



March 21, 2016

Commissioner Ted Nickel
 Commissioner of Insurance
 Office of the Commissioner of Insurance
 125 South Webster Street
 Madison, Wisconsin 53703-3474

Re: Public Hearing for Aetna-Humana Merger

Dear Commissioner Nickel:

The undersigned organizations represent hundreds of thousands of consumers and workers across the state and have long been monitoring the competitive landscape in the health care industry. Competition within different health care markets that offers ample choice, high quality, and transparency is vital to ensuring accessible and affordable care to patients. Competition among health insurers is essential to ensuring lower premiums, improving quality of care, and promoting access and choice. Affordable health care is crucial to the economic growth of the state and its ability to compete for well-paying jobs.

We write to raise concerns about the proposed Aetna-Humana merger and its impact on Wisconsin health insurance markets. The proposed merger would combine two of the nation's five largest insurers.¹ The merger of these dominant insurers could substantially lessen competition and harm millions of consumers in Wisconsin. We understand that the Office of the Commissioner of Insurance ("OCI") is currently reviewing the transaction. We appreciate the thoughtful and deliberative process being undertaken by OCI in holding a public hearing as well as its commitment to allowing the public to weigh in on this transaction through comments.² In preparation for this hearing, we are submitting these comments to share our concerns about the potential impacts of the proposed merger on Wisconsin consumers.

¹ The other three national insurers are UnitedHealthcare, Anthem, and Cigna. Anthem and Cigna have also proposed a merger that is currently pending and under review.

² Open Meeting Notices, Office of the Commissioner of Insurance, *available at* <http://oci.wi.gov/openmtg.htm>.

Under Wisconsin law, the Commissioner, after a public hearing, is authorized to disapprove any merger of insurers that “would be contrary to the law or to the interests of the insureds of any participating domestic corporation or the Wisconsin insureds of any participating nondomestic corporation.”³ “The commissioner may disapprove an acquisition if there is substantial evidence that the effect of the acquisition may be to substantially lessen competition in any line of insurance in this state or tend to create a monopoly.”⁴ In assessing if a health insurance merger substantially lessens competition, Wisconsin regulations states that it is *prima facie* evidence if there is a significant trend toward concentration in the product and geographical market, one of the merging insurers is in a grouping of large insurers, and the other has a market share of 2% or more.⁵ Wisconsin regulations also state that it is *prima facie* evidence if the merger is between a company with 19% or more and a company with 1% or more of a market.⁶ Even absent a showing of *prima facie* evidence, the Commissioner “may establish the requisite anticompetitive effect based upon other substantial evidence.”⁷

As we document below we are concerned that:

- the merger may be a *prima facie* violation in the administrative-services-only (“ASO”) market;
- the merger may be a *prima facie* violation in the Medicare Part D market;
- substantial evidence supports a finding of a violation in the Medicare Advantage market, especially by eliminating potential competition between Humana and Aetna;
- past rate increases and consumer protection violations by Aetna and Humana intensify the level of competitive concerns;
- the merger will lead to increased premiums, especially based on past mergers;
- the merger will raise concerns over network adequacy; and
- potential efficiencies will not outweigh the competitive harm from the merger.

Finally, we address possible remedies that OCI might consider to protect consumers and the public interest if this merger goes forward.

I. The Merger of Aetna and Humana Could Have a Substantial Harmful Impact on Wisconsin’s Insurance Markets and Consumers

Protecting health insurance competition is crucial to promoting affordable health care. Although there has been somewhat greater choice in the market with recent reforms and market initiatives, we are concerned that much of that progress could be undermined. On top of the proposed switch in the State Employee Health Plan from a competitive exchange to a self-insured plan, along with the long term FamilyCare model, further consolidation would raise even greater competitive concerns. Humana is involved in both markets, and is likely to bid to be the

³ W.R.S. § 611.73(3)(A).

⁴ Ins § 40.025(4)(a).

⁵ Ins § 40.025(4)(b)2.

⁶ Ins § 40.025(4)(b)1b.

⁷ Ins § 40.025(4)(b)4.

administrator of these public health plans at the expense of existing community-based companies. Especially considering companies such as Anthem pulling out of select counties and United Healthcare proposing leaving key markets, this proposed merger could be a tipping point to a significant reduction in health insurance competition in the state.

Loss of competition in the ASO market. We are concerned that the merger between Aetna and Humana could substantially lessen competition within the administrative-services-only (“ASO”) market. Large employers that self-insure rely on less than a handful of insurance companies for administrative services, including access to provider networks. A combination of Aetna and Humana would result in an entity with over a 10 percent market share of the Wisconsin ASO market.⁸ When combined with the announced Anthem-Cigna merger, the two new entities would be responsible for servicing 61.1 percent of all ASO business.⁹ The Anthem-Cigna merger appears to be a *prima facie* violation on its own, and the Aetna-Humana merger would also appear to be a *prima facie* violation if there is a significant trend toward concentration in the ASO market. We believe that detailed evaluation of the proposed merger’s impact on the ASO market is warranted under the statute, especially in regards to whether “there is a significant trend toward concentration” as defined in the statute.¹⁰ Indeed, a recent study of the impact of the proposed mergers showed a significant increase in commercial ASO insurance concentration.¹¹ Any increase in ASO costs could result in higher premiums and reduced health care benefits.

Loss of competition in the Medicare Part D market. Medicare Part D is the provision of prescription benefits for Medicare beneficiaries. Aetna has 6% and Humana has 24.4% of the Part D market statewide.¹² These numbers are well within the state’s defined thresholds for *prima facie* evidence of violation of the competitive standard for markets that are not highly concentrated.¹³ We also believe that the merger will significantly raise concentration in the important metropolitan areas of Milwaukee, Madison, Green Bay, Eau Claire, La Crosse, Wausau, Racine, and Janesville.¹⁴ The loss of competition could result in higher Part D premiums and higher drug costs overall.

Loss of existing and potential competition in Medicare Advantage. The merger also puts an end to what could be significant existing and future competition between Aetna and Humana in Medicare Advantage. Medicare Advantage is a Medicare supplemental program used by hundreds of thousands of Wisconsin Medicare beneficiaries.

⁸ 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://www.heritage.org/research/testimony/2015/effects-on-competition-of-proposed-health-insurer-mergers>.

⁹ *Id.*

¹⁰ Ins § 40.025(4)(b)2.

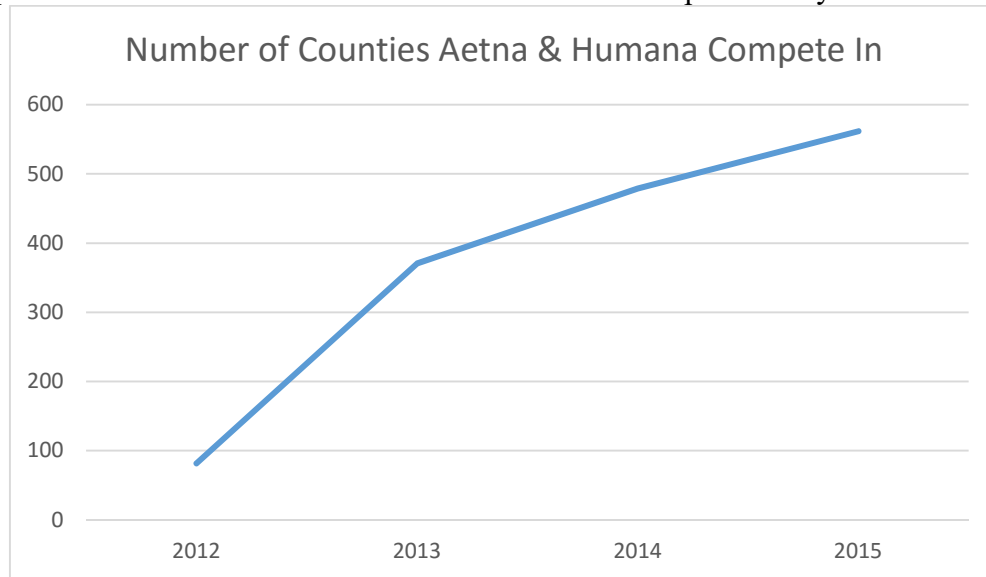
¹¹ Douglas Hervey, David Muhlestein, and Austin Bordelon, *How Might Proposed Payer Mergers Impact State Insurance Markets?*, HEALTH AFFAIRS BLOG (Dec. 1, 2015), <http://healthaffairs.org/blog/2015/12/01/how-might-proposed-payer-mergers-impact-state-insurance-markets/>.

¹² See Medicare Advantage/Part D Contract and Enrollment Data, Centers for Medicare and Medicaid Services, available at <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/MCRAdvPartDENrolData/index.html>.

¹³ Ins § 40.025(4)(b)1b.

¹⁴ See Medicare Advantage/Part D Contract and Enrollment Data, *supra* note 12.

Based on Centers for Medicare & Medicaid Services data, Aetna and Humana already have competing Medicare Advantage contracts in 27 Wisconsin counties.¹⁵ Aetna and Humana have increasingly been invading each other's territories and competing directly with Medicare Advantage products. A recent study by the Center for American Progress found that the number of overlap counties in the U.S. increased from 82 to 562 in the past three years.¹⁶



Absent this acquisition we could expect Aetna to significantly increase its competition against Humana in Medicare Advantage, and that competition would result in significant benefits to consumers.

The law is clear that the loss of potential competition is a sound reason to find a merger anticompetitive. As the Supreme Court observed in *United States v. Penn-Olin*, “[t]he existence of an aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be a substantial incentive to competition which cannot be underestimated.”¹⁷

In the past insurance commissioners have refused to approve health insurance mergers based on the loss of potential competition. For example, in 2007 the Pennsylvania Insurance Commissioner considered the merger between Pittsburgh-based Highmark and Philadelphia-based Independence Blue Cross. Even though there was little current competition between the

¹⁵ *Id.*

¹⁶ Topher Spiro, Maura Calsyn, & Meghan O'Toole, Bigger Is Not Better: Proposed Insurer Mergers Are Likely to Harm Consumers and Taxpayers, Center for American Progress (Jan. 21, 2015), <https://www.americanprogress.org/issues/healthcare/report/2016/01/21/129099/bigger-is-not-better/>.

¹⁷ *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 174 (1964). *See also* *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1082 (D.D.C. 1997); *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 116 (1975).

two firms, the merger was rejected because of the potential that the firms might increasingly enter each other's territories and compete.¹⁸

Past Consumer Protection Violations Intensify Competitive Concerns. Compliance with consumer protection provisions is crucial to ensuring a competitive market. Humana has an inadequate record of compliance. Humana has had the most total HMO grievances per 10,000 enrollees, as measured by OCI, in the years 2012-2014.¹⁹ Humana was 67%, 66%, and 3% higher in this metric than the next largest offender in the years 2012, 2013, and 2014 respectively.²⁰ This record casts further doubt on this merger being in the public interest.

Finally, Wisconsin consumers need assurances that certain improper business practices by Humana will be addressed if it is acquired by Aetna. The Centers for Medicare and Medicaid Services ("CMS") have recently fined Humana a substantial \$3.1 million for inappropriately delaying or denying coverage to elderly patients.²¹ Humana "limited the quantity of prescription drugs available to Medicare consumers," meaning "elderly patients who had legally obtained prescriptions from their physicians went to the pharmacy to pick up medications 'and were delayed access to drugs, never received the drugs or incurred increased out-of-pocket costs.'"²² Humana also violated Medicare appeals and grievances rules, including misclassifying denial of claims appeals as "customer service inquiries."²³ CMS stated that "Humana's failures in these areas were systemic and resulted in enrollees experiencing inappropriate delays or denials in receiving covered benefits or increased out-of-pocket costs."²⁴ It is unclear whether Wisconsin Medicare consumers would fare better under Aetna, as it too was fined \$1 million last year for pharmacy network directory errors.²⁵

II. The Merger Could Lead to Higher Consumer Costs in Wisconsin

In Wisconsin, as recent history indicates, new competitive entry has not offset concentration within regional markets. While Wisconsin has a large number of insurers generally, the market is broken up regionally and by target market. In some counties there are only three or even fewer insurers on the individual²⁶ and Medicare Advantage²⁷ markets. While new insurers have entered regional markets such as Network Health and Common Ground Healthcare Cooperative in both the group and individual market, this has not prevented Wisconsin from being one of the most expensive states in the country for health insurance.

¹⁸ See *Highmark Merger Timeline*, PENNSYLVANIA INSURANCE DEP'T, http://www.insurance.pa.gov/Companies/IndustryActivity/Pages/Highmark-Merger-Timeline.aspx#.Vkqhq_mrShc (last visited Jan. 8, 2015).

¹⁹ Consumer's Guide to Managed Care Health Plans in Wisconsin at 12, State of Wisconsin Office of the Commissioner of Insurance, available at http://oci.wi.gov/pub_list/pi-044.pdf.

²⁰ See *Id.*

²¹ Boris Ladwig, *Feds fine Humana \$3.1 million for Medicare violations*, INSIDER LOUISVILLE (Mar. 9, 2016 7:00 AM), <http://insiderlouisville.com/business/feds-fine-humana-3-1m-for-medicare-violations/>.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ 2016 Individual Health Insurance Carriers in Wisconsin, Wisconsin Office of the Commissioner of Insurance, available at http://oci.wi.gov/healthcare_ref/provider_map.htm#Ashland_a.

²⁷ See Medicare Advantage/Part D Contract and Enrollment Data, *supra* note 12.

Consumers are concerned that increased market power post-merger of Aetna and Humana could lead to rising costs, i.e. higher premiums and out-of-pocket charges. For Wisconsinites, health insurance premiums continue to rise. According to data from the Kaiser Family Foundation, average individual monthly premiums increased steadily from \$205.84 in 2010 to \$237.51 in 2013.²⁸ Last year six health insurance companies sought rate increases of 10 percent to 33 percent, spurring state legislative efforts to increase public notice and participation in rate increases.²⁹ With prices steadily increasing in Wisconsin, this proposed merger between two nationally dominant insurers could exacerbate this trend, leading to even higher consumer costs.

Economic studies have demonstrated a direct correlation between health insurer concentration and higher premiums.³⁰ Mergers between dominant insurers can make matters far worse. According to one health economics expert at the University of Southern California's Schaeffer Center for Health Policy and Economics, "when insurers merge, there's almost always an increase in premiums."³¹ 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.³² Another study found that the 2008 United-Sierra merger resulted in an additional 13.7 percent premium increase in Nevada.³³ There is also economic evidence that a dominant insurer can increase rates 75 percent higher than smaller insurers competing in the same state.³⁴ In contrast, we are not aware of any economic studies or evidence indicating that insurance mergers lead to lower prices for consumers.

Current market regulations will not deter an insurer from raising consumer costs. Some supporters of this merger have argued that the medical loss ratio ("MLR") limits the level of insurer profits thus protecting consumers from price increases.³⁵ While MLR is an important tool that requires health insurers to spend 80 to 85 percent of net premiums on medical services and quality improvements, it will not adequately protect consumers from anticompetitive harm.³⁶ MLR, as health antitrust expert Professor Jamie King has observed, "does not guarantee that

²⁸ *Average Monthly Premiums Per Person in the Individual Market*, Kaiser Family Foundation, available at <http://kff.org/other/state-indicator/individual-premiums/#graph>.

²⁹ David Wahlberg, *Large health insurance rate hikes in Wisconsin target of bill*, WISCONSIN STATE JOURNAL (Sep. 4, 2015), http://host.madison.com/wsj/news/local/health_med_fit/large-health-insurance-rate-hikes-in-wisconsin-target-of-bill/article_fe900e1f-e9ee-5240-978c-d431425aef5d.html.

³⁰ See Leemore Dafny, *Are Health Insurance Markets Competitive?*, 100 AM. ECON. REV. 1399 (2010).

³¹ David Lazarus, *As Health insurers merge, consumers' premiums are likely to rise*, L.A. TIMES (July 10, 2015 4:00 AM), <http://www.latimes.com/business/la-fi-lazarus-20150710-column.html>.

³² Leemore Dafny *et al.*, *Paying a Premium on Your Premium? Consolidation in the US Health Insurance Industry*, 102 AM. ECON. REV. 1161 (2012).

³³ 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).

³⁴ Eugene Wang and Grace Gee, *Larger Insurers, Larger Premium Increases: Health insurance issuer competition post-ACA*, TECH. SCI. (Aug. 11, 2015), available at <http://techscience.org/downloadpdf.php?paper=2015081104>.

³⁵ See Bertolini, *supra* note 33 (noting that the merger will lead to "lower costs.").

³⁶ See Letter to Commissioners Ted Nickel and Katherine Wade, American Hospital Association (Feb. 23, 2016), available at http://media.wix.com/ugd/1859d0_fe3f35a629c1411b8522c232258f8576.pdf.

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.”³⁷

III. There are Significant Concerns over Network Adequacy

As part of the review process, OCI should fully evaluate the impact of the proposed merger on provider network adequacy. For many consumers, the provider networks offered in a plan are as important a consideration as cost. The merging insurance companies have claimed that the merger will expand access for consumers through a more extensive network of hospitals, physicians, services, and health care professionals. 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, because 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.

For example, a recent study by the Leonard Davis Institute of Health Economics and the Robert Wood Johnson Foundation found that 57 percent of individual plans offered on the Wisconsin exchange use narrower networks that only include 25 percent or fewer of area providers.³⁸ Moreover, Wisconsin only regulates quantitative standards for network adequacy for specific types of network plans, and only in regards to extended hours of operation on the Health Insurance Exchange.³⁹ Therefore, there is currently little recourse for consumers if insurance products continue to narrow, dropping a consumer’s preferred provider.

We are concerned that the proposed Aetna-Humana merger and the resulting increase in market concentration could exacerbate existing network limitations in Wisconsin. We urge your careful attention to network adequacy in analyzing this proposed merger. We also urge you, in the event the merger is permitted, to consider the undertakings we suggest in Section VI to help ensure adequate and quality network choices for consumers.

³⁷ *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 https://judiciary.house.gov/hearings/?Id=020363B9-F9EF-4623-8E67-28A0B260675A&Statement_id=30A83B11-7A89-4261-9773-DCF6593808FF.

³⁸ Dana Polsky & Janet Weiner, *State Variation in Narrow Networks on the ACA Marketplaces*, LEONARD DAVIS INST. HEALTH ECON. (Aug. 2015), available at http://www.rwjf.org/content/dam/farm/reports/issue_briefs/2015/rwjf422684.

³⁹ See Justin Giovannelli, Kevin W. Lucia, and Sabrina Corlette, *Implementing the Affordable Care Act: State Regulation of Marketplace Plan Provider Networks*, COMMONWEALTH FUND (May 2015), available at http://www.commonwealthfund.org/~media/files/publications/issue-brief/2015/may/1814_giovannelli_implementing_aca_state_reg_provider_networks_rb_v2.pdf.

IV. Merger Efficiencies Are Unlikely and will not Outweigh the Competitive Harm

The merging parties have not fully documented their claimed efficiencies but have generally stated that their merger would create substantial efficiencies leading to improved health care quality and lower costs for consumers.⁴⁰ It is for OCI to carefully examine these claims and determine if they are fully substantiated.⁴¹ However, the law is clear that efficiencies, even if proven, do not count unless (1) they clearly outweigh the anticompetitive effects, (2) it is necessary for the insurers to merge to achieve the stated efficiencies, and (3) the stated efficiencies will actually benefit consumers.⁴²

The parties have claimed significant cost-savings associated with the merger. According to Aetna, its merger with Humana would create \$1.25 billion in “synergy opportunities” and “operating efficiencies.”⁴³ 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.⁴⁴ Assistant Attorney General Bill Baer from the DOJ’s Antitrust Division raised questions regarding the alleged cost efficiencies that would result from health insurance mergers. Baer noted that “consumers do not benefit when sellers . . . merge simply to gain bargaining leverage.”⁴⁵

That makes sense. Most large insurers are beyond the point where another merger would help them achieve any legitimate economies of scale. And there is little evidence that consumers would ever actually benefit from giving insurers increased bargaining power. In fact, Professor Thomas Greaney, a health antitrust scholar, has noted that there is actually “little incentive [for an insurer] to pass along the savings to its policyholders.”⁴⁶ As Consumers Union has suggested, a more likely result would be fewer choices for consumers, and providers being pressured to cut

⁴⁰ See Bertolini, *supra* note 33 (section labeled “Benefits of the Acquisition for Consumers and Providers.”).

⁴¹ The OCI should be especially skeptical of claims that new entry can resolve competitive concerns. Christine A. Varney, Assistant Attorney Gen., Antitrust Div., U.S. Dep’t of Justice, Remarks as Prepared for American Bar Association/American Health Lawyers Association Antitrust Healthcare Conference (May 24, 2010), *available at* <https://www.justice.gov/atr/speech/antitrust-and-healthcare> (“[E]ntry defenses in the health insurance industry will be viewed with skepticism and will almost never justify an otherwise anticompetitive merger.”).

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

⁴³ 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://news.aetna.com/news-releases/aetna-to-acquire-humana-for-37-billion-combined-entity-to-drive-consumer-focused-high-value-health-care/>.

⁴⁴ See Section II.

⁴⁵ Speech by Assistant Attorney General Bill Baer, Remarks as Prepared for the Delivery at The New Health Care Industry Conference: Integration, Consolidation, Competition in the Wake of the Affordable Care Act at Yale University (Nov. 13, 2015), <https://www.justice.gov/opa/speech/assistant-attorney-general-bill-baer-delivers-remarks-new-health-care-industry-conference>.

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/>.

corners on quality of care in order to meet the insurer's demands – the opposite of what consumers need.⁴⁷ The American Antitrust Institute, the leading non-profit antitrust think tank, recently concluded that economic studies and evidence indicate that “consumers do not benefit from lower healthcare costs through enhanced bargaining power.”⁴⁸

A more abstract argument raised by the merging insurers is that the merger will allow for more innovation. Innovation in health care delivery can be very beneficial and should be encouraged. For one thing, there is the effort 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 Wisconsin, the merger would increase and entrench the combined insurer's market power, reducing its incentives to compete and improve care. As noted by the American Antitrust Institute, excessive concentration created by the proposed merger *is likely to reduce incentives* for engaging in pro-consumer innovation.⁴⁹

Furthermore, the insurers have not offered any convincing details or analysis demonstrating how innovation would improve post-merger. 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 mergers are required in order to carry out such initiatives.⁵⁰ 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.⁵¹

V. Divestitures and Other Remedies

As part of its review of the proposed merger, OCI should consider what actions would help properly protect consumers and ensure the merger is in the public interest. If the OCI decides that a merger is not in the public interest, it has the power to disapprove the merger. Indeed, state insurance commissioners have disapproved health insurance mergers in the past, such as Pennsylvania's 2009 decision to deny Highmark's acquisition of Independence Blue Cross.⁵²

⁴⁷ 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://www.judiciary.senate.gov/imo/media/doc/09-22-15%20Slover%20Testimony.pdf> (“[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”).

⁴⁸ Letter from the American Antitrust Institute, Thomas Greaney, and Diana Moss, to William J. Baer, Assistant Attorney General Dep't of Justice (Jan. 11, 2016), available at http://www.antitrustinstitute.org/sites/default/files/Health%20Insurance%20Ltr_1.11.16.pdf.

⁴⁹ Greaney & Moss, *supra* note 37 (emphasis added).

⁵⁰ Dafny, *supra* note 30.

⁵¹ 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://www.law.yale.edu/solomon-center/events/inaugural-conference>.

⁵² See *Highmark Merger Timeline*, PENNSYLVANIA INSURANCE DEP'T, http://www.insurance.pa.gov/Companies/IndustryActivity/Pages/Highmark-Merger-Timeline.aspx#.Vkqhq_mrShc (last visited Jan. 8, 2015).

In other cases, mergers have been approved conditioned on the imposition of specific remedies such as divestitures or additional conduct regulation.⁵³ In evaluating any proposed remedy, it is important to remember that 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.⁵⁴

In nearly every health insurance merger enforcement action during the last two decades, DOJ has relied on the structural remedy of divestiture.⁵⁵ Divestitures require that the merging insurance companies spin off subscribers or operations to another, independent insurance company that is fully capable of restoring the same competition. In Wisconsin, the scope, breadth, and market shares of the merging companies' ASO and Part D operations is significant. These overlap problems are exacerbated by the also announced merger of Anthem and Cigna. Constructing any remedy involving divestitures may be an extremely difficult task.

It could be a mistake for the OCI to rely on the DOJ's traditional approach of divestiture. For example, the DOJ has previously used divestitures to resolve competitive concerns from mergers in Medicare Advantage markets. Recent studies by the Center for American Progress and the Capitol Forum found that the divestitures had largely failed to address the competitive concerns, with 2 of the 3 firms failing and a substantial increase in premiums.⁵⁶ Moreover, no remedy in this case could address the loss of potential competition. That is why the American Antitrust Institute has come out against both mergers, urging the DOJ to "just say no."⁵⁷ As noted before that was the approach taken by the Pennsylvania Insurance Commissioner in rejecting the Highmark-Independence Blue Cross merger.

Indeed, because of such concerns, DOJ, the Federal Trade Commission ("FTC"), and the courts have rejected 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, to cite two examples, 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.⁵⁸

⁵³ *E.g.*, 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://flair.com/Sections/LandH/AetnaHumanaHearing.aspx>.

⁵⁴ *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))

⁵⁵ *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).

⁵⁶ 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/>.

⁵⁷ Greaney & Moss, *supra* note 37.

⁵⁸ 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* <https://www.justice.gov/opa/pr/comcast-corporation-abandons-proposed-acquisition-time-warner-cable-after-justice-department>; *see also* Press Release, FTC, Following Sysco's Abandonment of Proposed Merger with US Foods, FTC Closes Case (July 1, 2015), *available at* <https://www.ftc.gov/news-events/press-releases/2015/07/following-syscos-abandonment-proposed-merger-us-foods-ftc-closes>.

Regarding health insurance markets, there is little evidence that the benefits of competition are effectively restored after divestitures. In fact, in the previously cited three retrospective studies on health insurance mergers, both matters involved divestitures of covered lives for different insurance products, but the merged companies were still able to raise premiums by significant margins.⁵⁹ Additionally, for any divestiture 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.⁶⁰ And there is yet another reason why divestitures are not effective in health insurance markets in the long term: what is divested amounts to the contracts with specific policyholders. In the next open season, it is all too easy for a divested policyholder to return to the previous insurer. 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.

Most recently, the Florida Office of Insurance Regulation (“OIR”) rejected divestitures as a potential remedy in the Aetna-Humana merger.⁶¹ The OIR noted that the divestitures were “not in the best interests of Florida policyholders and also may be short term in nature.”⁶² The 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.”⁶³

While the DOJ (and the Wisconsin Attorney General’s Office, using its own antitrust authority) may be considering divestitures, the OCI and Commissioner are 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 Wisconsin Attorney General. For example, in the 2008 acquisition of Sierra Health by UnitedHealth, the DOJ required divestiture of MA plans in Las Vegas,⁶⁴ 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 take specified actions to limit the number of uninsured within the state.⁶⁵

Regulatory remedies can also have their shortcomings for effectively protecting competition and consumers against the abuse of market power resulting from a merger.⁶⁶ Nevertheless, such

⁵⁹ Dafny, *supra* note 30; Guardado, *supra* note 31; Spiro *et al*, *supra* note 57.

⁶⁰ See Greaney, *supra* note 35.

⁶¹ Consent Order, *supra* note 52 at 9.

⁶² *Id.* at 8.

⁶³ *Id.* at 9.

⁶⁴ Final Judgment, *UnitedHealth Inc. and Sierra Health Servs.*, No: 1:08-cv-00322.

⁶⁵ *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-acquisition-of-sierra-health-services/>.

⁶⁶ Dep’t of Justice, *Antitrust Division Policy Guide to Merger Remedies* (2011), available at <https://www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf> (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.”).

remedies could play an important role in limiting harm to consumers and to the health care marketplace. In the event the Aetna-Humana is permitted to go forward, here is a short list of possible regulatory steps the OCI might consider, in addition to the divestitures possibly required by the DOJ, to limit the potential harm to consumers:

- (1) Requiring premium stability or heightened rate control for a number of years post-merger.
- (2) Requiring the merged company to maintain 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 is preserved and strengthened, including in rural and underserved areas.
- (6) Requiring that the merged company pass along any cost savings associated with the merger to consumers, in the form of lower premiums and deductibles.
- (7) Requiring the merged company to enter and participate in the Wisconsin Exchange.
- (8) Requiring the Part D networks to accept any willing provider in their networks.

Conclusion

The undersigned organizations are concerned about the consolidation within the health insurance industry and its impact on price, access, and quality of care. A merger between two of the largest, most dominant, national health insurers could substantially lessen competition for different insurance products in the State of Wisconsin. Although the merging companies are claiming various benefits associated with the merger, the credible scholarly evidence suggests that consumers will lose facing higher costs, less choice and diminished quality and innovation.

With the prospect that this merger might go forward, we urge the Office of the Commissioner of Insurance and the Commissioner to carefully analyze this merger and be ready to consider imposing requirements to 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,

Consumer Action
Consumers Union
Citizen Action of Wisconsin
SEIU Healthcare Wisconsin
Consumer Federation of America
US PIRG
WISPIRG
Wisconsin Jobs Now
Coalition of Wisconsin Aging Groups
Wisconsin AFL CIO

ABC for Health

Wisconsin Federation of Nurses and Health Professionals

American Federation of State, County and Municipal Employees (AFSCME)

National Association of Social Workers, Wisconsin Chapter

9to5 Association of Working Women, Wisconsin

Wisconsin Farmers Union

National Alliance on Mental Illness Wisconsin