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STATEMENT

of the

Missouri State Medical Association

to the

Missouri Department of Insurance, Financial Institutions and Professional Registration

In Opposition to Aetna's Proposed Acquisition of Humana

May 16, 2016

On behalf of its 5,000 physician members and hundreds of thousands of their patients, the Missouri State Medical Association (MSMA) is pleased to comment on Aetna's proposed acquisition of Humana. The Department of Insurance, Financial Institutions and Professional Registration (DIFP) has the statutory authority and implicit obligation to protect the public from acquisitions and mergers that create an anti-competitive environment in the insurance marketplace. As will be discussed these comments, MSMA thinks the proposed acquisition will substantially lessen competition in many Missouri markets, especially for Medicare Advantage products, which will be harmful to the public. MSMA physicians appreciate DIFP undertaking a rigorous review of this proposed acquisition, but believe very strongly that a formal denial of that merger is in the best interest of their patients.

Measuring Market Concentration

In 2010, the U.S. Department of Justice and the Federal Trade Commission issued the Horizontal Merger Guidelines (Guidelines) to establish an analytical framework for determining when a proposed merger is likely to result in a market concentration that threatens competition in a given market. Pursuant to the Guidelines, the agencies employ the Herfindahl-Hirschman Index[1] (HHI) to measure market concentration, and those scores generally fall into three categories. Markets with an HHI score of 1500 or less are considered "unconcentrated," those with a score between 1500 and 2500 are considered "moderately concentrated," and markets with scores greater than 2500 are considered "highly concentrated."

When a proposed merger in a given market increases market share, the Guidelines set forth the following general standards for market concentration:[2]

- *Small Change in Concentration*: Mergers involving an increase in the HHI of less than 100 points are unlikely to have adverse competitive effects and ordinarily require no further analysis.

- *Unconcentrated Markets*: Mergers resulting in unconcentrated markets are unlikely to have adverse competitive effects and ordinarily require no further analysis.

- *Moderately Concentrated Markets*: Mergers resulting in moderately concentrated markets that involve an increase in the HHI of more than 100 points potentially raise significant competitive concerns and often warrant scrutiny.

- *Highly Concentrated Markets*: Mergers resulting in highly concentrated markets that involve an increase in the HHI of between 100 points and 200 points potentially raise

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[1]The Herfindahl-Hirschman Index is a commonly-accepted measure of market concentration that is used to determine if an industry is competitive or monopolized.

[2]U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, (Washington, D.C.: 2010), 19.

significant competitive concerns and often warrant scrutiny. Mergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power. The presumption may be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power.

Market Consolidation in Missouri

In accordance with the aforementioned Guidelines, several major commercial markets in Missouri would be identified as moderately or highly concentrated if the Aetna-Humana merger is allowed. The HMO market in the Kansas City Metropolitan Statistical Area, which is already considered highly concentrated, would experience an HHI score increase of 246 points. The merger would put that market in the category that is "presumed to be likely to enhance market power."[3]

Other markets would suffer a similar fate. The PPO market in Joplin would see its HHI climb over the 2500 point threshold that separates "moderately concentrated" from "highly concentrated." Springfield's PPO market would see a post-merger HHI increase of 321 points; Jefferson City's score would increase by 352; and Columbia's score would jump by 391, nearly double the index increase necessary to raise "significant competitive concerns."[4]

Relating specifically to insurance company acquisitions, Missouri statutes impose additional measures of market concentration. Section 382.095 4.(2)(a), RSMo, provides that "A highly concentrated market is one in which the share of the four largest insurers is seventy-five percent or more of the market." As is discussed below, that standard triggers very serious concern about anti-competitive conditions in the state's Medicare Advantage marketplace if the Aetna-Humana merger is allowed to proceed.

Medicare Advantage Plans - A comprehensive study published by The Commonwealth Fund last year found that 97 percent of all counties nationwide are highly concentrated among Medicare Advantage (MA) plans. And the remaining three percent of counties are moderately concentrated.[5] Missouri's MA markets share the same characteristics. Using both the HHI and Missouri's statutory definition, nearly every county in the state is considered highly concentrated, even before the proposed merger. An analysis by the Henry J. Kaiser Family Foundation shows

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[3]*Competition in Health Insurance: A Comprehensive Study of U.S. Markets, Updated,* (American Medical Association, 2015), 6.

[4]Ibid., 8-9.

[5]B. Biles, G. Casillas, and S. Guterman, *Competition Among Medicare's Private Health Plans: Does it Really Exist?* (The Commonwealth Fund, 2015), 3.

that Aetna-Humana merger would create a statewide MA market share of 52.7 percent for the new entity alone.[6] The consequences are even more pronounced when considering the other large insurers. Below is the market share of the four largest MA insurers in St. Louis City and the ten largest counties in Missouri.

Regional Marketplace	Share of the Four Largest Insurers
St. Louis City	85.0%
St. Louis County	89.4%
Jackson County	88.7%
St. Charles County	89.9%
Greene County	83.1%
Clay County	86.3%
Jefferson County	88.4%
Boone County	86.9%
Jasper County	95.4%
Franklin County	94.2%

These market shares – and those in nearly every other Missouri county – are well above the statutory threshold of 75% for a highly concentrated market. That same statute also provides that "Any acquisition...involving two or more insurers competing in the same market is prima facie evidence of violation of the competitive standards...if the market is highly concentrated and the involved insurers possess the following share of the market:"

Insurer A	Insurer B
4%	4% or more
10%	2% or more
15%	1% or more

[6] *Data Note: Medicare Advantage Enrollment, by Firm, 2015* (Henry J. Kaiser Family Foundation, 2015), available at http://kff.org/medicare/issue-brief/data-note-medicare-advantage-enrollment-by-firm-2015.

Aetna's acquisition of Humana substantially exceeds these standards in the MA market. Statewide, the Aetna (Insurer A) market share is 28.4%, and Humana (Insurer B) holds 19.6%. Aetna and Humana do not compete with each other in every Missouri county or regional market. But where they do, the impact of a merger between the two can be deeply troubling. MA enrollment data from the Centers for Medicare and Medicaid Services demonstrate the merger would result in a very unhealthy concentration of market share in a worrisome number of Missouri counties.[7] Many would see the single new entity controlling more than half the market share, and that share would exceed 75 percent in more than a dozen. A showing of some of these numbers is appended at the end of these comments.

In other jurisdictions the merger's proponents have argued that high concentrations in MA markets are not a cause for concern because MA consumers have the option of choosing traditional Medicare if MA market conditions become unbearable. But MA and traditional Medicare are not competitors. And they never were intended to be. Congress created and designed the MA program so that "vigorous competition among private MA insures...would lead those insurers to offer seniors a wider array of health insurance choices and richer, more affordable benefits than TM [traditional Medicare] does, and to be more responsive to seniors."[8] That competition, and the benefits Congress envisioned, do not exist when mergers are allowed and market power consolidates.

MA plans are very popular among seniors primarily because they offer more comprehensive benefits than traditional Medicare, and at reasonable prices. They do not see the two programs as comparable, and do not think they are interchangeable in the marketplace. The Department of Justice has drawn the same conclusion, stating that traditional Medicare is not an adequate substitute for MA.[9] The only competition for an MA product is another insurer's MA product. If the Aetna-Humana merger goes forward, the option of shopping for another MA product will be even more limited than it currently is.

Market Concentration and the Erosion of Competition

MSMA physicians believe very strongly that high health insurance market concentration and the insurance industry's exercise of market power is detrimental to consumers and poses a

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[7]Centers for Medicare & Medicaid Services, *Medicare Advantage Enrollment by State, County, and Contract, April 2016*, available at https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/MCRAdvPartDEnrolData/Monthly-MA-Enrollment-by-State-County-Contract-Items/MA-Enrollment-by-SCC-2016-04.html?DLPage=1&DLEntries=10&DLSort=1&DLSortDir=descending.

[8]*United States v. Humana and Arcadian Management*, No. 12-cv-00464 (D.D.C. March 27, 2010), available at http://www.justice.gov/atr/case-document/file/499076/download.

[9]*U.S. v. United Health Group and Sierra Health Services Inc*., Civil No 1:08 -cu-00322 (DDC2008).

significant risk of harm to their patients. Higher premiums, higher out-of-pocket costs, stifled innovation, narrow provider networks, and reduced access to care follow in the absence of healthy competition. Conversely, marketplace choices inspire innovation and motivate competing insurers to lower premiums, enhance customer services, reduce costs, and improve the quality of care. A combined Aetna and Humana health insurance behemoth would eliminate choice and erode healthy competition, put profits over patients, and raise the ugly spectre of a host of adverse outcomes for Missouri physicians and their patients. Some issues follow.

Higher premiums - A growing body of evidence demonstrates that market concentration does not create efficiencies – as merger proponents claim – that result in lower costs and lower premiums. On the contrary, a number of studies demonstrate that greater consolidation leads to price increases.[10] Insurers exercising inordinate market power can force lower payments on health care providers and vendors, but the so-called savings generated from those tactics are seldom passed through to the policyholders.[11] Without competition, there is no incentive to do so. And the Aetna-Humana merger, especially in the Medicare Advantage markets, threatens to do just that.

Narrow provider networks - Insurers with undue market power wield unfair leverage to not only push prices higher than a balanced market would bear, but also to limit the scope of covered services and the amount they are willing to pay for those services. An increasingly prevalent tactic toward achieving the latter is to construct very narrow and inadequate provider networks. Restricted networks limit access to care and force patients to pay greater out-of-pocket costs to seek needed care in out-of-network settings. Restricted panels also disrupt important physician-patient relationships when a patient's physician is terminated from a network. Those patients are forced to either find a new participating physician or incur significant out-of-pocket costs to continue treatment with their personal out-of-network physician. That will prove particularly difficult for elderly Medicare Advantage patients, patients with disabilities, or those with limited incomes who may need to travel great geographic distances to obtain necessary care with a new physician. More perversely, it does not stretch credulity to suggest that an insurer with unfettered market power can engage in cherry-picking among its policyholders, targeting the sickest, most costly patients, and eliminating their physicians from its network.

Monopsony Conduct - The selling power exercised by a dominant insurer in an uncompetitive market is not the only threat to patient welfare. Concentrated markets also create monopsony-level purchasing power that allows dominant insurers to impose below-market reimbursement rates, forge very narrow provider networks, dictate unfair contractual terms on physicians, and discourage physicians from engaging in patient advocacy. One study even suggests that

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[10]L. Dafny, "Health Insurance Industry Consolidation: What Do We Know From the Past, Is It Relevant in Light of the ACA, and What Should We Ask?" Testimony before the Senate Committee on the Judiciary, September 22, 2015, 11-13.

[11]L. Dafny, et al, "Paying a Premium on Your Premium? Consolidation in the US Health Insurance Industry," *American Economic Review,* 2012; 102: 1161-1185.

monopsony power in the Medicare Advantage market is associated with more limited access to prescription drugs.[12]

Physicians and other health care providers have little or no leverage to negotiate with a large insurer in an uncompetitive market. Contracts are offered on a take-it-or-leave-it basis, and the uneven bargaining relationship means the physician must either enter into a contract he or she thinks is not in the best interest of the patients, or walk away from the contract altogether. Either way, the patient suffers. The latter option could threaten the very existence of the physician's practice. At the very least it forces his or her patients to find a new physician or pay out-of-network costs to maintain the continuity of their care. But signing that contract – often the physician's only realistic choice – threatens in many ways the quality of care delivered to patients, as is discussed below.

On three separate occasions the U.S. Department of Justice formally found that patients suffer when physicians have to accept reimbursement that falls below competitive levels. Two insurance mergers, including one involving Aetna, were rejected because of their anti-competitive effects on the purchase of physician services.[13] And a third was abandoned when the Department determined that the merged entity would have "the ability to control physician payment rates in a manner that could harm the quality of healthcare delivered to consumers."[14]

Reduced Quality of Care - When physicians in concentrated insurance markets are compelled to sign unfavorable contracts, the optimal delivery of health care services is compromised, the quality of care is diminished, and patients suffer the consequences. The concentration of market power that a merged Aetna-Humana conglomerate could wield would very likely result in uncompetitive reimbursement rates that will force physicians to spend less time with patients to meet practice expenses. Many will be compelled to forgo investment in new technology, equipment, and practice infrastructure that could improve access to care and the quality of services provided to their patients. Others will have to consider reducing the salaries and size of their office staff, which will further diminish quality and access to care. And some will entertain thoughts of retiring early or relocating their practice to markets with more competitive reimbursement rates.

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[12]R. Town and S. Liu, "The Welfare Impact of Medicare HMOs," *RAND Journal of Economics*, 2013; 34(4): 719-36.

[13]*U.S. v. Aetna Inc.*, supra note 12, at 17-18; and *U.S. v. Aetna Inc.*, No. 3-99 CV 1398-H, (Aug. 3, 1999), 5-6, available at http://www.usdoj.gove'atr/case/s/f2600/2648.pdf; and also *United States v. United Health Group Inc.*, No. 1:05CV02436 (D.D.C., Dec. 20, 2005), available at www.usdoj.gov/atr/cases/f213800/213815.htm.

[14]Blue Cross Blue Shield of Michigan and Physicians Health Plan of Mid-Michigan Abandon Merger Plans, Department of Justice, available at http://www.usdoj.gov/opa/pr/blue-cross-blue-shield-michigan-and-physicians-health-plan-mid-michigan-abandon-merger-plans.

Barriers to Entry - It is myopic to assume the normal ebb and flow of business competition will bring new insurers into concentrated markets to fill the void of competition created by the Aetna-Human merger. High barriers to entry, such as heavy state regulation, a sufficient base of covered lives to adequately spread risk, and trying to break into a market dominated by established insurers that enjoy long-term relationships with employers and other policyholders prevent new entrants from reviving competitive pricing in concentrated markets. Indeed, a U.S. Department of Justice study of entry and expansion in the health insurance industry found that "brokers typically are reluctant to sell new health insurance plans, even if those plans have substantially reduced premiums, unless the plan has strong brand recognition or a good reputation in the geographic area where the broker operates."[15] Unfortunately, the competition lost to an Aetna-Humana merger will not likely be restored for many years, if ever.

Elimination of Future Competition - The merging of two entities that otherwise were potential competitors in a market dominated by only one or the other effectively eliminates the opportunity for that competition. In markets where Aetna and Humana do not currently compete directly with each other, the merger deprives those markets of potential – and beneficial – competition from one against the other. Eliminating any potential entrant to a concentrated market eliminates an opportunity for competition. The Aetna-Humana merger protects both insurers from the competitive pressure they could put on each other.

Missouri Physician Attitudes

The foregoing effects of anti-competitive behavior in concentrated markets were identified by a significant number of Missouri physicians as likely to occur should the Aetna-Humana merger be allowed to proceed. The MSMA surveyed its membership in March and April of 2016, with these findings:

- 57% of physicians felt they had no choice but to contract with Aetna in order to maintain a financially viable practice; 41% felt that way with respect to Humana
- 25% of physicians who are contracted with Aetna, and 33% of those who are contracted with Humana had difficulty finding available in-network physicians who accepted new patients for referrals
- 46% of physicians who are contracted with Aetna, and 47% of those who are contracted with Humana encountered formulary limitations that prevented a patient's optimal treatment
- 56% of physicians who are contracted with Aetna, and 44% of those who are contracted with Humana reported that contracts were offered on a "take-it-or-leave-it" basis

[15]S. Pozen, Acting Assistant Attorney General, Department of Justice Antitrust Division, *Competition and Health Care: A Prescription for High-Quality, Affordable Care*, (March 19, 2012), 7.

- 89% of physicians *strongly or somewhat strongly oppose* the Aetna-Humana merger

- 88% of practices felt the Aetna-Humana merger would make contract negotiations *much less or somewhat less favorable* than before the merger

- 88% of practices believed the Aetna-Humana merger would *very or somewhat likely* lead to narrower physician networks, which in turn would reduce patient access to care

- 79% of physicians believed they *very or somewhat likely* would be pressured to not engage in patient advocacy as a result of the merger

- 88% of practices believed the Aetna-Humana merger would *very or somewhat likely* decrease reimbursement rates for physicians to such a degree that there would be a reduction in the quality and quantity of services physicians would be able to offer their patients

- 90% *disagreed or strongly disagreed* that the Aetna-Humana merger is necessary to gain efficiencies

- 91% *agreed or strongly agreed* that the Aetna-Humana merger will give the merged entity more influence over physicians' clinical and business practices with little or no recourse for physicians

Finally, if the Aetna-Humana merger is allowed to proceed and practices decided not to contract with the merged entity, physicians reported the following consequences:

- 35% would cut investments in practice infrastructure
- 41% would cut or reduce staff salaries
- 29% would spend less time with patients
- 26% would cut patient services
- 3% would move their practice to a more competitive market
- 3% would close their practice

Medical Loss Ratios Are Insufficient Remedy

The few who stand to benefit from an insurance company merger argue that medical loss ratio regulations protect patients against unreasonable premium prices that might result from the merger. This is a specious argument. Medical loss ratio requirements apply to fewer than half of patients under the age of 65, as the regulations do not apply to patients enrolled in self-insured plans. Moreover, they address only the percentage of premium income used for quality initiatives and to pay claims, and do not take into account the actual amount of premium increases. And,

most importantly, loss ratio regulations do not address such worrisome cost-containment tactics as restricted provider networks, administrative hassles for patients and providers, poor customer service, and health plans designed to limit coverage.

Conclusion

It is well established that a lack of competition in *any* given market is not in the best interest of the consumer. But a lack of competition in the health insurance marketplace impacts individuals not only as consumers, but also as patients, with the added risk of their health and well-being. Unfortunately, between 2010 and 2013 the state of Missouri suffered the fourth largest decline in health insurance competition levels in the nation, a situation the proposed Aetna acquisition of Humana would only exacerbate.[16] Competition, not consolidation, is the desired goal for the insurance marketplace. Experience clearly demonstrates that competition can lower premiums, improve consumer services, and inspire innovations that improve the quality of health care and lower health care costs.

As the foregoing demonstrates, the Aetna-Humana merger will create for the newly-combined enterprise an unhealthy concentration of market power in Missouri, especially in the Medicare Advantage marketplace. The physicians of the Missouri State Medical Association call on the Missouri Department of Insurance, Financial Institutions and Professional Registration to fulfill its obligation to protect the public from the consequences of anti-competitive market conditions by disapproving the proposed Aetna acquisition of Humana.

[16]Based on market concentration levels as determined by the Herfindahl-Hirschman Index; American Medical Association, 2015.

Change in Medicare Advantage Market Share Following Aetna-Humana Merger[17]

County	Aetna Share Pre-Merger	Combined Share Post-Merger
Audrain	23.8%	37.5%
Barry	38.1%	70.2%
Benton	32.6%	60.4%
Boone	8.6%	20.6%
Callaway	17.2%	33.3%
Carroll	29.2%	55.6%
Cass	47.2%	75.4%
Cedar	56.8%	86.7%
Christian	35.0%	58.8%
Clay	28.9%	71.5%
Cole	31.7%	47.9%
Dade	42.1%	80.3%
Dallas	44.2%	75.3%
Douglas	29.5%	64.8%
Franklin	43.7%	48.7%
Greene	36.5%	59.1%
Henry	43.1%	66.2%
Hickory	49.1%	78.2%
Jasper	39.0%	81.7%
Jefferson	16.4%	22.7%
Jackson	38.5%	75.1%
Johnson	38.6%	77.1%
Laclede	42.8%	86.3%
Lafayette	25.7%	69.6%

[17]Missouri Counties with substantial Medicare Advantage competition between Aetna and Humana before the proposed merger.

Lawrence	36.7%	65.2%
Lincoln	50.9%	58.5%
Livingston	39.3%	52.1%
McDonald	26.7%	83.4%
Miller	16.8%	40.6%
Montgomery	46.1%	60.5%
Newton	33.3%	81.1%
Osage	34.5%	49.3%
Ozark	8.2%	56.3%
Pettis	23.9%	46.9%
Phelps	27.8%	53.5%
Pike	20.1%	46.4%
Platte	28.7%	78.9%
Polk	47.7%	81.7%
Pulaski	33.9%	72.0%
Saline	36.2%	60.8%
St. Charles	30.4%	35.4%
St. Clair	32.1%	69.3%
St. Francois	1.5%	43.2%
St. Louis City	20.3%	27.4%
St. Louis County	24.2%	28.6%
Ste. Genevieve	52.2%	59.6%
Stone	31.3%	60.3%
Taney	26.0%	75.2%
Vernon	26.5%	59.0%
Warren	31.7%	34.6%
Washington	5.5%	45.9%
Webster	41.8%	65.9%
Wright	28.1%	59.4%