July 7, 2016

The Honorable Renata Hesse
Principal Deputy Assistant Attorney General
U.S Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Re: The Problems of Health Insurance Merger Remedies

Dear Principal Deputy Assistant Attorney General:

The undersigned organizations are some of the nation's leading consumer and public interest advocates. We have participated in and testified in numerous state insurance commission hearings on the proposed Anthem-Cigna and Aetna-Humana mergers.[1] In those testimonies we have documented the profound competitive concerns raised by these mergers and the lack of any efficiencies to justify them. Simply, we are concerned that as structured these mergers would substantially lessen competition in violation of Section 7 of the Clayton Act and result in increased premiums and reduced service for consumers.

These mergers would combine four of the five largest national health insurers, leaving only three national health insurers in the market. We are pleased that Acting Associate Attorney General William Baer recognized that these mergers were a "game changer."[2]

We now presume the merging insurers will suggest that these concerns can be resolved through some sort of remedy. Seven Senators, the California Department of Insurance, and the American Antitrust Institute have all concluded that there is no effective remedy for these mergers.[3] We

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[1] The Coalition to Protect Patient Choice has submitted comments in Florida, Virginia, California, California, Ohio, Illinois, Delaware, New York, Wisconsin, Iowa, Indiana, Missouri, and Georgia. *Available at* http://www.thecppc.com/#!state-comments/p6me4.

[2] Leslie Small, *A glimpse into the DOJ's review of health insurance mega-mergers*, FIERCEHEALTHCARE (Mar. 11, 2015 15:35 PM), http://www.fiercehealthcare.com/payer/a-glimpse-into-doj-s-review-health-insurer-mega-mergers.

[3] *See* Letter from Senators to Renata Hesse, Principal Deputy Assistant Attorney General, Antitrust Division (June 22, 2016), *available at* http://www.blumenthal.senate.gov/imo/media/doc/letter_Senators%20to%20DOJ%20on%20Aetna%20Anthem_FINAL.PDF, Letter from California Insurance Commissioner Dave Jones to Loretta Lynch, Attorney General of the United States (June 16, 2016) *available at* http://media.wix.com/ugd/1859d0_e61ba337124148bb957190c8be296bca.pdf, and Letter from California Insurance Commissioner Dave Jones to

write to also voice our significant concerns about whether any remedy can be effective in restoring the competition that would be lost.

This letter makes the following points:

- **Retrospective analysis of past mergers shows that remedies often fail.** A recent and comprehensive survey of studies of merger remedies by Economics Professor John Kwoka found that mergers allowed to proceed with remedies resulted in average price increases of 7.68% where a divestiture remedy was used and 16.01% in mergers where a conduct remedy or other conditions were used.
- **Remedies are generally only appropriate in mergers with significant efficiencies that would benefit consumers.** Where the problematic parts of the merger can be isolated and resolved through remedies, while permitting a merger that is otherwise beneficial for consumers as well as the merging companies, there is reason to explore remedies. But as we explain, and as reflected in a recent letter by seven Senators and in detailed reports by the California Insurance Commissioner, we do not believe the merging insurers have established this threshold condition that consumers will benefit from these mergers.[4]
- **These mergers raise issues similar to those that have caused antitrust enforcers to become tougher on mergers, and more skeptical of remedies, in recent cases.** This enforcement vigor is warranted in response to retrospective studies showing post-merger price increases. The proposed health insurance mergers do not present any better prospect for consumer benefits than were claimed in the proposed Halliburton-Baker Hughes, Sysco-US Foods, or Staples-Office Depot mergers, in all of which remedies were rejected.
- **Remedy attempts in the health insurance industry have largely failed.** Remedies were attempted in the 1999 Aetna-Prudential and 2008 United-Sierra mergers, and prices still increased by 7% and 13.7% respectively. The biggest failure was the 2012 Humana-Arcadian merger, where one of the three acquiring companies exited the market, another company partially exited the market, and premiums increased by 44%.
- **The divestitures necessary to resolve competitive concerns are unprecedented in size and scope.** Piecemeal divestitures will not fully restore competition and fulfill the law's obligation that "restoring competition requires replacing the competitive intensity lost as a result of the merger rather than focusing narrowly on returning to premerger [concentration] levels."[5] For both transactions, divestitures will be required in hundreds of counties throughout the U.S., involving hundreds of thousands, if not millions, of enrollees. There are also very few counties with established companies ready to service

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Loretta Lynch, Attorney General of the United States (June 23, 2016), available at http://media.wix.com/ugd/1859d0_fb4c76819a1f40c4a58a15e2ca727c56.pdf, Letter to William J. Baer, American Antitrust Institute (Jan. 11, 2016), *available at* http://www.antitrustinstitute.org/sites/default/files/Health%20Insurance%20Ltr_1.11.16.pdf.

[4] *See* Letter from Senators, *supra* note 3; CA DOI Anthem-Cigna letter, *supra* note 3; CA DOI Aetna-Humana letter, *supra* note 3. We will address efficiencies in greater detail in a later letter.

[5] U.S. Department of Justice, Antitrust Division Policy Guide to Merger Remedies § II (October 2004), *available at* http://www.usdoj.gov/atr/public/guidelines/205108.htm.

acquired enrollees on day one.[6] In the Humana-Arcadian merger, which involved a modest divestiture of 12,700 subscribers in 51 markets, two of the three acquiring companies failed to compete effectively, and completely or partially exited the market.

- **The costs of the divestitures in disrupted service, higher premiums, uncertainty, and inferior service will be borne by consumers.** Especially for the Aetna-Humana merger, the most vulnerable consumers – elderly and disabled Medicare beneficiaries – will predictably suffer the greatest harm. [7]

In evaluating any proposed remedy, the law requires that a remedy must *fully restore* the competition that would otherwise be lost, or must otherwise effectively prevent the harm that would result.[8] The Supreme Court has stated that if a remedy fails to pry open the market to competition, then the government "has won a lawsuit and lost a cause."[9] The remedy process is both critical and difficult. Acting Associate Attorney General Bill Baer has acknowledged the critical role of the DOJ, stating that "parties who are anxious to maximize shareholder value want to get a deal done, and they're often willing to throw out some conduct promises or some modest structural remedies. . . . Where there is a divergence between shareholder interests and consumer interests, our job is to police the transaction to make sure that consumer interests don't get the back of the hand."[10] We urge that this standard be vigorously applied here.

I. Mounting Evidence Shows Remedies Often Do Not Adequately Fix the Competitive Harm from Mergers

Considering the high bar set by the law – that a remedy must fully restore competition in the marketplace – one would hope for enforcement and remedies to ensure that mergers produce no measurable negative impacts. This unfortunately has not generally been the case. Economics Professor John Kwoka conducted a comprehensive analysis of merger retrospective studies and identified all the mergers where there was some type of remedy deployed.[11] Analyzing these

[6] *See* Letter to Assistant Secretary for Planning and Evaluation Richard Frank, American Hospital Association (May 2, 2016), *available at* http://media.wix.com/ugd/1859d0_ef7ed280017d421e8e6ac59094a98ec6.pdf [hereinafter "AHA letter"].

[7] We have, in some states, publicly urged that the commissioner of insurance consider various remedies. However, this was because we expect that the state insurance commissioners may consider a variety of remedies based on their limited powers, in the event that the Justice Department ultimately determines not to bring a full challenge. We do not prejudge the DOJ's determination on whether to challenge the mergers, and if the DOJ finds that a full challenge is warranted based on its investigation, we would fully support that challenge. We do not want to be misperceived as putting a thumb on the scale in favor of divestitures or behavioral remedies rather than an outright challenge. In fact, we see many potential shortcomings to either kind of remedy, as more fully explained below.

[8] *E.g., See* Ford Motor Co. v. United States, 405 U.S. 562, 573 (1972)("The relief in an antitrust case must be 'effective to redress the violations' and 'to restore competition.'" (citation omitted).

[9] International Salt Co. v. United States, 332 U.S. 392, 401 (1947) (abrogated on other grounds).

[10] *Oversight of the Enforcement of the Antitrust Laws: Hearing Before the Subcommittee on Antitrust, Competition Policy and Consumer Rights*, 114th Cong. (statement of witness William Baer), *available at* http://www.judiciary.senate.gov/meetings/oversight-of-the-enforcement-of-the-antitrust-laws-2016.

[11] John E. Kwoka, Jr., Does Merger Control Work? A Retrospective on U.S. Enforcement Actions and Merger Outcomes, 78 ANTITRUST L.J. 619, 637 (2013).

studies, Kwoka found that prices increased by an average of 7.68% in mergers where a divestiture remedy was used and 16.01% in mergers where a conduct remedy or other conditions were used.[12] Kwoka concludes:

> It would appear that neither divestiture nor conduct/conditions remedies are especially effective in preserving competition, since neither prevents significant postmerger price increases in the studied transactions. Moreover, as between the two policies, conduct and conditions remedies appear substantially less effective, with price increases twice as large as those under divestiture.[13]

Although appropriately qualified, these results are striking. As Kwoka states, the results suggest "that the remedies chosen may be inadequate to the task of preserving competition, and that conduct and conditions remedies may be especially ineffective."[14] These findings call into question whether the use of remedies to resolve merger investigations is worth the price, and certainly show that the prescribed legal standard for remedies is not being met. As noted, the Supreme Court has stated that if a remedy fails to pry open the market to competition, then the government "has won a lawsuit and lost a cause."[15]

II. Antitrust Enforcement Agencies Increasingly Skeptical of Remedy Fixes

Perhaps in reaction to the mounting evidence of the ineffectiveness of remedies, including some prominent recent failures of remedies,[16] antitrust enforcement agencies have been increasingly tough on deals where it does not seem that remedies will adequately address the competitive concerns. There are three recent examples of deals that collapsed, even though the merging companies offered to accept extensive remedies.

Halliburton-Baker Hughes. This proposed merger involved the second and third largest oil-field service firms in the world, and a purchase price of $28 billion.[17] The DOJ was concerned that the proposed merger threatened harm to competition in 23 separate markets for oil-field products and services that were important to ensuring a domestic and independent supply of

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[12] *Id.* at 640.
[13] *Id.* at 641.
[14] *Id. See also* Presentation by John Kwoka to the 17th Annual American Antitrust Institute Conference, Merger Remedies: Third Way or Soft Enforcement?, *available at* http://www.antitrustinstitute.org/sites/default/files/Kwoka%20Merger%20Remedies.pdf (asking if remedies had become "soft enforcement'—an easy alternative to challenging mergers).
[15] International Salt Co. v. United States, 332 U.S. 392, 401 (1947) (abrogated on other grounds).
[16] *See e.g.*, Melissa Lipman, Bankrupt Grocer May Push FTC To Dig Deeper On Divestitures, Law360 (Dec. 4, 2015 6:41 PM), http://www.law360.com/articles/734016/bankrupt-grocer-may-push-ftc-to-dig-deeper-on-divestitures (discussing the failed divestiture in the Albertsons-Safeway merger); David McLaughlin, Mark Clothier and Sara Forden, Hertz Fix in Dollar Thrifty Deal Fails as Insider Warned, Bloomberg (Nov. 29, 2013 12:00 AM), http://www.bloomberg.com/news/articles/2013-11-29/hertz-fix-in-dollar-thrifty-deal-fails-as-insider-warned (discussing the failed divestiture in the Hertz-Dollar Thrifty merger).
[17] Alison Sider, *Halliburton-Baker Hughes Merger Sinks on Regulators' Objections*, THE WALL STREET JOURNAL (May 1, 2016 9:39 PM), http://www.wsj.com/articles/halliburton-baker-hughes-to-call-off-merger-1462139014.

energy, leading to higher prices and lower competition.[18] The merging companies were two of only three companies believed to have the resources, technology, and know-how to address the most difficult challenges in the oil and gas industry.[19]

Halliburton was in talks with both Carlyle Group and General Electric Co. about a substantial remedies package including divestitures worth up to $7 billion, which was a quarter of the acquisition price.[20] However, these divestitures were deemed insufficient by the DOJ, which concluded that "their proposals fell well short of ensuring that the current competitive dynamic would be preserved: carving off assets (usually the weaker set) from one of the two firms in just some of the product markets at issue."[21] Baer said of the remedy proposal:

> We could not seriously consider a remedy where Halliburton determined which employees would go and who would stay, and where it decided what intellectual property would be licensed, what retained and what shared. We could not accept ongoing entanglements that would have prevented the buyer from acting as a free and independent competitor. And we would not accept a remedy proposal that, even putting aside those inadequacies, left unaddressed harm in some markets. In the end, there was no assurance that customers would view some unidentified third party buyer as a serious alternative to Halliburton and Schlumberger.[22]

The DOJ also stated that the divestiture failed to transfer intact businesses, would be highly disruptive, would require support agreements, and that the remedy would involve an unprecedented amount of complication and risk.[23] The DOJ ultimately concluded that "nothing short of no deal at all was the only right outcome."[24]

Sysco-US Foods. This proposed $3.5 billion merger would combine the U.S.'s two largest food distribution companies.[25] The FTC sued to block the deal, arguing that the merger would lead to higher prices and worse service for customers like restaurants and schools.[26] Specifically, the FTC alleged that the proposed merger would "significantly reduc[e] competition nationwide and in 32 local markets for broadline foodservice distribution services."[27] This merger would especially affect customers with nationwide locations, as the merging companies are the only

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[18] *Id.*
[19] Complaint at 2, U.S. v. Halliburton Co., and Baker Hughes Inc., Case 1:16-cv-00233-UNA (filed Apr. 6, 2016), *available at* https://www.justice.gov/atr/file/838661/download.
[20] Sider, *supra* note 17.
[21] William Baer, Remarks at American Antitrust Institute's 17th Annual Conference (June 16, 2016), *available at* https://www.justice.gov/opa/speech/acting-associate-attorney-general-bill-baer-delivers-remarks-american-antitrust-institute [hereinafter "Baer AAI speech"].
[22] *Id.*
[23] Halliburton Complaint, *supra* note 19 at 33-35.
[24] *Id.*
[25] Michael J. de la Merced, *Sysco Terminates Deal With US Foods*, THE NEW YORK TIMES (June 29, 2015), http://www.nytimes.com/2015/06/30/business/dealbook/sysco-terminates-deal-with-us-foods.html?_r=0.
[26] *Id.*
[27] Press Release, FTC Challenges Proposed Merger of Sysco and US Foods, FED. TRADE COMM'N (Feb. 19, 2015), https://www.ftc.gov/news-events/press-releases/2015/02/ftc-challenges-proposed-merger-sysco-us-foods

companies competing with a truly national footprint.[28] There was no other company with a comparable footprint that would be able to offset the competition that would have been lost to this merger.[29]

In an effort to allay these concerns, Sysco offered to divest 11 out of US Foods 61 distribution centers to Performance Food Group ("PFG"), the third largest firm in the market, claiming that it would offset the significant competitive harm likely to result from the merger.[30] The FTC enumerated several reasons why these divestitures were inadequate, including that the acquiring firm would remain too small to compete, that it would not be able to serve national customers due to significant gaps in its geographic network, that these gaps would put the acquiring firm at a disadvantage in transportation costs, that the small purchasing volume would put the acquiring firm at a disadvantage in its product costs, that it couldn't offer the same delivery options or product diversity, and that it wouldn't be competitive in value added services.[31] The FTC was also concerned about the risk facing the acquiring firm in successfully integrating the acquisition, which was more than five times greater than any previous acquisition by the company.[32] The FTC ultimately rejected this remedy proposal and challenged the merger in court, winning an injunction.

The court agreed with the FTC that there were significant shortcomings with the proposed divestiture, that the acquiring firm would be unlikely to step into the shoes of US Foods and be able to maintain competition.[33] In explaining its conclusion, the court quoted the 2004 Antitrust Division Policy Guide to Merger Remedies, which states that "[r]estoring competition requires replacing the competitive intensity lost as a result of the merger rather than focusing narrowly on returning to premerger HHI levels."[34] The proposed merger was then abandoned by the companies.

Staples-Office Depot. Staples, the world's largest supplier of office products and services, offered to purchase Office Depot, another office products and services supplier, for $6.3 billion.[35] This proposed merger was competitively problematic in the market for consumable office supplies sold to large business-to-business customers, where the two companies are the

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[28] Press Release, Following Sysco's Abandonment of Proposed Merger with US Foods, FTC Closes Case, FED. TRADE COMM'N (July 1, 2015), https://www.ftc.gov/news-events/press-releases/2015/07/following-syscos-abandonment-proposed-merger-us-foods-ftc-closes.
[29] *Id.*
[30] *Id.* The 50 distribution centers not divested would have brought Sysco's total number of distribution centers up to 122.
[31] Memorandum in Support of Plaintiff Federal Trade Commission's Motion for Temporary Restraining Order and Preliminary Injunction at 34-37, Case 1:15-cv-00256-APM (filed Mar. 5, 2015), *available at* https://www.ftc.gov/system/files/documents/cases/150305syscomemo.pdf.
[32] *Id.* at 37.
[33] FTC v. Sysco Corp., 113 F. Supp. 3d 1, 73 (D.C. Cir. 2015).
[34] 2004 Antitrust Division Policy Guide to Merger Remedies, DOJ (October 2004), *available at* https://www.justice.gov/atr/archived-antitrust-division-policy-guide-merger-remedies-october-2004.
[35] Press Release, FTC Challenges Proposed Merger of Staples, Inc. and Office Depot, Inc., FED. TRADE COMM'N (Dec. 7, 2015), https://www.ftc.gov/news-events/press-releases/2015/12/ftc-challenges-proposed-merger-staples-inc-office-depot-inc.

two largest suppliers by a wide margin.[36] The FTC alleged that the proposed merger "would violate the antitrust laws by significantly reducing competition nationwide in the market for "consumable" office supplies sold to large business customers for their own use."[37] Staples and Office Depot were the best options, and sometimes the only meaningful options in this market, and their direct head-to-head competition produced consumer benefits in terms of better prices and lower services.[38]

Staples offered to sell corporate contracts that were generating about $550 million in sales to Essendant for $22.5 million in order to secure the deal.[39] The FTC ultimately rejected this divestiture proposal for six different reasons: there was no definitive agreement presented, the contracts were short-term, the acquiring firm did not currently sell to the customers, the acquiring firm was not ready to compete on day one, the acquiring firm could not in any event replace the competition provided by Office Depot, and the acquiring firm would need to continue to rely on Staples.[40] The deal collapsed after a district court decision granting an injunction.[41]

III. Remedies are Unlikely to Work in the Proposed Health Insurance Mergers

In the case of the proposed mergers of Anthem and Cigna and of Aetna and Humana, the remedies that the merging insurers are likely to propose have all the characteristics of remedies that have previously failed, both in the case of health insurance mergers and with mergers more generally.

a. Health Insurance Remedies Often Fail

In nearly every health insurance merger enforcement action during the last two decades, DOJ has relied on the structural remedy of divestiture.[42] Divestitures in the health insurance industry usually require that the merging companies spin off enrollees to another insurance company that

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[36] Complaint at 1, In the Matter of Staples, Inc. and Office Depot, Inc., Docket No. 9367, *available at* https://www.ftc.gov/system/files/documents/cases/151207staplesoffdepot_pt3cmpt.pdf.
[37] Staples Press Release, *supra* note 35.
[38] Staples Complaint, *supra* note 36 at 1-2.
[39] Megan Woolhouse, Staples, *Office Depot to divest operations as they seek merger approval*, BOSTON GLOBE (Feb. 16, 2016), https://www.bostonglobe.com/business/2016/02/16/staples-office-depot-divest-operations-they-seek-merger-approval/WNHwdnJ0EfSDJRNKlDMbSO/story.html.
[40] Memorandum in Support of Plaintiff's Motion for a Preliminary Injunction at 37-38, Case 1:15-cv-02115-EGS (filed Feb. 19, 2016), *available at* https://www.ftc.gov/system/files/documents/cases/160219staplespimemo.pdf.
[41] Press Release, After Staples and Office Depot Abandon Proposed Merger FTC Dismisses Case from Administrative Trial Process, FED TRADE COMM'N (May 19, 2016), https://www.ftc.gov/news-events/press-releases/2016/05/after-staples-office-depot-abandon-proposed-merger-ftc-dismisses. The court did not examine the proposed remedies, because defendants rested after plaintiffs' case-in-chief. FTC v. Staples, Inc., No. 1:15-cv-02115-EGS, at 74 (D.D.C. May 17, 2016), *available at* https://www.ftc.gov/system/files/documents/cases/051016staplesopinion.pdf.
[42] *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).

is purportedly fully capable of restoring the same competition. But experience has shown a different outcome.

The DOJ has recognized the difficulties with making a divestiture work in health insurance markets. Indeed, as discussed below, the DOJ incorporates substantial behavioral remedies to attempt to buttress the ability of a divestiture to restore competition. In addition, it often includes a divestiture of a broader range of products[43] or a broader geographic scope[44] than the specific overlaps in order to attempt to facilitate competition by the acquiring firm.

In many of these cases there is little evidence that the benefits of competition are effectively restored after these divestitures. Three retrospective studies on health insurance mergers showed that the merged companies were still able to raise premiums by significant margins even after divestitures of enrollees for different insurance products.[45]

For any divestiture to be successful, the purchaser of the assets needs to have both the incentive and the ability to fully restore competition. A new entrant needs expertise in the relevant products and geographic area. It needs to be able to assemble and maintain a cost-competitive and attractive network of hospitals and physicians, which additionally requires scrutiny and continued monitoring from DOJ.[46] Thomas Greaney, nationally recognized expert on health care and antitrust law, also cautions of another factor working against successful divestiture remedies in the health insurance industry - "The lessons of oligopoly are pertinent here: consolidation that would pare the insurance sector down to less than a handful of players is likely to chill the enthusiasm for venturing into a neighbor's market or engaging in risky innovation."[47]

And there is yet another reason why divestitures are not effective in health insurance markets in the long term: what is being divested are temporary contractual arrangements with specific policyholders. In the next open season, it is all too easy for the merged firm to solicit and secure former policyholders, thus recreating the original conditions and eviscerating the remedy. Thus, a divestiture of subscribers is not a long-term asset.

For all these reasons, it may be difficult to genuinely preserve the competitive benefits of the pre-merger market structure through divesting subscribers or operations to a competitor.

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[43] *See* Final Judgment, U.S. v. UnitedHealth Group Inc., No. 1:05CV02436 (May 23, 2006), https://www.justice.gov/atr/case-document/final-judgment-185

[44] *See* Final Judgment, U.S. v. Humana Inc., No.: 1:12-cv-00464 (Sep. 21, 2012), https://www.justice.gov/atr/case-document/file/499026/download.

[45] Leemore Dafny *et al.*, *Paying a Premium on Your Premium? Consolidation in the US Health Insurance Industry*, 102 AM. ECON. REV. 1161 (2012); 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); Topher Spiro, Maura Calsyn, Meghan O'Toole, Divestitures Will Not Maintain Competition in Medicare Advantage, Center for American Progress (Mar. 8, 2016), https://www.americanprogress.org/issues/healthcare/report/2016/03/08/132420/divestitures-will-not-maintain-competition-in-medicare-advantage/.

[46] *See* Thomas Greaney, *Examining Implications of Health Insurance Mergers*, HEALTH AFFS. (July 16, 2015), http://healthaffairs.org/blog/2015/07/16/examining-implications-of-health-insurance-mergers/.

[47] *Id.*

This was the ultimate decision in Florida, where the Office of Insurance Regulation ("FL OIR") rejected divestitures as a potential remedy in the proposed Aetna-Humana merger.[48] The FL OIR noted that the divestitures were "not in the best interests of Florida policyholders and also may be short term in nature."[49] The FL OIR noted that such divestitures may "result in unwanted changes in quality of services [and] benefits," and furthermore, that policyholders can switch insurance every year which would "lessen the effectiveness of divestitures as a means to manage market concentration."[50]

Unfortunately, conduct remedies are at least as problematic in health insurance as in other markets. A good example of this is the 2008 acquisition of Sierra Health by UnitedHealth. There the DOJ required divestiture of MA plans in Las Vegas,[51] but the Nevada Insurance Commissioner required additional behavioral remedies. In order for the merging companies to receive approval, 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 take specified actions to limit the number of uninsured within the state.[52] Even these additional remedies were not enough to protect the people of Nevada against price increases of 13.7%.[53]

b. Past Health Insurance Merger Remedies Were Extensive, Yet Still Failed to Preserve Competition

As discussed above, the three most recent health insurance mergers were all approved with divestitures, and retrospective analysis shows that these remedies failed to restore competition.

Aetna-Prudential (1999). Aetna was required to divest approximately 427,000 enrollees in two plans in major metropolitan areas in central and southeastern Texas.[54] The divestiture was made to Blue Cross and Blue Shield of Texas, who acquired the two plans for $500 million – half of the $1 billion purchase price for Prudential.[55] The DOJ's order included 12 conditions to reinforce and support the divestiture, and also required a monitor trustee to oversee those conditions.[56]

The DOJ designed the conditions of this divestiture primarily around sectioning off the two plans and preparing them to be divested to a buyer that had not been selected at the time of the final

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[48] Consent Order at 8, In the Matter of Application for the Indirect Acquisition of Humana by Aetna, No. 125926-16-C0 (Feb. 15, 2016), *available at* http://floir.com/Sections/LandH/AetnaHumanaHearing.aspx.
[49] *Id.* at 8.
[50] *Id.* at 9.
[51] Final Judgment, *UnitedHealth Inc. and Sierra Health Servs.,* No: 1:08-cv-00322.
[52] *Healthcare Check-Up: The UnitedHealth Group Acquisition of Sierra Health Services*, NEVADA BUS. (Nov. 1, 2007), http://www.nevadabusiness.com/2007/11/healthcare-check-up-the-unitedhealth-group-acquistion-of-sierra-health-services/.
[53] Guardado, et al., *supra* note 45.
[54] Revised Final Judgment, US v. Aetna, No. 3-99CV 1398-H (Dec. 7, 1999), *available at* https://www.justice.gov/atr/case-document/revised-final-judgment
[55] Allison Bell, *Aetna Sells NYLCare Operations In Texas*, LIFEHEALTHPRO (Sep. 27, 1999), http://www.lifehealthpro.com/1999/09/27/aetna-sells-nylcare-operations-in-texas
[56] Aetna-Prudential Revised Final Judgment, *supra* note 42.

order. The DOJ required Aetna to take all steps necessary to ensure that the two divested plans were maintained and operated as independent, on-going, economically viable, and active competitors until the completion of the divestitures.[57] The companies were forbidden from consummating the merger until either the DOJ was satisfied that the two plans were independent and viable, or a divestiture had occurred.[58] The DOJ also put in place a condition that prevented employee poaching from the two divested plans.[59]

The Aetna-Prudential merger presents an important lesson, because while the DOJ's remedy was successful as far as it went, it was also under-inclusive in what was needed to fully preserve competition. A study of the merger by Professor Leemore Dafny found that the DOJ "achieved its objective of neutralizing the merger's effect on market concentration in Texas markets."[60] And yet even though the divestiture accounted for half of the purchase price, health insurance costs outside of the divestiture area increased by 7%.[61] The study also found that the merger led to a reduction in the employment of health care workers, and the replacement of physicians with nurses.[62] Average physician earnings decreased by 3%.[63] This suggests that output and cost of healthcare went down even as health insurance prices rose. These study results indicate that harms can occur at lower concentration thresholds than the DOJ has previously used to determine markets where divestitures must occur.

This divestiture was of only limited success despite the fact that the acquirer – Blue Cross of Texas – was already a very strong incumbent in the state, with very strong name recognition and significant existing relationships with broad networks of providers. For those reasons the divestiture may have been somewhat more successful in Texas. Another purchaser, without that presence, would likely have been even less successful. And there are probably no similarly situated buyers for the Aetna-Humana or Anthem-Cigna mergers.

United-Sierra (2008). United was required to divest "all tangible and intangible assets dedicated to the administration, operation, selling, and marketing of the Clark and Nye County CMS Plans."[64] The divestiture was to Humana, which acquired 26,000 enrollees.[65] The DOJ included 20 conditions to ensure that the divestiture was effective, and also required a monitor trustee to

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[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] Dafny, *supra* note 45 at 1175.
[61] *Id.* at 1163.
[62] *Id.* at 1184.
[63] *Id.* Nurse earnings actually slightly increased by 0.6%.
[64] Final Judgment, U.S. v. UnitedHealth Group Incorporated, No.1:08-cv-00322 (Sep. 24, 2008), *available at* https://www.justice.gov/atr/case-document/final-judgment-186.
[65] Larissa C. Bergin, *The Next Chapter in Antitrust and Health Care: Health Insurance Mergers An ABA Program Summary*, JONES DAY, http://www.jonesday.com/files/Publication/fddfe011-7ac6-4734-bba2-3c394760964f/Presentation/PublicationAttachment/38cb485b-8a91-437f-8072-479a8057f532/nextchapter.pdf.

oversee those conditions.[66] Humana acquired the plans for $185 million, and United completed its acquisition of Sierra for $2.6 billion.[67]

In a change from the Aetna-Prudential merger, the DOJ in the United-Sierra merger added extensive conditions targeted at assisting the acquirer, Humana, in successfully completing the transition of acquired lives, and at assisting Humana in being able to compete immediately after acquiring the divested plans. For example, United was prohibited from using certain branding for a period of time, but Humana was allowed to license certain branding from United.[68] Additionally, United was required to provide transitional support, to provide help in negotiating with providers so Humana could assure access to substantially the same provider network, and to arrange introductions to its top brokers for the divested plans.[69]

The United-Sierra merger is another example of an under-inclusive divestiture. The divestiture was solely of Medicare Advantage ("MA") plans. However, a retrospective study of plans sold to employers found that prices increased by 13.7% as a result of the merger.[70] Thus, even assuming the divestiture was successful in the MA market, the remedies still failed to restore competition in all impacted markets. It is also useful to note that the additional behavioral remedies imposed by the Nevada Insurance Commissioner, discussed above, were also ineffective at restoring competition. It is also troubling that Humana had to significantly rely on United under the order to complete the transition of enrollees to its network.

This divestiture was of only very limited success despite the fact that Humana was the strongest nationwide competitor in Medicare Advantage and this acquisition was a natural extension of its business model. Another acquirer would have faced a much more daunting task of entering the market. Humana had an exceptional reputation, strong national advertising, and tremendous expertise in the product. Few other competitors possessed their expertise and reputation.

Humana-Arcadian (2012). Humana was required to divest 15 plans that enrolled about 12,700 MA members across 51 counties in 5 states.[71] Humana sold the plans to three acquirers, Cigna, Vantage Health Plan Inc., and WellCare Health Plans Inc., who were each approved by the DOJ.[72] The DOJ's order included 12 conditions to the divestiture, and also required a monitor trustee to oversee those conditions.[73]

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[66] United-Sierra Final Judgment, *supra* note 64.
[67] *United-Sierra merger in Nevada approved -- with conditions*, AMEDNEWS.COM (Mar. 17, 2008), http://www.amednews.com/article/20080317/business/303179996/6/
[68] United-Sierra Final Judgment, *supra* note 64.
[69] *Id.*
[70] Guardado, et al., *supra* note 45.
[71] Topher Spiro, Maura Calsyn, Meghan O'Toole, Divestitures Will Not Maintain Competition in Medicare Advantage, Center for American Progress (Mar. 8, 2016), https://www.americanprogress.org/issues/healthcare/report/2016/03/08/132420/divestitures-will-not-maintain-competition-in-medicare-advantage/.
[72] *Id.*
[73] Humana Final Judgment, *supra* note 44 at 8-17.

In formulating the divestiture in this merger, the DOJ drew on the conditions imposed in the United-Sierra merger, and imposed significant additional conditions requiring Humana to assist the acquiring companies in the transition. Where possible, Humana had to assign all provider contracts to the acquirers, and had to help the acquirers form contracts with the providers where that was not possible.[74] Humana was also required to provide the acquirers access to certain provider networks for two years.[75] Humana was barred from using certain brands for two years, and had to allow the acquirers to license certain brands for a year after acquisition.[76] Humana had to offer transitional support services, and it had to allow the acquirers to make offers of employees involved in the operation of the divested plans, as well as to introduce the acquirers to the top brokers that were involved in the marketing and sales of the divested plans.[77] Finally, the acquirers had to have the intent and capability to compete and sell MA plans.[78]

There is no evidence that Humana failed to comply with the divestiture and conditions, and yet two of the three acquiring firms failed and exited the market, and prices rose.[79] This divestiture had the most conditions of the three mergers studied in retrospective analysis. The order had many provisions that required Humana to assist the acquiring firms in the transition, to build out provider networks, and to allow them to use established branding.

The remedy still failed to restore competition. A recent study by the Center for American Progress found that the divestitures had largely failed, with 2 of the 3 firms failing and a substantial increase in premiums.[80] Cigna was one of the acquiring firms that failed. On January 21, 2016, CMS had to suspend Cigna's MA enrollment and marketing activities, due to "widespread and systemic failures impacting Cigna enrollees' ability to access medical services."[81] This suggests that the acquiring companies did not have the intent and capability to pick up the competition lost by the acquisition. It also suggests that the extensive conditions the DOJ formulated to assist the transition of the divested assets were not successful.

Seven Senators have written, "History suggests that restoring competition is especially difficult in the health insurance industry.... We are not convinced that any divestitures required of the merging parties will succeed today, given that they have so clearly failed in the recent past."[82]

We agree.

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[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] Spiro, et al, *supra* note 45.
[80] *Id*.
[81] Zachary Tracer, *Cigna Banned From Medicare Sales for `Systemic Failures'*, BLOOMBERG (Jan. 22, 2016 8:26 AM), http://www.bloomberg.com/news/articles/2016-01-22/cigna-banned-from-selling-medicare-plans-by-u-s-stock-falls.
[82] Letter from Senators, *supra* note 3.

c. Any Proposed Remedies Must Be Consistent with DOJ Remedy Standards

The standards applied to merger remedies are set forth in the DOJ Remedy Guidelines and a recent speech by Bill Baer. We believe it is unlikely that there are any remedies for the two proposed mergers that will meet these standards.

Standard 1 -- "The remedy almost always needs to be structural, preserving an independent competitive force in the marketplace, rather than behavioral, simply placing limits on the merged firm's ability to use or profit from increased market power."[83] Although the insurers in both mergers will likely propose structural remedies, given the nature of the product, it would be very difficult for structural remedies alone to prevent the anticompetitive harms from the merger. Divestitures in the health insurance industry are difficult to design for the reasons discussed throughout this paper, and there are several instructive examples of divestiture failures in this industry. Many states are already refusing to completely rely on divestiture remedies to fully resolve the competitive problems with the proposed mergers. Examples include Florida[84] and California.[85]

Behavioral remedies are also unlikely to be effective. As discussed above, the Nevada Insurance Commissioner required additional behavioral remedies in addition to divestiture remedies, and these combined remedies were still not enough to protect against price increases resulting from the merger. "[C]onduct remedies are 'difficult to write, difficult to enforce, and seem on their face unlikely to restrain a firm's natural incentive and ability to exercise the market power secured by merger.'"[86] The Massachusetts Superior Court rejected proposed behavioral remedies in *Commonwealth v. Partners Healthcare System*, stating "conduct remedies 'seek to thwart the natural incentives of the merged entity to behave as a single firm' and thus require constant and costly monitoring."[87] The court based its decision primarily on the fact that behavioral remedies are too difficult to write, oversee, and enforce.[88]

Standard 2 -- "The structural relief should involve divesting standalone business units rather than simply product lines that need to be stripped from an infrastructure that the merging parties intend to retain."[89] When a divestiture is made in a health insurance merger, what is divested is its current contracts with enrollees. These relationships can be fleeting and the merged firm can solicit and secure the divested subscriber in the next open enrollment period. Indeed, that may be part of the reason why past divestitures have failed. Divesting subscribers is,

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[83] Baer AAI Speech, *supra* note 21. *See also* Antitrust Division Policy Guide to Merger Remedies, DOJ (June 2011), *available at* https://www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf.
[84] FL Consent Order, *supra* note 48.
[85] Press Release, DMHC Approves Aetna's Acquisition of Humana, DMHC (June 20, 2016), *available at* https://www.dmhc.ca.gov/Portals/0/AbouttheDMHC/NewsRoom/pr062016.pdf.
[86] Commonwealth v. Partners Healthcare System Inc., No. SUCV2014-02033-BLS2, at 32 (Mass. Supp. Jan. 29, 2015) (citing Affidavit of John E. Kwoka), *available at* http://www.mass.gov/ago/docs/press/2015/partners-memo-of-decision-and-order.pdf.
[87] *Id.* at 42 (citing Affidavit of John E. Kwoka).
[88] *Id.* at 47.
[89] Baer AAI Speech, *supra* note 21. *See also* Antitrust Division Policy Guide to Merger Remedies, *supra* note 83.

at best, closer to the product line rather than the standalone business unit. The acquiring insurance companies still have to build out a provider network, build relationships with brokers, and build brand loyalty in the area. These are not simple undertakings. The evidence from the failure of the divestitures in Humana-Arcadian raises significant concerns over whether any divestiture of MA subscribers can be effective.

Divesting ASO contracts will not be effective

A divestiture remedy is even more difficult in the case of employer funded administrative services only ("ASO") markets. Simple divestment of ASO contracts is unlikely to be successful for several reasons. First, it is telling that the employer selected Anthem or Cigna to supply administrative services for their self-funded plans, and not some yet-unknown third-party option. Presumably, these employers had the opportunity to select this divestiture candidate at the outset, and the reasons that they did not choose this candidate will likely still be in place at the time of the divestiture and remain at the end of the contract.

Second, employers look at more than just price when selecting a company to manage their employees' health insurance. It is equally if not more important for the managing company to have a sufficient provider network and competitive discount rates with its provider network. The American Hospital Association has explained that "the key service of an ASO plan is access to a cost-competitive health care provider network . . . without the network the ASO services have little value."[90]

Third, the merging companies may have advantages that cannot be replicated by any divestiture candidates. An example of this is a national provider network, which is likely a necessity to restore competition for national employer accounts. A piecemeal divestiture of individual geographic markets would not work for these employers.

Finally, the remaining rivals and potential buyers are far smaller than Anthem, Cigna and Aetna. None of these second-level ASO firms are even close to having a comparable national provider network. None of them have the expertise necessary to deal with the large sophisticated businesses that demand broad ASO services. This is a comparable problem to that found in the failed Sysco-US Foods merger, where the acquirer lacked the depth and expertise to fully restore competition.

Standard 3 -- "[T]he divested business needs to be fully capable from day one to preserve the status quo competitive dynamic in the market."[91] For the reasons discussed above, it is impossible for the divested insurance businesses to be ready from day one to preserve competition. It takes more than just contracted enrollees to create a viable alternative that can fully restore competition. The acquiring insurers must build out their provider networks and

[90] Letter to Associate Attorney General William Baer, American Hospital Association (Apr. 18, 2016), *available at* http://media.wix.com/ugd/1859d0_cc7dd19c94454fed982347bfab28a979.pdf.
[91] Baer AAI Speech, *supra* note 21. *See also* Antitrust Division Policy Guide to Merger Remedies, *supra* note 83.

develop brand loyalty, establish relationships with sophisticated businesses and brokers. A new entrant may lack the track record or reputation to be credible to sophisticated insurance buyers.

Problems with any Medicare Advantage divestiture

For Medicare Advantage local expertise and a local presence is vital for a firm to effectively enter the market or acquire divested assets.. The American Hospital Association ("AHA") study found that this is a significant problem in most markets where there is substantial overlap.[92] In the Aetna-Humana merger, they found that there was no viable divestiture option in 180 of the 368 presumptively anticompetitive counties, and there was only one potential divestiture candidate in 128 of the remaining counties.[93]

It is also important to consider the day one disruption to divested enrollees.[94] The Florida OIR in particular rejected divestiture as not in the best interest of policyholders in part because of the potential for disruption.[95] "Divestiture may force policyholders to replace their chosen providers in order to remain in-network, and may also result in unwanted changes in quality of services, benefits, and the cost-sharing structure of their plan."[96] This is especially difficult on seniors, and would foreseeably lead to many divested enrollees switching back to their original insurer in the next open season.

Finding a suitable buyer for the ASO business seems doubtful

The proposed Anthem-Cigna merger is especially problematic when it comes to finding a buyer which would fully replace the competition lost in the ASO market. The divestiture cannot be made to another large ASO provider, like Aetna, because doing so would increase concentration, not restore competition. Similarly, a divestiture to a company not already in the ASO market will also likely be impossible, because of the difficulty such a company has in establishing a competitive national provider network – period – let alone on day one. This leaves only other Blue Cross Blue Shield ("BCBS") member companies, like HCSC, Highmark, or BCBS of Michigan, as theoretically possible divestiture candidates.

It is highly doubtful that any BCBS member would be an effective competitor, due to Blue Cross Blue Shield Association ("BCBSA") rules.[97] BCBSA requirements include territory restrictions, which prevent BCBS members from competing using the BCBS brand in each other's territories.

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[92] AHA letter, *supra* note 6.
[93] *Id.*
[94] The failure to divest intact businesses and the disruption the divestiture would cause was a key concern in rejecting the proposed Halliburton-Baker Hughes merger. Halliburton Complaint, *supra* note 19 at 33-34.
[95] Florida Consent Order, *supra* note 48 at 9.
[96] *Id.*
[97] These rules resulted in antitrust suits that alleged that BCBS insurers are conspiring to divvy up markets and avoid competing against one another, driving up customers' prices and pushing down the amounts paid to doctors and other health-care providers. These suits have survived motions to dismiss. Anna Wilde Mathews, *Antitrust Lawsuits Target Blue Cross and Blue Shield*, THE WALL STREET JOURNAL (May 27, 2015), http://www.wsj.com/articles/antitrust-lawsuits-target-blue-cross-and-blue-shield-1432750106.

BCBSA also has a two-thirds rule – that two thirds of a BCBS member company's business, measured by national net revenue or membership, be sold, marketed, administered or underwritten under the Blue Cross and Blue Shield names and marks. Another BCBSA rule states that, under the Association's BlueCard program, all Blue members in a state (for all insurance products) are allocated to the resident Blue plan for purposes of contracting with providers.

These rules combine to handicap the competition a BCBS member could be expected to provide a merged Anthem-Cigna. The acquirer would not be able to serve customers in Anthem territories under the BCBS brand. The acquirer would also have to rely on Anthem's provider network in Anthem territories under the BlueCard program, and might not be able to separately contract with providers in these territories except to serve non-BCBS enrollees; and such contracts would not be as attractive as simply using Anthem's provider network through BlueCard, due to the better rates Anthem will most likely have due to larger scale. The acquirer could also not be depended on to compete vigorously using non-BCBS plans, because the two-thirds rule puts a cap on how many non-BCBS enrollees the acquirer can have.

There is also the additional concern that, even absent BCBSA rules, there is no acceptable divestiture candidate that could provide serious competition to a merged Anthem-Cigna in the ASO market. In this respect the proposed Anthem-Cigna merger is strikingly similar to the proposed Sysco-US Foods merger and, to some extent, the proposed Halliburton-Baker merger. In the proposed Sysco-US Foods merger, the FTC concluded that the divestiture to PFG would not work because, even with the additional distribution centers, PFG would not have a comparable distribution network that would be competitive for national customers. The FTC also saw significant risk that PFG would not be able to successfully absorb the large divestiture, which was substantially larger than any previous acquisition.

In the proposed Halliburton-Baker Hughes merger, the DOJ concluded that there was no buyer that could step into the shoes of the merging companies and provide the same level of sophistication in the services they offered customers, and therefore would simply not be a competitive threat to the merged entity. These same conditions exist in the ASO market, and creating an entity with the same competitiveness as a merged Anthem-Cigna would be extremely difficult. Such a divestiture might need to include significant non-ASO assets in order to give the acquiring company sufficient scale to obtain similarly competitive provider rates on a national scale.

A piecemeal divestiture in Group MA would not be effective

There is a similarly difficult challenge with divestitures in the Group MA market. This market can be significantly larger geographically than Individual MA, covering whole states or even large portions of the country. Companies who purchase Group MA are often looking for a nationwide alternative and are not willing to contract on a piecemeal, regional basis. They are looking for a provider network with a national reach that can provide adequate coverage for their employees, wherever they may be. As with ASO customers, these companies may prefer to purchase all of their insurance from a single health insurance supplier.

This would mean that Aetna and Humana cannot simply divest isolated Group MA overlaps in order to restore competition in piecemeal markets. They would likely need to also divest sufficient Group MA lives to enable the acquiring insurer to establish another national provider network. In addition, they would have to divest commercial lives in other lines of business to both enable the acquiring insurer to offer a competitive complete insurance solution to companies, and also to build out a provider network that is competitive in both discounted rates and geographic scope.[98] It will be difficult to find an acquirer that is already (1) established in the Group MA market, (2) does not already have so much competitive overlap of its own as to cancel out most of the "new" competition, (3) already has the provider networks to create a national provider network, and (4) has the necessary other lines of commercial business. If there is not one, the divestiture would likely need to include all of one of the merging insurer's group MA business and other commercial businesses in order for the acquirer to have a realistic chance to succeed.

Finally, the 2004 Antitrust Division Policy Guide to Merger Remedies states that "[r]estoring competition requires replacing the competitive intensity lost as a result of the merger rather than focusing narrowly on returning to premerger HHI levels."[99] The DOJ would have to find divestiture candidates that can provide the same competitive intensity lost in the acquisitions – on day one, or immediately thereafter. A piecemeal divestiture will not provide the resources or expertise necessary to restore the same competitive intensity.

Standard 4 -- "[T]he buyer of the divested business should be known and financially sound and the transaction needs to be relatively free of entanglements (e.g., supply or IP licensing arrangements) with the merged firm."[100] There may be some companies interested in acquiring divested lives. However, the scale at which these divestitures would have to occur would be enormous. The Humana-Arcadian merger required three divestiture partners in order to absorb 12,700 enrollees in 51 counties, and two of those proved to be inadequate. These mergers involve potentially millions of enrollees in hundreds of counties, a much more formidable, likely impossible challenge for selecting effective divestiture candidates to prevent much larger-scale potential consumer harm.[101] As we noted above, there is a paucity of insurers that can realistically be relied upon to fully restore competition.

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[98] This kind of divestiture would be similar to that in the UnitedHealth-Pacificare merger, where the DOJ required the companies to divest any commercial products amounting to 54,517 enrollees and required that at least 7,581 members were in the small group employer line of business.

[99] 2004 Antitrust Division Policy Guide to Merger Remedies, *supra* note 34.

[100] Baer AAI Speech, *supra* note 21. *See also* Antitrust Division Policy Guide to Merger Remedies, *supra* note 83.

[101] The failed remedy in the Albertsons-Safeway merger is an example of a divestiture in which the acquirer was ill-equipped to absorb a large acquisition. The acquirer, Haggens, ultimately went bankrupt and Albertsons reacquired many of the stores in the divestiture. Melissa Lipman, *supra* note 16.

Attorney General Loretta E. Lynch has stated that "[t]he more complex the deal – and the more markets it potentially endangers – the greater our skepticism that divestiture will safeguard competition. And if we believe that no good solution exists, then we will prosecute our suits to the very end."[102] The proposed mergers, like the proposed Halliburton-Baker Hughes merger, would require a remedy of unprecedented complexity and level of risk.[103]

We are concerned that these mergers are simply too complex to resolve through remedies. As to the Aetna merger, the California Department of Insurance ("CA DOI") found that "[t]he necessary divestitures in the MA markets would be close to impossible to accomplish given the number and scale of the impacted areas."[104] (It reached the identical decision on the Anthem deal). The CA DOI also succinctly captures another point we have made here about divestiture candidates: "divestiture to a company with an already significant market share would not remedy the competitive situation, and divestiture to a new entrant would likely fail in short order."[105] A letter from seven Senators to the DOJ also echoes these concerns, stating "[d]ivesting to an incumbent buyer may actually worsen competitive conditions and a de novo entrant lacks the economies of scale to compete effectively against entrenched larger incumbents, increasing the likelihood of failure."[106]

It is difficult to over-state the magnitude of the divestitures that would be required to seriously attempt to address the scale of competitive concerns raised by these mergers. For the Aetna deal, the AHA identified 855,039 MA beneficiaries for which it saw no viable divestiture option, 464,817 for which it saw only one divestiture option, and 496,680 for which it saw two or more divestiture options.[107] This is a total of 1,816,536 enrollees that would need to be absorbed into – and kept by – companies acquiring the contracts for those enrollees. For example, Wellcare, one of the larger MA firms in the market, would have to grow by over 700% to acquire these divested lives. [108] The FTC rejected the proposed remedy in Sysco-US Foods in part because the acquiring firm would have to absorb five times more assets than it had ever previously acquired. The same problem is almost certainly going to exist in any divestitures proposed by Aetna and Anthem.

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[102] Loretta E. Lynch, Keynote Luncheon Address During the 64th Annual American Bar Association Antitrust Law Spring Meeting (Apr. 6, 2016), *available at* https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-keynote-luncheon-address-during-64th-annual.
[103] Halliburton complaint, *supra* note 19 at 35.
[104] CA DOI Aetna-Humana letter, *supra* note 3 at 21. The CA DOI states largely the same thing in its letter to the DOJ on the proposed Anthem-Cigna merger.
[105] *Id.*
[106] Letter from Senators, *supra* note 3.
[107] AHA letter, *supra* note 6. The AHA defines a viable candidate as one that has more than a 5% share, in order to ensure that it has a viable provider network and an established reputation among consumers, and that divesting to the candidate would not itself result in a transaction that creates competitive concerns.
[108] For example, the Centers for Medicare & Medicaid Services reports that Wellcare has 229,496 MA enrollees (based on numbers last updated in 2014). A divestiture to Wellcare could be many times its current MA membership. MA Plan Directory, Centers for Medicare & Medicaid Services, *available at* https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/MCRAdvPartDEnrolData/MA-Plan-Directory.html.

There is simply no rival that has the resources, expertise and breadth of system to fully restore competition for these acquisitions.

For the reasons outlined above, and the substantial risk to consumers if remedies should fail, the DOJ should carefully consider whether any proposed remedy package could fix the competitive problems in these proposed mergers. We welcome the opportunity to meet with you and your staff to discuss these issues.

Sincerely,

Consumers Union
Families USA
Consumer Federation of America
Consumer Action
U.S. PIRG
Consumer Watchdog

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