



April 8, 2016

Commissioner Nick Gerhart  
 Commissioner of Insurance  
 Iowa Insurance Division  
 601 Locust St., 4th Floor  
 Des Moines, IA 50309-3738

Re: Public Hearing for Aetna-Humana Merger

Dear Commissioner Gerhart:

The undersigned organizations represent hundreds of thousands of consumers and workers across the state and write to ask the Commission to hold a hearing to evaluate the impact of Aetna’s proposed acquisition of Humana. The proposed merger would combine two of the nation’s five largest insurers.<sup>1</sup> The merger of these dominant insurers could substantially lessen competition and harm millions of consumers in Iowa, particularly in the market for Medicare Advantage. We write to ask that the Iowa Insurance Division (“IID”) thoroughly evaluate the impact of the merger in Iowa, and to take appropriate action under its authority to protect competition and consumers.

As we explain further below, we are concerned that:

- the merger would combine Aetna’s 40% of the Medicare Advantage in Iowa market with Humana’s 24%, leading to a 64% market share — well above levels that the Supreme Court has found to be undue market concentration that undermines competition and harms consumers;
- the history of past rate increases and consumer protection violations by Aetna and Humana 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 IID might consider to protect consumers and the public interest if this merger goes forward.

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<sup>1</sup> 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.

We are aware that the IID does not claim jurisdiction over approval of the merger under Iowa statute. However, that does not mean that the IID does not have an important role to play in ensuring that Iowa insurance enrollees are protected. The California Department of Insurance also did not claim jurisdiction to approve the merger, but it nonetheless held an extensive four-hour hearing in which it commissioned an expert report of the state of competition in the state, as well as calling several panels of representatives from the consumer and provider communities.<sup>2</sup> California Insurance Commissioner Dave Jones has stated that the Department will examine all relevant evidence and will put together a report and recommendation for the state attorney general's office and the federal antitrust enforcement agencies, who do have jurisdiction to challenge the merger. This fact-finding process will undoubtedly be invaluable in making sure California citizens' interests are protected.

## **I. The Merger of Aetna and Humana Could Have a Substantial Harmful Impact on Iowa's Insurance Markets and Consumers**

Protecting health insurance competition is crucial to promoting affordable health care. The Iowa insurance market is highly concentrated. The Kaiser Family Foundation reports that the top three firms in the individual, small group, and large group markets control 95%, 95%, and 96% of the markets respectively.<sup>3</sup> The Herfindahl-Hirschman Indexes ("HHIs") of the individual, small group, and large group markets are 7,128, 4,726, and 5,964 respectively.<sup>4</sup> The antitrust enforcement agencies generally consider markets in which the HHI is in excess of 2,500 points to be highly concentrated.<sup>5</sup> These are extremely high levels of concentration and any further consolidation should receive heightened scrutiny.

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

In Iowa, the merger would combine Aetna's 40% of the Medicare Advantage market with Humana's 24%, leading to a 64% market share.<sup>6</sup> This is one of the most significant combinations of market share from the deal nationwide. In addition, Polk County would be 77% controlled by the merged entity - one of 39 counties with population over 10,000 nationwide that would be over 50% controlled as a result of this deal.<sup>7</sup> These shares are 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

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<sup>2</sup> Public Hearing on Proposed Merger of Cigna Corp. with Anthem, Inc., YouTube (Mar. 29, 2016), <https://www.youtube.com/watch?v=InJbF3VXI2Y>.

<sup>3</sup> *Id.*

<sup>4</sup> Insurance Market Competition, Kaiser Family Foundation, <http://kff.org/state-category/health-insurance-managed-care/insurance-market-competitiveness/>.

<sup>5</sup> See U.S. Department of Justice & FTC, Horizontal Merger Guidelines § 5.2 (2010).

<sup>6</sup> 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/>.

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

be considered to threaten undue concentration, we are clear that 30% presents that threat.”<sup>8</sup> The level of consolidation also exceeds the levels that have led to past Justice Department enforcement actions against proposed health insurance mergers.<sup>9</sup>

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.<sup>10</sup> And head-to-head competition between Aetna and Humana in particular has been a driving force for lower premiums and more affordable health care. A recent study by the Center for American Progress evaluated competition throughout the country. It found that where Aetna and Humana compete head to head — as in Iowa — premiums are lower.<sup>11</sup> In particular, competition between Aetna and Humana lowers Aetna’s annual premiums by up to \$302, and lowers Humana’s annual premiums by \$43.<sup>12</sup>

We are concerned that the proposed merger would not only harm current competition, but would foreclose future competition as well. Absent this acquisition, we could expect Aetna to significantly increase its competition against Humana in Medicare Advantage, and that competition would result in significant benefits to consumers.

Aetna and Humana have increasingly been entering each other’s territories and competing directly on Medicare Advantage products. The recent Center for American Progress study found that the number of overlap counties in the U.S. increased from 82 to 562 in the past three years.<sup>13</sup>

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<sup>8</sup> *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 363-64 (1963).

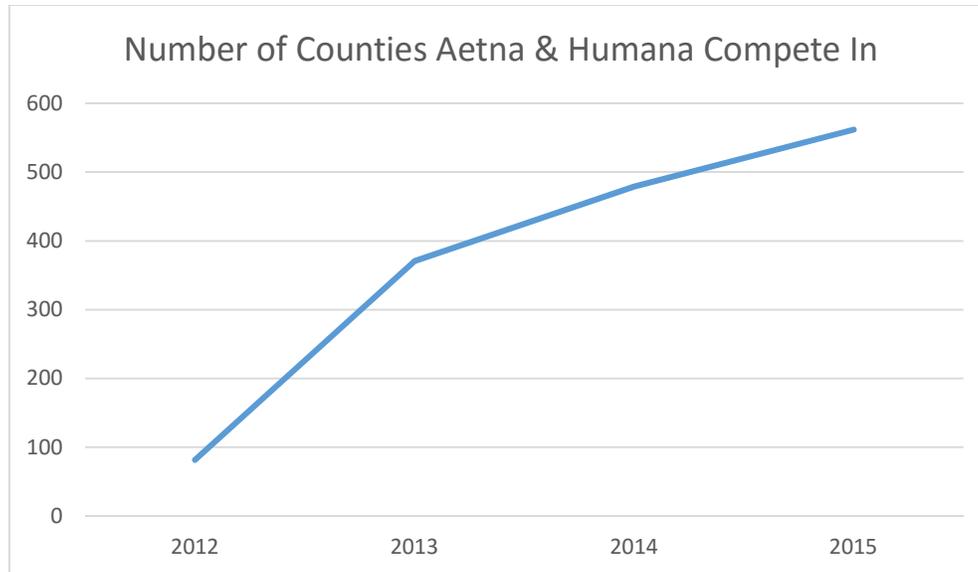
<sup>9</sup> Complaint at 8, *U.S. v. Humana Inc.*, No. 12-0464 (D.D.C. March 27, 2012) (challenging a merger with combined market shares of 40% and up); Complaint, *United States v. UnitedHealth Group Inc.*, No. 08-0322 (D.D.C. Feb. 25, 2008); Complaint at 8, *United States v. UnitedHealth Group Inc.*, 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).

<sup>10</sup> See Leemore Dafny, *Are Health Insurances Markets Competitive?*, 100 AM. ECON. REV. 1399 (2010).

<sup>11</sup> 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://www.americanprogress.org/issues/healthcare/report/2016/01/21/129099/bigger-is-not-better/>.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*



Based on Centers for Medicare & Medicaid Services data, Aetna and Humana already have competing Medicare Advantage contracts in approximately 57 Iowa counties.<sup>14</sup>

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.”<sup>15</sup>

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.<sup>16</sup>

**History of Consumer Protection Violations Increases Reason for Competitive Concerns.**

Compliance with consumer protection provisions is crucial to ensuring a competitive market. Iowa 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

<sup>14</sup> See Medicare Advantage/Part D Contract and Enrollment Data, Centers for Medicare and Medicaid Services, available at <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/MCRAdvPartDENrolData/index.html>.

<sup>15</sup> *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).

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

coverage to elderly patients.<sup>17</sup> Humana “limited the quantity of prescription drugs available to Medicare consumers,” meaning “elderly patients who had legally obtained prescriptions from their physicians went to the pharmacy to pick up medications ‘and were delayed access to drugs, never received the drugs or incurred increased out-of-pocket costs.’”<sup>18</sup> Humana also violated Medicare appeals and grievances rules, including misclassifying denial of claims appeals as “customer service inquiries.”<sup>19</sup> 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.”<sup>20</sup> It is far from clear that Iowa Medicare consumers would fare any better under Aetna, as it too was fined last year, in the amount of \$1 million, for significant pharmacy network directory errors.<sup>21</sup>

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

Consumers are concerned that increased market power resulting from the merger of Aetna and Humana could lead to rising costs, i.e. higher premiums and out-of-pocket charges. For Iowans, health insurance premiums continue to rise. Just last year the IID approved double digit rate increases for Wellmark, Coventry, and Gundersen – with the largest being a staggering 28.7% for Wellmark.<sup>22</sup> At a hearing on the merger last fall before the Senate Judiciary Committee, Senator Grassley noted: “I’ve heard concerns that these recent proposed insurance company mergers could lead to even higher premiums.”<sup>23</sup>

The concerns Senator Grassley’s noted are well founded. Economic studies have demonstrated a direct correlation between health insurer concentration and higher premiums.<sup>24</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>25</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>26</sup> Another study found that the 2008 United-Sierra merger resulted in an additional 13.7

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<sup>17</sup> Boris Ladwig, *Feds fine Humana \$3.1 million for Medicare violations*, INSIDER LOUISVILLE (Mar. 9, 2016 7:00 AM), <http://insiderlouisville.com/business/feds-fine-humana-3-1m-for-medicare-violations/>.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Matthew Patane, *Wellmark, Coventry double-digit rate increases approved*, THE DES MOINES REGISTER (Aug. 28, 2015 6:53 PM), <http://www.desmoinesregister.com/story/news/health/2015/08/26/wellmark-coventry-double-digit-rate-increases-approved/32431385/>.

<sup>23</sup> Oversight of the Enforcement of the Antitrust Laws: Hearing Before the S. Judiciary Comm., 114th Cong. (2016) (statement of Senator Chuck Grassley).

<sup>24</sup> See Leemore Dafny, *Are Health Insurances Markets Competitive?*, 100 AM. ECON. REV. 1399 (2010).

<sup>25</sup> 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>.

<sup>26</sup> Leemore Dafny *et al.*, *Paying a Premium on Your Premium? Consolidation in the US Health Insurance Industry*, 102 AM. ECON. REV. 1161 (2012).

percent premium increase in Nevada.<sup>27</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>28</sup> 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.<sup>29</sup> 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.<sup>30</sup> 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>31</sup>

### 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.<sup>32</sup> It is for IID to carefully examine these claims and determine if they are fully substantiated.<sup>33</sup> 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.<sup>34</sup>

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<sup>27</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>28</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://techscience.org/downloadpdf.php?paper=2015081104>.

<sup>29</sup> 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://www.aetnaandhumana.com/wp-content/uploads/2015/09/Bertolini-House-testimony9-29-15-v1.pdf> (noting that the merger will lead to “lower costs.”).

<sup>30</sup> 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](http://media.wix.com/ugd/1859d0_fe3f35a629c1411b8522c232258f8576.pdf).

<sup>31</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 [https://judiciary.house.gov/hearings/?Id=020363B9-F9EF-4623-8E67-28A0B260675A&Statement\\_id=30A83B11-7A89-4261-9773-DCF6593808FF](https://judiciary.house.gov/hearings/?Id=020363B9-F9EF-4623-8E67-28A0B260675A&Statement_id=30A83B11-7A89-4261-9773-DCF6593808FF).

<sup>32</sup> See Bertolini, *supra* note 22 (section labeled “Benefits of the Acquisition for Consumers and Providers.”).

<sup>33</sup> The IID 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.”).

<sup>34</sup> 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”).

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.”<sup>35</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>36</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>37</sup>

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.”<sup>38</sup> 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.<sup>39</sup> 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.”<sup>40</sup>

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 Iowa, the merger would increase and entrench the combined insurer’s market power, reducing its incentives to compete and improve

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<sup>35</sup> 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://news.aetna.com/news-releases/aetna-to-acquire-humana-for-37-billion-combined-entity-to-drive-consumer-focused-high-value-health-care/>.

<sup>36</sup> See Section II.

<sup>37</sup> 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>.

<sup>38</sup> 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/>.

<sup>39</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://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”).

<sup>40</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://www.antitrustinstitute.org/sites/default/files/Health%20Insurance%20Ltr\\_1.11.16.pdf](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.<sup>41</sup>

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.<sup>42</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>43</sup>

#### IV. Divestitures and Other Remedies

As part of its review of the proposed merger, IID should consider what actions would help properly protect consumers and ensure the merger is in the public interest. If the IID 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.<sup>44</sup>

In other cases, mergers have been approved conditioned on the imposition of specific remedies such as divestitures or additional conduct regulation.<sup>45</sup> 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.<sup>46</sup>

In nearly every health insurance merger enforcement action during the last two decades, DOJ has relied on the structural remedy of divestiture.<sup>47</sup> 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 Iowa, 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.

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<sup>41</sup> Greaney & Moss, *supra* note 37 (emphasis added).

<sup>42</sup> Dafny, *supra* note 30.

<sup>43</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://www.law.yale.edu/solomon-center/events/inaugural-conference>.

<sup>44</sup> See *Highmark Merger Timeline*, PENNSYLVANIA INSURANCE DEP'T, [http://www.insurance.pa.gov/Companies/IndustryActivity/Pages/Highmark-Merger-Timeline.aspx#.Vkqhq\\_mrShc](http://www.insurance.pa.gov/Companies/IndustryActivity/Pages/Highmark-Merger-Timeline.aspx#.Vkqhq_mrShc) (last visited Jan. 8, 2015).

<sup>45</sup> *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://flor.com/Sections/LandH/AetnaHumanaHearing.aspx>.

<sup>46</sup> *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))

<sup>47</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).

It could be a mistake for the IID 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, with 2 of the 3 firms failing and a substantial increase in premiums.<sup>48</sup> 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."<sup>49</sup> 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.<sup>50</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 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.<sup>51</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>52</sup> 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 Aetna-Humana merger.<sup>53</sup> The OIR noted that the divestitures were "not

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<sup>48</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>49</sup> Greaney & Moss, *supra* note 37.

<sup>50</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* <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>.

<sup>51</sup> Dafny, *supra* note 30; Guardado, *supra* note 31; Spiro *et al*, *supra* note 57.

<sup>52</sup> *See* Greaney, *supra* note 35.

<sup>53</sup> Consent Order, *supra* note 52 at 9.

in the best interests of Florida policyholders and also may be short term in nature.”<sup>54</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>55</sup>

While the DOJ (and the Iowa Attorney General’s Office, using its own antitrust authority) may be considering divestitures, the IID 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 Iowa Attorney General. For example, in the 2008 acquisition of Sierra Health by UnitedHealth, the DOJ required divestiture of MA plans in Las Vegas,<sup>56</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>57</sup>

Regulatory remedies can also have their shortcomings for effectively protecting competition and consumers against the abuse of market power resulting from a merger.<sup>58</sup> 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 merger is permitted to go forward, here is a short list of possible regulatory steps the IID 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 enter and participate in the Iowa Exchange.
- Requiring the Part D networks to accept any willing provider in their networks.

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<sup>54</sup> *Id.* at 8.

<sup>55</sup> *Id.* at 9.

<sup>56</sup> Final Judgment, *UnitedHealth Inc. and Sierra Health Servs.*, No: 1:08-cv-00322.

<sup>57</sup> *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-acquisition-of-sierra-health-services/>.

<sup>58</sup> 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.”).

## V. Suggested Questions to Pose to the Parties

We believe the concerns outlined above are significant and warrant a public hearing where Aetna and Humana can answer questions in a public forum about the impact the proposed merger will have on Iowa consumers. Below is a non-exhaustive list of questions that Iowa consumers need answers to:

1. What will be the impact on consumers of the loss of Aetna and Humana as independent alternatives for health insurance coverage?
2. What is the likelihood that Aetna could expand into Iowa Medicare Advantage markets even absent the merger? Why does Aetna need the merger to compete in these markets? Is there any means to remedy the concerns over competition in Medicare Advantage?
3. What cost-saving efficiencies can Aetna prove can be reasonably expected in Iowa from the acquisition of Humana? Will Aetna commit to a specified reduction in premiums in Iowa based on those efficiencies? If so, for how long would that commitment endure?
4. We are aware that neither Aetna nor Humana participates in the state health insurance exchange. Will Aetna commit to participating in the exchange if the merger is approved? If so, for how long would that commitment endure?
5. Does Aetna have a plan to remedy the conduct concerning Medicare Advantage-Prescription Drug and Prescription Drug Plans that led to a \$3.1 million fine on Dec. 29th, 2015 against Humana? Has Aetna taken steps to correct the conduct that led to a \$1 million fine on April 16, 2015?
6. It's been reported that the increased buyer power from the merger could drive down reimbursement rates below healthy competitive levels in many markets, which could adversely impact patient care quality and access.<sup>59</sup> Could a combined Aetna/Humana represent such a significant share of provider revenue in any Iowan geographic market as to potentially become a "must have" network for providers?<sup>60</sup> How might the merger impact the ability of healthcare providers to serve patients?

## 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 Iowa. Although the merging companies are claiming various benefits associated with the merger, the credible scholarly evidence suggests that consumers will lose facing higher costs, less choice and diminished quality and innovation.

With the prospect that this merger might go forward, we urge the Iowa Insurance Division and the Commissioner to hold a hearing, carefully analyze this merger and be ready to consider imposing requirements to protect consumers from harm.

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<sup>59</sup> *Anthem/Cigna; Aetna/Humana: Ongoing DOJ Physician Interviews Focus on Buyer Power Issues; Capitol Forum Analysis Shows Monopsony Enforcement Risk*, THE CAPITOL FORUM (Mar. 11, 2016), <https://thecapitolforum.com/>.

<sup>60</sup> We respectfully request that the Office of the Commissioner of Insurance reconsider its decision not to consider the impact of the merger on monopsony power.

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,

AFSCME  
Consumer Action  
Consumers Union  
Consumer Watchdog  
Consumer Federation of America  
NAMI Iowa  
SEIU Healthcare IA  
Iowa Citizens for Community Improvement  
League of Women Voters of Iowa

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