
April 25, 2016

Stephen W. Robertson
Commissioner
Indiana Department of Insurance
311 W Washington
Suite # 300
Indianapolis, IN 46204

Re: Public Hearing for Anthem-Cigna Merger

Dear Commissioner Robertson:

The undersigned organizations represent consumers and workers across the state, and write to express our concerns about the proposed Anthem-Cigna merger and its impact on Indiana health insurance markets and consumers. The proposed merger would combine two of the nation's five largest insurers.[1] The merger of these dominant insurers could substantially lessen competition and harm millions of consumers in Indiana. We are pleased that the Indiana Department of Insurance ("IDOI") is currently reviewing the transaction and will hold a public hearing as well as permitting the public to submit comments.[2] In preparation for the hearing, we are submitting these comments for the IDOI's consideration.

Under the relevant portions of Indiana law, the IDOI, after a public hearing, shall approve a merger or acquisition *only* if the following is shown by a preponderance of the evidence: "the effect of the acquisition of control would not be substantially to lessen competition in any line of insurance business in any section of this state or tend to create a monopoly therein."[3]

As we explain further below, we are concerned that:

- the merger is likely to substantially harm consumers in the administrative services only (also referred to as "self insured employer group"), the fully insured group, and Medicare Advantage markets, especially by eliminating potential competition between Cigna and Anthem;

[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] Press Release, *Notice of Public Hearing - Anthem / Cigna HealthCare - April 29th*, Indiana Department of Insurance, *available at* http://www.in.gov/idoi/files/Anthem_Cigna_HealthCare_notice_of_hearing.pdf.
[3] Ind. Code § 27-1-23-2(e)(2).

- in particular, the combined market shares of 59 percent in the administrative services only and 51.9 percent in the fully insured employer group markets are well above levels that the Supreme Court has considered to be undue market concentration that undermines competition and harms consumers;
- the history of high rates in the state increases the likelihood of competitive harms;
- the merger will likely lead to higher premiums based on what has happened in past mergers; and
- any potential efficiencies that might result from the merger will not overcome the likely competitive harm from the merger.

Finally, we address possible remedies that IDOI might consider to protect consumers and the public interest if this merger goes forward.

## I. The Merger of Anthem and Cigna Could Have a Substantial Harmful Impact on Indiana's Insurance Markets and Consumers

Protecting health insurance competition is crucial to promoting affordable health care. This is especially true in Indiana, where health insurance markets are competitively fragile. For example, the Kaiser Family Foundation has found that Indiana commercial health insurance markets are highly concentrated with Herfindahl-Hirschman Indexes ("HHIs") of 3,888, 3,568, and 4,038 in the individual, small group, and large group markets respectively.[4] The antitrust enforcement agencies generally consider markets in which the HHI is in excess of 2,500 points to be highly concentrated.[5] Moreover, the merger will result in presumptively anticompetitive increases in market shares in already concentrated insurance markets within the state.

**Loss of Existing Competition in the Administrative Services Only Market.** Anthem's acquisition of Cigna could substantially lessen competition within the administrative services only ("ASO") market. The ASO market consists of employer groups who cover their employees' health care costs, but purchase access to provider networks and other services from insurers. The ASO market is extremely important in Indiana—one of only two states in which more than 70 percent of workers with health insurance are insured through an ASO plan.[6] A merger of Anthem and Cigna would combine Cigna's 39 percent market share with Anthem's 20 percent share and result in an entity with a 59 percent share of the Indiana market.[7] This market share is well over what the Supreme Court has found to be undue concentration. In *U.S. v. Philadelphia National Bank*, the Supreme Court stated "Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that

[4] Insurance Market Competition, Kaiser Family Foundation, http://kff.org/state-category/health-insurance-managed-care/insurance-market-competitiveness/.
[5] *See* U.S. Department of Justice & FTC, Horizontal Merger Guidelines § 5.2 (2010).
[6] Stephen Miller, *Self-Insurance Growing, But Not Among Small Firms So Far*, Society for Human Resource Management (June 22, 2015), https://www.shrm.org/hrdisciplines/benefits/articles/pages/self-insurance-growing.aspx.
[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://www.heritage.org/research/testimony/2015/effects-on-competition-of-proposed-health-insurer-mergers.

threat."[8] The level of consolidation also exceeds the levels that have led to past Justice Department enforcement actions against proposed health insurance mergers.[9] This is substantial evidence that the merger may substantially lessen competition or tend to create a monopoly under Indiana statute. Under the statute, the merging parties have the burden of showing by a preponderance of evidence that it will not.[10]

**Loss of Existing Competition in the Fully Insured Employer Group Market.** The merger between Anthem-Cigna could substantially lessen competition within the fully insured employer group market. A combination of Anthem and Cigna would result in an entity with a 51.9 percent share of the Indiana market.[11] As stated above, this market share is well above what the Supreme Court and Department of Justice has found to be anticompetitive.

**Loss of existing and potential competition in Medicare Advantage.** The merger would put an end to what could be significant existing and especially future competition between Anthem and Cigna in Medicare Advantage. Medicare Advantage is a Medicare supplemental program used by tens of thousands of Indiana Medicare beneficiaries.

Competition in Medicare Advantage is crucial for consumers and for taxpayers who help fund Medicare Advantage. An independent economic study found a direct relationship between concentration and the level of premiums – i.e., consumers get the benefit of lower premiums when markets are less concentrated.[12] For example, a recent study by the Center for American Progress looked at head-to-head competition throughout the country between large national providers Aetna and Humana, who have also proposed to merge. It found that where Aetna and Humana compete head to head annual premiums are lower by up to $302 for Aetna, and by $43 for Humana.[13]

In Indiana, the merger would combine Anthem's 14% of the Medicare Advantage market with Cigna's 1%, leading to a 15% market share.[14] Although a 1% share may not seem significant in its own right, it is enough to provide a foundation for significant competitive growth if kept independent. These shares are thus significant enough to warrant study into whether the merger will substantially lessen competition. This is especially true in Lake County, where Anthem and Cigna both have a substantial presence.

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[8] United States v. Phila. Nat'l Bank, 374 U.S. 321, 363-64 (1963).

[9] Complaint at 8, U.S. v. Humana Inc., No. 12-0464 (D.D.C. March 27, 2012) (challenging a merger with combined market shares of 40% and up); Complaint, United States v. UnitedHealth Group Inc., No. 08-0322 (D.D.C. Feb. 25, 2008); Complaint at 8, United States v. UnitedHealth Group Inc., No. 05-2436 (D.D.C. Dec. 20, 2005) (challenging a merger with combined market shares of 33%); Complaint at 7, United States v. Aetna Inc., No. 99-1398 (N.D. Tex. June 21, 1999) (challenging a merger with combined market shares of 42% and up).

[10] Ind. Code § 27-1-23-2(e).

[11] *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://www.heritage.org/research/testimony/2015/effects-on-competition-of-proposed-health-insurer-mergers.

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

[13] *Id.*

[14] Gretchen Jacobson, Anthony Damico, and Tricia Neuman, *Data Note: Medicare Advantage Enrollment, by Firm, 2015*, KAISER FAMILY FOUNDATION (July 14, 2015), http://kff.org/medicare/issue-brief/data-note-medicare-advantage-enrollment-by-firm-2015/.

Absent the merger, Cigna would have the incentive to expand into other counties, likely invading Anthem counties, in order to expand its Medicare Advantage business in Indiana. This new competition would result in significant benefits to consumers. The law is clear that the loss of potential competition is a sound reason to find a merger anticompetitive. 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."[15]

In the past, insurance commissioners have refused to approve health insurance mergers based on the loss of potential competition that would have resulted. For example, in 2007 the Pennsylvania Insurance Commissioner considered the merger between Pittsburgh-based Highmark and Philadelphia-based Independence Blue Cross. Even though there was little current competition between the two firms, the merger was rejected because of the potential that the firms might increasingly enter each other's territories and compete.[16]

## II. The Merger Could Lead to Higher Consumer Costs in Indiana

Consumers are concerned that increased market power resulting from the merger of Anthem and Cigna could lead to even higher costs, i.e. higher premiums and out-of-pocket charges. Consumers already pay higher insurance premiums in Indiana than in most states. "When the Obamacare health plans began in 2014, the premiums offered in Indiana were 28 percent higher than the average of the 36 states where the federal government is operating the exchange."[17] One particular example was a 21.9% rate increase in 2015 for Anthem's group health prescription drug coverage.[18] Thus, even though the most recent rate increases requested by health insurers in Indiana asked for 2016 were fairly modest, Indiana's rates were already higher than those in most states.[19]

Economic studies have demonstrated a direct correlation between health insurer concentration and higher premiums.[20] 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."[21] Two separate, retrospective economic studies on health insurance mergers found significant premium increases for consumers post-merger. One study found that

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[15] United States v. Penn-Olin Chem. Co., 378 U.S. 158, 174 (1964). *See also* FTC v. Staples, Inc., 970 F. Supp. 1066, 1082 (D.D.C. 1997); United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 116 (1975).

[16] *See Highmark Merger Timeline*, PENNSYLVANIA INSURANCE DEP'T, http://www.insurance.pa.gov/Companies/IndustryActivity/Pages/Highmark-Merger-Timeline.aspx#.Vkqhq_mrShc (last visited Jan. 8, 2015).

[17] J.K. Wall, *Health insurers request modest rate hikes*, INDIANAPOLIS BUSINESS JOURNAL (June 6, 2015), http://www.ibj.com/articles/53481-health-insurers-request-modest-rate-hikes.

[18] Indiana Department of Insurance, Rate Watch, http://www.in.gov/idoi/RateWatch/SearchResults.aspx.

[19] J.K. Wall, *Health insurers request modest rate hikes*, INDIANAPOLIS BUSINESS JOURNAL (June 6, 2015), http://www.ibj.com/articles/53481-health-insurers-request-modest-rate-hikes.

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

[21] David Lazarus, *As Health insurers merge, consumers' premiums are likely to rise*, L.A. TIMES (July 10, 2015 4:00 AM), http://www.latimes.com/business/la-fi-lazarus-20150710-column.html.

the 1999 Aetna-Prudential merger resulted in an additional seven percent premium increase in 139 separate markets throughout the United States. [22] Another study found that the 2008 United-Sierra merger resulted in an additional 13.7 percent premium increase in Nevada.[23] There is also economic evidence that a dominant insurer can increase rates 75 percent higher than smaller insurers competing in the same state.[24] In contrast, we are not aware of any economic studies or evidence indicating that insurance mergers lead to lower prices for consumers.

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. While MLR is an important tool that requires health insurers to spend 80 to 85 percent of net premiums on medical services and quality improvements, it will not adequately protect consumers from anticompetitive harm.[25] 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."[26]

## III. Merger Efficiencies Are Unlikely, and will not Overcome the Competitive Harm

The merging parties have not fully documented their claimed efficiencies but have generally stated that their merger would create substantial efficiencies leading to improved health care quality and lower costs for consumers.[27] It is for IDOI to carefully examine these claims and determine if they are fully substantiated.[28] However, the law is clear that efficiencies, even if proven, do not count unless (1) they clearly outweigh the anticompetitive effects, (2) it is necessary for the insurers to merge to achieve the stated efficiencies, and (3) the stated efficiencies will actually benefit consumers.[29]

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

[23] 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).

[24] Eugene Wang and Grace Gee, *Larger Insurers, Larger Premium Increases: Health insurance issuer competition post-ACA*, TECH. SCI. (Aug. 11, 2015), *available at* http://techscience.org/downloadpdf.php?paper=2015081104.

[25] *See* Letter to Commissioners Ted Nickel and Katherine Wade, American Hospital Association (Feb. 23, 2016), *available at* http://media.wix.com/ugd/1859d0_fe3f35a629c1411b8522c232258f8576.pdf.

[26] *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* https://judiciary.house.gov/hearings/?Id=020363B9-F9EF-4623-8E67-28A0B260675A&Statement_id=30A83B11-7A89-4261-9773-DCF6593808FF.

[27] *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://betterhealthcaretogether.com/content/uploads/2015/09/Swedish-Testimony-for-House-Judiciary.pdf (section labeled "Improving quality and affordability").

[28] The IDOI should be especially skeptical of claims that new entry can resolve competitive concerns. 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* https://www.justice.gov/atr/speech/antitrust-and-healthcare ("[E]ntry defenses in the health insurance industry will be viewed with skepticism and will almost never justify an otherwise anticompetitive merger.").

[29] 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

The parties have claimed significant cost-savings associated with the merger.[30] 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.[31] 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."[32]

That makes sense. Most large insurers are beyond the point where another merger would help them achieve any legitimate economies of scale. And there is little evidence that consumers would ever actually benefit from giving insurers increased bargaining power. 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."[33] As Consumers Union has suggested, a more likely result would be fewer choices for consumers, and providers being pressured to cut corners on quality of care in order to meet the insurer's demands – the opposite of what consumers need.[34] The American Antitrust Institute, the leading non-profit antitrust think tank, recently concluded that economic studies and evidence indicate that "consumers do not benefit from lower healthcare costs through enhanced bargaining power."[35]

A more abstract argument raised by the merging insurers is that the merger will allow for more innovation. Innovation in health care delivery can be very beneficial and should be encouraged. For one thing, there is the effort 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 Indiana, the merger would increase and entrench the combined insurer's market power, reducing its incentives to compete and improve

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775, 789 (9th Cir. 2015) (efficiencies must demonstrably prove "that a merger is not, despite the evidence of a *prima facie* case, anticompetitive").

[30] *See* Swedish, *supra* note 33 (the merger will "lower costs" and "encourage greater cost and quality competition among providers.").

[31] *See* Section II.

[32] Speech by Assistant Attorney General Bill Baer, Remarks as Prepared for the Delivery at The New Health Care Industry Conference: Integration, Consolidation, Competition in the Wake of the Affordable Care Act at Yale University (Nov. 13, 2015), https://www.justice.gov/opa/speech/assistant-attorney-general-bill-baer-delivers-remarks-new-health-care-industry-conference.

[33] *See* Thomas Greaney, *Examining Implications of Health Insurance Mergers*, HEALTH AFFS. (July 16, 2015), http://healthaffairs.org/blog/2015/07/16/examining-implications-of-health-insurance-mergers/.

[34] *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://www.judiciary.senate.gov/imo/media/doc/09-22-15%20Slover%20Testimony.pdf ("[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").

[35] 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://www.antitrustinstitute.org/sites/default/files/Health%20Insurance%20Ltr_1.11.16.pdf.

care. As noted by the American Antitrust Institute, excessive concentration created by the proposed merger *is likely to reduce incentives* for engaging in pro-consumer innovation.[36]

Furthermore, the insurers have not offered any convincing details or analysis demonstrating how innovation would 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.[37] 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.[38]

## IV. Blues' Territorial Assignment and "Two-Thirds" Rule Restrict Blue Competition in the Marketplace

The Blue Cross Blue Shield Association ("the Association") coordinates the activities of individual insurers, known more commonly as "Blues." There are 36 independent Blues companies. The Association owns the Blue Cross and Blue Shield trademarks, which it licenses to the Blues. These licenses are limited to 67 "service areas," in which only one Blue is permitted to operate using the Blue marks, with limited exceptions in a few states.[39] The vast majority of service areas cover an entire state. This restriction on where a Blue mark holder can and cannot compete restricts competition and has led to highly concentrated insurance markets across the United States. The Association's territorial restrictions are currently being challenged as anticompetitive and litigated in federal court.[40]

Along with the Association's geographic market restrictions, the Association also uses the two-thirds rule to further restrict competition. Under the two-thirds rule, each Blue agrees that at least two-thirds of total nationwide annual revenue generated by it or its subsidiaries, excluding Medicare Advantage and Medicaid Managed Care, shall come from services offered under the Blue marks. As a result, the two-thirds rule limits the ability of each Blue to generate revenue from non-Blue branded business, and thereby limits the ability of each Blue to develop non-Blue brands that could and would compete with other Blues. As a result, while the Association's rules

[36] Greaney & Moss, *supra* note 37 (emphasis added).
[37] Dafny, *supra* note 30.
[38] 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://www.law.yale.edu/solomon-center/events/inaugural-conference.
[39] *See* Letter from Joe R. Whatley, Jr., Edith M. Kallas & Henry C. Quillen to William Baer, Assistant Att'y Gen., U.S. Dept. of Justice Antitrust Division (Aug. 13, 2015), *available at* http://www.changinglandscape.org /content/dojanthemcignamerger.pdf; *see also* Complaint at 2, In re Blue Cross Blue Shield Antitrust Litigation, MDL No. 2406, No. 13-cv-20000 (N.D. Ala.) (alleging that this Association practice is anticompetitive illegal); Randy Stutz, *Market Allocation in the Health Insurance Industry and the McCarran-Ferguson Act*, 89 OR. L. REV. 885, 889 (2011) (noting that health insurance markets are highly concentrated "such that the absence of 'Blue-onBlue' competition could be costly to consumers.").
[40] In re Blue Cross Blue Shield Antitrust Litigation, MDL No. 2406, No. 13-cv-20000 (N.D. Ala.).

permit Anthem to own non-Blue subsidiaries, like Cigna, the rules "prevent those subsidiaries from growing large enough to pose a competitive threat to another Blue plan."[41]

In order to be in compliance with the Association's rules and guidelines, if Anthem acquires Cigna, Anthem would be forced to limit Cigna's health insurance business in Indiana. For this reason, the two insurance companies should be questioned on the Association's rules and their potential impact in the State of Indiana as they pertain to the Anthem-Cigna merger.

## V. Divestitures and Other Remedies

As part of its review of the proposed merger, IDOI should consider what actions would help properly protect consumers and ensure the merger is in the public interest. If the IDOI decides 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.[42]

In other cases, mergers have been approved conditioned on the imposition of specific remedies such as divestitures or additional conduct regulation.[43] In evaluating any proposed remedy, it is important to remember that the law requires that a remedy must *fully restore* the competition that would otherwise be lost, or must otherwise effectively prevent the harm that would result.[44]

In nearly every health insurance merger enforcement action during the last two decades, DOJ has relied on the structural remedy of divestiture.[45] 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 Indiana, the scope, breadth, and market shares of the merging companies' Medicare Advantage operations is significant. These overlap problems are exacerbated by the also announced merger of Anthem and Cigna. Constructing any remedy involving divestitures may be an extremely difficult task.

It could be a mistake for the IDOI to rely on the DOJ's traditional approach of divestiture. For example, the DOJ has previously used divestitures to resolve competitive concerns from mergers in Medicare Advantage markets. Recent studies by the Center for American Progress and the Capitol Forum found that the divestitures had largely failed to address the competitive concerns,

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[41] Letter from Melinda Reid Hatton, V.P. & Gen. Couns., Am. Hosp. Assoc., to William Baer, Ass't Att'y Gen., U.S. Dep't of Justice Antitrust Div. (Feb. 29, 2016).

[42] *See Highmark Merger Timeline*, PENNSYLVANIA INSURANCE DEP'T, http://www.insurance.pa.gov/Companies/IndustryActivity/Pages/Highmark-Merger-Timeline.aspx#.Vkqhq_mrShc (last visited Jan. 8, 2015).

[43] *E.g.*, Consent Order at 8, In the Matter of Application for the Indirect Acquisition of Humana by Anthem, No. 125926-16-C0 (Feb. 15, 2016), *available at* http://floir.com/Sections/LandH/AnthemHumanaHearing.aspx.

[44] *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))

[45] *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).

with 2 of the 3 firms failing and a substantial increase in premiums. [46] Moreover, no remedy in this case could address the loss of potential competition. That is why the American Antitrust Institute has come out against both mergers, urging the DOJ to "just say no."[47] As noted before that was the approach taken by the Pennsylvania Insurance Commissioner in rejecting the Highmark-Independence Blue Cross merger.

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, to cite two examples, 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.[48]

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.[49] 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.[50] And there is yet another reason why divestitures are not effective in health insurance markets in the long term: what is divested amounts to the contracts with specific policyholders. In the next open season, it is all too easy for a divested policyholder to return to the previous insurer. For all these reasons, 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") rejected divestitures as a potential remedy in the Anthem-Cigna merger.[51] The OIR noted that the divestitures were "not in the best interests of Florida policyholders and also may be short term in nature."[52] 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."[53]

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[46] 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/.

[47] Greaney & Moss, *supra* note 37.

[48] 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* https://www.justice.gov/opa/pr/comcast-corporation-abandons-proposed-acquisition-time-warner-cable-after-justice-department; *see also* Press Release, FTC, Following Sysco's Abandonment of Proposed Merger with US Foods, FTC Closes Case (July 1, 2015), *available at* https://www.ftc.gov/news-events/press-releases/2015/07/following-syscos-abandonment-proposed-merger-us-foods-ftc-closes.

[49] Dafny, *supra* note 30; Guardado, *supra* note 31; Spiro *et al*, *supra* note 57.

[50] *See* Greaney, *supra* note 35.

[51] Consent Order, *supra* note 52 at 9.

[52] *Id.* at 8.

[53] *Id.* at 9.

While the DOJ (and the Indiana Attorney General's Office, using its own antitrust authority) may be considering divestitures, the IDOI 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 Indiana Attorney General. For example, in the 2008 acquisition of Sierra Health by UnitedHealth, the DOJ required divestiture of MA plans in Las Vegas,[54] 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.[55]

Regulatory remedies can also have their shortcomings for effectively protecting competition and consumers against the abuse of market power resulting from a merger.[56] Nevertheless, such remedies could play an important role in limiting harm to consumers and to the health care marketplace. In the event the Anthem-Cigna is permitted to go forward, here is a short list of possible regulatory steps the IDOI might consider, in addition to the divestitures possibly required by the DOJ, to limit the potential harm to consumers:

- Requiring premium stability or heightened rate control for a number of years post-merger.
- Requiring the merged company to maintain plan benefits and options.
- Improving access to providers throughout the state and within local areas.
- 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.
- Ensuring that consumer access to adequate networks is preserved and strengthened, including in rural and underserved areas.
- Requiring that the merged company pass along any cost savings associated with the merger to consumers, in the form of lower premiums and deductibles.
- Requiring the merged company to continue to participate in the Indiana Exchange.

## VI. Suggested Questions to Pose to the Parties

As you prepare for the upcoming public hearings, below is a non-exhaustive list of questions that we believe Indiana consumers need answers to regarding the impacts the proposed merger will have on the marketplace and on consumers:

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

[55] *Healthcare Check-Up: The UnitedHealth Group Acquisition of Sierra Health Services*, NEVADA BUS. (Nov. 1, 2007), http://www.nevadabusiness.com/2007/11/healthcare-check-up-the-unitedhealth-group-acquistion-of-sierra-health-services/.

[56] Dep't of Justice, *Antitrust Division Policy Guide to Merger Remedies* (2011), *available at* https://www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf (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.").

1. What will be the impact on consumers of the loss of Anthem and Cigna as independent alternatives for health insurance coverage?
2. What is the likelihood that Cigna could expand into Indiana Medicare Advantage markets absent the merger?
3. Is there any means to remedy the concerns over competition in the fully insured employer group and self-insured employer group markets?
4. What cost-saving efficiencies can Anthem prove can be reasonably expected in Indiana from the acquisition of Cigna? Will Anthem commit to a specified reduction in premiums in Indiana based on those efficiencies? If so, for how long would that commitment endure?
5. It's been reported that the increased buyer power from the merger could drive down reimbursement rates below healthy competitive levels in many markets, which could adversely impact patient care quality and access.[57] Could a combined Anthem/Cigna represent such a significant share of provider revenue in any Indiana geographic market as to potentially become a "must have" network for providers? How might the merger impact the ability of healthcare providers to serve patients?
6. How will Anthem abide by the Blue Cross Blue Shield Association rules? Will the rules require Anthem to eliminate certain Cigna products?

**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 Indiana. Although the merging companies are claiming that various benefits will flow from the merger, the credible scholarly evidence suggests that consumers will lose out, facing higher costs, less choice and diminished quality and innovation.

With the prospect that this merger might go forward, we urge the Indiana Department of Insurance to carefully evaluate its potential impacts and be ready to consider imposing additional 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,

Consumer Action
Consumers Union
Citizens Action Coalition
AFSCME
Consumer Federation of America

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

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