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

Re: Anthem-Cigna and Aetna-Humana Mergers

Commissioner Cunningham:

The undersigned consumer groups and unions have long been concerned with the competitive landscape within the health care industry. In order to improve health care and better serve patients, there must be competition within different health care markets that offers ample choice, high quality, and transparency. Competition is the key and the driving force to ensure better care at a lower price for all.

We write to you to raise concerns over the proposed consolidation in Virginia's health insurance markets. In particular, we are concerned with the proposed mergers between Anthem-Cigna and Aetna-Humana. The proposed mergers between these dominant insurers could substantially lessen competition for millions of consumer in Virginia. Competition between health insurers is vital to ensuring lower premiums, improving quality of care, and promoting access and choice.

According to Virginia Law, the Virginia State Corporation Commission ("Commission") must prevent any merger by an insurer that "tends to cause a substantially lessening of competition in any line of insurance and such lessening of competition is detrimental to policyholders or the public in general."[1] While we will not offer an opinion if the mergers of Anthem-Cigna and Aetna-Humana would violate Virginia Law,[2] we write this comment to raise concerns about these two mergers and request that the Commission thoroughly review the two proposed transactions as well as hold public hearings. As detailed throughout the comment, ensuring and increasing competition within health insurance markets is critical to improving care and lowering costs.

The below comment will discuss (1) the importance of public hearings, (2) concentration and the impact of both mergers, (3) a health insurance merger's impact on consumer costs, (4) network adequacy, (5) entry and potential competition, (6) the role of efficiencies, and (7) the usage of divestitures and other remedies.

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

Typically, consumers and other third parties are not privy to analysis done by state and federal enforcers in a merger review matter. However, in insurance mergers, the Insurance Commission

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[1] VA. CODE ANN. § 38.2-1323.
[2] The National Association of Insurance Commissioners' Model Insurance Holding Company System Regulatory Act provides detailed analysis of the "Competitive Standard" that can be used to investigate if a health insurance merger is anticompetitive. MODEL INS. HOLDING CO. SYS. REGULATORY ACT § 440-1 (Nat'l Ass'n of Ins. Comm'rs 2015).

is empowered by state law to offer a thorough public vetting of the acquisition. It is through the Commission that consumers and third parties can publicly raise concerns.

In Virginia, state law offers the Commission broad powers to fully investigate an insurance merger to determine its competitive effects. As a starting point, the Commission is empowered to hold a public hearing to assess competitive impact of a health insurance merger.[3] Public hearings not only offer the merging companies an opportunity to defend the transaction but also the Commission and affected third parties an opportunity to question the merger and gather critical information. Along with the hearing, the Commission is further empowered to utilize experts at the merging companies' expense "to assist in the review of the contents of any application filed pursuant to § 38.2-1323."[4] Given the complex nature of the insurance mergers, Commission can use both antitrust experts and economists to review the mergers. These individuals could also participate in a public hearing and offer testimony on their findings.

The mergers of Anthem-Cigna and Aetna-Humana would combine four of the nation's five national insurers.[5] With the potential competitive concerns related to these mergers, further detailed below, we request that the Commission *hold two public hearings*, one for each merger, to analyze competitive impact. The scale of these transactions and potential harms necessitates the Commission utilizing the powers granted under state law. Moreover, a hearing would allow consumers and other interested parties an opportunity to raise concerns publicly.

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

All four insurers, Anthem, Cigna, Aetna, and Humana, offer various insurance products within the Commonwealth of Virginia. Prior to the announcement of these mergers, the vast majority of insurance markets within the Commonwealth were already highly concentrated leaving limited options for consumers and employers. A 2014 report by the United States Government Accountability Office found that the three largest commercial insurers for individual, small group, and large group enrolled 89 percent of all Virginians.[6] Anthem Blue Cross Blue Shield, formerly known as Wellpoint, is by far the largest insurer within the state.[7]

Data from numerous sources analyzing market share data and concentration levels shows that the mergers of Anthem-Cigna and Aetna-Humana could diminish competition within a number of different insurance products. A recent report by Health Affairs relying on data from the National Association of Insurance Commissioners ("NAIC") found that the mergers would increase concentration by 34 percent within Virginia's commercial insurance market, greatly exceeding

[3] *See* VA. CODE ANN. § 38.2-1323(C).
[4] *Id.* at § 38.2-1332(E).
[5] UnitedHealthcare is the fifth national insurer and currently the largest health insurer in the United States. Post-merger, Anthem would surpass United as the largest insurer in the United States.
[6] United States Government Accountability Office, *Private Health Insurance: Concentration of Enrollees among Individual, Small Group, and Large Group Insurers from 2010 through 2013* (Dec. 1, 2014), *available at* http://goo.gl/eYS4Ir.
[7] *See generally* National Association of Insurance Commissioners, *2014 Market Share Reports* (2015), *available at* http://goo.gl/1OhhOu.

anticompetitive thresholds.[8] Along with lessening competition statewide, the Cigna-Aetna transaction alone could eliminate competition for different commercial insurance products in Winchester, Richmond, Blacksburg, Roanoke, Lynchburg, Danville, Harrisonburg, Virginia Beach, and Charlottesville.[9]

The merger between Anthem-Cigna could also substantially lessen competition within the administrative-services-only ("ASO") market. The ASO market relies on predominantly large employers that assume the responsibility for their employees' health care costs, but purchase administrative services through an insurer. A combination of Anthem and Cigna would create an entity with just under 72 percent market share within the ASO market.[10]

The merger between Aetna and Humana could also reduce competition within various health insurance products including Medicare Advantage. A combined Aetna and Humana would enroll 66 percent of all elderly individuals with a Medicare Advantage plan within Virginia.[11] In particular, the combined Aetna-Humana would control dominant market shares for Medicare Advantage in both Chesterfield and Henrico counties.[12]

III. The Mergers Impact on Consumer Costs in Virginia

Consumers are concerned that increased market power post-mergers of Anthem-Cigna and Aetna-Humana will lead to rising costs, i.e. higher premiums and out-of-pocket charges. In the Commonwealth of Virginia, for 2016, insurers proposed premium increase of between 11 and 14 percent for those purchasing plans outside of the Health Insurance Exchange.[13] The merging companies have also requested significant premium increases within Virginia: Aetna requested an average increase of 19.4 percent per plan, Anthem an average of around eight percent, and Humana requested a 12.4 percent increase for a silver level plan offered on the Exchange.[14]

There is little dispute that there is a direct correlation between insurance concentration and higher premiums.[15] 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."[16] Two separate, retrospective economic studies on health insurance mergers found

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[8] Douglas Hervey, David Muhlestein, & Austin Bordelon, *How Might Proposed Payer Mergers Impact State Insurance Markets?*, HEALTH AFFS. (Dec. 1, 2015), http://goo.gl/OT70Nl.
[9] American Medical Association, *Markets where an Anthem-Cigna merger warrants antitrust scrutiny* (Sept. 8, 2015).
[10] *See Effects on Competition of Proposed Health Insurer Mergers: Hearing before Comm. on the Judiciary Subcomm. on Regulatory Reform, Commercial and Antitrust Law*, 114th Cong. (Sept. 29, 2015) (testimony of Edmund F. Haislmaier, Heritage Foundation), *available at* http://goo.gl/9E2Dkm.
[11] Gretchen Jacobsen, Anthony Damico, & Tricia Neuman, *Data Note: Medicare Advantage Enrollment, by Firm, 2015*, KAISER FAMILY FOUND. (July 14, 2015), http://goo.gl/gJ1xnz.
[12] *Id.*
[13] Prue Salasky, *Virginia health insurers propose double-digit rate hikes*, DAILY PRESS (June 3, 2015), http://goo.gl/xBuAjM.
[14] Prue Salasky, *2016 Virginia health rates all over the board*, DAILY PRESS (July 26, 2015), http://goo.gl/tM3I89.
[15] *See* Leemore Dafny, *Are Health Insurances Markets Competitive?*, 100 AM. ECON. REV. 1399 (2010).
[16] David Lazarus, *As Health insurers merge, consumers' premiums are likely to rise*, L.A. TIMES (July 10, 2015 4:00 AM), http://goo.gl/nF7HRS.

significant premium increases for consumers post-merger.[17] There is also economic evidence that a dominant insurer can increase rates 75 percent higher than smaller insurers within the same state.[18] The insurance mergers could also impact out-of-pocket prices as patients see increases in deductibles or other insurance related costs.[19]

In contrast, there are no economic studies or evidence indicating that insurance mergers lead to lower prices for consumers. However, that has not prevented the merging companies from suggesting that merger will create cost savings which will be passed along to consumers.[20] Much of these supposed savings are attributed to the new merged firm's expected greater buying power, also known as monopsony power. According to proponents of the mergers, a dominant insurer can use monopsony power to lower provider reimbursement rates and pass the savings along to consumers.[21] But, there is no evidence consumers actually recoup any of these potential savings. In fact, Professor Thomas Greaney, a leading health antitrust scholar, has noted that there is actually "little incentive [for an insurer] to pass along the savings to its policyholders."[22] More likely, the now-dominant insurer would exploit its monopsony power to benefit only itself, closing off choices, and pressuring providers to cut corners on quality of care in order to meet its demands – the opposite of what consumers need.[23]

Current market regulations will not deter an insurer from raising consumer costs. Some supporters of these mergers have argued that the medical loss ratio ("MLR") "directly limits the

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[17] *See* Leemore Dafny *et al*., *Paying a Premium on Your Premium? Consolidation in the US Health Insurance Industry,* 102 AM. ECON. REV. 1161 (2012) (finding that post-Aetna-Prudential merger, in 139 separate markets, premiums rose by roughly seven percent); *see also* Jose Guardado et al. *The Price Effects of a Large Merger of Health Insurers: A Case Study of United-Sierra,* 1(3) HEALTH MANAGEMENT, POL'Y & INNOVATION 1 (2013) (finding a 13.7 increase in premiums post-merger of UnitedHealth and Sierra).

[18] Eugene Wang and Grace Gee, *Larger Insurers, Larger Premium Increases: Health insurance issuer competition post-ACA*, TECH. SCI. (Aug. 11, 2015), *available at* http://goo.gl/918ULo.

[19] *See generally* Leemore Dafny, *Evaluating the Impact of Health Insurance Industry Consolidation: Learning from Experience*, COMMONWEALTH FUND (Nov. 20, 2015), http://goo.gl/xRYb5x; *see also* Korin Miller, 6 Ways the Big Health Insurance Mergers Will Affect Your Coverage, YAHOO HEALTH (July 24, 2015), https://goo.gl/qLioCy (noting that "out-of-pocket payments could increase" because insurance coverage could limit certain services or number of visits forcing patients to pay more); *see also* Phelps & Philips & Manatt, *HIX Compare,* ROBERT WOOD JOHNSON FOUNDATION (Dec. 2015), *available at* http://goo.gl/mB8H43 (In Virginia, the average deductible for a Silver Plan on the Exchange increased by 7.1 percent from 2015 to 2016).

[20] *See generally Effects on Competition of Proposed Health Insurer Mergers: Hearing before Comm. on the Judiciary Subcomm. on Regulatory Reform, Commercial and Antitrust Law*, 114th Cong. (Sept. 29, 2015) (testimony of Mark T. Bertolini, Chairman & CEO of Aetna, Inc.), *available at* http://goo.gl/TokebO (Noting that the merger will lead to "lower costs."); *see also Effects on Competition of Proposed Health Insurer Mergers: Hearing before Comm. on the Judiciary Subcomm. on Regulatory Reform, Commercial and Antitrust Law*, 114th Cong. (Sept. 29, 2015) (testimony of Joseph Swedish, President & CEO of Anthem, Inc.), *available at* http://goo.gl/B0sy5T (the merger will "lower costs" and "encourage greater cost and quality competition among providers.").

[21] *See* Victoria R. Fuchs and Peter V. Lee, *A Health Side of Insurer Mega-Mergers*, WALL ST. J. (Aug. 26, 2015, 6:36 PM), http://goo.gl/hMhuzI.

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

[23] *See Health Insurance Industry Consolidation: Hearing before the Sen. Comm. on the Judiciary, Subcomm. on Antitrust, Competition Policy, and Consumer Rights*, 114th Cong. (Sept. 22, 2015) (testimony of George Slover, Consumers Union), *available at* http://goo.gl/ojiyge ("[b]ut a dominant insurer could force doctors and hospitals to go beyond trimming costs, to cut costs so far that it begins to degrade the care and service they provide below what consumers value and need").

level of insurer profits," thus protecting consumers from price increases.[24] While MLR is an important tool that requires health insurers spend 80 to 85 percent of net premiums on medical services and quality improvements, it will not adequately protect consumers from anticompetitive harm. Along with MLR not applying to self-insured plans, and the potential for MLR to be gamed by insurers to reduce consumer welfare, "MLR does not guarantee that dominant insurers will not raise premiums and as such, it is not a substitute for the pressures toward lower costs and higher quality created by a competitive market."[25]

IV. Network Adequacy Issues in Virginia

Ensuring access to providers and hospitals is essential for consumers. As part of their defense of the mergers, the merging companies have noted that the mergers will "expand[] access" for consumers "through a more extensive network of hospitals, physicians, services, and health care professionals."[26] While we commend this goal, there is a concern that the opposite could actually occur post-mergers, with consumers being forced into narrow provider networks. In designing a health insurance provider network, there is a careful balance between cost and provider access. A narrow insurance network is intended to give consumers low-price provider options at the cost of limiting the number of providers offered. Offering the *choice* of narrow network options can be consumer-friendly to cost-sensitive individuals. But, if an insurer can *force* consumers into a narrow network of providers and *eliminate* choice, that can be harmful, leaving consumers with less access and potentially lower quality of care.

In the Commonwealth of Virginia, narrow networks are becoming the new norm. A recent study by the Leonard Davis Institute of Health Economics and the Robert Wood Johnson Foundation found that 58 percent of all individual plans offered in Virginia use narrow networks that only include 25 percent or fewer of all area providers.[27] Moreover, under current Virginia Law, consumers have limited protections as "network adequacy" only requires a provider offer "sufficient number" of different types of providers to "meet covered persons' health care needs."[28] As a result, limited or narrow network can force consumers to drive great distances to seek medical care, particularly affecting rural consumers who already have limited options. Lastly, forced narrow networks can also impact the quality of care. A survey from the American College of Emergency Physicians found that 73 percent of respondents noted that narrow networks have caused disruptions in care.[29]

We are concerned that the mergers of Anthem-Cigna and Aetna-Humana could further restrict consumer access to providers and force consumers into narrow networks. Given the merging companies' stated commitment to improving access, we believe this is an important issue that

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[24] *E.g.*, Bertolini, *supra* note 21.

[25] *Effects on Competition of Proposed Health Insurer Mergers: Hearing Before Comm. on the Judiciary Subcomm. on Regulatory Reform, Commercial and Antitrust Law*, 114th Cong. (Sept. 29, 2015) (testimony of Jamie S. King, Professor University of California, Hastings College of Law), *available at* http://goo.gl/Gje3Ci.

[26] *See* Swedish, *supra* note 21.

[27] Dana Polsky & Janet Weiner, *State Variation in Narrow Networks on the ACA Marketplaces*, LEONARD DAVIS INST. HEALTH ECON. (Aug. 2015), *available at* http://goo.gl/kkCWAT.

[28] *See* VA. CODE ANN. 5-408-260

[29] *See* Caitlin Bronson, *Insurance commissioners blast narrow health insurance provider networks*, INSURANCE BUS. (Nov. 11, 2015), http://goo.gl/SdqhtN.

must be addressed when analyzing the mergers and should be a point of emphasis as a part of any public hearing.

V. Entry by Competitors and Loss of Potential Competition

The prospect of competitive entry into a relevant market "will alleviate concerns about adverse competitive effects."[30] However, entry as a defense to a merger, particularly within health insurance markets, is viewed with skepticism.[31] The merging companies have previously argued that there is sufficient competition and new entry in a number of insurance product markets.[32] But, analysis of available data shows that new entry and competition within insurance markets has been severely limited.

In Virginia, there has been some new competitive entry on the Health Insurance Exchange for 2016. Still, on average, Virginians only have access to plans from 3.2 insurers, with nearly 30 percent having access to only one or two insurers.[33] According to the Kaiser Family Foundation, in counties with fewer than three insurers, consumers "may not benefit from insurer market competition to hold down premiums or offer plans with better value."[34] Concentration and a lack of competitive entry is even more pronounced in Medicare Advantage. From 2015 to 2016, there was no increase in Medicare Advantage plans offered in Virginia.[35] Moreover, according to a recent report from the Commonwealth Fund, the vast majority of Virginia's Medicare Advantage markets remain highly concentrated with limited competition.[36] In fact, in rural Virginia counties, the 27,035 Medicare Advantage enrollees have incredibly limited options with the three largest firms controlling 93 percent of the total market and Humana controlling a dominant overall market share.[37]

Along with a lack of current competition and new entry, there is also a significant loss of *potential* competition due to these two mergers. Entry into a new health insurance market requires "a large provider network to attract customers, but they also need a large number of customers to obtain sufficient price discounts from providers to be competitive with

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[30] U.S. Dep't. of Justice Fed. Trade Comm'n, Horizontal Merger Guidelines at § 9 (2010), *available at* https://goo.gl/Hh3dks.

[31] 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* http://goo.gl/rzPC0G ("entry defenses in the health insurance industry will be viewed with skepticism and will almost never justify an otherwise anticompetitive merger.").

[32] *See* Swedish, *supra* note 23 ("Health insurance is flush with competition"); *see also* Bertolini, *supra* note 21 ("Aetna will continue to face significant competition from a large number of health plans and other new market entrants").

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

[34] *Id.*

[35] Gretchen Jacobsen, Anthony Damico, & Tricia Neuman, W*hat's In and What's Out? Medicare Advantage Market Entries and Exits for 2016*, KAISER FAMILY FOUNDATION (Oct. 2015), http://goo.gl/6ZhW6V (According to the data, three Medicare Advantage plans departed while three new Medicare Advantage plans entered Virginia for 2016).

[36] *See* Brian Biles, Giselle Casillas & Stuart Guterman, *Competition Among Medicare's Private Health Plans: Does It Really Exist?*, COMMONWEALTH FUND at 1 (Aug. 25, 2015), *available at* http://goo.gl/nLcrud (Finding that 97 percent of all Medicare Advantage markets are highly concentrated lacking sufficient plan competition).

[37] *Id.*

incumbents."[38] This "Catch 22" makes it nearly impossible for new, competitive entry to occur, particularly in markets dominated by incumbent insurers.[39]

However, potential competition could come from national insurers such as Anthem, Cigna, Aetna, and Humana. These national insurers have national footprints and have sufficient economies of scale to enter new insurance markets. By merging, these insurers would be foreclosing the possibility of their own future entry into new markets and improving competition. As noted by Professor Dafny, "consolidation even in non-overlapping markets reduces the number of potential entrants who might attempt to overcome price-increasing (or quality-reducing) consolidation in markets where they do not currently operate."[40] Professor Greaney has further stated that the "lessons of oligopoly are pertinent here: consolidation that would pare the insurance sector down to less than a handful players is likely to chill the enthusiasm for venturing into a neighbor's market... [o]ne need look no further than the airline industry for a cautionary tale."[41]

Lastly, potential entry could also be stifled by the Blue Cross Blue Shield Association "two-thirds" rule and market allocation.[42] Anthem is a "Blue" mark holder in a number of states and is bound by contract to ensure that two-thirds of their annual revenue must be attributable to the Blue mark. By acquiring Cigna, under the two-thirds rule, the combination may prevent the newly merged firm from expanding non-Blue business and may require Cigna to pull out of markets in which another Blue insurer competes.[43] Moreover, Blue plans do not compete within the same geographic area. In Virginia, Anthem is a Blue plan and the largest insurer in the state. However, Anthem does not compete in northern Virginia, as that area is controlled by Carefirst, another Blue mark holder.[44] As a result of the merger, the newly formed Anthem could prevent Cigna from expanding into northern Virginia to increase competition and directly compete with Carefirst.

VI. Health Insurance Merger Efficiencies are Unlikely in Virginia

A potential benefit of mergers is the enhancement of the new company's ability to compete, by strengthening its capacity to drive down price, improve quality, enhance services, or create new products.[45] The insurers involved in both of these mergers have argued that their merger would

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[38] U.S Dep't of Justice & Fed. Trade Comm'n, *Improving Health Care: A Dose of Competition* at 254 (2004), *available at* http://goo.gl/GzIuvL.
[39] *See* Varney, *supra* note 31.
[40] Dafny, *supra* note 30.
[41] *The State of Competition in the Health Care Marketplace: The Patient Protection and Affordable Care Act's Impact on Competition, Comm. on the Judiciary Subcomm. on Regulatory Reform, Commercial and Antitrust Law*, 114th Cong. (Sept. 10, 2015) (testimony by Professor Thomas Greaney, Saint Louis University School of Law), *available at* http://goo.gl/bceVxi (citation omitted).
[42] *See* Jacqueline DiChiara, *BCBS Licensing Agreement Questioned in Anthem Acquisition*, REVCYCLEINTELLIGENCE (Aug. 26, 2015), http://goo.gl/NRHoy8.
[43] *See* Bruce Japsen, *Why Blue Cross Hates Anthem's Cigna Deal*, FORBES (July 27, 2015 8:00AM), http://goo.gl/gp9GpK.
[44] *See Service Area*, CAREFIRST, https://goo.gl/DCiczA (last visited Jan. 7, 2016).
[45] Horizontal Merger Guidelines, *supra* note 30 at § 6.4.

create substantial efficiencies leading to improved health care quality and lower costs.[46] The issue becomes if it is really necessary for the insurers to merge to achieve these efficiencies, and if the stated efficiencies will actually benefit consumers.[47]

One of the more highly touted efficiencies of these mergers is the supposed cost-savings associated with the mergers. According to Aetna, the merger with Humana will create $1.25 billion in "synergy opportunities" and "operating efficiencies."[48] However, while the merging insurers have offered little details about the 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. There is no evidence or scholarly studies showing that insurance mergers lead to savings for consumers. In fact, as previously noted, scholarly evidence indicates that health insurance mergers lead to higher consumer costs, not increased consumer savings.[49]

A more abstract argument raised by the merging insurers is that the mergers will allow the merged entities to improve innovation. Innovation within health delivery models is critical. Specifically, there is a need to change health care from the current volume-based system to a patient-oriented, value-based delivery model that incentivizes insurers and providers to improve care and lower costs. But, in Virginia, the mergers with both further entrench Anthem and Aetna's preexisting market power offering little incentive for the companies to compete and improve care. When examining these mergers, industry experts have suggested that the mergers could "undercut" the critical innovation efforts needed to improve health care.[50] Such a loss in innovation would harm consumers as insurers compete less with providers to offer new insurance products.

Furthermore, the insurers have not offered sufficient details or analysis demonstrating how innovation will improve post-mergers. In fact, reviewing their testimony and data, Professor Dafny found it speculative to argue that the mergers would enhance the insurers' ability to develop and implement new value-based payment agreements, because there is no evidence a merger is required to carry out such initiatives.[51] Moreover, at a recent conference, Dafny further noted statistical evidence shows that 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.[52]

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[46] *See* Swedish, *supra* note 21 (section labeled "Improving quality and affordability"); *see also* Bertolini, *supra* note 21 (section labeled "Benefits of the Acquisition for Consumers and Providers.").
[47] Horizontal Merger Guidelines, *supra* note 30 at § 10 (to rebut a presumption of competitive harm, efficiencies must be merger-specific, cognizable, and substantiated).
[48] Press Release, Aetna, Aetna to Acquire Humana for $37 Billion, Combined Entity to Drive Consumer-Focused, High-Value Health Care (July 3, 2015), *available at* https://goo.gl/dktKof; *see also* Testimony of Aetna, *supra* note 25 ("$1.25 billion in operating cost savings projected, to be fully realized in 2018).
[49] *See* Section III.
[50] *See* Reed Abelson, *With Merging of Insurers, Questions for Patients About Costs and Innovation*, N.Y. TIMES (July 5, 2015), http://goo.gl/NPp38y.
[51] *Health Insurance Industry Consolidation: Hearing before the Sen. Comm. on the Judiciary, Subcomm. on Antitrust, Competition Policy, and Consumer Rights*, 114th Cong. 15 (Sept. 22, 2015) (testimony of Professor Leemore Dafny, Professor Northwestern University), *available at* http://goo.gl/mhExI6.
[52] Leemore Dafny, Comments at The New Health Care Industry: Integration, Consolidation, Competition in the Wake of the Affordable Care Act (Nov. 13, 2015), *available at* https://goo.gl/GNIvVj.

VII. Divestitures and Other Remedies

In nearly every anticompetitive health insurance matter for the last two decades, the Department of Justice ("DOJ") has exclusively relied on the structural remedy of divestiture.[53] Divestitures require the merging insurance company spin off a number of subscribers to an alternative insurance company to restore competition. In Virginia, given the significant commercial insurance, ASO, and Medicare Advantage, the DOJ might, if it approves the merger at all, require a number of divestitures by the merging companies.

However, the sufficiency of divestitures as a suitable remedy has come under significant scrutiny. Economic research by Professor John Kwoka finds that divestitures often fail to restore competition to the marketplace.[54] Indeed that skepticism has led the DOJ, Federal Trade Commission ("FTC"), and the courts to reject divestitures in other merger matters. In their reviews of the proposed mergers of Comcast-Time Warner Cable and Sysco-US Foods, the enforcement agencies rejected the divestitures offered as remedies, and instead blocked the mergers. When Sysco pursued its merger anyway, the court agreed with the FTC and enjoined the merger.[55]

Within health insurance markets, there is little evidence that competition is effectively restored after divestitures. In fact, in the previously cited two retrospective studies on health insurance mergers, both matters involved divestitures of covered lives for different insurance products, but the merged companies were still able to raise premiums by significant margins.[56] Additionally, for any divestiture in these matters to be successful, the merging companies will have to ensure the purchaser of the assets will have a cost-competitive network of hospitals and physicians requiring scrutiny and continued monitoring from the DOJ.[57] With the lack of competition within a number of Virginia markets and the dominant position of four firms throughout the state, it may be difficult to divest assets to a competitor and genuinely preserve the competitive benefits of the pre-merger market structure.

While the DOJ and Virginia Attorney General may be considering divestitures, the Commission is also empowered to develop additional remedies for a health insurance merger. These remedies can be in addition to any such remedies, including divestitures, ordered by the DOJ or Virginia Attorney General. For example, in the 2008 acquisition of Sierra Health by UnitedHealth, the DOJ required divestiture of MA plans in Las Vegas,[58] but the Nevada Insurance Commissioner required additional remedies. In order for the merging companies to receive approval from the

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[53] *See* 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); *see also* Final Judgment, *United States v. UnitedHealth Group Inc. and Sierra Health Servs. Inc.*, No: 1:08-cv-00322 (D.D.C. Sept. 24, 2008); *see also* Final Judgment, *United States v. Humana Inc.*, No. 1:12-cv-00464 (D.D.C. March 27, 2012).
[54] John Kwoka, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S POLICY, MIT PRESS (2015).
[55] Press Release, DOJ, Comcast Corporation Abandons Proposed Acquisition of Time Warner Cable After Justice Department and Federal Communications Commissions Informed Parties of Concerns (Apr. 24, 2015), *available at* http://goo.gl/msZq6f; *see also* Press Release, FTC, Following Sysco's Abandonment of Proposed Merger with US Foods, FTC Closes Case (July 1, 2015), *available at* https://goo.gl/XfwPsW.
[56] Dafny, *supra* note 17; Guardado, *supra* note 17.
[57] *See* Greaney, *supra* note 41.
[58] Final Judgment, *UnitedHealth Inc. and Sierra Health Servs.*, No: 1:08-cv-00322.

Commissioner, they had to agree that no acquisition costs would be passed along to consumers or providers, that there would be no premium increases, that there would be no scaling back of benefits, and that UnitedHealth would have to take specified actions to limit the number of uninsured within the state.[59]

Targeted remedies beyond divestitures may play a critical role in ensuring that competition within Virginia's health insurance markets remains stable. Should either merger be permitted to go forward, here is a short list of remedies we suggest that the Virginia State Corporation Commission consider, among others, that could help limit the competitive harm:

- (1) Requiring premium stability or rate control for a number of years post-merger.
- (2) Requirements ensuring that the merged company cannot scale back plan benefits.
- (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) Prohibiting the merged company from further restricting network access, and requiring the merged company to increase plan variety and network options for consumers.
- (6) Provisions to ensure that the merged company increase access and improve care within rural and underserved health insurance markets.
- (7) Requiring that the merged company pass along any cost savings associated with the merger to consumers, in the form of lower premiums and deductibles.

We would also be happy to further discuss this important issue with you directly.

Conclusion

Our organizations are troubled by the consolidation within the health industry and its impact on price, access, and quality of care. Mergers between four of the five dominant insurers could further eliminate competition within the Commonwealth of Virginia. While the merging companies have argued supposed benefits associated with these mergers, available scholarly evidence suggests that consumers will see limited to no benefits and instead will face higher costs, less innovation, and potentially lower quality of care.

While the DOJ may ultimately seek divestiture as a remedy in local markets throughout Virginia, the record of accomplishment on divestures leaves doubts that competition would be restored. For these reasons, we strongly urge the Virginia State Corporation Commission to use the remainder of the merger review period to carefully analyze these mergers and to hold two separate public hearings. We also strongly recommend the Virginia State Corporation Commission be ready to consider the usage of other remedies beyond divestitures, should either of these mergers be permitted to go forward.

[59] *Healthcare Check-Up: The UnitedHealth Group Acquisition of Sierra Health Services*, NEVADA BUS. (Nov. 1, 2007), http://goo.gl/Uztt13.

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,