January 11, 2016

Commissioner Jacqueline K. Cunningham
Bureau of Insurance
Virginia State Corporation Commission
Tyler Building, 1300 E. Main St.
Richmond, VA 23219

Re: Anthem-Cigna and Aetna-Humana Mergers

Dear Commissioner Cunningham:

The undersigned organizations represent a wide variety of consumers across the state and have long been concerned with the competitive landscape in the health care industry. Competition within different health care markets that offers ample choice, high quality, and transparency can be vital to ensuring accessible and affordable care to patients. Competition between health insurers is vital to ensuring lower premiums, improving quality of care, and promoting access and choice.

We write to raise concerns over the proposed consolidation in Virginia'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 Virginia. We write to ask that the Commission utilize all of its powers, including conducting public hearings, to thoroughly evaluate the impact of these mergers.

Under Virginia law, the Virginia State Corporation Commission ("Commission") is authorized to disapprove any merger of insurers that would substantially lessen competition in insurance.[1] We urge the Commission to carefully review the potential adverse effects of the Anthem-Cigna and Aetna-Humana mergers,[2] to hold public hearings, and to take appropriate action under its 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 the Commission 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.

---

[1] VA. CODE ANN. §§ 38.2-1323, 38.2-1326.

[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).

Our comment discusses (1) why public hearings are necessary, (2) the high concentration and potential anticompetitive impact of both mergers, (3) the potential impact of these mergers on consumer costs, (4) the potential adverse effects on network adequacy, (5) why new entry and potential competition are not likely to alleviate these concerns, (6) the relevance of possible efficiencies, and (7) whether there are any remedies that can adequately protect consumers and the public interest if these mergers go forward.

I. Virginia State Corporation Commission Should Hold Public Hearings for the Two Mergers

The Commonwealth has granted the Commission extensive powers to determine whether a proposed health insurance acquisition is in the public interest.[3] This is wholly consistent with the standards adopted by the National Association of Insurance Commissioners ("NAIC") under the Model Act.[4] This authority is in addition to, and goes beyond, the authority of federal and state antitrust enforcers.

Virginia law gives the Commission broad powers to fully investigate an insurance merger to determine its effects on competition. As a starting point, the Commission is empowered to hold public hearings to assess competitive impact of a health insurance merger.[5] 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 Commission 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 Commission is authorized to utilize experts "to assist in the review of the contents of any application filed pursuant to § 38.2-1323."[6] Given the complex nature of these insurance mergers, the Commission might make use of antitrust legal experts and economists. These individuals could also participate in public hearings and offer testimony on their findings.

The Commission's process adds importantly to that of the federal and state antitrust enforcers in a number of respects. First, the Commission has the broad mandate to ensure the mergers are in the "public interest,"[7] 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 Commission proceedings are public and ensure a significant level of transparency and public participation, and the creation of a public record; antitrust investigations are confidential, with limited opportunities for public input. Finally, the Commission has broader powers to fashion and monitor remedies to protect consumers from the harms these proposed mergers could cause.[8]

The mergers of Anthem-Cigna and Aetna-Humana would combine four of the nation's five largest insurers.[9] Because of the substantial potential competitive concerns related to these

[4] *See generally* Model Holding Act, *supra* note 2.
[5] *See* VA. CODE ANN. § 38.2-1323(C).
[6] *Id.* at § 38.2-1332(E).
[7] *Id.* at § 38.2-1326(4).
[8] We further discuss remedial provisions in Section VII.
[9] 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.

mergers in the Commonwealth of Virginia as detailed further below, we request that the Commission *hold two public hearings* – a separate one for each merger – to analyze the impacts and potential harms.

II. Impact of the Mergers of Anthem-Cigna and Aetna-Humana on the Virginia Health Insurance Market

All four insurers, Anthem, Cigna, Aetna, and Humana, offer various insurance products within the Commonwealth. Prior to the announcement of these mergers, the vast majority of insurance markets within the Commonwealth 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 89 percent of all Virginians.[10] Anthem Blue Cross Blue Shield, formerly known as WellPoint, is by far the largest insurer in the state.[11]

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 the Commonwealth's antitrust and insurance statutes. A recent report by Health Affairs relying on data from the NAIC found that the mergers would increase concentration by 34 percent in Virginia's commercial insurance market, greatly exceeding thresholds for concern.[12] Along with lessening competition statewide, the Anthem-Cigna transaction alone could eliminate competition for different commercial insurance products in Winchester, Richmond, Blacksburg, Roanoke, Lynchburg, Danville, Harrisonburg, Virginia Beach, and Charlottesville.[13]

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 72 percent market share of the Virginia ASO market.[14]

The merger between Aetna and Humana could also reduce competition within various health insurance products, including Medicare Advantage ("MA"). A combined Aetna and Humana would have 66 percent of all elderly individuals with an MA plan in Virginia.[15]

---

[10] 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.

[11] *See generally* National Association of Insurance Commissioners, *2014 Market Share Reports* (2015), *available at* http://goo.gl/1OhhOu.

[12] Douglas Hervey, David Muhlestein, & Austin Bordelon, *How Might Proposed Payer Mergers Impact State Insurance Markets?*, HEALTH AFFS. (Dec. 1, 2015), http://goo.gl/OT70Nl.

[13] American Medical Association, *Markets where an Anthem-Cigna merger warrants antitrust scrutiny* (Sept. 8, 2015).

[14] *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.

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

III. The Mergers' Impact on Consumer Costs in Virginia

A critical reason for public hearings is for the Commission to fully evaluate the impact of these mergers on consumers. Studies of past health insurance mergers have documented that mergers harm consumers in higher premiums and reduced service. Consumers are very concerned that these proposed mergers would lead to the same harm – rising costs, i.e. higher premiums and out-of-pocket charges. In the Commonwealth of Virginia, for 2016, insurers proposed premium increases of between 11 and 14 percent for those purchasing plans outside of the Health Insurance Exchange.[16] The merging companies have also requested significant premium increases within Virginia: Aetna requested an average increase of 19.4 percent per plan, Anthem an average of around eight percent, and Humana requested a 12.4 percent increase for a silver level plan offered on the Exchange.[17]

There is little dispute that there is a direct correlation between health insurer concentration and higher premiums.[18] 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."[19] 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.[20] Another study found that the 2008 United-Sierra merger resulted in an additional 13.7 percent premium increase in Nevada.[21] There is also economic evidence that a dominant insurer can increase rates 75 percent higher than smaller insurers competing in the same state.[22] The insurance mergers could also impact out-of-pocket costs as patients see increases in deductibles or other insurance-related costs.[23]

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

---

[16] Prue Salasky, *Virginia health insurers propose double-digit rate hikes*, DAILY PRESS (June 3, 2015), http://goo.gl/xBuAjM.

[17] Prue Salasky, *2016 Virginia health rates all over the board*, DAILY PRESS (July 26, 2015), http://goo.gl/tM3I89.

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

[19] 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.

[20] *See* Leemore Dafny *et al*., *Paying a Premium on Your Premium? Consolidation in the US Health Insurance Industry*, 102 AM. ECON. REV. 1161 (2012).

[21] 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).

[22] 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.

[23] *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 Virginia, the average deductible for a Silver Plan on the Exchange increased by 7.1 percent from 2015 to 2016).

suggesting that their mergers will create cost savings which they will pass along to consumers.[24] 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.[25] But, there is no evidence consumers actually receive 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."[26] 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.[27]

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.[28] 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."[29]

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

---

[24] *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 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.").

[25] *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.

[26] *See* Thomas Greaney, *Examining Implications of Health Insurance Mergers*, HEALTH AFFS. (July 16, 2015), http://goo.gl/ETT1DB.

[27] *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").

[28] *E.g.*, Bertolini, *supra* note 24.

[29] *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."[30] 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 58 percent of all individual plans offered in Virginia use narrower networks that only include 25 percent or fewer of all area providers.[31] Moreover, under current Virginia law, consumers have limited protections as "network adequacy" only requires that an insurance plan offer "sufficient number" of different types of providers to "meet covered persons' health care needs."[32]

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 Virginia. 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 VI to help ensure maintenance of adequate network choices for consumers.

V. Difficulty of New Entry by Competitors, and Loss of Potential Competition

The likely prospect of new competitive entry into a market can potentially "alleviate concerns about a merger's adverse competitive effects."[33] However, using entry as a defense to a merger, particularly within health insurance markets, is rightly viewed with skepticism.[34] Entry will only

[30] *See* Swedish, *supra* note 24.
[31] 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.
[32] *See* VA. CODE ANN. § 5-408-260.
[33] U.S. Dep't. of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines at § 9 (2010), *available at* https://goo.gl/Hh3dks.
[34] 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),

alleviate concerns if the entry "will *deter or counteract* any competitive effects of concern."[35] The merging companies here have previously argued that there is sufficient existing competition and new entry in a number of insurance product markets.[36] 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 Commission can test the merging companies' claims and secure information from other parties about the likelihood of entry.

In Virginia, there has been modest entry on the Health Insurance Exchange for 2016. Still, on average, Virginians only have access to plans from 3.2 insurers, with nearly 30 percent of them having access to only one or two insurers.[37] According to the Kaiser Family Foundation, in counties with fewer than three insurers, consumers "may not benefit from insurer market competition to hold down premiums or offer plans with better value."[38] Concentration and a lack of competitive entry are even more pronounced in Medicare Advantage. From 2015 to 2016, there was no increase in the number of companies offering MA plans in Virginia.[39] Furthermore, according to a recent report from the Commonwealth Fund, the vast majority of Virginia's MA markets remain highly concentrated, with limited competition.[40] In fact, in rural Virginia counties, the 27,035 MA enrollees have incredibly limited options, with the three largest firms controlling 93 percent of the total market, and Humana controlling a dominant overall market share.[41]

Along with a lack of current competition, and extremely limited prospects for new entry, 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."[42] 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.[43]

---

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.").

[35] Horizontal Merger Guidelines, *supra* note 33 at § 9.

[36] *See* Swedish, *supra* note 24 ("health insurance is flush with competition"); *see also* Bertolini, *supra* note 24 ("Aetna will continue to face significant competition from a large number of health plans and other new market entrants").

[37] Cynthia Cox, Gary Claxton & Larry Levitt, *Analysis of Insurer Participation in 2016 Marketplaces*, KAISER FAMILY FOUNDATION (Nov. 3, 2015), http://goo.gl/QcETCd.

[38] *Id.*

[39] 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 (According to the data, three MA plans departed while three new MA plans entered Virginia for 2016).

[40] *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 MA markets are highly concentrated lacking sufficient plan competition).

[41] *Id.*

[42] 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.

[43] *See* Varney, *supra* note 34.

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."[44] 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."[45]

The adverse effect of the Anthem-Cigna merger on potential new entry would be heightened further because of the Blue Cross Blue Shield Association's "two-thirds" rule and market allocation rule.[46] In states where an insurer is a "Blue" mark holder, it is bound by contract to ensure that two-thirds of its annual revenue there must be attributable to the Blue mark. Additionally, Blue plans are not permitted to compete against each other in the same geographic area. In Virginia, Anthem is a Blue plan and the largest insurer in the state. However, Anthem does not compete in northern Virginia, as that territory belongs to Carefirst, another Blue mark holder.[47] The Blue rules could not only shut out a combined Anthem-Cigna from expanding competition in CareFirst's territory, but could also require it to close down Cigna's current operations there.[48]

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 in Virginia

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."[49]

---

[44] *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.
[45] *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).
[46] *See* Jacqueline DiChiara, *BCBS Licensing Agreement Questioned in Anthem Acquisition*, REVCYLCEINTELLIGENCE (Aug. 26, 2015), http://goo.gl/NRHoy8.
[47] *See Service Area*, CAREFIRST, https://goo.gl/DCiczA (last visited Jan. 7, 2016).
[48] *See* Bruce Japsen, *Why Blue Cross Hates Anthem's Cigna Deal*, FORBES (July 27, 2015 8:00AM), http://goo.gl/gp9GpK.
[49] Horizontal Merger Guidelines, *supra* note 33 at § 6.4.

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.[50] 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.[51]

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."[52] 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.[53]

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 Virginia, these mergers will further entrench Anthem and Aetna's preexisting market power, reducing their incentives to compete and improve care. Industry experts have suggested that the mergers could undercut innovation.[54]

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.[55] 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.[56]

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

---

[50] *See* Swedish, *supra* note 24 (section labeled "Improving quality and affordability"); *see also* Bertolini, *supra* note 24 (section labeled "Benefits of the Acquisition for Consumers and Providers.").
[51] Horizontal Merger Guidelines, *supra* note 33 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").
[52] 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.
[53] *See* Section III.
[54] *See* Reed Abelson, *With Merging of Insurers, Questions for Patients About Costs and Innovation*, N.Y. TIMES (July 5, 2015), http://goo.gl/NPp38y.
[55] Dafny, *supra* note 44.
[56] 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.

VII. Divestitures and Other Remedies

A public hearing is also essential to determine what action is necessary for the Commission to properly protect consumers and ensure either proposed merger is in the public interest. If the Commission decides 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.[57]

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 evaluated 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.[58] Divestitures require that the merging insurance companies spin off subscribers or operations to another, independent insurance company to restore competition. In Virginia, given the significant scope, breadth, and market shares of the merging companies' commercial insurance, ASO, and MA operations, 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.

However, the effectiveness of divestiture as a remedy has come under significant questioning. Economic research by Professor John Kwoka finds that divestitures often fail to restore competition to the marketplace.[59] 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.[60]

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

---

[57] *See Highmark Merger Timeline*, PENNSYLVANIA INSURANCE DEP'T, http://goo.gl/0b6827 (last visited Jan. 8, 2015).

[58] *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).

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

[60] 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.

insurance products, but the merged companies were still able to raise premiums by significant margins.[61] 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.[62] With the lack of competition in a number of Virginia markets already, and the dominance of four firms throughout the state, 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 Virginia Attorney General's Office, using its own antitrust authority) may be considering divestitures, the Commission is 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 Virginia Attorney General. For example, in the 2008 acquisition of Sierra Health by UnitedHealth, the DOJ required divestiture of MA plans in Las Vegas,[63] 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.[64]

Regulatory remedies also have their shortcomings for effectively protecting competition and consumers against the abuse of market power resulting from a merger.[65] 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 Virginia State Corporation Commission 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.

---

[61] Dafny, *supra* note 20; Guardado, *supra* note 21.
[62] *See* Greaney, *supra* note 45.
[63] Final Judgment, *UnitedHealth Inc. and Sierra Health Servs.*, No: 1:08-cv-00322.
[64] *Healthcare Check-Up: The UnitedHealth Group Acquisition of Sierra Health Services*, NEVADA BUS. (Nov. 1, 2007), http://goo.gl/Uztt13.
[65] 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.").

- (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 industry and its impact on price, access, and quality of care. Mergers between four of the five dominant insurers could further harm competition in the Commonwealth of Virginia. 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 Commission 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.

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
Virginia Consumer Voices for Healthcare
The Commonwealth Institute
US PIRG
SEIU Virginia 512
Virginia Organizing
Consumer Action
Consumer Watchdog
Virginia Rural Health Association
DC 37 Health & Security Plan

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