

March X, 2016

Commissioner Marguerite Salazar  
Department of Regulator Agencies  
Division of Insurance  
1560 Broadway, Suite 850  
Denver, Colorado 80202

Re: Public Hearing for Anthem-Cigna Merger

Dear Commissioner Salazar:

The undersigned organizations represent a wide variety of consumers 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 care, 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.

We write to raise concerns over consolidation within Colorado's health insurance markets with the proposed Anthem and Cigna merger. The proposed merger would combine two of the nation's five largest insurers. The merger of these dominant insurers could substantially lessen competition for millions of consumers in Colorado. We understand that the Colorado Division of Insurance ("DOI") is currently reviewing the transaction and will hold a public hearing once Anthem and Cigna complete their filing and an independent review is conducted.<sup>1</sup> We appreciate the thoughtful and deliberative process being undertaken by DOI as well as its commitment to allowing the public to weigh in on this transaction through a public hearing. In preparation for this hearing, we are submitting these comments to share our concerns about the potential impact of the proposed merger on Colorado consumers.

Under Colorado law, the Commissioner, after a public hearing, is authorized to disapprove any merger of insurers that would substantially lessen competition in insurance.<sup>2</sup> In assessing if a health insurance merger substantially lessens competition, Colorado law applies the same "competitive standard"<sup>3</sup> adopted by the National Association of Insurance Commissioners in its Model Act.<sup>4</sup> We submit these comments to highlight the consumer implications we believe should be considered during your review of the proposed merger. As detailed throughout this letter, ensuring and increasing competition within health insurance markets is critical to improving care and lowering costs.

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<sup>1</sup> Colorado Division of Insurance, Notice of initial application for the proposed merger of Cigna Corp. and Anthem, Inc., pursuant to § 10-3-803(8)(a), C.R.S. (Dec. 2, 2015), *available at* <https://goo.gl/ZEvkJh>.

<sup>2</sup> C.R.S. § 10-3-803(7)(b).

<sup>3</sup> *Id.* at § 10-3-803.5(4)(b)(I-IV).

<sup>4</sup> 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).

This letter discusses (1) the high concentration and potential anticompetitive impact of this merger, (2) the potential impact of the merger on consumer costs, (3) the potential adverse effects on network adequacy, (4) why new entry and potential competition are not likely to alleviate these concerns, (5) the relevance of possible efficiencies, and (6) possible remedies that DOI might consider to protect consumers and the public interest if this merger goes forward.

## **I. The Merger of Anthem-Cigna Will Have a Significant Impact on Colorado's Already Highly Concentrated Insurance Markets**

Based on Colorado statute, Colorado's health insurance markets are considered highly concentrated.<sup>5</sup> According to the Colorado Health Market Review for 2015, the four largest Colorado insurers, Kaiser Permanente, UnitedHealthcare, Anthem, and Humana, have a combined market share of 79.3 percent.<sup>6</sup> Under Colorado's competitive standard, the commercial insurance markets are highly concentrated, as the four largest insurers have more than a 75 percent market share.<sup>7</sup> The combination of Anthem (17.3) and Cigna (5.5) within the commercial market would give the merged firm a 22.8 percent market share,<sup>8</sup> further consolidating the market and creating the second largest commercial insurer in the state. Moreover, under Colorado law, the combined market share of Anthem and Cigna in Colorado's highly concentrated insurance market is "prima facie evidence" of the merger's violation of the state's competitive standard.<sup>9</sup>

In a recent report by Health Affairs, the authors, relying on data from the NAIC, examined the Anthem-Cigna and Aetna-Humana transactions' impact on various insurance product lines nationally.<sup>10</sup> According to the data, the mergers, and in particular the combination of Anthem and Cigna, would increase commercial insurance concentration by 42 percent, the third highest in the country.<sup>11</sup> Along with lessening competition statewide, the Anthem-Cigna transaction would also eliminate competition for commercial insurance in a number of metropolitan statistical areas. According to data from the American Medical Association, the Anthem-Cigna transaction will enhance market power for the combined firm in Grand Junction, Fort Collins-Loveland, Greeley, Pueblo, Colorado Springs, Boulder, and Denver-Aurora.<sup>12</sup>

Lastly, 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 own employees' health care costs, but purchase administrative services through an insurer. A combination of Anthem and Cigna would

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<sup>5</sup> C.R.S. § 10-3-803.5(4)(b)(II).

<sup>6</sup> Allan Baumgarten, Colorado Health Market Review (Sept. 2015).

<sup>7</sup> C.R.S. § 10-3-803.5(4)(b)(II).

<sup>8</sup> Baumgarten, *supra* note 5.

<sup>9</sup> *See* C.R.S. § 10-3-803.5(4)(b)(I)(A).

<sup>10</sup> Douglas Hervey, David Muhlestein, & Austin Bordelon, *How Might Proposed Payer Mergers Impact State Insurance Markets?*, HEALTH AFFS. (Dec. 1, 2015), <http://goo.gl/OT70NI>.

<sup>11</sup> *Id.*

<sup>12</sup> American Medical Association, *Markets where an Anthem-Cigna merger warrants antitrust scrutiny* (Sept. 8, 2015).

create an entity with a 58.9 percent market share of the Colorado ASO market.<sup>13</sup> The merger will lead a to 43 percent increase in concentration in the Colorado ASO market, one of the largest increases in concentration in the United States.<sup>14</sup>

## II. The Merger's Impact on Consumer Costs in Colorado

Consumers are concerned that increased market power post-merger of Anthem-Cigna could lead to rising costs, i.e. higher premiums and out-of-pocket charges. For Coloradans, health insurance premiums continue to rise. According to data from the Colorado Division of Insurance, individual premiums increased statewide by 9.84 percent.<sup>15</sup> In Denver alone, the premium on the second-lowest cost “benchmark” silver plans on Connect for Health Colorado increased by 32.2 percent.<sup>16</sup> In 2015, HMO Colorado Inc., a subsidiary of Anthem, was approved for an 8.2 percent increase while Cigna requested a 5.1 percent decrease in premiums.<sup>17</sup> With prices steadily increasing in Colorado commercial insurance markets, this proposed merger between two dominant insurers could exacerbate this trend, leading to even higher consumer costs.

There is little dispute that there is a direct correlation between insurance concentration and higher premiums.<sup>18</sup> 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.”<sup>19</sup> 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.<sup>20</sup> Another study found that the 2008 United-Sierra merger resulted in an additional 13.7 percent premium increase in Nevada.<sup>21</sup> There is also economic evidence that a dominant insurer can increase rates 75 percent higher than smaller insurers competing in the same state.<sup>22</sup>

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<sup>13</sup> 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>.

<sup>14</sup> Hervey *et al.*, *supra* note 9.

<sup>15</sup> *Health Insurance Filings and Approved Plans*, COLORADO DEP'T OF REGULATORY AGENCIES, <https://goo.gl/m4aOVh> (last visited Feb. 19, 2016).

<sup>16</sup> Cynthia Cox *et al.*, *Analysis of 2016 Premium Changes in the Affordable Care Act's Health Insurance Marketplaces*, KAISER FAMILY FOUNDATION (Oct. 26, 2015), available at <http://goo.gl/bHq5Ih>.

<sup>17</sup> Bruce Finley, *Colorado health plan choices, premiums rise for 2016*, DENVER POST (June 16, 2015 5:04 PM), <http://goo.gl/81Ur27>.

<sup>18</sup> See Leemore Dafny, *Are Health Insurances Markets Competitive?*, 100 AM. ECON. REV. 1399 (2010).

<sup>19</sup> 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>.

<sup>20</sup> Leemore Dafny *et al.*, *Paying a Premium on Your Premium? Consolidation in the US Health Insurance Industry*, 102 AM. ECON. REV. 1161 (2012).

<sup>21</sup> 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).

<sup>22</sup> 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>.

In contrast, we are not aware of any economic studies or evidence indicating that insurance mergers lead to lower prices for consumers. However, despite the lack of data, the merging companies have suggested that their merger will create cost savings which they will pass along to consumers.<sup>23</sup> Much of these anticipated savings are attributed to the new merged firm's expected greater buying power, also known as monopsony power. According to proponents of the merger, a dominant insurer can use monopsony power to lower provider reimbursement rates and pass the savings along to consumers.<sup>24</sup> But, there is no evidence consumers actually receive any of these potential savings. 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."<sup>25</sup> More likely, the now-dominant insurer would use 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.<sup>26</sup> As the American Antitrust Institute, the leading non-profit antitrust think tank, recently concluded, economic studies and evidence indicate that "consumers do not benefit from lower healthcare costs through enhanced bargaining power."<sup>27</sup>

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.<sup>28</sup> 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. MLR, as health antitrust expert Professor Jamie King has observed, "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."<sup>29</sup>

### III. There are Significant Concerns over Network Adequacy

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<sup>23</sup> 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 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.").

<sup>24</sup> 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>.

<sup>25</sup> See Thomas Greaney, *Examining Implications of Health Insurance Mergers*, HEALTH AFFS. (July 16, 2015), <http://goo.gl/ETT1DB>.

<sup>26</sup> 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/s16PSj> ("[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").

<sup>27</sup> 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://goo.gl/BD1zTL>.

<sup>28</sup> E.g., Mara Lee, *Anthem Merger Filing: No Plans to Cut Cigna Workers 'In Any Material Respect'*, HARTFORD COURANT (Sept. 25, 2015 6:45 PM), <http://goo.gl/6OXe2T> (quoting Anthem's application to the Connecticut Insurance Department to acquire Cigna).

<sup>29</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 Jamie S. King, Professor University of California, Hastings College of Law), available at <http://goo.gl/Gje3Ci>.

As part of the review process, DOI should fully evaluate the impact of the merger on provider network adequacy. For many consumers, the 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.”<sup>30</sup> 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 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.

A recent study by the Leonard Davis Institute of Health Economics and the Robert Wood Johnson Foundation found that 47 percent of individual plans offered on the Colorado Exchange use narrower networks that only include 25 percent or fewer of all area providers.<sup>31</sup> Moreover, Colorado does not currently regulate quantitative standards for network adequacy on the Health Insurance Exchange, although quantitative standards are in the process of being adopted.<sup>32</sup> Therefore, there is currently little to no recourse for consumers if insurance products continue to narrow dropping a consumer’s preferred provider.

We are concerned that the proposed Anthem-Cigna merger and the resulting increase in market concentration could exacerbate network limitations in Colorado. 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 network choices for consumers.

#### **IV. New Entry Will Not Prevent Competitive Harm**

The likely prospect of new competitive entry into a market can potentially “alleviate concerns about a merger’s adverse competitive effects.”<sup>33</sup> However, as the former Assistant Attorney General of the Justice Department Antitrust Division has observed “entry defenses in the health

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<sup>30</sup> See Swedish, *supra* note 22.

<sup>31</sup> 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>.

<sup>32</sup> 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://goo.gl/8DHEct>.

<sup>33</sup> U.S. Dep’t. of Justice & Fed. Trade Comm’n, *Horizontal Merger Guidelines* at § 9 (2010), available at <https://goo.gl/Hh3dks>.

insurance industry will be viewed with skepticism and will almost never justify an otherwise anticompetitive merger.”<sup>34</sup>

Entry will only alleviate concerns if the entry “will *deter or counteract* any competitive effects of concern.”<sup>35</sup> It is not enough that new firms might emerge; *those firms must be forceful and committed enough to successfully constrain anticompetitive conduct*. Indeed, in the mergers studied and discussed above, there was new entry, but that entry did not prevent significant harm to competition from resulting from those mergers.

The merging companies here have previously argued that there is sufficient existing competition and new entry in a number of insurance product markets.<sup>36</sup> But analysis of available data shows that new entry and competition within insurance markets has been severely limited. This is another issue that should be fully evaluated as part of the review process.

In Colorado, as recent history indicates, competitive entry has not offset concentration within the market. In particular, the Colorado HealthOP, the largest insurer on Connect for Health Colorado exchange in 2015, foreclosed in 2015, forcing 83,000 consumers to switch to a new plan for 2016.<sup>37</sup> Along with the largest insurer leaving, two other carriers, New Health Ventures and Time Insurance Company, also left the Colorado insurance market.<sup>38</sup> Moreover, there is no evidence of entry in small group, large group, or the ASO markets. As previously noted, Colorado’s insurance markets remain highly concentrated and prices continue to rise.<sup>39</sup>

Along with a lack of current competition, this merger may result in a significant loss of *potential* competition. As the Department of Justice (“DOJ”) has found, 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 incumbents.”<sup>40</sup> This “Catch 22” makes it nearly impossible for new, competitive entry to occur, particularly in markets dominated by one or a small handful of incumbent insurers.<sup>41</sup>

With these entry barriers, a key remaining potential source of new competition is established national insurers – such as Anthem and Cigna. These insurers have national footprints and have sufficient resources to enter new insurance markets. Unfortunately, by merging, these insurers would be foreclosing the possibility of their own future entry into each other’s markets and improving competition. As noted by Professor Dafny, “consolidation even in non-overlapping

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<sup>34</sup> 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/rzPCOG>.

<sup>35</sup> Horizontal Merger Guidelines, *supra* note 42 at § 9 (emphasis added).

<sup>36</sup> See Swedish, *supra* note 22 (“health insurance is flush with competition”).

<sup>37</sup> David Olinger, *Colorado health exchange ready for influx of customers of failed co-op*, DENVER POST (Oct. 26, 2015 5:31 PM), <http://goo.gl/39TSwl>.

<sup>38</sup> See Louise Norris, *Colorado Health insurance exchange*, HEALTH INSURANCE.ORG (Feb. 7, 2016), <https://goo.gl/jIqDr4>.

<sup>39</sup> See Section II.

<sup>40</sup> 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>.

<sup>41</sup> See Varney, *supra* note 33.

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.”<sup>42</sup> 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.”<sup>43</sup>

## V. Health Insurance Merger Efficiencies are Unlikely in Colorado

As a general matter, one potential benefit of mergers is the enhancement of the new company’s ability to compete, by strengthening its capacity to bring down price, improve quality, enhance services, or create new products – collectively referred to as “efficiencies.”<sup>44</sup>

The insurers involved in the merger have argued that their merger would create substantial efficiencies leading to improved health care quality and lower costs for consumers.<sup>45</sup> But these kinds of efficiencies cannot help justify a merger unless (1) it is really necessary for the insurers to merge to achieve the stated efficiencies, and (2) the stated efficiencies will actually benefit consumers.<sup>46</sup>

The parties have claimed significant cost-savings associated with the merger.<sup>47</sup> 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.<sup>48</sup> 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.”<sup>49</sup> Thus, Baer’s statement seems to suggest that in order to pass DOJ scrutiny, the firms will need to demonstrate/provide evidence of efficiencies.

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<sup>42</sup> *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>.

<sup>43</sup> *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).

<sup>44</sup> Horizontal Merger Guidelines, *supra* note 34 at § 6.4.

<sup>45</sup> See generally *Anthem and Cigna: Driving Health Care Innovation Together*, <http://goo.gl/TkN35X> (last visited Feb. 19, 2016).

<sup>46</sup> Horizontal Merger Guidelines, *supra* note 33 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”).

<sup>47</sup> See generally *Anthem and Cigna: Consumers*, <http://goo.gl/2XAE9i> (last visited Feb. 19, 2016) (noting the merger will generate “meaningful cost savings”).

<sup>48</sup> See Section II.

<sup>49</sup> Jeff Overley, *DOJ Antitrust Chief Airls Doubts on Insurer Tie-Ups*, Law360 (last visited Feb. 24, 2016), <http://www.law360.com/articles/726814/doj-antitrust-chief-airls-doubts-on-health-insurer-tie-ups>.

A more abstract argument raised by the merging insurers is that the mergers will allow them to improve innovation. Innovation in health care delivery is critical. For one thing, 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 we are concerned that, in Colorado, the merger will further entrench Anthem’s preexisting market power, reducing their 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 innovation.<sup>50</sup> This could run counter to Colorado’s existing efforts to encourage innovation in health.<sup>51</sup>

Furthermore, the insurers have not offered sufficient details or analysis demonstrating how innovation will 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.<sup>52</sup> 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.<sup>53</sup>

## **VI. Divestitures and Other Remedies**

As part of its review of the proposed merger, DOI should consider what actions would help properly protect consumers and ensure the merger is in the public interest. If the DOIs decide 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.<sup>54</sup>

In other cases, mergers have been approved conditioned on the imposition of specific remedies such as divestitures or additional conduct regulation. In evaluating any proposed remedy, it is important to remember that the law requires that a remedy must *restore* the competition that would otherwise be lost, or must otherwise effectively prevent the harm that would result.<sup>55</sup>

In nearly every health insurance merger enforcement action during the last two decades, DOJ has relied on the structural remedy of divestiture.<sup>56</sup> Divestitures require that the merging insurance

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<sup>50</sup> Greaney & Moss, *supra* note 26 (emphasis added).

<sup>51</sup> See Colorado State Innovation Model, *available at* <https://www.colorado.gov/healthinnovation>.

<sup>52</sup> Dafny, *supra* note 40.

<sup>53</sup> 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>.

<sup>54</sup> See *Highmark Merger Timeline*, PENNSYLVANIA INSURANCE DEP’T, <http://goo.gl/0b6827> (last visited Jan. 8, 2015).

<sup>55</sup> 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))

<sup>56</sup> 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).



companies spin off subscribers or operations to another, independent insurance company that is fully capable of restoring the same competition. In Colorado, given the significant scope, breadth, and market shares of the merging companies' commercial insurance and ASO operations, if DOJ approves the Anthem-Cigna merger, it may require a significant, potentially unprecedented number of divestitures by the merging companies.

Given the potential size and scope of divestitures that would be required, including those that would likely be required in Colorado, the American Antitrust Institute has come out against the merger of Anthem-Cigna, urging the DOJ to "just say no."<sup>57</sup> Recent economic research by Professor John Kwoka supports the concerns regarding the effectiveness of divestitures, finding that divestitures often fail to restore competition to the marketplace.<sup>58</sup> The Center for American Progress conducted a study of the Humana-Arcadian merger and found that only 2 of the 15 plans divested are still being offered today.<sup>59</sup> In addition, the study found that the divested plans increased premiums at a much higher rate than medical inflation during the time they stayed in the market.<sup>60</sup>

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, 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.<sup>61</sup>

Regarding health insurance markets, there is little evidence that the benefits of competition are 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.<sup>62</sup> 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.<sup>63</sup> With the lack of competition in a number of Colorado markets already, it may be difficult to genuinely preserve the competitive benefits of the pre-merger market structure through divesting subscribers or operations to a competitor.

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<sup>57</sup> Greaney & Moss, *supra* note 26.

<sup>58</sup> John Kwoka, *MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S POLICY*, MIT PRESS (2015).

<sup>59</sup> 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/>.

<sup>60</sup> *Id.*

<sup>61</sup> 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>.

<sup>62</sup> Dafny, *supra* note 19; Guardado, *supra* note 20.

<sup>63</sup> *See* Greaney, *supra* note 24.

Most recently, the Florida Office of Insurance Regulation (“OIR”) disregarded divestitures as a potential remedy to health insurance mergers.<sup>64</sup> In their consent order to the Aetna-Humana merger, the OIR noted that the divestitures were “not in the best interests of Florida policyholders and also may be short term in nature.”<sup>65</sup> 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.”<sup>66</sup>

While the DOJ (and the Colorado Attorney General’s Office, using its own antitrust authority) may be considering divestitures, the DOI 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 Colorado Attorney General. For example, in the 2008 acquisition of Sierra Health by UnitedHealth, the DOJ required divestiture of MA plans in Las Vegas,<sup>67</sup> 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.<sup>68</sup>

Regulatory remedies may, if improperly designed, have shortcomings for effectively protecting competition and consumers against the abuse of market power resulting from a merger.<sup>69</sup> Nevertheless, such remedies could play an important role in limiting harm to consumers and to the health care marketplace. In the event Anthem-Cigna is permitted to go forward, here is a short list of possible regulatory steps DOI might consider, in addition to divestitures, to limit the impact 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.

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<sup>64</sup> Consent Order, In the Matter of Application for the Indirect Acquisition of Humana Health Insurance Company of Florida Inc. by Aetna Inc. at 9, Florida Office of Insurance Regulation (Feb. 15, 2016), *available at* <http://www.floir.com/siteDocuments/AetnaHumanaAcquisition185926-16-CO.pdf>.

<sup>65</sup> 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://goo.gl/AvXzED>.

<sup>66</sup> *Id.* at 9.

<sup>67</sup> Final Judgment, *UnitedHealth Inc. and Sierra Health Servs.*, No: 1:08-cv-00322.

<sup>68</sup> *Healthcare Check-Up: The UnitedHealth Group Acquisition of Sierra Health Services*, NEVADA BUS. (Nov. 1, 2007), <http://goo.gl/Uztt13>.

<sup>69</sup> Dep’t of Justice, *Antitrust Division Policy Guide to Merger Remedies* (2011), *available at* <http://goo.gl/cm0gBI> (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. Feinberg, *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.”).

- (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.<sup>70</sup>

## **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 Colorado. Although the merging companies are claiming various benefits associated with the merger, the scholarly evidence suggests that consumers will face higher costs, less innovation, and potentially lower quality of care.

With the prospect that this merger might go forward, we urge the Colorado Department of Insurance and the Commissioner to carefully analyze this merger and 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,

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<sup>70</sup> This list of suggested remedies is not comprehensive, and additional remedies could be necessary as the impacts of the merger are examined.