

Forsberg, Kristin L - OCI

From: Michael DeLong <michael.delong@dcantitrustlaw.com>
Sent: Tuesday, March 15, 2016 8:32 AM
To: Forsberg, Kristin L - OCI
Cc: Matthew Lane; David Balto
Subject: Letters Requesting Intervenor Status and New York Comments
Attachments: SEIU Letter Requesting Intervenor Status.pdf; Citizen Action Wisconsin Intervenor Letter.pdf; New York Comments.pdf

Kristin,

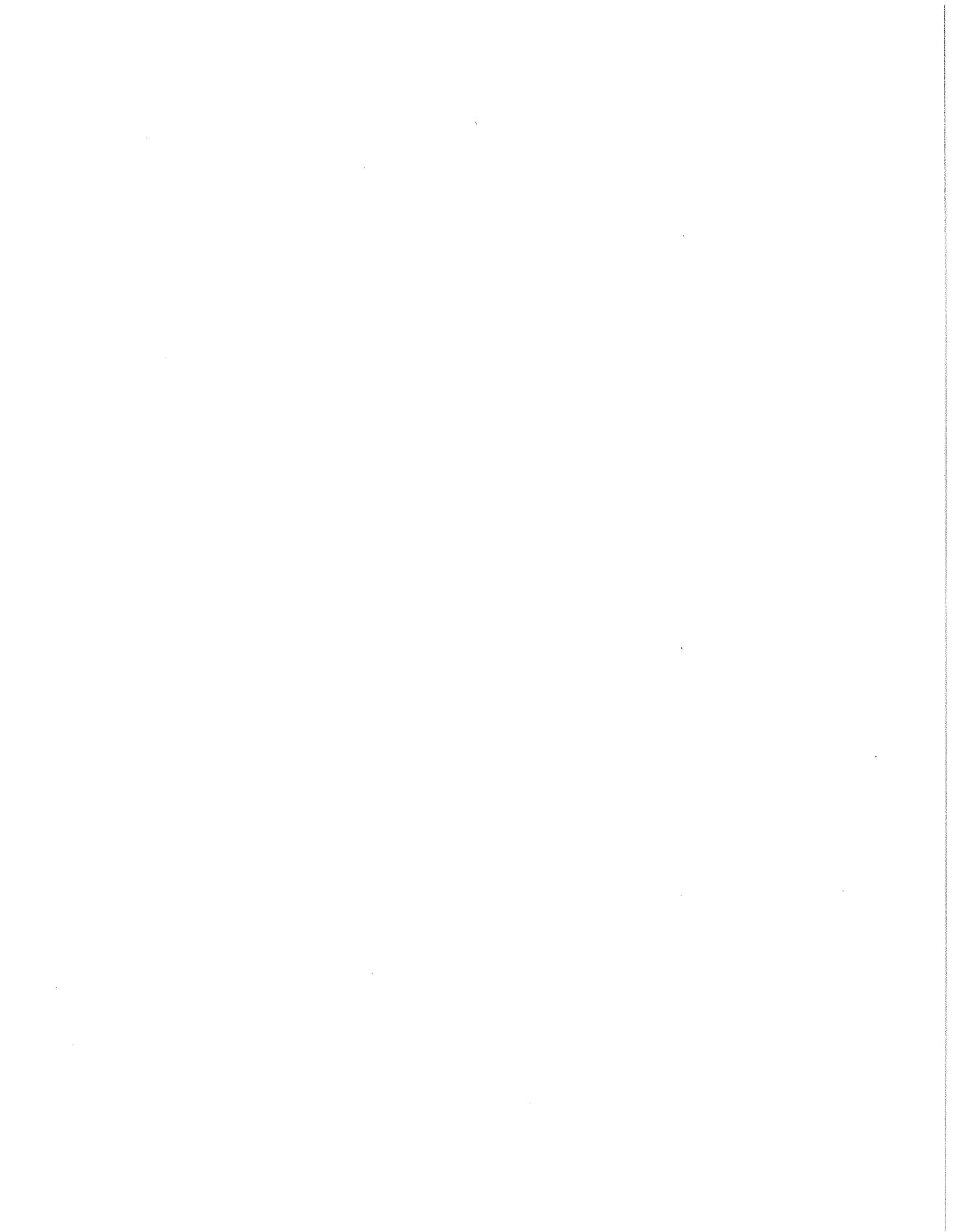
Attached are two letters formally requesting intervenor status on behalf of SEIU Healthcare Wisconsin and Citizen Action of Wisconsin. These groups represent Wisconsin consumers who are likely to pay higher premiums, and experience reduced choice, quality, and innovation as a result of an approval of the proposed Aetna-Humana merger, especially if the merger is approved without appropriate remedies. As intervenors, these groups would like to ask the following questions of the parties:

1. Is there a significant trend towards consolidation in the ASO market as defined in Ins § 40.025(4)(b)2? If so how does Aetna and Humana rebut the prima facie evidence of violation of the competitive standard in Ins § 40.025(4)(a)?
2. What is the likelihood that Aetna would expand into Wisconsin Medicare Advantage markets absent the merger? Why does Aetna need the merger to compete in these markets? Is there any means to remedy the concerns over competition in Medicare Advantage?
3. What efficiencies does Aetna expect from the acquisition of Humana in Wisconsin? Will Aetna commit to reducing premiums in Wisconsin based on those efficiencies?
4. We are aware that neither Aetna nor Humana participate in the state health insurance exchange. Would Aetna be willing to commit to participating in the exchange after the merger?
5. Does Aetna have a plan to remedy the conduct concerning Medicare Advantage-Prescription Drug and Prescription Drug Plans that led to a \$3.1 million fine on Dec. 29th, 2015 against Humana? Has Aetna taken steps to correct the conduct that led to a \$1 million fine on April 16, 2015?
6. It's been reported that the increased buyer power from the merger could drive down reimbursement rates below competitive levels in many markets, which can impact patient care quality and access. Will a combined Aetna/Humana represent a significant share of provider revenue in any Wisconsin geographic market? What would be the impact of the merger on healthcare providers and their provision of care?

In addition, we have enclosed the referenced comments made to the Department of Financial Services of New York that give an example of the significant competition issues that could impact the state of Wisconsin.

Sincerely,

Michael DeLong
Law Offices of David Balto
925-708-1135





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March 15, 2016

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

Re: Request for Intervenor Status

Dear Commissioner Nickle:

This letter is to serve as a formal request on behalf of David A. Balto to receive intervenor status under s. 227.44(2m), Stats. as a representative of the below signed groups in order to pose questions to the parties in the hearing scheduled March 30, 2015. The below signed groups have a substantial interest that may be affected by the decision following the hearing. The below signed groups represent Wisconsin consumers who are likely to pay higher premiums, and experience reduced choice, quality, and innovation as a result of an approval of the proposed Aetna-Humana merger, especially if the merger is approved without appropriate remedies.

The below signed groups believe that the interest it asserts is recognized by law. The Commissioner must make a finding that the proposed merger would not be "contrary to the interests of the insureds,"¹ and, in doing so, may make a determination that the merger is anticompetitive based on substantial evidence.² The below signed groups are uniquely suited to both provide information to assist the Commissioner in his findings and to pose questions that are of great importance to insureds affected by the proposed merger.

We are concerned that the merger represents a significant consolidation in the administrative-services-only ("ASO") market, which is a market that may be exhibiting a significant trend towards consolidation. Indeed, the proposed Aetna-Humana and Anthem-Cigna mergers would increase the ASO market concentration by 6% alone, if approved without divestitures, and the merged firms would represent 61.1% of all ASO business.³ The below signed groups are also concerned that the merger would end an

¹ S. 611.72(3)(am), Stats.

² Ins § 40.025(4)(b)4.

³ *Effects on Competition of Proposed Health Insurer Mergers: Hearing before Comm. on the Judiciary Subcomm. on Regulatory Reform, Commercial and Antitrust Law, 114th Cong. (Sept. 29, 2015) (testimony of Edmund F. Haislmaier, Heritage Foundation), available at <http://goo.gl/9E2Dkm>.*

important source of future competition between Aetna and Humana. Based on Centers for Medicare and Medicaid ("CMS") data, we believe that Aetna and Humana currently compete in 27 counties in the Medicare Advantage market alone. Finally, we are concerned whether Aetna has a plan to remedy certain Humana business practices that led to a substantial \$3.1 million fine by the CMS.⁴

If granted intervenor status, we would pose the following questions to the parties:

1. Is there a significant trend towards consolidation in the ASO market as defined in Ins § 40.025(4)(b)? If so how does Aetna and Humana rebut the prima facie evidence of violation of the competitive standard in Ins § 40.025(4)(a)?
2. What is the likelihood that Aetna would expand into Wisconsin Medicare Advantage markets absent the merger? Why does Aetna need the merger to compete in these markets?
3. What efficiencies does Aetna expect from the acquisition of Humana in Wisconsin? Will Aetna commit to reducing premiums in Wisconsin based on those efficiencies?
4. We are aware that neither Aetna nor Humana participate in the state health insurance exchange. Would Aetna be willing to commit to participating in the exchange after the merger?
5. Does Aetna have a plan to remedy the conduct concerning Medicare Advantage-Prescription Drug and Prescription Drug Plans that led to a \$3.1 million fine on Dec. 29th, 2015 against Humana? Has Aetna taken steps to correct the conduct that led to a \$1 million fine on April 16, 2015?

Bruce Colburn



Vice President Healthcare W.

⁴ 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/>.

March 15, 2016

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

Re: Request for Intervenor Status

Dear Commissioner Nickel:

This letter is to serve as a formal request on behalf of David A. Balto to receive intervenor status under Wis. Stat. § 227.44(2m), stats. as a representative of Citizen Action of Wisconsin in order to participate and pose questions to the parties in the Class 1 hearing on the Aetna-Humana merger scheduled March 30, 2015. Citizen Action of Wisconsin has a substantial interest that may be affected by the decision following the hearing. Citizen Action of Wisconsin represents Wisconsin consumers who are likely to pay higher premiums, and experience reduced choice, quality, and innovation as a result of an approval of the proposed Aetna-Humana merger, especially if the merger is approved without appropriate remedies.

Citizen Action of Wisconsin believes that the interest it asserts is recognized by law. The Commissioner must make a finding that the proposed merger would not be “contrary to the interests of the insureds,”¹ and, in doing so, make a determination whether the merger is anticompetitive based on prima facie or substantial evidence.² Citizen Action of Wisconsin is uniquely suited to both provide information to assist the Commissioner in his findings about the nature of competition and to pose questions that are of great importance to insureds affected by the proposed merger.³

We are concerned that the merger represents a significant consolidation in the administrative-services-only (“ASO”) market, which is a market that may be exhibiting a significant trend towards consolidation. Indeed, the proposed Aetna-Humana and Anthem-Cigna mergers would increase the ASO market concentration by 6% alone, if approved without divestitures, and the merged firms would represent 61.1% of all ASO business.⁴ This alone may be a violation of the statute.

Citizen Action of Wisconsin is also concerned that the merger would end an important source of potential competition between Aetna and Humana. Based on Centers for Medicare and Medicaid

¹ S. 611.72(3)(am), Stats.

² Ins § 40.025(4)(b).

³ For an example of the extensive competitive issues of the merger, see the attached comment to the state of New York signed by Consumers Union, Health Care for All New York, New York Public Interest Research Group, 1199SEIU United Healthcare Workers East, Sergeants Benevolent Association, Consumer Action, Consumer Federation of America, and U.S. PIRG

⁴ *Effects on Competition of Proposed Health Insurer Mergers: Hearing before Comm. on the Judiciary Subcomm. on Regulatory Reform, Commercial and Antitrust Law, 114th Cong. (Sept. 29, 2015)* (testimony of Edmund F. Haislmaier, Heritage Foundation), available at <http://goo.gl/9E2Dkm>.

("CMS") data, we believe that Aetna and Humana currently compete in 27 counties in the Medicare Advantage market alone. Aetna and Humana are increasingly 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 increased from _ to _ in the past _ years.

Finally, we are concerned whether Aetna has a plan to remedy certain Humana business practices that led to a substantial \$3.1 million fine by the CMS.⁵ 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.'"⁶ Humana also violated Medicare appeals and grievances rules, including misclassifying denial of claims appeals as "customer service inquiries."⁷ There should be assurances that these practices will be corrected by Aetna, who was fined \$1 million itself by CMS on April 16, 2015 for conduct related to misleading beneficiaries on pharmacy access.

The concerns discussed above are amplified by the fact that Wisconsin insureds pay some of the highest premiums in the country.⁸ If granted intervenor status, we would pose the following questions to the parties:

1. Is there a significant trend towards consolidation in the ASO market as defined in Ins § 40.025(4)(b)2? If so how does Aetna and Humana rebut the prima facie evidence of violation of the competitive standard in Ins § 40.025(4)(a)?
2. What is the likelihood that Aetna would expand into Wisconsin Medicare Advantage markets absent the merger? Why does Aetna need the merger to compete in these markets? Is there any means to remedy the concerns over competition in Medicare Advantage?
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6. It's been reported that the increased buyer power from the merger could drive down reimbursement rates below competitive levels in many markets, which can impact patient care quality and access.⁹ Will a combined Aetna/Humana represent a significant share of provider

⁵ 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/>.

⁶ *Id.*

⁷ *Id.*

⁸ *Wisconsin health insurance premiums higher than national average*, TWIN CITIES PIONEER PRESS (Sept. 24, 2013), <http://www.twincities.com/2013/09/24/wisconsin-health-insurance-premiums-higher-than-national-average/>

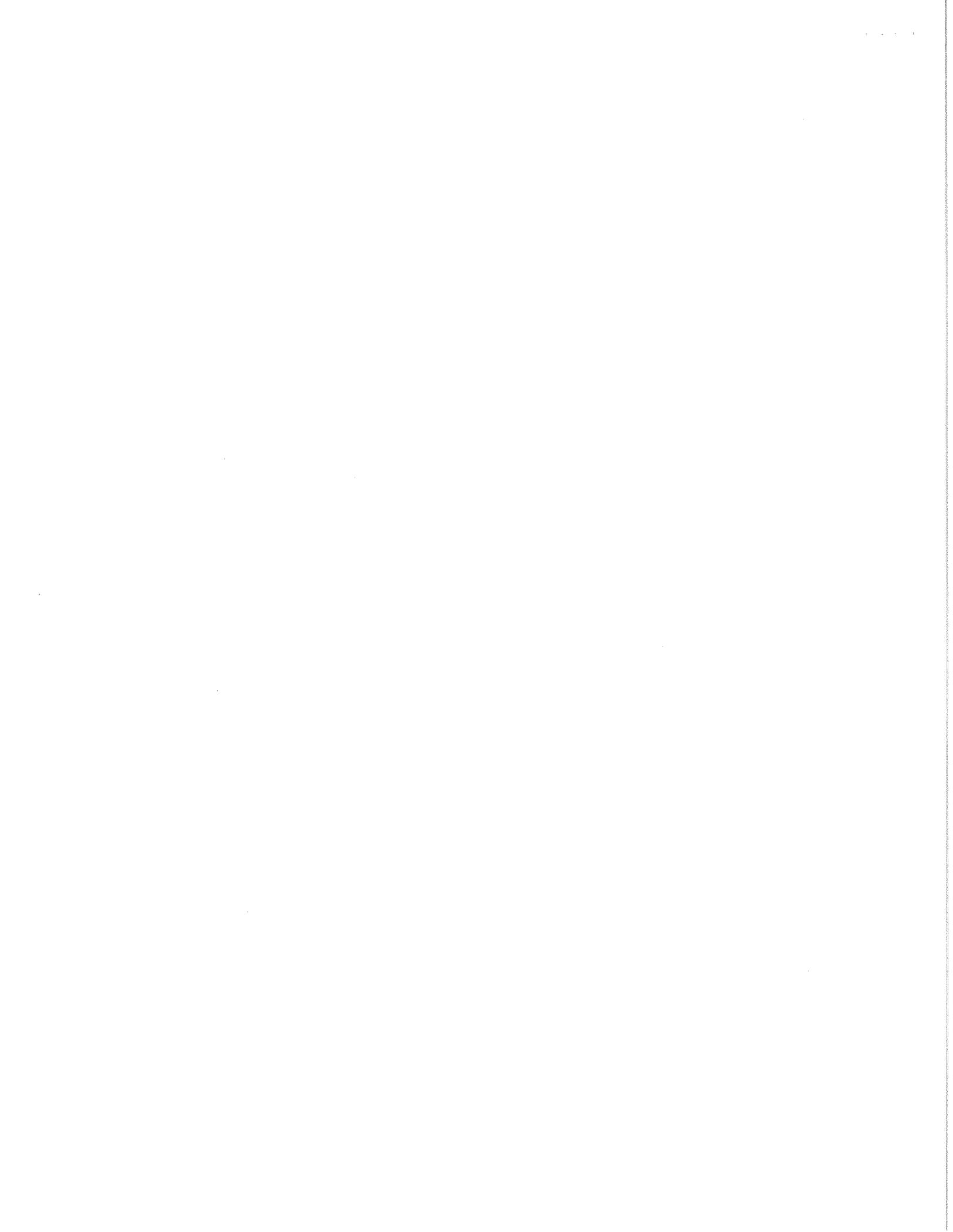
⁹ *Anthem/Cigna; Aetna/Humana: Ongoing DOJ Physician Interviews Focus on Buyer Power Issues; Capitol Forum Analysis Shows Monopsony Enforcement Risk*, THE CAPITOL FORUM (Mar. 11, 2016), <https://thecapitolforum.com/>.

revenue in any Wisconsin geographic market?¹⁰ What would be the impact of the merger on healthcare providers and their provision of care?

Respectfully Submitted,

Kevin Kane
Citizens Action of Wisconsin

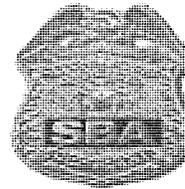
¹⁰ We respectfully request that the Office of the Commissioner of Insurance reconsider its decision not to consider the impact of the merger on monopsony power.



ConsumersUnion®



U.S. PIRG



March 4, 2016

Acting Superintendent Maria T. Vullo
New York State Department of Financial Services
One State Street, 19th Floor
New York, NY 10004

Re: Anthem-Cigna and Aetna-Humana Mergers

Dear Superintendent Vullo:

We write about the potential adverse impact on New York's health insurance markets resulting from the proposed mergers between Anthem-Cigna and Aetna-Humana, four of the nation's five largest health insurers.^{1,2} We urge you to review these mergers carefully to determine how they affect the competitive landscape in New York's health insurance marketplace. We believe that competition between health insurers helps lower premiums, improve quality of care, and promote access and choice.

Under New York law, the Superintendent is empowered to review proposed health insurance mergers and acquisitions within the state to determine whether they are in the public interest.³ This determination is based on several factors, including if the merger "may substantially ... lessen competition in any line of commerce of insurance or to tend to create a monopoly therein" and "whether the acquisition is likely to be hazardous or prejudicial to the insurer's policyholders or shareholders."⁴ We ask that the New York State Department of Financial Services ("DFS") carefully review the proposed Anthem-Cigna and Aetna-Humana mergers, and consider holding

¹ United Healthcare is currently the largest health insurer in the United States by enrollment. Post-merger, Anthem would surpass United Healthcare's enrollment numbers. See Dana Mattioli, Liz Hoffman, and Anna Wilde Mathews, "Anthem Nears Deal to Buy Cigna for \$48 Billion," *The Wall Street Journal*, July 22, 2015, <http://www.wsj.com/articles/anthem-nears-deal-to-buy-cigna-1437604564>.

² This comment was drafted with the assistance of David Balto and James Kovacs, attorneys at the Law Offices of David A. Balto. The following comment and its content are similar to comments authored by Mr. Balto and Mr. Kovacs that have been presented to Departments of Insurance in Florida, Virginia, Ohio, Illinois, and California. On behalf of consumer groups and unions, similar comments will be filed in a number of additional states discussing issues related to health insurance consolidation and the mergers of Anthem-Cigna and Aetna-Humana.

³ N.Y. INSURANCE LAW at § 1506(b).

⁴ *Id.* at § 1506(b)(6-7).

public hearings or other public process, to evaluate the impact of the mergers in New York, and, if appropriate, take action under DFS' authority to protect consumers.

Our comments below discuss: (1) the potential impact the proposed mergers will have on New York's insurance markets; (2) the potential impact the proposed mergers will have on New York's health insurance consumers; (3) the possible remedies that could be explored by DFS; and (4) a request for a public hearing or other public process to address consumers' concerns.

1. The Mergers of Anthem-Cigna and Aetna-Humana Have a Potential Adverse Effect on New York's Health Insurance Markets

According to a 2014 United States Government Accountability Office report, New York's health insurance markets are highly concentrated with the three largest insurers in the State controlling 60 percent of the individual market, 74 percent of the small group market, and 66 percent of the large group market.⁵ Since Anthem, Cigna, Aetna, and Humana all offer insurance products in New York, the loss of two carriers could potentially further consolidate our insurance marketplace.

According to figures compiled by the American Medical Association, the combined Anthem-Cigna company would result in concentration beyond antitrust thresholds in the metropolitan statistical areas ("MSA") of Dutchess County-Putnam County, Glens Falls, Kingston, Nassau County-Suffolk County, and New York-Jersey City-White Plain, NY-NJ and in Essex and Schulyer Counties, which are not part of an MSA.⁶ It appears that these concerns are most pronounced in the Nassau County-Suffolk County MSA and Essex County, where there may be no divestiture options to mitigate the impact of the proposed mergers.⁷ Divestiture is an approach used to mitigate the harm caused by a merger in a particular local region, by requiring that one or the other merging insurer's operations in that region be divested, or sold off, to another insurer, so that the competition would not be lost there. But that requires that there be a suitable company to divest to, who is committed to and capable of competing. And in those three counties, according to the Interstudy Database, there are no viable divestiture options to mitigate the impact of the proposed mergers.

This merger could also adversely affect the administrative-services-only ("ASO") market, where larger employers cover their employees' health care costs, but purchase access to provider networks and other services from insurers. According to figures compiled by Mark Farrah Associates, a combined Anthem and Cigna would have more than 35 percent of the New York ASO market.⁸ The proposed Anthem-Cigna merger could harm the ASO markets in Allegany, Essex,

⁵ See United States Government Accountability Office, *Private Health Insurance: Concentration of Enrollees among Individual, Small Group, and Large Group Insurers from 2010 through 2013* (Dec. 1, 2014), at 13, 15, and 17, available at <http://www.gao.gov/assets/670/667245.pdf>.

⁶ See Attached Spreadsheet from Interstudy Database, *Anthem and Cigna Commercial Lives Overlap by MSA, New York*, compiled by the American Medical Association (January 2015).

⁷ *Id.*

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://judiciary.house.gov/_cache/files/1e694641-b703-40f1-8d6f-1d46c489cc0b/haislmaier-revised-testimony.pdf.

and Schuyler Counties and the MSAs of Binghamton, Cortland, Dutchess-County-Putnam County, Glens Falls, Kingston, Nassau County-Suffolk County, and New York-Jersey City-White Plains, NY-NJ.⁹ In six of these regions, there appear to be no divestiture options.¹⁰

Similarly, while Aetna and Humana would not, even after the proposed merger, have the largest market share of Medicare Advantage (“MA”) overall among insurers in New York State, it does appear that the merger would have an adverse effect on *individual* consumers in the following four counties: Broome, Onondaga, Oswego, and Onondaga.¹¹ It would also have a potentially more serious impact on Medicare Advantage *group* consumers in Madison, Onondaga, Oswego, and Otsego counties, two of which appear to have no viable divestiture options.¹²

2. The Mergers Have a Potential Adverse Effect on Consumers

Studies of past health insurance mergers indicate that mergers lead to higher premiums and increased cost-sharing.¹³ We are unaware of any studies demonstrating that health insurance mergers benefit consumers. As described below, we are concerned that the proposed mergers could adversely affect consumers in two ways: (1) they could result in higher costs; and (2) they could result in fewer choices of health care providers and services for consumers.

First, the proposed mergers might lead to rising costs, i.e. higher premiums and out-of-pocket charges. Although insurers often claim that merging increases their leverage to negotiate lower provider reimbursement rates, Professor Thomas Greaney, a leading health antitrust scholar, has noted that the insurer “has little incentive to pass along the savings to its policyholders.”¹⁴ This is especially worrisome in the New York environment, where consumers already pay some of the highest health insurance costs in the country – an average monthly premium of \$428.54 for individuals in 2013, the third highest in the nation.¹⁵ And insurance premiums continue to climb annually. For 2016, New Yorkers will see on average a 7.1 percent premium increase in the individual market and a 9.8 percent premium increase for small group insurance.¹⁶

⁹ See Attached Spreadsheet from Interstudy Database, *Anthem and Cigna ASO Commercial Lives Overlap by MSA, New York*, compiled by the American Medical Association (January 2015).

¹⁰ *Id.*

¹¹ See Attached Spreadsheet from Interstudy Database, *Aetna and Humana Medicare Advantage Overlap by County, New York*, compiled by the American Medical Association (June 2015).

¹² See Attached Spreadsheet from Interstudy Database, *Aetna and Humana Medicare Advantage Overlap by County, New York, Group MA Plans Only*, compiled by the American Medical Association (June 2015).

¹³ See Leemore Dafny, Mark Duggan, and Subramaniam Ramanarayanan, *Paying a Premium on Your Premium? Consolidation in the US Health Insurance Industry*, 102 AM. ECON. REV. 1161 (2012); see also Jose Guardado, David Emmons, and Carol Kane, *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).

¹⁴ 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/>.

¹⁵ See *Average Monthly Premiums Per Person in the Individual Market*, KAISER FAMILY FOUND. (2015), <http://kff.org/other/state-indicator/individual-premiums/>.

¹⁶ See Press Release, Dep’t of Financial Servs., *New York State Department of Financial Services Announces 2016 Health Insurance Premium Rates, Including Rates for NY State of Health* (July 31, 2015), available at: <http://www.dfs.ny.gov/about/press/pr1507311.htm>.

Research indicates that there is a direct correlation between health insurer concentration and higher premiums.¹⁷ 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, which affected 139 separate markets throughout the United States, resulted in an additional seven percent premium increase overall.¹⁸ Another study found that the 2008 United-Sierra merger resulted in an additional 13.7 percent premium increase in Nevada.¹⁹ Another study examining 34 states found that dominant insurers increased rates an average of 75 percent higher than smaller insurers competing in the same state.²⁰ Anticompetitive insurance mergers could also increase out-of-pocket costs, as patients are required to bear higher deductibles or other insurance-related costs.²¹

Most recently, the Center for American Progress (“CAP”) released findings on Medicare Advantage that argued for the importance of competition in controlling the amounts charged by carriers at issue here. According to the CAP report, in counties where Humana and Aetna compete with each other on MA plans, both Aetna’s and Humana’s average premiums are lower.²² Specifically, Aetna’s average annual premiums are \$302 lower in counties where Humana also offers a MA plan.²³ Aetna and Humana currently offer MA plans that compete with each other in many counties in New York.²⁴ We are concerned that, if their merger is permitted, and absent effective regulatory action, consumers in these counties will face steep premium increases.

Second, consumers are concerned that the mergers would restrict their choice of and access to an adequate number of providers. 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 mergers will “expand ... access” for consumers “through a more extensive network of hospitals, physicians, services, and health care professionals.”²⁵ We are concerned, however, that the opposite will happen: That consumers will find their options limited to plans with overly restricted provider networks and/or lose access to an adequate number of providers in their local area.

¹⁷ See Leemore Dafny, *Are Health Insurances Markets Competitive?*, 100 AM. ECON. REV. 1399 (2010).

¹⁸ See Dafny, *supra* note 12.

¹⁹ See Guardado, *supra* note 12.

²⁰ See 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/a/2015081104/>.

²¹ See generally Leemore Dafny, *Evaluating the Impact of Health Insurance Industry Consolidation: Learning from Experience*, COMMONWEALTH FUND (Nov. 20, 2015), <http://goo.gl/xRYb5x>; see also Korin Miller, *6 Ways the Big Health Insurance Mergers Will Affect Your Coverage*, YAHOO HEALTH (July 24, 2015), <https://www.yahoo.com/health/6-ways-the-big-health-insurance-mergers-will-124932195967.html> (noting that “out-of-pocket payments could increase” because insurance coverage could limit certain services or number of visits forcing patients to pay more).

²² See Tophir Spiro, Maura Calsyn, and Meghan O’Toole, *Bigger is Not Better: Proposed Insurer Mergers Are Likely to Harm Consumers and Taxpayers*, CTR. FOR AM. PROGRESS (Jan. 21, 2016), available at <https://www.americanprogress.org/issues/healthcare/report/2016/01/21/129099/bigger-is-not-better/>.

²³ *Id.*

²⁴ See Attached Spreadsheet from Interstudy Database, *Aetna and Humana Medicare Advantage Overlap by County, New York*, compiled by the American Medical Association (June 2015).

²⁵ See *Healthy Competition? An Examination of the Proposed Health Insurance Mergers and the Consequent Impact on Competition: Hearing before Comm. on the Judiciary Subcomm. on Regulatory Reform, Commercial and Antitrust Law*, 114th Cong. (Sept. 29, 2015) (testimony of Joseph Swedish, President & CEO of Anthem, Inc.), available at http://judiciary.house.gov/_cache/files/7ec53173-463e-4d15-a1da-f9db48349b0d/swedish-testimony.pdf.

These concerns are not speculative. Consumers often complain about the shrinking health plan networks in New York. And they are right to believe their access to providers is constricting rapidly. A recent study by the Leonard Davis Institute of Health Economics and the Robert Wood Johnson Foundation found that 39 percent of silver level plans offered on the New York Insurance Exchange use narrow networks that only include 25 percent or fewer of all area providers.²⁶ We are concerned that the proposed Anthem-Cigna and Aetna-Humana mergers and the resulting increase in market concentration will exacerbate existing network limitations in New York.²⁷

3. Possible Remedies

It is our understanding that both the United States Department of Justice Antitrust Division and the New York State Attorney General are reviewing the proposed mergers. Even if these agencies ultimately allow the mergers to proceed, with or without requiring divestitures,²⁸ we urge the DFS, which is uniquely qualified to judge the mergers' effect on insurance consumers, to consider conditioning its approval on the following additional protections on behalf of New York's health insurance consumers:

- (1) Requiring premium stability or heightened rate control for a number of years post-merger.
- (2) Prohibiting the merged company from reducing plan benefits and options.
- (3) Ensuring that the merged company continues to offer the differentiated insurance products offered previously by the two companies, within the state and local areas, for a number of years.
- (4) Ensuring that consumer access to adequate provider networks and network options is preserved and strengthened, including in rural and underserved areas.
- (5) Requiring that the merged company pass along any cost savings associated with the merger to consumers, in the form of lower premiums and deductibles.

4. The Department Should Consider Holding Public Hearings on the Mergers

We believe the Department's review of these mergers would benefit from public hearings. Public hearings not only offer the merging companies an opportunity to describe the nature and possible benefits of their proposed mergers, but also allow third parties and the public to air concerns and enable the Department to gather critical information, shared in an open forum. The DFS has recognized the important role of public hearings for merger reviews, and has held them previously; for example, in 2008, regarding the Group Health Incorporated and Health Insurance Plan of Greater New York conversion to a for-profit company.²⁹ We believe that a similar public process is warranted here as well.

²⁶ 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.

²⁷ See, e.g., Dareh Gregorian, *Man sues Empire insurance company, claims search for doctor became "frustrating runaround"*, NEW YORK DAILY NEWS, Oct. 7, 2014.

<http://www.nydailynews.com/new-york/man-fails-find-doctor-sues-empire-insurance-company-article-1.1966755>

²⁸ Divestiture was used as a remedy for the mergers described above between Aetna and Prudential and United and Sierra, but failed to prevent higher premiums. Dafny, *supra* note 12; Guardado, *supra* note 12.

²⁹ Press Release, New York State Dep't of Financial Servs., Department to Hold Hearings on GHI, HIP's Conversion Plan (Jan. 3, 2008), available at <http://dfs.ny.gov/insurance////press/p0801031.htm>.

Conclusion

The undersigned organizations are concerned that the proposed mergers of four of the five largest national health insurers may adversely impact New York health insurance consumers by increasing premium and co-pays, reducing access, and hindering quality of care.

With the potential prospect that one or both of these mergers might go forward without antitrust challenge, and with some geographic areas of the state having no viable divestiture option, we urge the New York Department of Financial Services to carefully analyze these mergers, and to consider holding public hearings on each of them, and to be prepared to consider imposing additional requirements to afford New York's consumers adequate protections.

Please feel free to contact us with any questions.

Respectfully submitted,

Consumers Union
Health Care for All New York
New York Public Interest Research Group
1199SEIU United Healthcare Workers East
Sergeants Benevolent Association
Consumer Action
Consumer Federation of America
U.S. PIRG

Cc: Deputy Superintendent Troy Oechsner
Assistant Deputy Superintendent John Powell
Assistant Chief Christine Gralton
Assistant Chief Lisa Fernez

Anthem and Cigna Commercial Lives Overlap by MSA, New York
January 2015 Interstudy Enrollment

MSA	Enrollment				Shares				HHI			Number of Divestiture Options	Aetna Divestiture Option?	Humana Divestiture Option?		
	Anthem		Cigna		Anthem		Cigna		Combine		Pre-				Delta	Post-
	Total	MSA	Total	MSA	Merger	Merger	Merger	Merger	Merger	Merger	Merger				Merger	
New York-Jersey City-White Plains, NY-NJ	1,129,051	555,179	6,723,237	6,723,237	16.8%	8.3%	25.1%	1,707	277	1,984	4	Yes	No			
Nassau County-Suffolk County, NY	442,713	112,987	1,945,324	1,945,324	22.8%	5.8%	28.6%	2,633	264	2,897	0	No	No			
Dutchess County-Putnam County, NY	45,949	15,463	250,711	250,711	18.3%	6.2%	24.5%	1,648	226	1,874	4	Yes	No			
Kingston, NY	19,291	3,719	98,148	98,148	19.7%	3.8%	23.4%	1,674	149	1,823	5	Yes	No			
Glens Falls, NY	13,527	2,086	68,792	68,792	19.7%	3.0%	22.7%	1,552	119	1,671	5	No	No			
Cortland, NY	2,783	623	18,891	18,891	14.7%	3.3%	18.0%	2,459	97	2,556	2	Yes	No			
Binghamton, NY	13,453	5,282	123,562	123,562	10.9%	4.3%	15.2%	2,415	93	2,508	3	Yes	No			
Ithaca, NY	11,181	1,564	76,353	76,353	14.6%	2.0%	16.7%	2,358	60	2,418	4	Yes	No			
Auburn, NY	4,386	824	35,083	35,083	12.5%	2.3%	14.9%	2,433	59	2,491	2	Yes	No			
Syracuse, NY	34,720	9,807	349,359	349,359	9.9%	2.8%	12.7%	3,270	56	3,326	2	No	No			
Batavia, NY	3,191	688	29,969	29,969	10.6%	2.3%	12.9%	1,325	49	1,374	6	No	No			
Olean, NY	4,300	623	33,961	33,961	12.7%	1.8%	14.5%	1,875	46	1,921	5	No	No			
Hudson, NY	3,625	735	34,636	34,636	10.5%	2.1%	12.6%	1,595	44	1,639	5	No	No			
Albany-Schenectady-Troy, NY	79,817	12,069	667,486	667,486	12.0%	1.8%	13.8%	1,764	43	1,807	5	No	No			
Corning, NY	4,381	743	38,842	38,842	11.3%	1.9%	13.2%	2,320	43	2,363	4	No	No			
Ogdensburg-Massena, NY	4,886	933	46,199	46,199	10.6%	2.0%	12.6%	2,511	43	2,554	1	No	No			
Seneca Falls, NY	2,378	303	18,519	18,519	12.8%	1.6%	14.5%	2,423	42	2,465	3	No	No			
Oneonta, NY	3,761	360	25,734	25,734	14.6%	1.4%	16.0%	2,284	41	2,325	4	No	No			
Rochester, NY	37,082	29,083	771,912	771,912	4.8%	3.8%	8.6%	4,067	36	4,104	1	Yes	No			
Watertown-Fort Drum, NY	5,532	586	43,606	43,606	12.7%	1.3%	14.0%	2,245	34	2,279	4	No	No			
Gloversville, NY	2,801	600	31,424	31,424	8.9%	1.9%	10.8%	1,482	34	1,516	6	No	No			
Plattsburgh, NY	5,104	647	44,394	44,394	11.5%	1.5%	13.0%	2,010	34	2,044	4	No	No			
Utica-Rome, NY	16,607	3,419	188,792	188,792	8.8%	1.8%	10.6%	2,627	32	2,659	3	No	No			
Elmira, NY	7,632	834	65,082	65,082	11.7%	1.3%	13.0%	3,741	30	3,771	2	No	No			
Amsterdam, NY	2,408	525	31,671	31,671	7.6%	1.7%	9.3%	1,480	25	1,505	6	No	No			
Jamestown-Dunkirk-Fredonia, NY	5,808	583	60,579	60,579	9.6%	1.0%	10.5%	1,822	18	1,840	5	No	No			
Buffalo-Cheektowaga-Niagara Falls, NY	27,679	10,357	686,761	686,761	4.0%	1.5%	5.5%	2,416	12	2,428	4	No	No			
Malone, NY	2,518	203	29,329	29,329	8.6%	0.7%	9.3%	2,520	12	2,532	3	No	No			
Non-MSA Counties																
Schuyler, NY	1,230	271	6,932	6,932	17.7%	3.9%	21.7%	1,965	139	2,103	4	Yes	No			
Essex, NY	2,295	1,448	21,963	21,963	10.4%	6.6%	17.0%	3,010	138	3,148	0	No	No			
Sullivan, NY	4,474	1,195	35,199	35,199	12.7%	3.4%	16.1%	2,242	86	2,328	4	Yes	No			
Allegany, NY	2,330	703	19,642	19,642	11.9%	3.6%	15.4%	1,514	85	1,599	6	Yes	No			
Lewis, NY	1,741	270	12,775	12,775	13.6%	2.1%	15.7%	2,626	58	2,684	4	Yes	No			
Chenango, NY	2,188	438	24,047	24,047	9.1%	1.8%	10.9%	3,157	33	3,190	2	No	No			
Greene, NY	2,671	458	27,304	27,304	9.8%	1.7%	11.5%	1,689	33	1,722	5	No	No			
Delaware, NY	2,351	311	21,145	21,145	11.1%	1.5%	12.6%	2,184	33	2,216	5	No	No			
Wyoming, NY	2,710	315	26,504	26,504	10.2%	1.2%	11.4%	1,404	24	1,429	6	No	No			
Hamilton, NY	302	25	3,583	3,583	8.4%	0.7%	9.1%	1,693	12	1,705	5	No	No			

Notes:

- Presumptively Anticompetitive MSAs have an increase in HHI of more than 200 and a post-merger HHI greater than 2,500.
- Highly Concentrated Markets are MSAs with an increase in HHI of between 100 and 200 and a post-merger HHI greater than 2,500.
- Moderately Concentrated Markets are MSAs with an increase in HHI of at least 100 and a post-merger HHI between 1,500 and 2,500.
- No Antitrust Risk MSAs have an increase in HHI of less than 100 or a post-merger HHI of less than 1,500.

Anthem and Cigna ASO Commercial Lives Overlap by MSA, New York
January 2015 Interstudy Enrollment

MSA	Enrollment			Shares			HHI			Number of Divestiture Options	Aetna Divestiture Option?	Humana Divestiture Option?
	Anthem	Cigna	MSA Total	Anthem	Cigna	Combined	Pre-Merger	Delta	Post-Merger			
New York-Jersey City-White Plains, NY-												
NJ	505,973	393,679	3,179,721	15.9%	12.4%	28.3%	2,037	394	2,431	2	Yes	No
Nassau County-Suffolk County, NY	178,986	84,553	993,017	18.0%	8.5%	26.5%	4,013	307	4,320	0	No	No
Dutchess County-Putnam County, NY	18,578	11,590	131,524	14.1%	8.8%	22.9%	2,283	249	2,532	0	No	No
Glens Falls, NY	5,473	1,973	32,879	16.6%	6.0%	22.6%	1,802	200	2,002	5	No	No
Kingston, NY	7,802	3,092	50,405	15.5%	6.1%	21.6%	2,646	190	2,836	0	No	No
Cortland, NY	1,124	587	10,795	10.4%	5.4%	15.8%	2,692	113	2,805	0	No	No
Binghamton, NY	5,437	4,994	72,814	7.5%	6.9%	14.3%	2,134	102	2,237	2	Yes	No
Hudson, NY	1,466	595	13,517	10.8%	4.4%	15.2%	2,734	95	2,830	4	Yes	No
Albany-Schenectady-Troy, NY	32,272	10,541	284,120	11.4%	3.7%	15.1%	1,939	84	2,023	4	No	No
Auburn, NY	1,775	761	19,218	9.2%	4.0%	13.2%	2,706	73	2,779	1	Yes	No
Olean, NY	1,742	456	14,744	11.8%	3.1%	14.9%	1,612	73	1,685	4	Yes	No
Rochester, NY	14,993	27,960	343,895	4.4%	8.1%	12.5%	3,017	71	3,088	2	Yes	No
Batavia, NY	1,290	609	15,120	8.5%	4.0%	12.6%	1,542	69	1,611	6	Yes	No
Syracuse, NY	14,037	8,371	189,397	7.4%	4.4%	11.8%	2,694	66	2,759	2	Yes	No
Seneca Falls, NY	961	289	9,810	9.8%	2.9%	12.7%	2,282	58	2,340	3	No	No
Ogdensburg-Massena, NY	1,976	872	25,187	7.8%	3.5%	11.3%	3,975	54	4,029	0	No	No
Ithaca, NY	4,520	1,499	49,977	9.0%	3.0%	12.0%	3,245	54	3,299	0	No	No
Gloversville, NY	1,132	591	16,095	7.0%	3.7%	10.7%	1,555	52	1,607	5	No	No
Oneonta, NY	1,520	311	13,636	11.1%	2.3%	13.4%	2,266	51	2,317	1	No	No
Watertown-Fort Drum, NY	2,238	563	22,314	10.0%	2.5%	12.6%	2,786	41	2,827	4	Yes	No
Elmira, NY	3,085	804	34,898	8.8%	2.3%	11.1%	3,231	41	3,272	0	No	No
Corning, NY	1,773	716	25,013	7.1%	2.9%	10.0%	3,607	41	3,647	1	No	No
Amsterdam, NY	974	450	14,739	6.6%	3.1%	9.7%	1,811	40	1,851	4	No	No
Utica-Rome, NY	6,716	2,440	92,186	7.3%	2.6%	9.9%	2,974	39	3,012	1	No	No
Plattsburgh, NY	2,063	614	26,890	7.7%	2.3%	10.0%	3,083	35	3,118	3	No	No
Jamestown-Dunkirk-Fredonia, NY	2,348	539	27,378	8.6%	2.0%	10.5%	1,794	34	1,828	4	No	No
Buffalo-Cheektowaga-Niagara Falls, NY	11,189	9,655	272,362	4.1%	3.5%	7.7%	1,636	29	1,665	6	Yes	No
Malone, NY	1,018	198	16,408	6.2%	1.2%	7.4%	3,783	15	3,798	1	No	No
<i>Non-MSA Counties</i>												
Essex, NY	928	1,430	11,351	8.2%	12.6%	20.8%	2,776	206	2,982	0	No	No
Allegany, NY	941	693	9,420	10.0%	7.4%	17.3%	1,729	147	1,876	5	Yes	No
Schuyler, NY	498	270	4,544	11.0%	5.9%	16.9%	2,878	130	3,008	0	No	No
Sullivan, NY	1,809	1,001	19,613	9.2%	5.1%	14.3%	4,186	94	4,280	2	Yes	No
Lewis, NY	703	265	6,917	10.2%	3.8%	14.0%	2,282	78	2,359	3	Yes	No
Greene, NY	1,080	373	13,282	8.1%	2.8%	10.9%	2,921	46	2,967	4	Yes	No
Delaware, NY	951	259	10,556	9.0%	2.5%	11.5%	2,856	44	2,900	0	No	No
Chenango, NY	883	401	12,834	6.9%	3.1%	10.0%	3,200	43	3,243	0	No	No
Wyoming, NY	1,096	307	12,960	8.5%	2.4%	10.8%	1,830	40	1,870	5	No	No
Hamilton, NY	124	25	1,819	6.8%	1.4%	8.2%	2,880	19	2,899	2	No	No

Notes:

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- No Antitrust Risk MSAs have an increase in HHI of less than 100 or a post-merger HHI of less than 1,500.

**Aetna and Humana Medicare Advantage Overlap by County, New York
Excludes Special Needs Plans
June 2015**

County	State	Enrollment		Shares		HHI		Number of Divestiture Options	Anthem Divestiture Option?	Cigna Divestiture Option?			
		Aetna	Humana	Aetna	Humana	Pre-Merger	Delta				Post-Merger		
Tioga	NY	698	367	3,653	19.1%	10.0%	29.2%	1,960	384	2,344	3	No	No
Oswego	NY	1,253	653	7,121	16.2%	8.5%	24.7%	1,946	275	2,220	3	No	No
Broome	NY	2,990	870	14,191	21.1%	6.1%	27.2%	2,219	258	2,478	2	No	No
Onondaga	NY	2,939	2,993	29,818	9.9%	10.0%	19.9%	2,013	198	2,211	2	No	No
Cayuga	NY	455	168	4,032	11.3%	4.2%	15.5%	2,433	94	2,527	0	No	No
Madison	NY	57	375	4,493	1.3%	8.3%	9.6%	2,648	21	2,669	3	No	No
Delaware	NY	45	150	2,687	1.7%	5.6%	7.3%	2,438	19	2,457	3	No	No
Livingston	NY	317	128	7,107	4.5%	1.8%	6.3%	3,532	16	3,548	1	No	No
Columbia	NY	74	126	4,017	1.8%	3.1%	5.0%	2,269	12	2,281	5	No	No
Richmond	NY	3,555	117	27,706	12.8%	0.4%	13.3%	1,901	11	1,912	4	Yes	No
Allegany	NY	18	329	3,487	0.5%	9.4%	10.0%	1,683	10	1,692	6	No	No
Nassau	NY	2,034	571	51,488	4.0%	1.1%	5.1%	2,846	9	2,855	3	Yes	No
Seneca	NY	66	49	2,780	2.4%	1.8%	4.1%	3,071	8	3,079	2	No	No
Chemung	NY	31	494	6,068	0.5%	8.1%	8.7%	3,149	8	3,157	4	No	No
Chenango	NY	36	163	3,809	0.9%	4.3%	5.2%	2,696	8	2,704	3	No	No
Oneida	NY	102	920	15,392	0.7%	6.0%	6.6%	2,634	8	2,642	4	No	No
Steuben	NY	20	835	6,513	0.3%	12.8%	13.1%	2,673	8	2,681	4	No	No
Yates	NY	75	37	2,687	2.8%	1.4%	4.2%	3,526	8	3,534	2	No	No
Tompkins	NY	56	60	3,101	1.8%	1.9%	3.7%	4,153	7	4,160	2	No	No
Warren	NY	70	174	6,100	1.1%	2.9%	4.0%	1,878	7	1,885	5	No	No
Greene	NY	31	117	3,395	0.9%	3.4%	4.4%	2,091	6	2,097	5	Yes	No
Cortland	NY	16	81	2,031	0.8%	4.0%	4.8%	2,879	6	2,886	3	No	No
Chautauqua	NY	71	695	12,690	0.6%	5.5%	6.0%	2,630	6	2,636	4	No	No
Cattaraugus	NY	52	326	7,515	0.7%	4.3%	5.0%	3,385	6	3,391	4	No	No
Otsego	NY	46	47	2,743	1.7%	1.7%	3.4%	2,423	6	2,428	3	No	No
Suffolk	NY	2,337	317	52,021	4.5%	0.6%	5.1%	3,802	5	3,808	3	Yes	No
Kings	NY	5,056	224	92,077	5.5%	0.2%	5.7%	1,630	3	1,633	4	Yes	No
Queens	NY	5,252	240	106,283	4.9%	0.2%	5.2%	1,910	2	1,912	4	Yes	No
Herkimer	NY	18	135	4,845	0.4%	2.8%	3.2%	2,947	2	2,949	4	No	No
Rensselaer	NY	62	214	11,325	0.5%	1.9%	2.4%	3,430	2	3,432	5	Yes	No
Saratoga	NY	121	172	17,244	0.7%	1.0%	1.7%	2,839	1	2,840	6	Yes	No
New York	NY	3,164	58	53,778	5.9%	0.1%	6.0%	1,996	1	1,997	4	Yes	No
Ontario	NY	696	15	13,091	5.3%	0.1%	5.4%	3,804	1	3,805	3	No	No
Albany	NY	91	262	21,972	0.4%	1.2%	1.6%	4,116	1	4,117	4	No	No
Monroe	NY	6,327	41	89,117	7.1%	0.0%	7.1%	3,269	1	3,270	3	No	No
Bronx	NY	2,438	30	55,978	4.4%	0.1%	4.4%	1,932	0	1,933	5	Yes	No
Schenectady	NY	16	148	11,935	0.1%	1.2%	1.4%	2,593	0	2,594	5	No	No
Niagara	NY	479	12	23,294	2.1%	0.1%	2.1%	4,125	0	4,125	4	No	No
Erie	NY	1,552	63	99,481	1.6%	0.1%	1.6%	4,351	0	4,351	3	No	No

Notes:

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- No Antitrust Risk counties have an increase in HHI of less than 100 or a post-merger HHI of less than 1,500.

**Aetna and Humana Medicare Advantage Overlap by County, New York
Group MA Plans Only, Excludes Special Needs Plans
June 2015**

County	State	Enrollment			Shares			HHI			Number of Divestiture Options	Anthem Divestiture Option?	Cigna Divestiture Option?
		Aetna	Humana	County Total	Aetna	Humana	Combined	Pre-Merger	Delta	Post-Merger			
Madison	NY	47	211	524	10.6%	39.9%	50.7%	2,770	850	3,620	0	No	No
Oswego	NY	201	51	600	33.5%	8.5%	42.0%	2,153	570	2,723	3	No	No
Ontario	NY	505	1,288	5,562	9.1%	22.8%	31.8%	2,475	413	2,889	0	No	No
Orange	NY	45	22	379	12.1%	5.8%	17.9%	2,554	141	2,695	1	No	No
Cayuga	NY	38	16	350	10.9%	4.6%	15.4%	3,181	99	3,281	0	No	No
Oneida	NY	102	59	1,128	9.0%	5.2%	14.3%	3,763	95	3,858	1	No	No
Steuben	NY	20	148	1,103	1.8%	13.4%	15.2%	3,515	49	3,563	0	No	No
Allegany	NY	18	27	621	2.9%	4.3%	7.2%	3,406	25	3,431	1	No	No
Livingston	NY	15	128	2,006	0.7%	6.4%	7.1%	4,875	10	4,885	2	No	No
Nassau	NY	2,034	32	12,065	16.9%	0.3%	17.1%	4,305	9	4,314	2	No	No
Suffolk	NY	2,337	13	10,158	23.0%	0.1%	23.1%	3,634	6	3,640	2	No	No
Erie	NY	1,552	63	20,739	7.5%	0.3%	7.8%	4,261	5	4,266	2	No	No
Niagara	NY	479	12	5,189	9.2%	0.2%	9.5%	3,659	4	3,663	2	No	No
New York	NY	1,372	11	9,019	15.2%	0.1%	15.3%	5,118	4	5,122	2	No	No
Ontario	NY	52	15	3,143	1.7%	0.5%	2.1%	5,023	2	5,024	2	No	No
Monroe	NY	421	41	23,436	1.8%	0.2%	2.0%	4,891	1	4,892	2	No	No

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County	Enrollment				Shares			HHI			Number of Divestiture Options	Anthem Divestiture Option?	Cigna Divestiture Option?
	State	Aetna	Humana	County Total	Aetna	Humana	Combined	Pre-Merger	Delta	Post-Merger			
Tioga	NY	472	367	3,168	14.9%	11.6%	26.5%	2,003	345	2,348	2	No	No
Oswego	NY	1,052	602	7,121	14.8%	8.5%	23.2%	2,048	250	2,298	2	No	No
Broome	NY	1,521	870	11,551	13.2%	7.5%	20.7%	2,107	198	2,305	3	No	No
Onondaga	NY	2,434	1,727	24,256	10.0%	7.1%	17.2%	2,338	143	2,481	0	No	No
Cayuga	NY	417	152	3,682	11.3%	4.1%	15.5%	2,477	94	2,570	0	No	No
Seneca	NY	66	49	2,137	3.1%	2.3%	5.4%	2,830	14	2,844	1	No	No
Richmond	NY	2,434	117	20,761	11.7%	0.6%	12.3%	1,744	13	1,758	4	Yes	No
Yates	NY	75	37	2,271	3.3%	1.6%	4.9%	3,254	11	3,265	2	No	No
Kings	NY	2,795	224	73,505	3.8%	0.3%	4.1%	1,568	2	1,570	5	Yes	No
Queens	NY	2,508	240	87,417	2.9%	0.3%	3.1%	1,997	2	1,998	4	Yes	No
New York	NY	1,792	47	44,759	4.0%	0.1%	4.1%	2,188	1	2,189	4	Yes	No
Bronx	NY	1,046	30	42,747	2.4%	0.1%	2.5%	1,860	0	1,861	5	Yes	No

Notes:

- Presumptively Anticompetitive counties have an increase in HHI of more than 200 and a post-merger HHI greater than 2,500.
- Highly Concentrated Markets are counties with an increase in HHI of between 100 and 200 and a post-merger HHI greater than 2,500.
- Moderately Concentrated Markets are counties with an increase in HHI of at least 100 and a post-merger HHI between 1,500 and 2,500.
- No Antitrust Risk counties have an increase in HHI of less than 100 or a post-merger HHI of less than 1,500.

