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*By Email and Courier*

April 18, 2016

The Honorable William Baer  
(Acting) Associate Attorney General  
United States Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530

Dear Associate Attorney General Baer:

We are writing to provide additional information concerning the competitive dynamics in the sale of Administrative Services Only health insurance plans, which often are referred to as self-insured plans or ASOs. It is our understanding that Anthem and Cigna are arguing to the Department of Justice (“Department”) that, as a general matter, combining ASO plans presents relatively low antitrust risk, even in highly concentrated markets, because health plans merely “pass through” provider costs to customers and, therefore, do not have the opportunity to earn a profit on them, or on the financial risk associated with the customer’s medical claims. At the very least, this argument strains credibility. Any notion that ASO health insurance contracts are somehow immune from the standard principles of supply and demand is inconsistent with market realities, basic economics and common sense. Indeed, following that argument’s apparent logic, a consolidation of all ASO plans in a geographic market could pass muster under the antitrust laws.

With an ASO plan, the health plan charges its customers a fee to provide them with access to: (1) health care provider networks, (2) claims processing services, and (3) other health plan logistics. The health plan does not provide the bulk of the risk-taking or insurance component with an ASO plan, but sometimes supplies “stop-loss” insurance coverage. ASO contracts are a large part of Anthem and Cigna’s businesses, generating billions of dollars in fees every year. Cigna collected more than \$4 billion in “medical fees” in 2015.<sup>1</sup> With more than 11 million Cigna customers in ASO plans, Cigna’s fee revenue is approximately \$370 per member year.<sup>2</sup>

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<sup>1</sup> Cigna Corporation Form 10-K for the fiscal year ended December 31, 2015, at 110.

<sup>2</sup> Cigna Corporation Investor Presentation, February 4, 2016, at 9.



Similarly, Anthem collected \$5 billion in “administrative fees.”<sup>3</sup> Anthem saw an increase in its fee revenue in 2015, partly due to “rate increases for self-funded members in [Anthem’s] Large Group and National Account business.”<sup>4</sup> This transaction, if allowed to proceed, will enable the parties to increase these fees and other charges substantially, and reduce their levels of service for their ASO plans.

As we have shown in our prior communications to the Department, combining Anthem and Cigna will produce a \$100 billion health insurance company with large shares of sales of ASO plans in highly concentrated commercial insurance markets in more than 800 geographic regions. Indeed, if one limits the analysis to self-insured ASO plans, there are 1,009 MSAs and rural counties in which the acquisition would result in an HHI exceeding 2,500 with an HHI increase of at least 200, covering 38.3 million self-insured commercial lives who reside in these markets. In 460 of these markets, the combined Anthem-Cigna share of self-insured commercial business would be at least 50 percent.

Despite the unprecedented increase in concentration in the commercial health insurance markets that the transaction would produce, Anthem and Cigna are apparently arguing that, because the employer takes most of the insurance risk with an ASO product, combining the parties’ ASO plans is unlikely to reduce competition. The Department has repeatedly recognized the flaws in this argument. The service that health plans provide for ASO plans that is most valuable and difficult to replicate is not the insurance component of health plans; instead, the key service of an ASO plan is *access to a cost-competitive health care provider network*.

Indeed, without the network the ASO services have little value. While a number of companies provide some processing services for health claims, Anthem and Cigna do not provide these companies with access to their provider networks at their negotiated rates. Consequently, if an acquisition produces a single firm with a large share of the sales of ASO plans in a particular geographic market, that firm is likely to increase ASO and other fees to access the network, and to reduce levels of service.

The plans also may argue that ASO fee increases are constrained by customers’ ability to shift to fully-insured plans, but this argument is also ill-founded. First, customers that have chosen ASO plans have presumably done so because they believe that they can bear the insurance risk themselves for their members more cost-effectively than a third party that provides a fully-insured health plan. Self-funded companies would switch to fully-insured plans only if ASO rates are increased in an amount sufficient to eliminate this cost advantage. A transaction that causes self-funded companies to switch to fully-insured products, then, is a transaction that enables the exercise of *new* market power. Second, in many of the local areas in which the overlap between Anthem and Cigna is problematic for ASO products, it is also problematic when both ASO and fully-insured products are considered together.

We feel confident that documents and data from the plans, their competitors and various associations will validate that providers of ASO plans compete over the provision of network

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<sup>3</sup> Anthem, Inc. Form 10-K for the fiscal year ended December 31, 2015, at 82. This figure may be somewhat overstated as Anthem notes that it includes “amounts received for the administration of Medicare or certain other government programs.”

<sup>4</sup> Anthem, Inc. Form 10-K for the fiscal year ended December 31, 2015, at 60.

access to their customers and that this competition benefits consumers in the form of lower fees to access provider networks and higher-quality services. Industry publications frequently report on the significance of competition for ASO business. *See e.g.*, Bob Herman, *Self-service insurance: Insurers forced to compete harder for self-insured customers*, Modern Healthcare, Jan. 3, 2015.

It is also important to recognize that ASO plans are the fastest-growing portion of the health insurance industry and that, increasingly, these products are purchased by smaller and medium-sized companies. It is not correct that ASO plans are only purchased by large companies. According to the Kaiser Family Foundation, 56 percent of workers with coverage through employers with between 200 and 999 employees are enrolled in self-funded plans.<sup>5</sup> Even some small employers purchase self-funded plans, with 17 percent of workers with coverage through employers with between 3 and 199 employees enrolled in self-funded plans.<sup>6</sup> These smaller purchasers are particularly vulnerable to anticompetitive price increases from health insurers with large market shares.

Finally, the Department should reject the plans' "efficiencies" argument that the transaction will enable them to negotiate lower prices with hospitals that will likely be passed through to purchasers of ASO plans. First, in markets where the transaction will produce a combined company with a large market share, any savings in reimbursement rates would likely be offset by higher network access fees. Second, as the Department has recognized, markets in which the health plans are highly concentrated can produce high entry barriers that result in higher health insurance prices for consumers.

Therefore, before crediting any claims about the plans' willingness to pass through any savings from lower provider reimbursement rates for ASO plans (much less conclude that customers will benefit from them), the Department should closely examine conditions in each of the hundreds of markets in which the transaction will give the plans a large market share.

For these and the many other reasons detailed in our correspondence with the Department, we urge you to challenge the deal.

Sincerely,

/s/

Melinda Reid Hatton  
Senior Vice President & General Counsel

### **Attachment**

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<sup>5</sup> The Kaiser Family Foundation and Health Research & Educational Trust, *Employer Health Benefits 2014 Annual Survey*, at 176.

<sup>6</sup> *Ibid.*

# **ATTACHMENT**

# Self-service insurance: Insurers forced to compete harder for self-insured customers

By [Bob Herman](#) | January 3, 2015

Last March, Aetna scored one of the biggest single contracts in its history when the Teacher Retirement System of Texas shifted the administration of its self-insured healthcare benefits program from Blue Cross and Blue Shield of Texas to Aetna.

The TRS' ActiveCare account insures 415,000 active public school teachers and their dependents and pays out more than \$1.5 billion in healthcare claims every year.

BCBS of Texas had the account for 12 years, but TRS officials determined that Aetna offered the best overall value for its teachers, said Sally Imig, Aetna's top sales executive for public businesses in Texas. "Like all public entities, they have to save costs," she said. For TRS members, the change means little. But the deal matters a lot to Aetna. It is an administrative services only, or ASO, contract resulting in hundreds of millions of dollars in new revenue.

ASO contracts are a big part of health insurers' business, representing billions of dollars in annual revenue. ASO plans are also becoming a preferred option for smaller and larger employers alike, in part because of the Patient Protection and Affordable Care Act. As more employers explore the advantages of self-insurance and ASO contracts, insurers know they have to compete to retain or grab that business. That means they have to find innovative ways—including wellness programs, accountable-care networks, hospital bill audits and direct contracting with providers—to appeal to employers and help them reduce costs and improve care.

"The standard things in administering claims aren't going to keep claims down," said Jonathan Edelheit, Employer Healthcare & Benefits Congress president. "Self-funded employers are demanding getting better value from their plans."

Health insurers provide ASO services to self-insured companies, which pay their employees' medical claims expenses. Under such contracts, employers pay a fee to third-party administrators such as Aetna to handle claims processing, organize provider networks and manage other health plan logistics.

It's essentially an outsourcing deal where insurers generally bear little or no financial risk, unlike in fully insured products. Instead, employers take on the financial risk of their employees' health, and they typically buy stop-loss insurance to protect themselves against catastrophic claims. Stop-loss insurance often can be purchased from the same insurer providing the ASO services. Some employers, though, hold health plans accountable for some financial risk. For example, employers may place a portion of the

ASO fee at risk and judge the insurer's performance by measures such as employee satisfaction.

Employers of all sizes are moving toward self-insurance. Self-insuring and hiring a third-party administrator under an ASO contract can save employers 10% to 25% on their healthcare costs. That's because insurers build in higher profit margins for fully insured products, partly reflecting the actuarial risk they are taking for higher-than-expected healthcare costs.

Another big reason is that self-insured company plans are exempt from state insurance regulations and premium taxes under the federal Employee Retirement and Income Security Act. They also are not subject to many of the provisions of the ACA. Experts say healthcare reform has prompted more employers to become self-insured.

Cost savings and less regulation have clearly produced a shift. Traditional fully insured membership dropped more than 10% from September 2013 to September 2014, according to data from consulting firm Mark Farrah Associates.

Meanwhile, ASO membership increased more than 3% in the same time frame, totaling more than 101 million people. "Once you move to ASO, you rarely move back," said Beth Bierbower, president of Humana's employer group division.

Most Americans with employer-provided insurance are in self-funded plans, and that's been the case since at least 2010. Roughly 60% of members at Aetna, Anthem and Cigna are in ASO plans. More than 3 in 5 U.S. companies are self-insured, and self-insurance is almost universal among large employers. About 91% of people in companies with 5,000 or more workers were in self-insured plans in 2014, compared with 15% of people in companies with fewer than 200 workers, according to the Kaiser Family Foundation. Fifteen years ago, only 62% of workers in companies with 5,000 or more employees were in self-insured plans.

But ASO contracts aren't usually as profitable as insurers' full-risk products. The Congressional Research Service reported that commercial ASO contracts are break-even deals on average, though larger national insurers can reap 5% margins. Insurers would rather keep companies in the more lucrative fully insured plans. But they take the business they can get. And it's becoming an increasingly cutthroat one, with local governments and union health plans more willing to change third-party administrators to keep costs down.

Greg Maddrey, a director at the Chartis Group, a Chicago-based consulting firm, said he has seen small employers with as few as 10 workers moving to self-insured plans. But he and other experts say employers of that size are far too small to take on the financial risk of one or more employees experiencing high medical costs. Nevertheless, Humana offers ASO arrangements and stop-loss insurance to companies with fewer than 50 employees, Bierbower said. UnitedHealthcare and others do as well.

Corporate wellness programs have been one of the most popular health plan add-ons for insurers to attract self-funded employers. Companies pay insurers a few extra dollars per employee per month to provide the wellness programs, which typically offer workers financial incentives to exercise and monitor their health. But findings on whether employee wellness programs produce cost savings and improved health have been mixed. Some of the most recent research suggests wellness programs don't save any money at all.

Insurers also are creating and selling more accountable-care and “value-network” products as self-insured employers demand better care coordination. In these narrow-network plans, hospitals and doctors form an accountable care organization and are financially responsible for the care of a contracted employee population. The insurer acts as the claims administrator and distributes the defined budget.

Cigna Corp. has aggressively pursued this ACO strategy. This past summer, Cigna met its goal of creating 100 private ACOs, which are offered to all groups. Aetna has accountable-care deals with Houston-based Memorial Hermann Health System and other major providers in Texas, which are being offered to self-insured public schools within the TRS, Imig said.

In some cases, ACOs are partnering with smaller third-party administrators to create their own health plan. Kelsey-Seybold Clinic, a multispecialty physician group in Houston that has an ACO, partnered with benefits company Boon-Chapman in 2013 to offer its own health plan. The plan, called KelseyCare, is offered to partially self-funded employers with 50 or more workers in the greater Houston area.

Insurers that will win the most business in the ASO space are those that offer services demonstrating unique, long-term value, Edelheit said. One such service is hospital bill auditing, which is when an insurer verifies that every procedure or code is correct. Employers can save 10% to 15% on their hospital expenses if their third-party administrator conducts these deep reviews, Edelheit said.

Some industry observers think established insurers are at risk of losing some ASO business as more employers directly contract with health systems. Boeing Co., for instance, signed deals with two major systems in Washington state last summer. Intel Corp. similarly cut out its insurance middleman in 2013 and contracted with Presbyterian Healthcare Services, an integrated delivery system in Albuquerque that has its own health plan.

But not all health systems have their own insurance infrastructure, which means insurers may still play an administrative role in direct contracting deals. And many say those direct deals will be more the exception than the rule for self-insured employers. “Not many companies can do what a Boeing is doing,” said Brian Marcotte, CEO of the National Business Group on Health, which represents large corporations, including Boeing. “And not even Boeing can do it in every market.”