



HEALTH CARE FOR ALL NEW YORK



June 22, 2016

Troy Oechsner
Deputy Superintendent for Health Insurance
New York State Department of Financial Services
One State Street, 19th Floor
New York, NY 10004

Re: Authority to Act and Proposed Actions in the Proposed Anthem-Cigna and Aetna-Humana Mergers

Dear Deputy Superintendent Oechsner:

Thank you for affording us the opportunity to meet with your staff on May 3, 2016. We found the meeting very informative. During the meeting we identified two issues for potential follow-up: (1) whether the Department of Financial Services (“the Department”) has authority to act on the proposed mergers in question; and (2) a list of possible remedial actions that could be taking by the Department regarding the mergers.

Authority Under N.Y. Ins. Law § 1506

We believe that the Department has the authority to review these transactions and take action under N.Y. Ins. Law §1506(c)(1)(McKinney’s), which states:

The following conditions affecting any controlled insurer, regardless of when such control has been acquired, are violations of this article:

...

(B) the effect of retention of control, in the case of a domestic controlled insurer, may be substantially to lessen competition in any line of commerce in insurance or to tend to create a monopoly therein, or, **in the case of a foreign or alien controlled insurer, may be substantially to lessen competition in any line of commerce in insurance in this state or to tend to create a monopoly therein.**¹

Although there is no case law that speaks directly to the application of § 1506 to a foreign insurer merging with a domestic insurer, the Office of General Counsel issued the following opinion on January 31, 2011, which affirms that the Department has jurisdiction over

¹ N.Y. Ins. Law § 1506(c)(1) (emphasis added).

such proposed transactions: “The Insurance Law does not prohibit a merger where the foreign insurer is the survivor, although the Superintendent has broad discretion in applying the statutory standards in determining whether to approve any particular proposed merger.”²

We agree with the Office of General Counsel that the plain meaning of this statute authorizes the Department to disapprove or impose conditions on a merger involving a foreign controlled insurer if the effect of change of control may be substantially to lessen competition in the state of New York or to tend to create a monopoly therein. Because that is exactly the question at issue in these mergers, we urge the Department to consider exercising its jurisdiction as described below.

Proposed Actions

To assess and ameliorate the impact that the proposed mergers of Anthem-Cigna and Aetna-Humana would have on New York’s consumers, we urge the Department to take the following actions pursuant to §1506(c)(1) of the Insurance Law.

1. The Department should hold separate public hearings on each proposed merger. The hearings should be easily accessible by the public and provide a forum for consumer groups and other interested parties to air their perspectives and concerns. Timely hearing notice should be sent to all of the employers and enrollees of the carriers (and their subsidiaries, e.g. Empire) that are considering merging.
2. The Department should issue a formal determination on the Anthem-Cigna and Aetna-Humana mergers, as to whether they are in the public interest.
3. The Department should hire an expert to determine the market shares and market overlap of the merging companies in each merger in each relevant product and geographic market. This will be useful both for the Department and the New York State Attorney General’s Office.

If the Department chooses to take action under § 1506(c)(1), we urge it to consider conditioning its approval on the following additional protections for consumers of health insurance:

1. The Department should require any cost savings resulting from the mergers be passed along to consumers, in the form of lower premiums.
2. The Department should require the merged companies (and their subsidiaries) to continue their current levels of participation in the New York State of Health Marketplace.
3. The merged companies should be prohibited from reducing plan benefits and options.
4. The Department should ensure that the merged companies still offer the differentiated insurance products previously offered by the four companies, within the state and local areas, for at least the next several years.
5. The Department should require that the merged companies maintain access to adequate provider networks and that network options are preserved and strengthened, including in rural and underserved areas.

² See Office of General Counsel, Option No. 11-01-10, available at: <http://www.dfs.ny.gov/insurance/ogco2011/rg110110.htm>.

We believe that the above conditions will help ensure that New York consumers are better protected against potential adverse effects from the mergers. We appreciate your attention to this request, and your continued oversight in this matter.

If possible, we would like to set up a follow up call to discuss this letter. Please contact Charles Bell of Consumers Union at: 914-378-2507.

Sincerely,

Consumer Action
Consumers Union
Health Care for All New York
1199 SEIU United Healthcare Workers East
Sergeants Benevolent Association