

March 21, 2016

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

Re: Public Hearing for Aetna-Humana Merger

Dear Commissioner Nickel:

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

Under Wisconsin law, the Commissioner, after a public hearing, is authorized to disapprove any merger of insurers that "would be contrary to the law or to the interests of the insureds of any participating domestic corporation or the Wisconsin insureds of any participating nondomestic corporation."³ In assessing if a health insurance merger substantially lessens competition, Wisconsin regulations states that it is *prima facie* evidence if there is a significant trend toward concentration in the product and geographical market, one of the merging insurers is in a grouping of large insurers, and the other has a market share of 2% or more.⁴ We believe that may be the case in the administrative-services-only ("ASO") market. Wisconsin regulations also state that it is *prima facie* evidence if the merger is between a company with 19% or more and a company with 1% or more of a market.⁵ We believe that may be the case in the Part D market.

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

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

³ W.R.S. § 611.73(3)(A).

⁴ Ins § 40.025(4)(b)2, *available at* <http://goo.gl/3I99NM>.

⁵ Ins § 40.025(4)(b)1b.

Barring a showing of prima facie evidence, the Commissioner “may establish the requisite anticompetitive effect based upon other substantial evidence.”⁶ 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.

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 OCI might consider to protect consumers and the public interest if this merger goes forward.

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

With the proposed switch in the State Employee Health Plan from a competitive exchange to a self-insured plan, along with the long term FamilyCare model, concerns with consolidation in the health insurance market are legitimate and concerning. Humana is involved in both markets, and is likely to bid to be the administrator of these public health plans at the expense of existing community based companies. Especially considering companies such as Anthem pulling out of select counties and United Healthcare proposing leaving key markets, the OCI must explore how the proposed merger would impact consumers, and how it could work to leverage down the cost of health coverage for consumers in a defined and accountable way.

The merger between Aetna-Humana could substantially lessen competition within the administrative-services-only (“ASO”) and Part D markets. 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 Aetna and Humana would result in an entity with a 10 percent market share of the Wisconsin ASO market.⁷ When combined with the announced Anthem-Cigna merger, the two new entities would be responsible for servicing 61.1 percent of all ASO business.⁸ We believe that detailed study of the merger’s impact ASO market is warranted, especially in regards to whether “there is a significant trend toward concentration” in the ASO market.⁹ Indeed, a recent study of the impact of the proposed mergers showed a significant increase in commercial ASO insurance concentration.¹⁰ In addition, Aetna has 6% and Humana has 24.4% of the Part D market statewide.¹¹ These numbers are well within the state defined thresholds for *prima facie* evidence

⁶ Ins § 40.025(4)(b)4.

⁷ 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>.

⁸ *Id.*

⁹ Ins § 40.025(4)(b)2.

¹⁰ Douglas Hervey, David Muhlestein, and Austin Bordelon, *How Might Proposed Payer Mergers Impact State Insurance Markets?*, HEALTH AFFAIRS BLOG (Dec. 1, 2015), <http://goo.gl/8oi5SP>.

¹¹ See Medicare Advantage/Part D Contract and Enrollment Data, Centers for Medicare and Medicaid Services, available at <https://goo.gl/OIFG0T>.

of violation of the competitive standard for markets that are not highly concentrated.¹² We also believe that the merger will significantly raise concentration in the important metro areas of Milwaukee, Madison, Green Bay, Eau Claire, La Crosse, Wausau, Racine, and Janesville.¹³

The merger also puts an end to what could be significant future competition between Aetna and Humana. For example, based on Centers for Medicare & Medicaid Services data, Aetna and Humana have competing Medicare Advantage contracts in 27 counties.¹⁴ 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.¹⁵ As the Supreme Court observed in *United States v. Penn-Olin* "[t]he existence of an aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be a substantial incentive to competition which cannot be underestimated."¹⁶

It is also of great concern that Humana has had the most total HMO grievances per 10,000 enrollees, as measured by OCI, in the years 2012-2014.¹⁷ Humana was 67%, 66%, and 3% higher in this metric than the next largest offender in the years 2012, 2013, and 2014 respectively.¹⁸ For this merger to be in the public interest, Aetna must do a better job of serving Humana HMO customers.

Finally, Wisconsin consumers need assurances that certain improper business practices by Humana will be addressed if it is acquired by Aetna. The Centers for Medicare and Medicaid Services ("CMS") have recently fined Humana a substantial \$3.1 million for inappropriately delaying or denying coverage to elderly patients.¹⁹ 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.'"²⁰ Humana also violated Medicare appeals and grievances rules, including misclassifying denial of claims appeals as "customer service inquiries."²¹ CMS stated that "Humana's failures in these areas were systemic and resulted in enrollees experiencing inappropriate delays or denials in receiving covered benefits or increased out-of-pocket costs."²² It is unclear whether Wisconsin

¹² Ins § 40.025(4)(b)1b.

¹³ See Medicare Advantage/Part D Contract and Enrollment Data, *supra* note 12.

¹⁴ *Id.*

¹⁵ Topher Spiro, Maura Calsyn, & Meghan O'Toole, Bigger Is Not Better: Proposed Insurer Mergers Are Likely to Harm Consumers and Taxpayers, Center for American Progress (Jan. 21, 2015), <https://goo.gl/aYWzZT>.

¹⁶ *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 174 (1964).

¹⁷ Consumer's Guide to Managed Care Health Plans in Wisconsin at 12, State of Wisconsin Office of the Commissioner of Insurance, available at <http://goo.gl/SXZT04>.

¹⁸ *See Id.*

¹⁹ Boris Ladwig, *Feds fine Humana \$3.1 million for Medicare violations*, INSIDER LOUISVILLE (Mar. 9, 2016 7:00 AM), <http://goo.gl/yGYx7K>.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

Medicare consumers would fare better under Aetna, as it too was fined \$1 million last year for pharmacy network directory errors.²³

II. The Merger Could Impact Consumer Costs in Wisconsin

In Wisconsin, as recent history indicates, competitive entry has not offset concentration within regional markets. While Wisconsin has a large number of insurers generally, the market is broken up regionally and by target market. In some counties there are fewer than three insurers on the individual²⁴ and Medicare Advantage²⁵ markets. While new insurers have entered regional markets such as Network Health and Common Ground Healthcare Cooperative in both the group and individual market, this has not prevented Wisconsin from being one of the most expensive states in the country for health insurance.

Consumers are concerned that increased market power post-merger of Aetna-Humana could lead to rising costs, i.e. higher premiums and out-of-pocket charges. For Wisconsinites, health insurance premiums continue to rise. According to data from the Kaiser Family Foundation, average individual premiums increased steadily from \$205.84 in 2010 to \$237.51 in 2013.²⁶ Last year six health insurance companies sought rate increases of 10 percent to 33 percent, spurring state legislative efforts.²⁷ With prices steadily increasing in Wisconsin, this proposed merger between two nationally 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.²⁸ 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."²⁹ 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.³⁰ Another study found that the 2008 United-Sierra merger resulted in an additional 13.7 percent premium increase in Nevada.³¹ There is also

²³ *Id.*

²⁴ 2016 Individual Health Insurance Carriers in Wisconsin, Wisconsin Office of the Commissioner of Insurance, available at <http://goo.gl/TY0deS>.

²⁵ See Medicare Advantage/Part D Contract and Enrollment Data, *supra* note 12.

²⁶ *Average Monthly Premiums Per Person in the Individual Market*, Kaiser Family Foundation, available at <http://goo.gl/HriHks>.

²⁷ David Wahlberg, *Large health insurance rate hikes in Wisconsin target of bill*, WISCONSIN STATE JOURNAL (Sep. 4, 2015), <http://goo.gl/se14xa>.

²⁸ See Leemore Dafny *et al.*, *Are Health Insurance Markets Competitive?*, 100 AM. ECON. REV. 1399 (2010).

²⁹ 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>.

³⁰ Leemore Dafny *et al.*, *Paying a Premium on Your Premium? Consolidation in the US Health Insurance Industry*, 102 AM. ECON. REV. 1161 (2012).

³¹ 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).

economic evidence that a dominant insurer can increase rates 75 percent higher than smaller insurers competing in the same state.³²

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.³³ 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.³⁴ 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."³⁵ 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.³⁶ 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."³⁷

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.³⁸ 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."³⁹

³² 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>.

³³ 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")

³⁴ 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/hMhuzL>.

³⁵ See Thomas Greaney, *Examining Implications of Health Insurance Mergers*, HEALTH AFFS. (July 16, 2015), <http://goo.gl/ETT1DB>.

³⁶ 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").

³⁷ 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>.

³⁸ See Bertolini, *supra* note 33 (noting that the merger will lead to "lower costs.").

³⁹ *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>.

III. There are Significant Concerns over Network Adequacy

As part of the review process, OCI 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. 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.

For example, a recent study by the Leonard Davis Institute of Health Economics and the Robert Wood Johnson Foundation found that 57 percent of individual plans offered on the Wisconsin exchange use narrower networks that only include 25 percent or fewer of all area providers.⁴⁰ Moreover, Wisconsin only regulates quantitative standards for network adequacy for specific types of network plans and only in regards to extended hours of operation on the Health Insurance Exchange.⁴¹ Therefore, there is currently little recourse for consumers if insurance products continue to narrow dropping a consumer's preferred provider.

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

IV. Health Insurance Merger Efficiencies are Unlikely in Wisconsin

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.”⁴²

⁴⁰ 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>.

⁴¹ 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>.

⁴² U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* (2010) at § 6.4, available at <https://goo.gl/e116dm>.

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.⁴³ 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.⁴⁴

The parties have claimed significant cost-savings associated with the merger. According to Aetna, its merger with Humana would create \$1.25 billion in “synergy opportunities” and “operating efficiencies.”⁴⁵ 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.⁴⁶ 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.”⁴⁷ Thus, Baer’s statement seems to suggest that in order to pass DOJ scrutiny, the firms will need to demonstrate and/or provide evidence of efficiencies.

A more abstract argument raised by the merging insurers is that the mergers will allow for more 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 Wisconsin, the merger will transfer and entrench Humana’s preexisting market power to Aetna, reducing its incentives to compete and improve care. As noted by the American Antitrust Institute, excessive concentration created by the proposed merger *is likely to reduce incentives* for engaging in innovation.⁴⁸

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.⁴⁹ Moreover, at a recent conference, Professor Dafny further noted that statistical evidence shows concentrated insurance markets often have

⁴³ See Bertolini, *supra* note 33 (section labeled “Benefits of the Acquisition for Consumers and Providers.”).

⁴⁴ Horizontal Merger Guidelines, *supra* note 42 at § 10 (to rebut a presumption of competitive harm, efficiencies must be merger-specific, cognizable, and substantiated); *St. Alphonsus Med. Ctr. v. St. Luke’s Health Sys.*, 778 F.3d 775, 789 (9th Cir. 2015) (efficiencies must demonstrably prove “that a merger is not, despite the evidence of a prima facie case, anticompetitive”).

⁴⁵ 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>.

⁴⁶ See Section II.

⁴⁷ Jeff Overley, *DOJ Antitrust Chief Airs Doubts on Insurer Tie-Ups*, LAW360 (last visited Feb. 24, 2016), <http://goo.gl/jT5697>.

⁴⁸ Greaney & Moss, *supra* note 37 (emphasis added).

⁴⁹ Dafny, *supra* note 30.

less innovative insurance product offerings, meaning mergers between insurers will not likely lead to higher quality or more innovative insurance products.⁵⁰

V. Divestitures and Other Remedies

As part of its review of the proposed merger, OCI should consider what actions would help properly protect consumers and ensure the merger is in the public interest. If the OCI 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.⁵¹

In other cases, mergers have been approved conditioned on the imposition of specific remedies such as divestitures or additional conduct regulation.⁵² 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.⁵³

In nearly every health insurance merger enforcement action during the last two decades, DOJ has relied on the structural remedy of divestiture.⁵⁴ Divestitures require that the merging insurance companies spin off subscribers or operations to another, independent insurance company that is fully capable of restoring the same competition. In Wisconsin, the scope, breadth, and market shares of the merging companies' ASO and Part D operations is significant. These overlap problems are exacerbated by the also announced merger of Anthem and Cigna. If the DOJ approves both deals, 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 nationwide, including those that would likely be required in Wisconsin, the American Antitrust Institute has come out against the both mergers, urging the DOJ to "just say no."⁵⁵ 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.⁵⁶ The Center for American Progress conducted a study of the Humana-Arcadian merger and found that only 2 of the 15

⁵⁰ 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>.

⁵¹ See *Highmark Merger Timeline*, PENNSYLVANIA INSURANCE DEP'T, <http://goo.gl/0b6827> (last visited Jan. 8, 2015).

⁵² E.g., Consent Order at 8, In the Matter of Application for the Indirect Acquisition of Humana by Aetna, No. 125926-16-C0 (Feb. 15, 2016), available at <http://goo.gl/AvXzED>.

⁵³ E.g., See *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972) ("The relief in an antitrust case must be 'effective to redress the violations' and 'to restore competition.'" (citation omitted))

⁵⁴ 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).

⁵⁵ Greaney & Moss, *supra* note 37.

⁵⁶ John Kwoka, *MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S POLICY*, MIT PRESS (2015).

plans divested are still being offered today.⁵⁷ 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.⁵⁸

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.⁵⁹

Regarding health insurance markets, there is little evidence that the benefits of competition are effectively restored after divestitures. In fact, in the previously cited three retrospective studies on health insurance mergers, both matters involved divestitures of covered lives for different insurance products, but the merged companies were still able to raise premiums by significant margins.⁶⁰ 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.⁶¹ It may be difficult to genuinely preserve the competitive benefits of the pre-merger market structure through divesting subscribers or operations to a competitor.

Most recently, the Florida Office of Insurance Regulation (“OIR”) disregarded divestitures as a potential remedy to health insurance mergers.⁶² 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.”⁶³ 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.”⁶⁴

While the DOJ (and the Wisconsin Attorney General’s Office, using its own antitrust authority) may be considering divestitures, the OCI and Commissioner are empowered to develop additional remedies for a health insurance merger. These remedies can be in addition to any remedies, including divestitures, ordered by the DOJ or the Wisconsin Attorney General. For example, in the 2008 acquisition of Sierra Health by UnitedHealth, the DOJ required divestiture of MA plans in Las Vegas,⁶⁵ but the Nevada Insurance Commissioner required additional remedies. In order for the merging companies to receive approval from the Commissioner, they

⁵⁷ Topher Spiro, Maura Calsyn, Meghan O’Toole, Divestitures Will Not Maintain Competition in Medicare Advantage, Center for American Progress (Mar. 8, 2016), <https://goo.gl/pYIsyA>.

⁵⁸ *Id.*

⁵⁹ 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>.

⁶⁰ Dafny, *supra* note 30; Guardado, *supra* note 31; Spiro *et al*, *supra* note 57.

⁶¹ *See* Greaney, *supra* note 35.

⁶² Consent Order, *supra* note 52 at 9.

⁶³ *Id.* at 8.

⁶⁴ *Id.* at 9.

⁶⁵ Final Judgment, *UnitedHealth Inc. and Sierra Health Servs.*, No: 1:08-cv-00322.

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.⁶⁶

Regulatory remedies can also have their shortcomings for effectively protecting competition and consumers against the abuse of market power resulting from a merger.⁶⁷ Nevertheless, such remedies could play an important role in limiting harm to consumers and to the health care marketplace. In the event the Aetna-Humana is permitted to go forward, here is a short list of possible regulatory steps the OCI might consider, in addition to divestitures, to limit the potential 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.
- (5) Ensuring that consumer access to adequate networks is preserved and strengthened, including in rural and underserved areas.
- (6) Requiring that the merged company pass along any cost savings associated with the merger to consumers, in the form of lower premiums and deductibles.
- (7) Requiring the merged company to enter the Wisconsin Exchange.

Conclusion

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

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

⁶⁶ *Healthcare Check-Up: The UnitedHealth Group Acquisition of Sierra Health Services*, NEVADA BUS. (Nov. 1, 2007), <http://goo.gl/Uztt13>.

⁶⁷ 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. Feinstein, *Editor's Note: Conduct Remedies: Tried But Not Tested*, 26 ANTITRUST at 5, 6 (Fall 2011) (“Divestitures continue to be the remedy of choice—and with extremely rare exceptions—the only remedy for horizontal mergers at both the FTC and DOJ.”).

Respectfully submitted,