2015).

The merger between Anthem-Cigna could also substantially lessen competition within the administrative-services-only (“ASO”) market. The ASO market relies on predominantly large employers that assume the responsibility for their own employees’ health care costs, but purchase administrative services through an insurer. A combination of Anthem and Cigna would create an entity with just under 60 percent market share of the Ohio ASO market.<sup>15</sup> The Aetna-Humana merger will also diminish competition in the ASO market with the combined firm having a 17.2 percent market share.<sup>16</sup> Therefore, post-mergers, two firms, Anthem and Aetna, will control 80 percent of the Ohio ASO market.

Along with commercial insurance and ASO, the mergers also raise concerns in Medicare Advantage (“MA”) markets. In particular, the combined Aetna-Humana would have a 50 percent market in MA throughout Ohio, according to the Kaiser Family Foundation, with Anthem also controlling 23 percent of the market.<sup>17</sup> Along with having a dominant market share in the state, the Aetna-Humana transaction would substantially lessen choices for MA consumers in the following counties: Clark, Clermont, Delaware, Franklin, Hamilton, and Lorain.<sup>18</sup> A recent report by Health Affairs relying on data from the NAIC found that the mergers would increase concentration by 64 percent in Ohio’s Medicare Advantage markets, the fourth highest in the country and greatly exceeding thresholds for antitrust concern.<sup>19</sup>

### **III. The Mergers are Likely to Result in Higher Consumer Costs Throughout Ohio**

A critical reason for public hearings is for the ODI to fully evaluate the impact of these mergers on consumers. Studies of past health insurance mergers tell a compelling and simple story – mergers lead to higher premiums and reduced service.<sup>20</sup> There are no studies demonstrating that health insurance mergers benefit consumers. Consumers are rightly very concerned that these proposed mergers would lead to the same harm – rising costs, i.e. higher premiums and out-of-pocket charges. In Ohio, from 2015 to 2016, premiums on the Health Insurance Exchange increased by an average of 13 percent.<sup>21</sup> Even after rate review, a number of insurers within the individual markets raised rates by double digits including Aetna at 13.2 percent and Humana at 19.25 percent.<sup>22</sup> With prices steadily increasing in highly concentrated Ohio insurance markets,

---

<sup>15</sup> See *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 Edmund F. Haislmaier, Heritage Foundation), available at <http://goo.gl/9E2Dkm>.

<sup>16</sup> *Id.*

<sup>17</sup> Gretchen Jacobsen, Anthony Damico, & Tricia Neuman, *Data Note: Medicare Advantage Enrollment, by Firm, 2015*, KAISER FAMILY FOUND. (July 14, 2015), <http://goo.gl/gJ1xnz>.

<sup>18</sup> *Id.*

<sup>19</sup> Douglas Hervey, David Muhlestein, & Austin Bordelon, *How Might Proposed Payer Mergers Impact State Insurance Markets?*, HEALTH AFFS. (Dec. 1, 2015), <http://goo.gl/OT70NI>.

<sup>20</sup> See *infra* Leemore Dafny *et al.*, *Paying a Premium on Your Premium? Consolidation in the US Health Insurance Industry*, 102 AM. ECON. REV. 1161 (2012); see also *infra* 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).

<sup>21</sup> Randy Tucker, *Many Ohioans still uninsured as federal health care sign-ups begin*, MYDAYTON DAILY NEWS (Oct. 23, 2015 4:25 PM), <http://goo.gl/OzXSaH>.

<sup>22</sup> Louise Norris, *Ohio Health insurance exchange/market place*, HEALTHINSURANCE.ORG (Jan. 14, 2016), <https://goo.gl/uy8YmJ>.

mergers between four dominant insurers could exacerbate the issue, leading to even higher consumer costs.

There is little dispute that there is a direct correlation between health insurer concentration and higher premiums.<sup>23</sup> 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."<sup>24</sup> Two separate, retrospective economic studies on health insurance mergers found significant premium increases for consumers post-merger. One study found that the 1999 Aetna-Prudential merger resulted in an additional seven percent premium increase in 139 separate markets throughout the United States.<sup>25</sup> Another study found that the 2008 United-Sierra merger resulted in an additional 13.7 percent premium increase in Nevada.<sup>26</sup> There is also economic evidence that a dominant insurer can increase rates 75 percent higher than smaller insurers competing in the same state.<sup>27</sup> The insurance mergers could also impact out-of-pocket costs as patients see increases in deductibles or other insurance-related costs.<sup>28</sup>

Most recently, the Center for American Progress ("CAP") released findings on Medicare Advantage that demonstrated the key importance of competition. According to the CAP report, in counties where Humana and Aetna compete with each other on MA plans, both Aetna's and Humana's average premiums are lower.<sup>29</sup> Specifically, Aetna's average annual premiums are \$302 lower in counties where Humana also offers a MA plan.<sup>30</sup> In Ohio, Aetna and Humana both compete with MA plans in 35 separate counties.<sup>31</sup> The clear implication of this evidence is that a merger between Aetna and Humana would raise prices for MA plans throughout Ohio.

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 their mergers will create cost savings which they will pass along to consumers.<sup>32</sup>

---

<sup>23</sup> See Leemore Dafny, *Are Health Insurances Markets Competitive?*, 100 AM. ECON. REV. 1399 (2010).

<sup>24</sup> 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>.

<sup>25</sup> See Dafny, *supra* note 20.

<sup>26</sup> See Guardado, *supra* note 20.

<sup>27</sup> 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>.

<sup>28</sup> 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); see also Phelps & Philips & Manatt, *HIX Compare*, ROBERT WOOD JOHNSON FOUNDATION (Dec. 2015), available at <http://goo.gl/mB8H43> (In Ohio, the average deductible for a Silver Plan on the Exchange increased by 12.9 percent from 2015 to 2016).

<sup>29</sup> See Topher Spiro, Maura Calsyn, and Meghan O'Toole, *Bigger is Not Better: Proposed Insurer Mergers Are Likely to Harm Consumers and Taxpayers*, CTR. FOR AM. PROGRESS (Jan. 21, 2016), available at <https://goo.gl/1Aa70h>.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 15.

<sup>32</sup> See generally *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> (noting that

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.<sup>33</sup> But, there is no evidence consumers actually receive any of these potential savings. In fact, Professor Thomas Greaney, a health antitrust scholar, has noted that there is actually "little incentive [for an insurer] to pass along the savings to its policyholders."<sup>34</sup> 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.<sup>35</sup> As the American Antitrust Institute, the leading non-profit antitrust think tank, recently concluded, economic studies and evidence indicate that "consumers do not benefit from lower healthcare costs through enhanced bargaining power."<sup>36</sup>

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.<sup>37</sup> 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, as health antitrust expert Professor Jamie King has observed, "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."<sup>38</sup>

Public hearings will help the ODI and the Director better evaluate the impact of the mergers on the costs of health insurance for consumers.

---

the merger will lead to "lower costs."); see also *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 Joseph Swedish, President & CEO of Anthem, Inc.), available at <http://goo.gl/B0sy5T> (the merger will "lower costs" and "encourage greater cost and quality competition among providers.").

<sup>33</sup> 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/hMhuzL>.

<sup>34</sup> See Thomas Greaney, *Examining Implications of Health Insurance Mergers*, HEALTH AFFS. (July 16, 2015), <http://goo.gl/ETT1DB>.

<sup>35</sup> 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").

<sup>36</sup> Letter from the American Antitrust Institute, Thomas Greaney, and Diana Moss, to William J. Baer, Assistant Attorney General Dep't of Justice (Jan. 11, 2016), available at <http://goo.gl/BD1zTL>.

<sup>37</sup> E.g., Bertolini, *supra* note 32.

<sup>38</sup> *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>.

#### **IV. There are Significant Concerns over Network Adequacy**

Another reason to hold public hearings is to fully evaluate the impact of the mergers on provider network adequacy. For many consumers, the networks offered in a plan are as important a consideration as cost. The merging insurance companies have claimed that the mergers will “expand[] access” for consumers “through a more extensive network of hospitals, physicians, services, and health care professionals.”<sup>39</sup> We are concerned, however, that the opposite could actually result, that consumers could find their options limited to plans with overly restrictive provider networks.

Narrower insurance networks are intended to give consumers the option of lower-cost insurance in exchange for limiting the number of providers. Offering the *choice* of narrower-network plans, assuming they meet network adequacy standards and contain providers of good quality, can be consumer-friendly, since these plans will likely cost consumers less. But if the market becomes so concentrated that dominant insurers are able to eliminate or unduly restrict broader-network options, that would be harmful for consumers who are willing to pay more and want a broader network – and it could even potentially lower quality of care, for example if higher quality providers are excluded.

A recent study by the Leonard Davis Institute of Health Economics and the Robert Wood Johnson Foundation found that 60 percent of all individual plans offered in Ohio use narrower networks that only include 25 percent or fewer of all area providers.<sup>40</sup> And Ohio does not currently regulate quantitative standards for network adequacy on the Health Insurance Exchange.<sup>41</sup>

We are concerned that the proposed Anthem-Cigna and Aetna-Humana mergers and the resulting increase in market concentration could exacerbate existing network limitations in Ohio. We urge your careful attention to network adequacy in analyzing these proposed mergers and as part of any public hearing on them; we also urge you, in the event either of these mergers is permitted, to consider the undertakings we suggest in Section VII to help ensure maintenance of adequate network choices for consumers.

#### **V. New Entry Will Not Prevent Competitive Harm**

The likely prospect of new competitive entry into a market can potentially “alleviate concerns about a merger’s adverse competitive effects.”<sup>42</sup> However, as the former Assistant Attorney General of the Justice Department Antitrust Division has observed “entry defenses in the health

---

<sup>39</sup> See Swedish, *supra* note 32.

<sup>40</sup> 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>.

<sup>41</sup> See Justin Giovannelli, Kevin W. Lucia, and Sabrina Corlette, *Implementing the Affordable Care Act: State Regulation of Marketplace Plan Provider Networks*, COMMONWEALTH FUND (May 2015), available at <http://goo.gl/8DHEct>.

<sup>42</sup> U.S. Dep’t. of Justice & Fed. Trade Comm’n, *Horizontal Merger Guidelines* at § 9 (2010), available at <https://goo.gl/Hh3dks>.

insurance industry will be viewed with skepticism and will almost never justify an otherwise anticompetitive merger.”<sup>43</sup>

Entry will only alleviate concerns if the entry “will *deter or counteract* any competitive effects of concern.”<sup>44</sup> It is not enough that new firms might emerge; *those firms must be forceful and committed enough to successfully constrain anticompetitive conduct*. Indeed, in the mergers studied and discussed above, there was new entry, but that entry did not prevent significant harm to competition from resulting from those mergers.

The merging companies here have previously argued that there is sufficient existing competition and new entry in a number of insurance product markets.<sup>45</sup> But analysis of available data shows that new entry and competition within insurance markets has been severely limited. This is another issue that should be fully evaluated in a public hearing in which the ODI can test the merging companies’ claims and secure information from other parties about the likelihood of entry.

In Ohio, entry either on the Exchange or within the Medicare Advantage markets has been limited and has not offset anticompetitive harm. Moreover, there is no evidence of entry in the small group, large group, or ASO markets. As previously noted, Ohio insurance markets remain highly concentrated, and prices continue to rise in a number of them. Along with a reduction in current competition, these mergers may result in a significant loss of *potential* competition. As the Department of Justice (“DOJ”) has found, 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.”<sup>46</sup> This “Catch 22” makes it nearly impossible for new, competitive entry to occur, particularly in markets dominated by one or a small handful of incumbent insurers.<sup>47</sup>

With these entry barriers, any new competition is most likely to come from national insurers such as Anthem, Cigna, Aetna, and Humana. These insurers have national footprints and have sufficient resources to enter new insurance markets. Unfortunately, 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.”<sup>48</sup> Professor Greaney has further stated that the “lessons of oligopoly are pertinent here: consolidation that

---

<sup>43</sup> 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>.

<sup>44</sup> Horizontal Merger Guidelines, *supra* note 42 at § 9 (emphasis added).

<sup>45</sup> See Swedish, *supra* note 32 (“health insurance is flush with competition”); see also Bertolini, *supra* note 32 (“Aetna will continue to face significant competition from a large number of health plans and other new market entrants”).

<sup>46</sup> 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>.

<sup>47</sup> See Varney, *supra* note 43.

<sup>48</sup> *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>.



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."<sup>49</sup>

A public hearing is essential to evaluate the merging companies' entry defense and the potential loss of future competition.

## **VI. Health Insurance Merger Efficiencies are Unlikely to Outweigh the Competitive Harm**

As a general matter, one potential benefit of mergers is the enhancement of the new company's ability to compete, by strengthening its capacity to bring down price, improve quality, enhance services, or create new products – collectively referred to as “efficiencies.”<sup>50</sup>

The insurers involved in each of these mergers have argued that their merger would create substantial efficiencies leading to improved health care quality and lower costs.<sup>51</sup> But these kinds of efficiencies cannot help justify a merger unless (1) it is really necessary for the insurers to merge to achieve the stated efficiencies, and (2) the stated efficiencies will actually benefit consumers.<sup>52</sup>

The parties have claimed significant cost-savings. According to Aetna, its merger with Humana would create \$1.25 billion in “synergy opportunities” and “operating efficiencies.”<sup>53</sup> However, while the merging insurers have offered little details about these 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 or greater value. There is no evidence or scholarly studies showing that insurance mergers lead to savings for consumers. In fact, as previously noted, evidence indicates that health insurance mergers lead to higher consumer costs, not increased consumer savings.<sup>54</sup>

A more abstract argument raised by the merging insurers is that the mergers will allow them to improve innovation. Innovation in health care delivery is critical. For one thing, 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 we are concerned that, in Ohio, these mergers will further entrench Anthem and Aetna's preexisting

---

<sup>49</sup> *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).

<sup>50</sup> Horizontal Merger Guidelines, *supra* note 42 at § 6.4.

<sup>51</sup> See Swedish, *supra* note 32 (section labeled “Improving quality and affordability”); see also Bertolini, *supra* note 30 (section labeled “Benefits of the Acquisition for Consumers and Providers.”).

<sup>52</sup> Horizontal Merger Guidelines, *supra* note 42 at § 10 (to rebut a presumption of competitive harm, efficiencies must be merger-specific, cognizable, and substantiated); *St. Alphonsus Med. Ctr. v. St. Luke's Health Sys.*, 778 F.3d 775, 789 (9th Cir. 2015) (efficiencies must demonstrably prove “that a merger is not, despite the evidence of a prima facie case, anticompetitive”).

<sup>53</sup> 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>.

<sup>54</sup> See Section III.

market power, reducing their incentives to compete and improve care. As noted by the American Antitrust Institute, excessive concentration created by the proposed mergers *is likely to reduce incentives* for engaging in innovation.<sup>55</sup>

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 speculative their claims that the mergers would enhance their ability to develop and implement new value-based payment agreements, noting that there was no evidence that merger would be required in order to carry out such initiatives.<sup>56</sup> Moreover, at a recent conference, Professor Dafny further noted that statistical evidence shows 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.<sup>57</sup>

A public hearing will permit the essential inquiry on whether these supposed efficiencies can overcome the potential anticompetitive effects of the mergers.

## VII. Divestitures and Other Remedies

A public hearing is also essential to determine what action is necessary for the ODI to properly protect consumers and ensure either proposed merger is in the public interest. If the ODI and Director decide that a merger is not in the public interest, it has the power to simply block the merger. Indeed, state insurance commissioners have blocked health insurance mergers in the past, such as Pennsylvania's 2009 action to block Highmark's acquisition of Independence Blue Cross.<sup>58</sup>

In other cases, mergers have been approved conditioned on the imposition of certain remedies such as divestitures or additional conduct regulation. Both of these types of remedies have significant limitations and risks that should be scrutinized carefully in a public hearing. In evaluating any proposed remedy, it is important to remember that the law requires that a remedy must *restore* the competition that would otherwise be lost, or otherwise prevent the harm that would result.

In nearly every health insurance merger enforcement action during the last two decades, DOJ has relied on the structural remedy of divestiture.<sup>59</sup> Divestitures require that the merging insurance companies spin off subscribers or operations to another, independent insurance company that is fully capable of restoring the same competition. In Ohio, given the significant scope, breadth, and market shares of the merging companies' commercial insurance, ASO, and MA operations,

---

<sup>55</sup> Greaney & Moss, *supra* note 36 (emphasis added).

<sup>56</sup> Dafny, *supra* note 48.

<sup>57</sup> 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>.

<sup>58</sup> *See Highmark Merger Timeline*, PENNSYLVANIA INSURANCE DEP'T, <http://goo.gl/0b6827> (last visited Jan. 8, 2015).

<sup>59</sup> *See, e.g.*, 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); Final Judgment, *United States v. UnitedHealth Group Inc. and Sierra Health Servs. Inc.*, No: 1:08-cv-00322 (D.D.C. Sept. 24, 2008); Final Judgment, *United States v. Humana Inc.*, No. 1:12-cv-00464 (D.D.C. March 27, 2012).

if DOJ approves either or both of these mergers at all, it would likely need to require a significant, potentially unprecedented number of divestitures by the merging companies.

Given the potential size and scope of divestitures that would be required, including those that would likely be required in Ohio, the American Antitrust Institute has come out against the mergers of Anthem-Cigna and Aetna-Humana, urging the DOJ to “just say no.”<sup>60</sup> Recent economic research by Professor John Kwoka supports the concerns regarding the effectiveness of divestitures, finding that divestitures often fail to restore competition to the marketplace.<sup>61</sup> Indeed, skepticism regarding divestiture has led DOJ, the Federal Trade Commission (“FTC”), and the courts to reject divestitures as a remedy in other merger enforcement 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.<sup>62</sup>

Regarding health insurance markets, there is little evidence that the benefits of competition are 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.<sup>63</sup> Additionally, for any divestiture in these matters to be successful, the purchaser of the assets will need to have and maintain a cost-competitive and attractive network of hospitals and physicians; ensuring this will require scrutiny and continued monitoring from DOJ.<sup>64</sup> With the lack of competition in a number of Ohio markets already, it may be difficult to genuinely preserve the competitive benefits of the pre-merger market structure through divesting subscribers or operations to a competitor.

While the DOJ (and the Ohio Attorney General’s Office, using its own antitrust authority) may be considering divestitures, the ODI and Director are also empowered to develop additional remedies for a health insurance merger. These remedies can be in addition to any remedies, including divestitures, ordered by the DOJ or the Ohio Attorney General. For example, in the 2008 acquisition of Sierra Health by UnitedHealth, the DOJ required divestiture of MA plans in Las Vegas,<sup>65</sup> 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

---

<sup>60</sup> Greaney & Moss, *supra* note 36.

<sup>61</sup> John Kwoka, *MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S POLICY*, MIT PRESS (2015).

<sup>62</sup> 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>.

<sup>63</sup> Dafny, *supra* note 20; Guardado, *supra* note 20.

<sup>64</sup> *See* Greaney, *supra* note 49.

<sup>65</sup> Final Judgment, *UnitedHealth Inc. and Sierra Health Servs.*, No: 1:08-cv-00322.

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.<sup>66</sup>

Regulatory remedies also have their shortcomings for effectively protecting competition and consumers against the abuse of market power resulting from a merger.<sup>67</sup> Nevertheless, such remedies could play an important role in limiting harm to consumers and to the health care marketplace. In the event either merger is permitted to go forward, here is a short list of possible regulatory steps the Ohio Department of Insurance might consider, among others that could help limit the harm:

- (1) Requiring premium stability or heightened rate control for a number of years post-merger.
- (2) Requirements ensuring that the merged company cannot scale back plan benefits and options.
- (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) Ensuring that consumer access to adequate networks and network options is preserved and strengthened, including in rural and underserved areas.
- (6) 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.

## Conclusion

The undersigned organizations are troubled by the consolidation within the health insurance industry and its impact on price, access, and quality of care. Mergers between four of the five dominant, national insurers could substantially lessen competition for different insurance products in the State of Ohio. Although the merging companies are claiming various supposed benefits associated with these mergers, all 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.

With the prospect that one or both of these mergers might go forward, and recognizing the shortcomings of divestitures as an effective remedy, we urge the Ohio Department of Insurance and the Director to carefully analyze both these mergers, and to hold separate public hearings on each of them, so as to be prepared to consider imposing additional requirements to better protect consumers from harm.

---

<sup>66</sup> *Healthcare Check-Up: The UnitedHealth Group Acquisition of Sierra Health Services*, NEVADA BUS. (Nov. 1, 2007), <http://goo.gl/Uztt13>.

<sup>67</sup> Dep't of Justice, *Antitrust Division Policy Guide to Merger Remedies* (2011), available at <http://goo.gl/cm0gBI> (conduct remedies can be “too vague to be enforced, or that can easily be misconstrued or evaded, fall short of their intended purpose and may leave the competitive harm unchecked”); see also Deborah L. Feinstein, *Editor's Note: Conduct Remedies: Tried But Not Tested*, 26 ANTITRUST at 5, 6 (Fall 2011) (“Divestitures continue to be the remedy of choice—and with extremely rare exceptions—the only remedy for horizontal mergers at both the FTC and DOJ.”).

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  
Universal Health Care Action Network – Ohio  
U.S. PIRG  
Consumer Federation of America  
Consumer Watchdog  
Consumer Action  
District Council 37, AFSCME  
Sergeants Benevolent Association

Counsel of record for this comment is:

David A. Balto  
James Kovacs  
The Law Offices of David A. Balto  
1325 G. St.  
Suite 500  
Washington, DC 20005  
202-577-5424  
David.balto@dcantitrustlaw.com  
James.kovacs@dcantitrustlaw.com