



June 28, 2016

Commissioner Ralph T. Hudgens
Office of Insurance and Safety Fire Commissioner
Two Martin Luther King, Jr. Drive
West Tower, Suite 704
Atlanta, Georgia 30334

Re: Public Hearing for Aetna-Humana and Anthem-Cigna Mergers

Dear Commissioner Hudgens:

The undersigned organizations represent hundreds of thousands of consumers and workers across the state of Georgia and the nation. We write regarding the proposed Anthem-Cigna and Aetna-Humana¹ mergers and their potential impact on Georgia health insurance markets. The proposed mergers would combine four of the nation’s five largest insurers into just three giants.² We are concerned that the mergers of these dominant insurers could substantially lessen competition, harm millions of consumers in Georgia, and result in higher premiums and reduced choice. We are pleased that the Office of Insurance and Safety Fire Commissioner (“DOI”) plans to hold public hearings to thoroughly evaluate the impact of the mergers and we ask to participate as a witness in the hearings. We urge DOI to take appropriate action under its authority to protect competition and consumers.

As we explain further below, we are concerned that:

- Under Georgia law, these acquisitions are *prima facie* violations of the competitive standard in the individual, small group, large group, and Medicare Advantage markets;
- we estimate that the Anthem-Cigna merger will impact over 4.5 million commercial consumers and over 2.9 million administrative services only (“ASO”) consumers across 38 MSAs (metropolitan statistical areas) and 57 counties;
- we estimate that the Aetna-Humana merger will impact over 280,000 Medicare Advantage consumers across 61 counties;
- for both mergers consumers will be harmed by higher premiums, less choice and reduced service based on what has happened in past mergers;
- past premium rate increases by the merging parties intensify the level of competitive concerns; and
- any potential efficiencies that might result from the mergers would not overcome the likely competitive harm from the mergers.

¹ In Georgia Anthem is known as Blue Cross Blue Shield of Georgia, Inc. and Blue Cross Blue Shield Healthcare Plan of Georgia, Inc.

² The other national insurer is UnitedHealthcare.

Finally, we address possible remedies that the DOI might consider to help protect consumers and the public interest in the event that either or both of these mergers are permitted to go forward.

I. The Mergers of Aetna with Humana and Anthem with Cigna Could Have a Substantial Harmful Impact on Georgia’s Insurance Markets and Consumers

Protecting health insurance competition is crucial to promoting affordable health care. Georgia health insurance markets are already competitively fragile and most are already highly concentrated under Georgia law, meaning the top four insurers control at least 75 percent of the market.³ There is substantial economic evidence that shows a close correlation between concentration and premiums – consumers in more highly concentrated markets pay more in premiums.⁴ And in Georgia insurance premiums are continuing to increase, by as much as 29 percent in 2016.⁵

These health insurance mergers could be a tipping point to a significant reduction in competition in the state, leading to even higher costs and decreased quality for many Georgians. Studies show that increased consolidation in the health insurance industry can raise prices across the board, not just among merging insurers.⁶ Because of this, we estimate that the mergers could impact over 4.5 million consumers in the commercial market and 2.9 million consumers in the ASO market in the state of Georgia. We also estimate that the Aetna-Humana merger could impact over 280,000 consumers in the Medicare Advantage market in this state.

Under Georgia law, the Commissioner is authorized to disapprove a proposed merger if “[t]he effect of the merger or other acquisition of control would be substantially to lessen competition in insurance in this state or tend to create a monopoly.”⁷ In its assessment of whether a merger substantially lessens competition in insurance, Georgia law states that it is *prima facie* evidence of violation of the competitive standards if the merging companies possess the following market shares in highly concentrated markets:⁸

Company A Market Share	Company B Market Share
4%	4%
10%	2%
15%	1%

³ Office of Insurance and Safety Fire Commissioner, Initial Competition Letter, <https://www.oci.ga.gov/ExternalResources/Documents/RegServices/AetnaFormAFiles/5.%20-%20DOI%20Ltr.%20-%20Competition%20-%208-12-15.pdf> (August 12, 2015).

⁴ Evaluating the Impact of Health Insurance Industry Consolidation: Learning from Experience, The Commonwealth Fund, <http://www.commonwealthfund.org/publications/issue-briefs/2015/nov/evaluating-insurance-industry-consolidation>.

⁵ Andy Miller, *Health Insurance Rates Headed Up In 2016*, Georgia Health News (Sept. 14, 2015), <http://www.georgiahealthnews.com/2015/09/health-insurance-rates-headed-2016/>.

⁶ Commonwealth, *supra* note 4.

⁷ O.C.G.A. §33-13-3.

⁸ *Id.* A market is highly concentrated if the market shares of the four largest insurers total 75 percent or more.

Furthermore, the law states that if the market is not highly concentrated, it is *prima facie* evidence of violation of the competitive standards if the merging companies possess the following market shares:⁹

Company A Market Share	Company B Market Share
5%	5%
10%	4%
15%	3%
19%	1%

The market shares that would result from these proposed mergers in many Georgia markets are well over above the *prima facie* thresholds set forth in Georgia law. They are also well above levels that the Supreme Court has found to be undue market concentration that undermines competition and harms consumers. 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 threat.”¹⁰ These levels of consolidation also exceed the levels that have led to past Justice Department enforcement actions against proposed health insurance mergers.¹¹

Loss of competition in the individual insurance market. We are concerned that both the Anthem-Cigna merger and the Aetna-Humana merger will substantially lessen competition in the individual health insurance market in Georgia, resulting in significant harm to consumers, including significant premium increases. The DOI has determined that the mergers would both be *prima facie* violations.¹² The top four insurance companies already control approximately 90 percent of this market, making it highly concentrated under Georgia law. Humana has a 49.2 percent market share, Anthem has 27.5 percent, Aetna has 8.8 percent, and Cigna has 2.1 percent.¹³

Loss of competition in the small group insurance market. The Georgia small group insurance market is also highly concentrated, with almost 90 percent of it controlled by the top four insurance companies.¹⁴ Anthem has a 32.1 market share, Aetna 25.7, Humana 23.3 percent, and Cigna almost 1 percent. The Aetna-Humana merger would thus be a *prima facie* violation as to this market, and the Anthem-Cigna merger is right on the edge of *prima facie* anticompetitive.

⁹ O.C.G.A. §33-13-3-1(d). There is another trigger for a *prima facie* violation when there has been a significant trend toward increased concentration, and even in the absence of a *prima facie* trigger, the Commission can establish a violation based on other substantial evidence. *Id.*

¹⁰ *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 363-64 (1963).

¹¹ 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 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).

¹² Office of Insurance and Safety Fire Commissioner, Initial Competition Letter.

¹³ *Id.*

¹⁴ *Id.*

Loss of competition in the large group insurance market. The top four insurance companies also control approximately 90 percent of the large group insurance market in Georgia¹⁵ – and if the mergers go forward, the combined Aetna and combined Anthem will together control approximately two-thirds of the market. Aetna currently holds 9.4 percent of the market, Humana 3.1 percent, Anthem 49.4 percent, and Cigna 5.5 percent.¹⁶ The Anthem-Cigna merger would be a *prima facie* violation, and the Aetna-Humana merger would be on the edge of *prima facie* anticompetitive. The number of individuals insured in large group plans in Georgia (830,000) is almost twice that of individuals covered under small group plans (353,000) and individual plans (482,000).¹⁷

Loss of competition in the administrative services only market. Anthem’s acquisition of Cigna could substantially lessen competition within the 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. A combination of Anthem and Cigna would combine Cigna’s 54.7 percent market share with Anthem’s 16.3 percent share and result in an entity with a 71 percent market share of the Georgia market.¹⁸

Loss of competition in the Medicare Advantage market. Medicare Advantage is a Medicare supplemental program used by over 460,000 Georgia Medicare beneficiaries. The top four insurance companies control approximately 85 percent of this market in Georgia,¹⁹ making it highly concentrated. Aetna has 9 percent, and Humana has 22 percent, so their merger would be a *prima facie* violation under Georgia law. (Economic studies²⁰ and a Department of Justice enforcement action have found that Medicare Advantage is a distinct market from traditional Medicare “[d]ue in large part to the lower out-of-pocket costs and richer benefits that many Medicare Advantage plans offer seniors over traditional Medicare.”²¹)

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ December 1, 2014 Letter to Congressional Addressees, Government Accountability Office, <http://www.gao.gov/assets/670/667245.pdf>.

¹⁸ 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>.

¹⁹ 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/>.

²⁰ Anna D. Sinaiko & Richard Zeckhauser, *Persistent Preferences and Status Quo Bias Versus Default Power: The Choices of Terminated Medicare Advantage Clients* (Working Paper, Harvard University, 2015) (investigating beneficiary responses to the elimination of an MA plan found enrollees selected another MA plan rather than accepting the program default of enrollment under traditional Medicare): Anna D. Sinaiko & Richard Zeckhauser, *Medicare Advantage—What Explains Its Robust Health*, *Am J ManagCare*. 2015;21(11):804-806, available at <https://www.hks.harvard.edu/fs/rzeckhau/Medicare%20Advantage.pdf> (examining the ongoing and increasing enrollment in MA plans, despite significant cuts in benefits following reforms under the Affordable Care Act, which suggests distinct consumer preferences for the package of benefits and managed care format of MA plans).

²¹ Competitive Impact Statement, *United States v. UnitedHealthGroup Inc. and Sierra Health Services, Inc.*, No. 08-cv-322 (D.D.C. Feb. 25, 2008), available at <https://www.justice.gov/atr/case/us-v-unitedhealth-group-inc-and-sierra-health-services-inc>; see also Competitive Impact Statement, *United States v. Humana Inc. and Arcadian Management Services, Inc.*, No. 12-cv-00464 (D.D.C. March 27, 2012), available at <https://www.justice.gov/atr/case-document/file/499056/download>.

Additionally, in rejecting the Aetna-Humana merger just this past month, the Missouri Department of Insurance, Financial Institutions, & Professional Registration, agreed with these conclusions. It found that “the federal government recognizes and has promoted Medicare Advantage as a separate economic entity from Traditional Medicare” and “the health insurance industry has promoted Medicare Advantage as a separate economic entity.”²²

Competition in Medicare Advantage is crucial for consumers and for taxpayers who help fund Medicare Advantage. Economic studies have shown that mergers among health insurers diminish competition, leading to increased premiums—not just premiums charged by merging companies but also premiums charged by their rivals in the same market.²³ 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 Georgia — premiums are lower.²⁴ In particular, competition between Aetna and Humana lowers Aetna’s annual premiums by up to \$302, and lowers Humana’s annual premiums by \$43.²⁵

Loss of potential competition in Medicare Advantage. We are concerned that the proposed Aetna-Humana merger would not only harm current competition, but would foreclose future competition as well. Aetna has been expanding its Medicare Advantage business, and, absent this merger, we could expect Aetna to significantly increase its competition against Humana in Medicare Advantage, resulting in lower premiums and improved services for consumers.

Aetna and Humana have increasingly been entering each other’s territories and competing directly on Medicare Advantage products. A 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.²⁶

²² Findings of Fact, Conclusions of Law and Order, *Div. of Ins. Co. Reg v. Aetna Inc. and Humana Inc.*, Case No. 160325191C (Mo. Dept. of Ins., May 24, 2016), available at

http://media.wix.com/ugd/1859d0_63ad123416474f5c93f0f6bb68300a08.pdf.

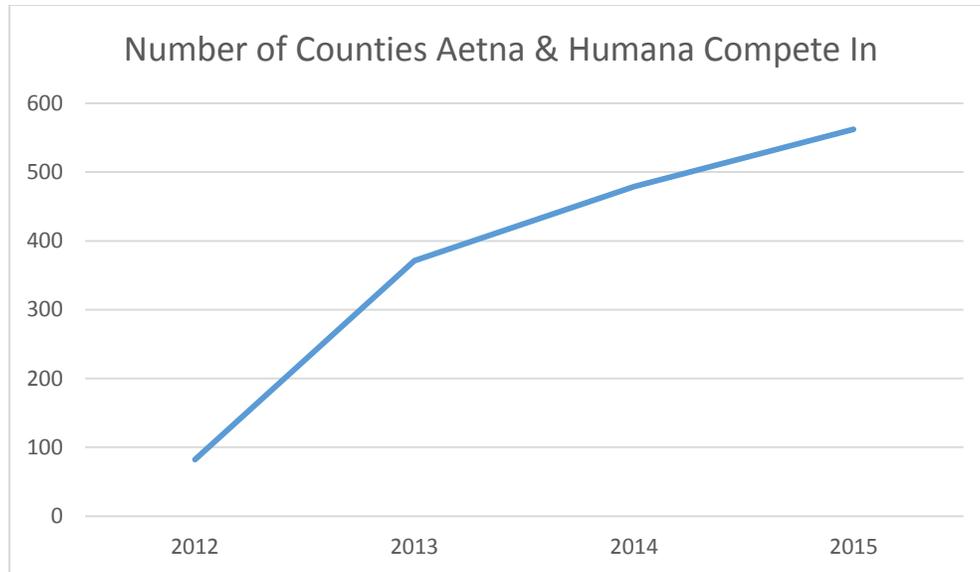
²³ See Leemore Dafny, Are Health Insurance Markets Competitive? 100 AM. ECON. REV. 1399 (2010).

²⁴ 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/>.

²⁵ *Id.*

²⁶ *Id.*



Based on Centers for Medicare & Medicaid Services data, Aetna and Humana already have competing Medicare Advantage contracts in 96 Georgia counties.²⁷ Without this merger we could expect even greater expansion by Aetna.

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.”²⁸

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 2007-2008 the Pennsylvania Insurance Commissioner considered the merger between Pittsburgh-based Highmark and Philadelphia-based Independence Blue Cross. Even though there was little competition between the two firms at the time, the merger was rejected because it would have inhibited the firms from entering each other’s territories and competing.²⁹

History of consumer protection violations increases reason for competitive concerns.

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

²⁷ 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>.

²⁸ *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).

²⁹ 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).

coverage to elderly patients.³⁰ 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.’”³¹ Humana also violated Medicare appeals and grievances rules, including misclassifying denial of claims appeals as “customer service inquiries.”³² 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.”³³ It is far from clear that Georgia 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.³⁴

II. The Mergers Could Lead to Higher Consumer Costs in Georgia

Consumers are concerned that increased market power resulting from the Aetna-Humana and Anthem-Cigna mergers could lead to rising costs, i.e. higher premiums and out-of-pocket charges. For Georgians, health insurance premiums continue to rise. For 2017, Humana has requested a 65.2 percent average premium increase for individual plans sold on Georgia’s health exchange.³⁵ For 2016, Aetna was approved for a 17.3 percent increase and Humana was approved for a 19.8 percent increase for HMO plans and a 21.8 percent increase for POS plans on the Georgia health insurance exchange.³⁶

History tells a compelling and unambiguous story—when insurers merge, consumers pay more. 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.”³⁷ 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.³⁸ Another study found that the 2008 United-Sierra merger resulted in an additional 13.7 percent premium increase in Nevada.³⁹ There is also economic evidence that a dominant insurer can increase rates 75 percent higher than smaller

³⁰ 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/>.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ Louise Radnofsky, *Insurers Seek Large Premium Boosts*, WALL STREET JOURNAL (May 25, 2016 7:53 PM), <http://www.wsj.com/articles/insurers-seek-big-premium-boosts-1464220397>.

³⁶ Louise Norris, *Georgia health insurance exchange / marketplace*, HealthInsurance.org (Apr. 8, 2016), <https://www.healthinsurance.org/georgia-state-health-insurance-exchange/>.

³⁷ 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>.

³⁸ Leemore Dafny *et al.*, *Paying a Premium on Your Premium? Consolidation in the US Health Insurance Industry*, 102 AM. ECON. REV. 1161 (2012).

³⁹ 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).

insurers competing in the same state.⁴⁰ Studies show that cost savings from reduced payments from providers are not passed on to consumers.⁴¹ There are also studies showing that, conversely, increasing competition leads to lower premiums.⁴² **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 these mergers have argued that the medical loss ratio (“MLR”) limits the level of insurer profits thus protecting consumers from price increases.⁴³ 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.⁴⁴ 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.”⁴⁵

III. Merger Efficiencies Are Unlikely and Will Not Overcome the Competitive Harm

The parties have claimed that their mergers would create substantial efficiencies leading to improved health care quality and lower costs for consumers.⁴⁶ It is for DOI to carefully examine these claims and determine if they are fully substantiated.⁴⁷ Other insurance commissioners have

⁴⁰ 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>.

⁴¹ Evaluating the Impact of Health Insurance Industry Consolidation: Learning from Experience, The Commonwealth Fund (Sep. 20, 2015), available at <http://www.commonwealthfund.org/publications/issue-briefs/2015/nov/evaluating-insurance-industry-consolidation>.

⁴² E.g., Steven Sheingold, Nguyen Nguyen, and Andre Chappel, *Competition and Choice in the Health Insurance Marketplaces, 2014-2015: Impact on Premiums*, ASPE. Issue Brief (July 27, 2015), available at https://aspe.hhs.gov/sites/default/files/pdf/108466/rpt_MarketplaceCompetition.pdf.

⁴³ 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.”).

⁴⁴ 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.

⁴⁵ *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.

⁴⁶ See Bertolini, *supra* note 43 (section labeled “Benefits of the Acquisition for Consumers and Providers.”).

⁴⁷ Another potential defense is that entry will alleviate any anticompetitive effects. We do not address this argument although we believe there is no basis for it. The DOI should be especially skeptical of these claims. See 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.”). Additionally the California Department of Insurance, in its review of the Anthem-Cigna merger, noted that “it is typically difficult for new health insurers to enter a market” and that “significant barriers exist”, including new insurers having difficulty contracting with enough healthcare providers to establish an attractive network. Letter from California Insurance

found that the merging parties have fully documented their claimed efficiencies.⁴⁸ Even if they can demonstrate the claimed efficiencies, 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.⁴⁹

A critical question to be examined is why is this merger necessary in order to achieve any of the potential efficiencies the merging insurers point to. Both of these companies already have tremendous resources and expertise. Having an opportunity to combine that with a competitor's resources and expertise is not a basis to permit the companies to merge. For example, in *FTC v. St. Luke's*, an important recent case dealing with claimed efficiencies, a dominant hospital wanted to acquire a physician practice 60 miles away. Their claimed efficiencies mostly revolved around being able to move the physician practice onto their computer system, which would allow them to better integrate their care.⁵⁰ The Ninth Circuit was explicit that "the Clayton Act does not excuse mergers that lessen competition or create monopolies simply because the merged entity can improve its operations."⁵¹ Working to compete by matching or exceeding your rival's operations is what the American competitive free market system is based on; Aetna and Humana don't need a merger to accomplish that.

The parties have claimed significant cost-savings associated with the mergers. According to Aetna, its merger with Humana would create \$1.25 billion in "synergy opportunities" and "operating efficiencies."⁵² Anthem similarly claims that its merger with Cigna will cut costs by \$2 billion annually.⁵³ 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.⁵⁴ Associate Attorney General Bill Baer, who was then the Assistant Attorney General in charge of the DOJ's Antitrust Division, raised questions regarding

Commissioner Dave Jones to Loretta Lynch, Attorney General of the United States (June 16, 2016), *available at* http://media.wix.com/ugd/1859d0_e61ba337124148bb957190c8be296bca.pdf.

⁴⁸ California Insurance Commissioner Dave Jones found for both mergers that the efficiency claims were not documented, saying that they failed to present persuasive evidence about benefits resulting the mergers. *See* Letter from California Insurance Commissioner Dave Jones to Loretta Lynch, Attorney General of the United States (June 16, 2016), *available at* http://media.wix.com/ugd/1859d0_e61ba337124148bb957190c8be296bca.pdf, and Letter from California Insurance Commissioner Dave Jones to Loretta Lynch, Attorney General of the United States (June 23, 2016), *available at* http://media.wix.com/ugd/1859d0_fb4c76819a1f40c4a58a15e2ca727c56.pdf.

⁴⁹ Horizontal Merger Guidelines, 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").

⁵⁰ *St. Alphonsus Medical Center-Nampa et al v. St. Luke's*, 778 F. 3d 775, 791 (9th Cir. 2015).

⁵¹ *Id.* at 792.

⁵² 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/>.

⁵³ Ana B. Ibarra, *Anthem-Cigna Merger Proposal Takes a Grilling*, CALIFORNIA HEALTHLINE March 30, 2016, <http://californiahealthline.org/news/anthem-cigna-merger-proposal-takes-a-grilling/>.

⁵⁴ *See* Section II.

the alleged efficiencies that would result from health insurance mergers. Baer noted that “consumers do not benefit when sellers . . . merge simply to gain bargaining leverage.”⁵⁵

That makes sense. There is no evidence that these large insurers are at a 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 leading health antitrust scholar, has noted that there is actually “little incentive [for an insurer] to pass along the savings to its policyholders.”⁵⁶ 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.⁵⁷ California Insurance Commissioner Dave Jones in his review of the Aetna merger also found that “market concentration results in poor quality because the lack of competition removes incentives to compete by improving quality.”⁵⁸ 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.”⁵⁹ Finally, seven U.S. Senators recently concluded that “the evidence overwhelmingly suggests that few if any cost savings secured by the merging firms through the existence of market power will be passed on to consumers.”⁶⁰

Claimed efficiencies also have to be substantiated. In the two comprehensive reviews of the efficiency claims, the California Insurance Commissioner found that neither merger substantiated significant efficiencies. For example in the Anthem merger, Commissioner Jones observed that “Anthem and Cigna failed to provide the promised numerical estimate, even a heavily qualified one, for a single asserted synergy or efficiency, let alone for each of the synergies and efficiencies that they claim total \$2 billion. The failure to do so indicated that the \$2 billion figure is not credible and that there is no guarantee that any savings that might

⁵⁵ 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>.

⁵⁶ 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/>.

⁵⁷ 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%20Sllover%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”).

⁵⁸ Letter from California Insurance Commissioner Dave Jones to Loretta Lynch, Attorney General of the United States (June 23, 2016), available at http://media.wix.com/ugd/1859d0_fb4c76819a1f40c4a58a15e2ca727c56.pdf.

⁵⁹ 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.

⁶⁰ Letter from Senators to Renata Hesse, Principal Deputy Assistant Attorney General, Antitrust Division (June 22, 2016), available at http://www.blumenthal.senate.gov/imo/media/doc/letter_Senators%20to%20DOJ%20on%20Aetna%20Anthem_FINAL.PDF.

ultimately occur would benefit policyholders.”⁶¹ And in the Aetna merger, Commissioner Jones concluded that Aetna and Humana have provided no reliable evidence indicating that the asserted efficiencies would counteract the harm to competition or disprove the likely harms resulting from the merger.⁶²

A more abstract argument raised by the merging insurers is that the mergers would 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 Georgia, the mergers would increase and entrench the combined insurers’ market power, reducing their incentives to compete and improve care. As noted by the American Antitrust Institute, excessive concentration created by the proposed mergers *is likely to reduce incentives* for engaging in pro-consumer innovation.⁶³

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.⁶⁴ Moreover, Professor Dafny has further noted that 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.⁶⁵

IV. Divestitures and Other Remedies

As part of its review of the proposed mergers, DOI should consider what actions would help properly protect consumers and ensure the mergers are in the public interest. If DOI 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.⁶⁶

In other cases, mergers have been approved conditioned on the imposition of specific remedies such as divestitures or additional conduct regulation.⁶⁷ In evaluating any proposed remedy, it is

⁶¹ Letter from California Insurance Commissioner Dave Jones to Loretta Lynch, Attorney General of the United States (June 16, 2016), *available at* http://media.wix.com/ugd/1859d0_e61ba337124148bb957190c8be296bca.pdf.

⁶² Letter from California Insurance Commissioner Dave Jones to Loretta Lynch, Attorney General of the United States (June 23, 2016), *available at* http://media.wix.com/ugd/1859d0_fb4c76819a1f40c4a58a15e2ca727c56.pdf.

⁶³ *Id.*

⁶⁴ Dafny, *supra* note 38.

⁶⁵ 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>.

⁶⁶ See *Highmark Merger Timeline*, PENNSYLVANIA INSURANCE DEP’T, http://www.insurance.pa.gov/Companies/IndustryActivity/Pages/Highmark-Merger-Timeline.aspx#.Vqkqh_mrShc (last visited Jan. 8, 2015).

⁶⁷ *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://fior.com/Sections/LandH/AetnaHumanaHearing.aspx>.

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.⁶⁸

In nearly every health insurance merger enforcement action during the last two decades, DOJ has relied on the structural remedy of divestiture.⁶⁹ 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 Georgia, the scope, breadth, and market shares of the merging companies' individual insurance, small group insurance, large group insurance, administrative services only, and Medicare Advantage operations is significant. We estimate that Anthem would have to divest over 530,000 lives in the commercial market and over 440,000 in the ASO market. We estimate that Aetna would have to divest over 40,000 lives in the Medicare advantage market. Constructing any remedy involving divestitures may be an extremely difficult task. These divestitures would be astronomically larger than any other divestiture in history; by comparison, in the 2007-2008 United-Sierra merger United was required to divest 26,000 lives, and in the 2012 Humana-Arcadian merger Humana was required to divest 12,700 lives.

It could be a mistake for the DOI 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.⁷⁰ 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."⁷¹ 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, Staples/Office Depot, and Sysco-US Foods, to cite three examples, the enforcement agencies rejected the divestitures offered as remedies, and instead blocked the mergers. When Sysco and Staples pursued their mergers anyway, the court agreed with the FTC and enjoined the mergers.⁷²⁷³

⁶⁸ *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))

⁶⁹ 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).

⁷⁰ 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/>.

⁷¹ Greaney & Moss, *supra* note 59.

⁷² 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

Regarding health insurance markets, there is little evidence that the benefits of competition are effectively restored after divestitures. In fact, in the previously cited 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.⁷⁴ 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.⁷⁵ And there is yet another reason why divestitures are not effective in health insurance markets in the long term: what is divested fundamentally amounts to little more than 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.⁷⁶ The OIR noted that the divestitures were “not in the best interests of Florida policyholders and also may be short term in nature.”⁷⁷ 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.”⁷⁸

While the DOJ (and the Georgia Attorney General’s Office, using its own antitrust authority) may be considering divestitures, the DOI is 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 Georgia Attorney General. For example, in the 2008 acquisition of Sierra Health by UnitedHealth, the DOJ required divestiture of MA plans in Las Vegas,⁷⁹ 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.⁸⁰ Even with these additional remedies, the people of Nevada were not fully protected against price increases.⁸¹

Foods, FTC Closes Case (July 1, 2015), *available at* <https://www.ftc.gov/news-events/press-releases/2015/07/following-sycos-abandonment-proposed-merger-us-foods-ftc-closes>.

⁷³ Press Release, FTC, FTC Challenges Proposed Merger of Sysco and US Foods, *available at* <https://www.ftc.gov/news-events/press-releases/2015/02/ftc-challenges-proposed-merger-sysco-us-foods>.

⁷⁴ Dafny, *supra* note 38; Guardado, *supra* note 39; Spiro *et al.*, *supra* note 70.

⁷⁵ See Greaney & Moss, *supra* note 59.

⁷⁶ Consent Order, *supra* note 67 at 9.

⁷⁷ *Id.* at 8.

⁷⁸ *Id.* at 9.

⁷⁹ Final Judgment, *UnitedHealth Inc. and Sierra Health Servs.*, No: 1:08-cv-00322.

⁸⁰ *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/>.

⁸¹ Guardado, *et al.*, *supra* note 39.

Regulatory remedies can also have their shortcomings for effectively protecting competition and consumers against the abuse of market power resulting from a merger.⁸² Nevertheless, such remedies could play an important role in limiting harm to consumers and to the health care marketplace. In the event either or both mergers are permitted to go forward, here is a short list of possible regulatory steps the DOI 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 its merger to consumers, in the form of lower premiums and deductibles.

V. 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 Georgia consumers need answers to regarding the impacts each of these proposed mergers would have on the marketplace and on consumers:

1. What will be the impact on consumers of the loss of the acquired firms as independent alternatives for health insurance coverage?
2. What is the likelihood that the merging firms could expand into Georgia Medicare Advantage markets even absent their merger? Why do the merging firms need their 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 the acquiring firms prove can be reasonably expected in Georgia from their merger? Will they result in reduced premiums? Will the acquiring firms commit to a specified reduction in premiums in Georgia based on those claimed efficiencies? If so, for how long would that commitment endure?
4. Will the acquiring firms commit to continued participation in the state exchange if their mergers are 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?

⁸² 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.”).

6. It's been reported that the increased buyer power from the mergers could drive down reimbursement rates below healthy competitive levels in many markets, which could adversely impact patient care quality and access.⁸³ Could the combined firms come to represent such a significant share of provider revenue in any Georgian 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?
7. What do the parties propose as potential remedies for the competitive problems?

Conclusion

The undersigned organizations are concerned about the consolidation within the health insurance industry and its impact on price, access, and quality of care. The proposed mergers, among four of the largest, most dominant, national health insurers, could substantially lessen competition in a wide range of important insurance products in the State of Georgia. 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 these mergers might go forward, we urge the Georgia Office of Insurance and Safety Fire Commissioner to carefully evaluate their 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
Consumer Federation of America
U.S. PIRG
Consumer Watchdog

Counsel of record for this comment is:

David A. Balto
Matthew Lane
Bradley Wasser
The Law Offices of David A. Balto
1325 G. St.
Suite 500
Washington, DC 20005
202-577-5424
David.balto@dcantitrustlaw.com

⁸³ *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).

Matt.lane@dcantitrustlaw.com
Brad.wasser@dcantitrustlaw.com