MHA
MISSOURI HOSPITAL ASSOCIATION

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Mary S. Erickson, Hearing Officer
Department of Insurance, Financial Institutions and Professional Registration
Harry S Truman State Office Building, Room 530
301 West High Street
Jefferson City, MO 65102

Dear Hearing Officer Erickson:

The Missouri Hospital Association submits these comments on behalf of its 148 members, which include every acute care hospital in the state. MHA and its members appreciate the opportunity to express significant concerns about the anticompetitive impact of the proposed Aetna-Humana merger currently under review by the director. MHA believes that the proposed merger will result in reduced benefit choices, higher premiums and inadequate healthcare access for Missouri citizens, especially vulnerable seniors who are enrolled in Medicare Advantage plans across the state. Some of these harms stem from a substantial increase in monopsony power on the part of the involved insurers, creating the ability to impose unfair and anticompetitive contractual terms on hospitals and other health care providers, potentially reducing access and quality of care.

Based on the concerns expressed herein, MHA urges the director to carefully review the proposed merger and consider the negative impact on competition in the insurance market and the public's access to healthcare. Ultimately, MHA believes that a denial of the proposed merger is warranted to protect the public interest.

VIOLATION OF THE COMPETITIVE STANDARD UNDER SECTION 382.095, RSMO

By statute, the director must first assess whether there is "substantial evidence that the effect of the acquisition may be substantially to lessen competition in any line of insurance in this state or tend to create a monopoly therein . . . ."[1] In making that determination, the director is to consider market concentration and then the relative shares of the market held by the merging entities. The threshold question is whether the relevant market is highly concentrated. A highly concentrated market exists when the four largest insurers share at least 75 percent of the market.[2]

1 Section 382.095.4(1), RSMo (2000).
2 Section 382.095.4(2)(a), RSMo (2000).

In the commercial market, every Missouri county is highly concentrated, with the top four insurers holding a market share exceeding 80 percent in 107 out of 114 counties, the City of St. Louis and in 24 of 28 Metropolitan Statistical Areas.[3] This statistic includes both fully insured and Administrative Services Only products. That the insurance market is highly concentrated across product lines in every area of the state demonstrates the need for further scrutiny of the proposed merger.

When a market is highly concentrated, any acquisition is deemed to violate the statutory competitive standards when the involved insurers possess the following market shares:[4]

Insurer A (Aetna)	Insurer B (Humana)
4%	4% or more
10%	2% or more
15%	1% or more

Applying these ratios, the merger of Aetna/Humana exceeds the competitive standards in 77 of 114 counties and 20 of 28 MSAs for the combined ASO and fully insured commercial market.[5] Thus, these figures are *prima facie* evidence that the proposed merger violates the anticompetitive standard of Section 382.095.4(2)(a), RSMo. By statute, once the competitive standard is violated, the director must obtain evidence rebutting the presumption of antitrust behavior to approve a proposed merger.

The effects of the proposed merger are particularly troubling in the Medicare Advantage market, where Aetna and Humana are robust competitors. There is no question that the Medicare Advantage market is highly concentrated – the four largest insurers hold 100 percent of the market share in all but 16 counties, where the top four hold at least 92 percent.[6] Among Missouri's 28 MSAs, the top four insurers possess 100 percent of the market in all but five, with the lowest concentration of the four largest insurers' share at 93.4 percent.[7] In such extreme market conditions, any merger will substantially lessen competition and, as a result, the ability of consumers to purchase affordable coverage.

For consumers of Medicare Advantage plans, the anticompetitive standard is readily met in 65 Missouri counties, along with the City of St. Louis.[8] The proposed merger would consolidate two of the four largest insurers in this particular product market. Given the extreme level of market concentration, the surviving entity would have virtually unlimited influence on the market.

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3 See Table 1. Sources: HealthLeaders-InterStudy Managed Market Surveyor, January 2015; U.S. Census Bureau, Metropolitan and Micropolitan Statistical Areas and Components, February 2013, available at http://census.gov/population/metro/files/lists/2013/List1.txt>.

4 Section 382.095.4(1), RSMo (2000).

5 See Table 1.

6 See Table 2. Sources: Centers for Medicare & Medicaid Services, MA Enrollment by Contract/Plan/State/County, available at https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/MCRAdvPartDEnrolData/Monthly-Enrollment-by-Contract-Plan-State-County.html>; U.S. Census Bureau, Metropolitan and Micropolitan Statistical Areas and Components, February 2013, available at http://www.census.gov/population/metro/files/lists/2013/List1.txt>.

7 *Id*.

8 *Id*.

Moreover, the relative strength of both parties' market position demonstrates the anticompetitive effects of the proposed merger under any antitrust analysis. Even if a merger does not expressly violate the anticompetitive framework established by Section 382.095.4(2), RSMo, the director may determine an anticompetitive effect based on other, substantial evidence.[9] Such evidence can include, but is not limited to, market shares, volatility of market leaders, the number of competitors, concentration, concentration trends and the ease of exit and entry into the market.[10]

MARKET SHARES

Aetna's acquisition of Coventry in early 2013 has steadily increased its share of the Medicare Advantage market.[11] Statewide, it presently enrolls nearly one-third of the total enrolled Medicare Advantage lives.[12] In sixteen counties and two MSAs, Aetna possesses over 50 percent of the market. In many cases, its market share approaches or exceeds 70 percent. Humana holds a substantial portion of the remaining market, with a statewide market share of 23.1% in 2015. Together, they hold at least 55 percent of the Medicare Advantage market.[13]

This proposed consolidation comes at a time when more Missouri seniors are choosing among the multitude of Medicare Advantage plans currently offered to them. Statewide, the number of Medicare Advantage enrollees increased 9 percent from 2013 to 2014 and 8 percent from 2014 to 2015.[14] In the last five years, over 100,000 new enrollees have entered the Medicare Advantage market.[15] This trend will continue as the aging Baby Boomers create a "silver tsunami" across the state. Allowing these companies to merge will reduce plan choice and provider access and affect premium rates and coverage options for hundreds of thousands of Missourians.

The framework employed by the Department of Justice and the courts to analyze antitrust behavior is instructive in examining the anticompetitive effects of market share. A merger in which one entity ends up controlling "an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects."[16] The Supreme Court instructed that a post-merger market share of 30 percent is sufficient to reach that threshold.[17]

The combined market share of Aetna and Humana exceeds 30 percent in 55 counties in which either company currently has an appreciable presence. The same holds true for 20 of Missouri's 28 MSAs. If this merger is approved, the combined market share of the two entities will exceed 90 percent in eight counties and three MSAs; 80 percent in 19 counties and four MSAs; 70 percent in 11 counties and two MSAs and 60 percent in 11 counties and four MSAs.[18] In

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9 Section 382.095.4(4), RSMo (2000).
10 *Id*.
11 See CMS MA Enrollment Data, *supra* note 6.
12 See Table 2.
13 See Table 2.
14 See CMS MA Enrollment Data, *supra* note 6.
15 *Id*.
16 *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 363 (1963).
17 *Id*. at 364.
18 See Table 2.

essence, the combined entity will become the foremost competitor in the Medicare Advantage market. Under a traditional antitrust analysis, such extreme market dominance by one organization is presumptively anticompetitive.

MARKET CONCENTRATION

This evidence is even more compelling when analyzed in terms of market concentration. In 2010, the Department of Justice (DOJ) and the Federal Trade Commission (FTC) jointly developed merger guidelines for analyzing the anticompetitive effects of any merger of actual or potential competitors.[19] To evaluate market concentration, the agencies use the Herfindahl-Hirschman Index (HHI), which measures the sum of the squares of each insurer's individual market share, to afford greater weight to larger entities. Both the post-merger HHI and the increase in HHI is relevant to a market concentration analysis. The latter is calculated as twice the product of the market shares of the two entities involved in the merger.[20]

Markets with a pre-merger HHI between 1500 and 2500 are moderately concentrated. A market with an HHI above 2500 is considered highly concentrated. An increase in HHI of more than 100 points in a moderately concentrated market raises significant competitive concerns and should be heavily scrutinized. In highly concentrated markets, an increase in HHI between 100 and 200 points raises similar concerns. If the increase is more than 200 points in a highly concentrated market, the merger is deemed to be anticompetitive.

In the combined Medicare Advantage market, the proposed merger is presumptively anticompetitive in 66 Missouri counties and the City of St. Louis, as they are highly concentrated and would experience an increase in HHI exceeding 200 points.[21] In nearly every affected area, the post-merger HHI vastly exceeds the 2500 figure concentration threshold, with virtually no divesture options. Nearly the same result can be found in the individual market, with 64 affected counties, along with the City of St. Louis.[22] Two additional counties raise anticompetitive concerns, as they are highly concentrated and will experience an HHI increase between 100 and 200 points.[23] With regard to group plans, presumptively anticompetitive results are found in 16 counties and the City of St. Louis.[24] These data demonstrate the drastic effect this merger will have on the competitive nature of the Medicare Advantage market, to the detriment of Missouri's seniors.

Market concentration also plays a role in the statutory analysis the director is required to undertake with respect to any proposed merger. The director may decline to authorize any acquisition if there is a significant trend toward increased concentration in the relevant product and geographic markets. Also known as the market concentration trend test, this framework is met "when the aggregate market share of any grouping of the largest insurers in the market, from

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19 U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines* (2010); available at https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf
20 *Id*, at 18-19.
21 See Table 3. Source: HealthLeaders InterStudy, January 2015 Enrollment Data.
22 See Table 4. Source: HealthLeaders InterStudy, January 2015 Enrollment Data.
23 *Id*.
24 See Table 5. Source: HealthLeaders InterStudy, January 2015 Enrollment Data.

the two largest to the eighth largest, has increased by seven percent or more of the market over a period of time extending from any base year five to ten years prior to the acquisition up to the time of the acquisition."[25]

The market trend concentration test establishes a violation of the competitive standard when:

- there is a significant trend toward increased concentration in the market;
- one of the insurers involved in the merger is included in the grouping of such large insurers comprising the requisite seven percent or more increase in market share; and
- the other insurer's market share is at least two percent.

The proposed merger involves the second and fourth largest companies in this product market.[26] Between them, they cover the majority of Missouri enrollees in Medicare Advantage plans, with United Healthcare, holding approximately 22% of the remaining market.[27] Approval of the proposed merger will exacerbate the existing and significant trend toward increased concentration in the market and further suppress competition.

NUMBER OF COMPETITORS

The proposed merger will substantially impact an already collapsing market. Even with the relatively few insurers offering Medicare Advantage products, Aetna has been steadily increasing its business through robust competition with Humana. Currently, the two companies enjoy at least moderate levels of competition in 64 counties.[28] As noted above, the largest remaining competitor post-merger will be United Healthcare, leaving two dominant insurers in the marketplace, with approximately 83% of the market.

The dearth of alternative competitors can also be found in the lack of divesture options.[29] There simply are not a sufficient number of viable buyers to absorb the lives in the counties most affected by the proposed merger. The result leaves approximately 276,000 of Missouri's seniors vulnerable to the harmful effects of decreased competition, including higher premiums. Studies of similar mergers, involving Aetna/Prudential and between UnitedHealth/Sierra Health, established a seven percent and 13 percent premium growth rate, respectively.[30] In this instance, there are simply too few competitors in the Medicare Advantage market to sustain competition with increased consolidation.

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25 Section 382.095.4(2)(b), RSMo (2000).
26 Bruce Jaspen, *Hospitals Say Aetna Humana Deal Endangers Medicare Advantage*, Forbes, Sept. 2, 2015; available at http://www.forbes.com/sites/brucejapsen/2015/09/02/hospitals-say-aetna-humana-deal-endangers-medicare-advantage/#72f28b267419.
27 Henry J. Kaiser Family Foundation, *Data Note: Medicare Advantage Enrollment, by Firm, 2015*; available at http://kff.org/medicare/issue-brief/data-note-medicare-advantage-enrollment-by-firm-2015/.
28 See Table 2.
29 See Tables 3-5.
30 Leemore Dafny, Mark Duggan & Subramaniam Ramanarayanan, *Paying a Premium on Your Premium? Consolidation in the US Health Insurance Industry*, 102 Am. Econ. Rev. 1161, 1163 (2012); Eugene Wang & Grace Gee, *Larger Insurers, Larger Premium Increases: Health insurance issuer competition post-ACA,* J. Tech. Sci. (Aug. 11, 2015), available at http://techscience.org/downloadpdf.php?paper=2015081104.

EASE OF ENTRY AND EXIT

Consolidation in the insurance market is itself a barrier to entry, as it creates a sufficiently strong market presence to deter new competition. Presently, the combined market share of the top four insurers in the Medicare Advantage market is between 90 and 100 percent in nearly every Missouri county and MSA. A combined Aetna-Humana will possess over 50 percent of Medicare Advantage shares, rendering it the most dominant force in the market. With the remaining shares concentrated among the existing largest insurers, it will be difficult for a new entrant to gain any competitive ground.
Reduced reimbursements to MA plans under the Affordable Care Act create further disincentives to expend the resources to build provider networks and overcome the regulatory barriers to market entry. The result of the proposed merger is likely to be a permanent consolidation of the MA market among very few insurers, reducing competition and ultimately harming consumers.

The DOJ and FTC found insurers attempting to enter consolidated markets controlled by already dominant insurers faced a dual problem – such entities need to develop large provider networks to appeal to customers, but also required a sufficient number of customers to offer viable contracts to providers.[31] Therefore, constriction makes it more difficult for new participants to enter the market.

These entry barriers can be seen in divestiture activities in past transactions and the prospects for divestiture here. A post-analysis of the DOJ-required divestitures in the 2012 Humana/Arcadian merger revealed that two of the three buyers lost the majority of acquired lives in just a few years and have largely existed the relevant markets, despite both appearing to be strong, well-positioned buyers.[32] The failure of both to succeed competitively largely was due to difficulty establishing provider networks and an established brand in the relevant markets. In both instances, Humana's market strength resulting from the merger allowed it to regain a large number of the divested lives.

EFFECT ON CONSUMERS AND PROVIDERS

Medicare Advantage plans have a unique role in the insurance market for seniors. Under the traditional Medicare program, individuals who paid Medicare taxes receive government-funded Part A coverage for hospital services and may elect to purchase coverage for physician and outpatient services under Part B. Additional premiums apply for Part D prescription coverage. All coverages are subject to deductibles and out-of-pocket costs. There are no out-of-pocket limits for Parts A and B. Seniors that wish to plan for catastrophic health events must purchase additional coverage.

Medicare Advantage plans provide coverage for both Part A and Part B services, and many offer prescription drug benefits. However, such plans differ from traditional Medicare in key respects: they typically offer additional benefits not covered by Medicare Part B, with lower premium

31 U.S. Department of Justice and Federal Trade Commission, *Improving Health Care: A Dose of Competition* (2004); available at https://www.justice.gov/sites/default/files/atr/legacy/2006/04/27/204694.pdf.
32 The Capital Forum, *Aetna/Humana: A Closer Look at DOJ's Most Recent Medicare Advantage Merger Enforcement Action— Substantial Member Losses, Rapid Market Exits, CMS Sanctions Raise Questions about Divestiture Solutions' Viability*, (Feb. 3, 2016); available at https://thecapitolforum.com/wp-content/uploads/2013/12/Aetna-Humana-2016.02.03.pdf.

costs and limits on out-of-pocket expenses. Much of this growth in the program and differentiation in benefits is driven by payments to Medicare Advantage plans that exceed traditional Medicare.[33] As a result of these benefits, MA enrollment is steadily increasing, even as current estimates suggest that Medicare Advantage payments are 102 percent of traditional Medicare, down from 113 percent in 2011.[34]

Due to the differences between traditional Medicare and MA plans, the Department of Justice has recognized that seniors have a strong preference for MA plans, which constitute a separate product market.[35] Therefore, seniors who participate in the MA market are not likely to view the government program as a substitute for their insurance plan and are unlikely to switch to traditional Medicare.

While merger proponents typically argue that consolidation creates efficiencies, there is little to no evidence that any realized savings are passed on to consumers. In fact, research suggests that consolidation almost uniformly results in higher premiums, across virtually every insurance product market.[36] In the MA market, these higher premiums will affect those least able to afford them – Missouri's seniors, many of whom are on a fixed income.

MONOPSONY CONCERNS

Moreover, the monopsony power created by consolidated markets harms patients and providers alike. Researchers and the courts have repeatedly concluded that increased competition lead to increased benefits, while decreased competition affects both consumer choice and quality of care.[37]

Monopsony is characterized by a market involving a large buyer and fragmented suppliers.[38] The buyer attempts to achieve lower input pricing by reducing the price, quality or quantity of services to sub-competitive levels.[39] The healthcare industry is particularly susceptible to this state when a dominant insurer can exert leverage against a network of independent providers.

In 2014, Missouri hospitals provided $2.4 billion in unreimbursed care as a result of unpaid costs by Medicare and Medicaid, and in treating the un- and underinsured.[40] The significant market power to be gained by Aetna as a result of the proposed merger threatens to place hospitals at an extreme competitive disadvantage when negotiating service contracts. Lower fees to hospitals

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33 Medicare Payment Advisory Commission, *Report to the Congress: Medicare Payment Policy* (March 2016).
34 *Id*.
35 Competitive Impact Statement, *U.S. v. UnitedHealth Group, Inc. and Sierra Health Services, Inc.,* No. 08-cv-322 (D.D.C., Feb. 25, 2008).
36 Leemore Dafny, *The Risk of Health Insurance Company Mergers*, Harvard Business Review (Sept. 24, 2015); available at https://hbr.org/2015/09/the-risks-of-health-insurance-company-mergers.
37 Robert Town and Su Liu, *The Welfare Impact of Medicare HMOs*, *RAND Journal of Economics*, 719-36 (2003); *U.S. v. Aetna, Inc.*, No. 3-99-cv-1398H (Aug. 3, 1999).
38 Leemore Dafny, Testimony before the Senate Committee on the Judiciary, *Health Insurance Industry Consolidation: What Do We Know From the Past, Is It Relevant in Light of the ACA, and What Should We Ask?*" (Sept. 22, 2015); available at: http:www/judiciary.senate.gov/download/09-22-15-dafny-testimony-updated.
39 *Id*.
40 Missouri Hospital Association, *Hospitals: Vital to Communities, Community Investment Report* (2015); available at http://focusonhospitals.com/wp-content/uploads/2015/11/Community-Investment-Report_0216.pdf.

not only threaten hospitals' bottom lines, but jeopardizes their ability to invest in resources that benefit patients, such as equipment and staff. The inherent danger of a monopsony is that it drives fees so far below competitive levels as to jeopardize quality of and access to care.[41]

Monopsony power harms consumers, as well. While merger proponents argue that the ability to leverage prices benefits the public, there is no evidence from prior mergers to suggest such savings are passed on to consumers.[42] The competitive imbalance between insurers and providers can lead to smaller provider networks, reducing patient choice and/or increasing out-of-pocket costs. Those that can least afford these effects comprise the Medicare Advantage market.

CONCLUSION

Competition is central to ensuring that Missouri citizens receive access to high quality healthcare, at a reasonable cost. The potential merger of Aetna and Humana threatens to jeopardize the stability of the payer system in Missouri, especially with regard to the Medicare Advantage market. If the merger is approved, Missourians will have far fewer choices among plans and, potentially, more restricted access to care. Consolidation will affect the ability of hospitals and other health care providers to bargain competitively for contracts containing appropriate fees for medical services. In turn, such providers are less able to invest in the resources to maintain and improve the quality of care. An anticompetitive suppression of healthcare payments will suppress innovation, to the detriment of consumers.

The proposed merger violates the statutory competitive standard for industry acquisitions in a vast number of counties across the state, and it does not withstand general antitrust scrutiny. MHA and its members respectfully request that the director carefully review this proposal and take all steps necessary to protect Missourians, including a denial of the merger.

Sincerely,

Jane C. Drummond, J.D.
General Counsel and Vice President of Legal Affairs

enclosure

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41 Dafny, *supra* note 38.
42 Thomas Greaney, *Examining Implications of Health Insurance Mergers*, Health Affairs Blog (July 16, 2015), available at http://healthaffairs.org/blog/2015/07/16/examining-implications-of-health-insurance-mergers/.