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September 9, 2015

The Honorable William J. Baer
Assistant Attorney General
United States Department of Justice Antitrust Division
950 Pennsylvania Avenue NW
Washington, DC 20530

Dear Assistant Attorney General Baer,

On behalf of the American Psychiatric Association (APA), the national medical specialty society representing more than 36,000 physicians specializing in psychiatry, we are writing to express concern over the implications that recently announced proposed mergers within the health insurance industry hold for our patients. APA agrees with the American Medical Association, the American Hospital Association, and the American Academy of Family Physicians, and shares their concern that these proposed consolidations will functionally leave the vast majority of health care administration in the United States to three major insurers, thereby eliminating consumer choice and encouraging insurers to raise prices and reduce quality of care in most markets.¹ Furthermore, individuals with mental illness, including substance use disorders, are uniquely affected by the impact these mergers will have on access to psychiatric care in insurance plan provider networks. We request that the Department of Justice (DOJ) focus attention in its review of the proposed mergers on each company's history of restricting access to clinically appropriate psychiatric care, as well as their ability to more severely restrict access to care if such acquisitions are permitted.

As described below, actions of the insurance industry to date strongly suggest that combined insurance companies with substantial buying power will strengthen their control over the purchase of psychiatric services. Moreover, the merging of companies that have a demonstrated history of discrimination against individuals with mental illnesses will only exacerbate access to mental health care services in the United States.

¹ See statement of the American Medical Association, July 24, 2015. Available at: <http://www.ama-assn.org/ama/pub/news/news/2015/2015-07-24-insurance-mergers-reduce-competition-choice.page>. Accessed August 20, 2015; See also American Medical Association, September 8, 2015, *Markets where an Anthem-Cigna merger warrants antitrust scrutiny*. Available at: <http://mb.cision.com/Public/373/9826625/b52c04d33f1dc1fb.pdf>. Accessed September 8, 2015; Letter from the American Hospital Association to the Department of Justice Antitrust Division, August 5, 2015. Available at: <http://www.aha.org/advocacy-issues/letter/2015/150805-let-acquisitions.pdf>. Accessed August 20, 2015; and Letter from the American Academy of Family Physicians to the Department of Justice Antitrust Division, July 28, 2015. Available at: <http://www.aafp.org/dam/AAFP/documents/advocacy/legal/antitrust/LT-DOJ-Consolidation-072715.pdf>. Accessed August 20, 2015.

Prevalence of Mental Illness, including Substance Use Disorders

Approximately 33.8 percent of the population (37.9 percent of adults and 20 percent of children) in the United States suffers from a mental illness (including substance use disorders).² In addition, 18.1 percent of adults and 13 percent of children in this group have been diagnosed with a serious mental illness.³ However, only 40 percent of adults and 50.6 percent of children with a diagnosed mental illness – and only 59 percent of those with serious mental illness – receive treatment.⁴ In other words, 60 percent of adults, 49.4 percent of children, and 41 percent of people with a serious mental illness who are in need of mental health care receive no care at all.

Mental health coverage accounts for only 4.8 percent of all private health care expenditures; excluding prescription drug costs, mental health expenditures account for just for 3.1 percent of all health care costs.⁵ In fact, mental health care spending is sustained at artificially low levels - and access to care is made difficult through insurance companies' illegal discrimination in benefits provided to patients with mental illnesses in violation of the Mental Health Parity and Addiction Equity Act of 2008 (42 USC § 1185 (a)).

Mental Health Parity and Addiction Equity Act of 2008

The Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA) aimed to end insurance discrimination against patients suffering from mental illness, including substance use disorders. MHPAEA sought to remove financial coverage and treatment limitation discrimination against a population that has been thoroughly discriminated against and stigmatized for decades. Although roughly seven years have passed since MHPAEA was enacted into law, insurers continue unabashedly to discriminate in insurance coverage against patients with mental illness in the following ways:

1. *Maintaining and Exacerbating Inadequate Provider Networks.* Insurers post directories of providers and claim they are available to provide treatment to the insured. Insurers represent to the public (and to insurance commissions in order to obtain their license to do business) that the psychiatrists disclosed in a directory are available to the insured and that their number is adequate to meet the medical needs of the population base covered. In reality, the psychiatric providers listed in those

² See United States Census Bureau. Quick Facts from the US Census Bureau. Washington, DC: United States Department of Commerce, 2015. Available at: <http://quickfacts.census.gov/qfd/states/00000.html> Accessed August 3, 2015

³ National Institute of Mental Health. (a) Any Disorder Among Children. (n.d.) Available at:

<http://www.nimh.nih.gov/health/statistics/prevalence/any-disorder-among-children.shtml> Accessed August 3, 2015.

⁴ National Institute of Mental Health. (e) Use of Mental Health Services and Treatment Among Adults. (n.d.) Available at:

<http://www.nimh.nih.gov/health/statistics/prevalence/use-of-mental-health-services-and-treatment-among-adults.shtml> Accessed August 3, 2015;

National Alliance on Mental Illness. Mental Illness Facts and Numbers. Arlington, VA: National Alliance on Mental Illness, 2013. Available at:

http://www2.nami.org/factsheets/mentalillness_factsheet.pdf. Accessed August 3, 2015; National Institute of Mental Health. (d) Use of Mental

Health Services and Treatment Among Children. (n.d.) Available at: <http://www.nimh.nih.gov/health/statistics/prevalence/use-of-mental-health-services-and-treatment-among-children.shtml>. Accessed August 3, 2015.

⁵ Substance Abuse and Mental Health Services Administration. National Expenditures for Mental Health Services and Substance Abuse Treatment, 1986–2009. HHS Publication No. SMA-13-4740. Rockville, MD: Substance Abuse and Mental Health Services Administration, 2013. Available at: <https://store.samhsa.gov/shin/content/SMA13-4740/SMA13-4740.pdf>. Accessed August 3, 2015.

directories are not available to see the patients who purchased the insurance coverage. For instance, a recent study by the Mental Health Association of Maryland found that of the psychiatrists listed in psychiatric networks for plans sold through Maryland Health Connections, only 14 percent accepted new patients and were available for an appointment in 45 days, 57 percent of the psychiatrists listed were not reachable, and less than 40 percent of those listed accepted the insurance offered by the plan listing them as participating.⁶ As another example, a similar report on network adequacy in New Jersey found that 33 percent of the psychiatrists' contact information was incorrect, 8 percent of the psychiatrists listed were not psychiatrists, 49 percent were not taking new privately insured patients, and 50 percent had wait times of two or more months.⁷ Discriminating against individuals with mental illness by maintaining a network that is not adequate to provide access to care violates MHPAEA (See 78 Fed. Reg. 68246).

Maintaining inaccurate directories benefits the insurance company because the "robust" directory attracts premium paying customers and its real emptiness allows the company to avoid expenses associated with providing needed mental health care. Creating mega-insurers threatens to exacerbate the "phantom network" problem by eliminating competition on both the consumer and provider ends of the service chain. As part of its due diligence, the DOJ should demand that the merger partners produce their network directories of psychiatrists in each relevant market and run data demonstrating how many claims each of the psychiatrists listed in that directory submitted in the prior 12 months. Based on examples cited above, the likely result will be that less than half of those psychiatrists listed actually see patients with that insurance, meaning the plan is misstating its ability to meet the needs of the population it insures.

2. *Control of the Supply of Psychiatrists to Plan Beneficiaries.* Although there is a great need for mental health care, insurers intentionally discourage psychiatrists from participating in their networks by paying them less than other physicians for the same Current Procedural Terminology (CPT) codes (such codes describe services provided). APA has filed litigation against Anthem alleging that this practice violates the Mental Health Parity and Addiction Equity Act.⁸ If the plans can discourage participation by psychiatrists, people do not access care and the plans do not have to spend money on mental health services. DOJ's due diligence should analyze the impact that the combinations and reduction in competition will have on rates paid to psychiatrists and the resulting effect on access to psychiatric care within the networks. Combining two companies that discourage network

⁶ Mental Health Association of Maryland. (2014). Access to Psychiatrists in 2014 Qualified Health Plans. Available at: <https://www.mhamd.org/wp-content/uploads/2014/01/2014-QHP-Psychiatric-Network-Adequacy-Report.pdf>. Accessed August 14, 2015.

⁷ Mental Health Association in New Jersey, Inc. (2013). Managed Care Network Adequacy Report. Available at: <http://www.mhanj.org/wp-content/uploads/2014/09/Network-Adequacy-Report-Final.pdf>. Accessed on August 14, 2015.

⁸ See, e.g., Tabs 1-2, Original Complaint and Second Amended Complaint.

participation by psychiatrists through discriminatory reimbursement will exacerbate the access problem in violation of MHPAEA (See 78 FR 68246; 29 CFR 2590.712 (c)(4)(ii)(C) and (D)).

3. *Artificially Limiting Services.* Insurers also deny mental health claims much more frequently than they deny other medical claims.^{9, 10} DOJ must review the denial rates of potential merger partners to see how they treat mental health claims compared to other medical claims and not permit companies that artificially limit access to care, in violation of MHPAEA, to combine and control output (See 75 FR 5416; 29 CFR 2590.712 (c)(4)(ii)(A)).
4. *Diminishing Standard of Psychiatric Care.* The exercise of market power against physicians by health plans can occur in ways other than through the imposition of lower reimbursement rates. For example, the development and/or execution of strictly tailored medical necessity criteria, quality initiatives, and admission procedures, among others, could be adversely impacted by the exercise of monopsony power. This is of particular concern to psychiatrists.

Non-price terms and conditions should also be considered in merger analysis because they can result in substantial reductions in quality, efficiency and/or reimbursement below competitive levels. Even if the antitrust agencies believe that physicians may have some ability to resist anticompetitive reductions in reimbursement, it may be that physicians have less or no ability to resist the imposition of anticompetitive terms and conditions following a health plan merger that would adversely affect quality, efficiency and appropriate patient access to stated benefits.¹¹

APA encourages DOJ, state insurance commissioners, state Attorneys General, and Congress to look into the merging parties' treatment of patients with mental illnesses, including substance use disorders, and critically evaluate the adequacy of networks and historical patterns of providing access to mental health care by:

- a) demanding data on claims filed by each psychiatrist listed in the directory;
- b) gathering claims data on out-of-network versus in-network claims paid in mental health as compared to other health care;
- c) comparing the denial rates between mental health and other health claims;

⁹ See, e.g., Tab 3, CBS News, "Denied", a transcript of the CBS News report finding that coverage of Anthem's denial of mental health and substance use disorder claims, which led to early release from hospitals against psychiatrists' recommendations, and subsequent death of patients. For video, see http://www.cbs.com/shows/60_minutes/video/uo_Aa3sp_lwp28lFirqom4Ptr_IdUknq/denied/.

¹⁰ See, e.g., Tabs 4-8, Assurance of Discontinuance Agreements between New York Attorney General and Value Options, Excellus Health Plans, EmblemHealth, MVP Healthcare, and Cigna finding that companies more harshly review and more frequently deny mental health and substance use disorder claims than other medical claims.

¹¹ See, e.g., Tab 9, Examination of Health Care Cost Trends and Cost Drivers, June 30, 2015 (report of Massachusetts Attorney General's Office finding that management of mental health benefits, including through the use of separate Managed Behavioral Health Organization (MBHO), negatively impacts coordination of patient care, data sharing, provider rates and access to care and actually results in increasing the cost of the patient's health care in the long run.)

- d) exploring the basis for discriminatory rates paid to psychiatrists versus other physicians for the same CPT codes and associated impacts on access to care; and
- e) exploring the guideline setting process, instructions, and payment models used by the companies with reviewers.

After a thorough investigation of existing practices, we are confident the relevant authorities will be convinced that the merged entities would be a threat not only to consumer choice and pricing, but also to consumer mental health and well-being. APA is available to discuss any of these issues with you and your staff or provide additional information.

Sincerely,



Renée Binder, M.D.
President



Saul Levin, M.D., M.P.A.
CEO and Medical Director

Enclosures (9)

CC:

Deborah L. Feinstein

Director

Bureau of Competition

Federal Trade Commission