

## Forsberg, Kristin L - OCI

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**From:** Michael DeLong <michael.delong@dcantitrustlaw.com>  
**Sent:** Wednesday, March 16, 2016 2:02 PM  
**To:** Forsberg, Kristin L - OCI  
**Cc:** David Balto; Matthew Lane; Brad Wasser; Bruce Colburn; Kirk Adams; Kevin Kane  
**Subject:** Updated Letter Requesting Intervenor Status and Redlined Draft  
**Attachments:** Wisconsin Intervenor Letter Redlined.docx; Wisconsin Intervenor Letter.pdf

Kristin, attached are two documents: one is a redlined draft of the letter requesting intervenor status, and the other is the clean PDF of the letter requesting intervenor status.

There were a few small corrections that needed to be made to the letters on behalf of Citizen Action of Wisconsin and SEIU Healthcare Wisconsin. We decided the easiest way was to combine the letters, and we used the Citizen Action letter. We attached a redlined draft so you can see the changes that were made, and we attached the final PDF letter as well.

Can the corrected versions be distributed and put in the record?

Please let us know if you have any questions.

Sincerely,

Michael DeLong  
[925-708-1135](tel:925-708-1135)  
Law Offices of David A. Balto

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. a representative of the below signed groups in order to participate and pose questions to the parties in the Class 1 hearing on the Aetna-Humana merger scheduled March 30, 2016. 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 they assert is recognized by law. The Commissioner must make a finding that the proposed merger would not be “contrary to the interests of the insureds,”<sup>1</sup> and, in doing so, make a determination whether the merger is anticompetitive based on prima facie or substantial evidence.<sup>2</sup> The below signed groups are 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.<sup>3</sup>

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% combined, if approved without divestitures, and after both mergers the merged firms would represent 61.1% of all ASO business.<sup>4</sup> This alone may be a violation of the statute.

The below signed groups are also concerned that the merger would end an important source of potential competition between Aetna and Humana. Based on Centers for Medicare and Medicaid

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<sup>1</sup> S. 611.72(3)(am), Stats.

<sup>2</sup> Ins § 40.025(4)(b).

<sup>3</sup> 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

<sup>4</sup> *Effects on Competition of Proposed Health Insurer Mergers: Hearing before Comm. on the Judiciary Subcomm. on Regulatory Reform, Commercial and Antitrust Law, 114th Cong. (Sept. 29, 2015)* (testimony of 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 in the U.S. increased from 82 to 562 in the past three years.<sup>5</sup>

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.<sup>6</sup> 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.'"<sup>7</sup> Humana also violated Medicare appeals and grievances rules, including misclassifying denial of claims appeals as "customer service inquiries."<sup>8</sup> 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.<sup>9</sup> 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?
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

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<sup>5</sup> Topher Sprio, 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, 2016), <https://www.americanprogress.org/issues/healthcare/report/2016/01/21/129099/bigger-is-not-better/>.

<sup>6</sup> 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/>.

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

<sup>8</sup> *Id.*

<sup>9</sup> *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/>

quality and access.<sup>10</sup> Will a combined Aetna/Humana represent a significant share of provider revenue in any Wisconsin geographic market?<sup>11</sup> What would be the impact of the merger on healthcare providers and their provision of care?

Respectfully Submitted,

SEIU Healthcare Wisconsin  
Citizens Action of Wisconsin

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<sup>10</sup> *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/>.

<sup>11</sup> 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.