January 11, 2016

Director Shelly Rouillard
California Department of Managed Health Care
980 9th Street, Suite 500
Sacramento, CA 95814-2725

Re: Public Comment for Aetna-Humana Merger before the California Department of Managed Care

Director Rouillard:

Consumer Action, a California based non-profit consumer focused organization, is concerned by the increasing consolidation in the health care industry. Competition within different health care markets that offers ample choice, high quality, and transparency can be vital to ensuring accessible and affordable care to patients. Competition between health insurers is vital to ensuring lower premiums, improving quality of care, and promoting access and choice.

Within that context, Consumer Action offers these comments on the proposed merger of Aetna and Humana. Our comments focus on the issues associated with increased consolidation within health insurance markets and the impact on consumers. Importantly, we believe the Aetna-Humana transaction should not be considered individually. In California, there are three separate health insurance mergers that are all pending before the California Department of Managed Health Care ("DMHC") – Aetna-Humana, Anthem-Cigna, and Centene-Health Net of California.[1] While each merger should be analyzed individually on the merits, a loss of three insurers within the state will further consolidate different insurance product lines throughout California.

We urge the DHMC to carefully review the potential adverse effects of the Aetna-Humana merger and of health insurance consolidation generally. As detailed throughout the comment, ensuring and increasing competition within health insurance markets is critical to improving care and lowering costs.

The below comment will address (1) concentration and the impact of the Aetna-Humana merger, (2) a merger's impact on consumer costs, (3) concerns regarding network adequacy, (4) the unlikeliness of health insurance merger efficiencies, and (5) divestitures and other remedies.

I. Aetna-Humana Merger's Impact on California Insurance Markets

California's insurance markets remain highly concentrated. In 2013, the commercial market had a dominant insurer with a 48 percent market share and only four total insurers with at least a five percent market share.[2] A 2014 report by the United States Government Accountability Office

[1] *See About the DHMC*, California Dep't of Managed Health Care, https://goo.gl/RgQGBh (last visited Jan. 9, 2016).
[2] Individual Insurance Market Competition, KAISER FAMILY FOUND. (2013), http://goo.gl/xiqs7q (last visited Jan. 9, 2016).

found that the three largest commercial insurers for individual, small group, and large group enrolled 84 percent of all Californians.[3] The three mergers of Aetna-Humana, Anthem-Cigna, and Centene-Health Net of California will further exacerbate competition issues within the state.

Both Aetna and Humana offer insurance products in California.[4] While Humana is a smaller player in California offering only Medicare Advantage ("MA") products, Aetna has a larger total market share and offers a range of products. Nationally, the newly formed Aetna will cover 33 million Americans, adding 3.2 million Medicare Advantage ("MA") members making Aetna the largest insurer in MA.[5] In California, according to a report presented to the DHMC, the combination of Aetna and Humana will reduce competition for MA in eight separate counties – Fresno, Kern, Los Angeles, Orange, Riverside, San Bernardino, San Diego, and Ventura.[6]

II. The Merger's Impact on Consumer Costs in California

Studies of past health insurance mergers have documented that mergers harm consumers in higher premiums and reduced service. We are concerned that these proposed mergers would lead to the same harms for consumers in California – i.e. rising costs, higher premiums and out-of-pocket charges. From 2011 to 2016, premiums in the California individual market have gone up on average 8.5 percent per year.[7]

There is little dispute that there is a direct correlation between health insurer concentration and higher premiums.[8] 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."[9] 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. [10] Another study found that the 2008 United-Sierra merger resulted in an additional 13.7 percent premium increase in Nevada.[11] There is also economic evidence that a dominant insurer can increase rates 75 percent

[3] United States Government Accountability Office, *Private Health Insurance: Concentration of Enrollees among Individual, Small Group, and Large Group Insurers from 2010 through 2013* (Dec. 1, 2014), *available at* http://goo.gl/eYS4Ir.
[4] *See generally* National Association of Insurance Commissioners, *2014 Market Share Reports* (2015), *available at* http://goo.gl/1OhhOu.
[5] 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://goo.gl/dktKof.
[6] Cattaneo & Stroud, Inc., *Effect of Proposed California HMO Acquisitions*, presentation to the Financial Standards Solvency Board Meeting, 9 September 2015, slide 13
[7] *See* Katherine B. Wilson, *Individual Health Insurance Premium Growth in California*, CAL HEALTHCARE FOUND. (Nov. 2015), *available at* http://goo.gl/0WD2Ti (for 2016, rates increased by 3.8 percent).
[8] *See* Leemore Dafny, *Are Health Insurances Markets Competitive?*, 100 AM. ECON. REV. 1399 (2010).
[9] David Lazarus, *As Health insurers merge, consumers' premiums are likely to rise*, L.A. TIMES (July 10, 2015 4:00 AM), http://goo.gl/nF7HRS.
[10] *See* Leemore Dafny *et al*., *Paying a Premium on Your Premium? Consolidation in the US Health Insurance Industry*, 102 AM. ECON. REV. 1161 (2012).
[11] Jose 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).

higher than smaller insurers competing in the same state.[12] The insurance mergers could also impact out-of-pocket costs as patients see increases in deductibles or other insurance-related costs.[13]

In contrast, there are no economic studies or evidence indicating that insurance mergers lead to lower prices for consumers. However, that has not prevented the merging companies from suggesting that their mergers will create cost savings which they will pass along to consumers.[14] Much of these supposed savings are attributed to the new merged firm's expected greater buying power, also known as monopsony power. According to proponents of health insurance mergers, a dominant insurer can use monopsony power to lower provider reimbursement rates and pass the savings along to consumers.[15] But, there is no evidence consumers actually receive any of these potential savings. 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."[16] More likely, the now-dominant insurer would exploit its monopsony power to benefit only itself, closing off choices, and pressuring providers to cut corners on quality of care in order to meet its demands – the opposite of what consumers need.[17]

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") "directly limits the level of insurer profits," thus protecting consumers from price increases.[18] While MLR is an important tool that requires health insurers spend 80 to 85 percent of net premiums on medical services and quality improvements, it will not adequately protect consumers from anticompetitive harm. Along with MLR not applying to self-insured plans, and the potential for MLR to be gamed by insurers to reduce consumer welfare, MLR, as health antitrust expert Professor Jamie King has observed, "does not guarantee that dominant insurers will not raise

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[12] Eugene Wang and Grace Gee, *Larger Insurers, Larger Premium Increases: Health insurance issuer competition post-ACA*, TECH. SCI. (Aug. 11, 2015), *available at* http://goo.gl/918ULo.

[13] *See generally* Leemore Dafny, *Evaluating the Impact of Health Insurance Industry Consolidation: Learning from Experience*, COMMONWEALTH FUND (Nov. 20, 2015), http://goo.gl/xRYb5x; *see also* Korin Miller, 6 Ways the Big Health Insurance Mergers Will Affect Your Coverage, YAHOO HEALTH (July 24, 2015), https://goo.gl/qLioCy (noting that "out-of-pocket payments could increase" because insurance coverage could limit certain services or number of visits forcing patients to pay more).

[14] *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://goo.gl/TokebO (noting that the merger will lead to "lower costs.").

[15] *See* Victoria R. Fuchs and Peter V. Lee, *A Health Side of Insurer Mega-Mergers*, WALL ST. J. (Aug. 26, 2015, 6:36 PM), http://goo.gl/hMhuzI.

[16] *See* Thomas Greaney, *Examining Implications of Health Insurance Mergers*, HEALTH AFFS. (July 16, 2015), http://goo.gl/ETT1DB.

[17] *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://goo.gl/ojiyge ("[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").

[18] *E.g.*, Bertolini, *supra* note 14.

premiums and as such, it is not a substitute for the pressures toward lower costs and higher quality created by a competitive market."[19]

III. There are Significant Concerns over Network Adequacy

We urge the DMHC to also consider and evaluate the impact of the Aetna-Humana on provider network adequacy. For many consumers, the networks offered in a plan are as important a consideration as cost. In designing a health insurance provider network, there is a careful balance between cost and provider access. A narrow insurance network is designed to give consumers low-price provider options at the cost of limiting the number of providers offered. Offering the *choice* of narrow network options can be consumer-friendly to cost-sensitive individuals. But, if an insurer can *force* consumers into a narrow network of providers and *eliminate* choice, that can be harmful, leaving consumers with less access and potentially lower quality of care.

Network adequacy is an issue in California. A recent study by the Leonard Davis Institute of Health Economics and the Robert Wood Johnson Foundation found that 75 percent of all individual plans offered in California use narrower networks that only include 25 percent or fewer of all area providers.[20] These adequacy concerns can force consumers to drive great distances to seek medical care. A survey from the American College of Emergency Physicians found that 73 percent of respondents noted that narrow networks have caused disruptions in care.[21] For these reasons, we request that DMHC analyze and consider network adequacy issues in the Aetna-Humana merger.

IV. Health Insurance Merger Efficiencies are Unlikely in California

As a general matter, one potential benefit of mergers is the enhancement of the new company's ability to compete, by strengthening its capacity to bring down price, improve quality, enhance services, or create new products – collectively referred to as "efficiencies."[22]

Aetna and Humana have argued that the merger would create substantial efficiencies leading to improved health care quality and lower costs.[23] But these kinds of efficiencies cannot help justify a merger unless (1) it is really necessary for the insurers to merge to achieve the stated efficiencies, and (2) the stated efficiencies will actually benefit consumers.[24]

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[19] *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* http://goo.gl/Gje3Ci.

[20] Dana Polsky & Janet Weiner, *State Variation in Narrow Networks on the ACA Marketplaces*, LEONARD DAVIS INST. HEALTH ECON. (Aug. 2015), *available at* http://goo.gl/kkCWAT.

[21] *See* Caitlin Bronson, *Insurance commissioners blast narrow health insurance provider networks*, INSURANCE BUS. (Nov. 11, 2015), http://goo.gl/SdqhtN.

[22] U.S. Dep't. of Justice Fed. Trade Comm'n, Horizontal Merger Guidelines at § 6.4 (2010), *available at* https://goo.gl/Hh3dks.

[23] *See* Bertolini, *supra* note 14 (section labeled "Benefits of the Acquisition for Consumers and Providers.").

[24] Horizontal Merger Guidelines, *supra* note 22 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").

According to Aetna, its merger with Humana would create $1.25 billion in "synergy opportunities" and "operating efficiencies."[25] 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.[26]

A more abstract argument raised by the merging insurers is that the mergers will allow them to improve innovation. Innovation in health care delivery is critical. For one thing, there is a need 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. Aetna and Humana have not offered sufficient details or analysis demonstrating how innovation will improve post-mergers. In fact, reviewing their testimony and data, Professor Dafny found their claims speculative at best that the mergers would enhance their ability to develop and implement new value-based payment agreements, noting that there was no evidence that merger would be required in order to carry out such initiatives.[27] Moreover, at a recent conference, Professor Dafny further noted that statistical evidence shows 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.[28]

V. Divestitures and Other Remedies

In other cases, mergers have been approved conditioned on the imposition of certain remedies such as divestitures or additional conduct regulation. Both of these types of remedies have significant limitations and risks that should be evaluated by the DMHC. In evaluating any proposed remedy, it is important to remember that the law requires that a remedy must *restore* the competition that would otherwise be lost, or otherwise prevent the harm that would result.

In nearly every health insurance merger enforcement action during the last two decades, Department of Justice ("DOJ") has relied on the structural remedy of divestiture.[29] Divestitures require that the merging insurance companies spin off subscribers or operations to another, independent insurance company to restore competition. However, the effectiveness of divestiture as a remedy has come under significant questioning. Economic research by Professor

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[25] 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://goo.gl/dktKof.
[26] *See* Section II.
[27] *Health Insurance Industry Consolidation: Hearing before the Sen. Comm. on the Judiciary, Subcomm. on Antitrust, Competition Policy, and Consumer Rights*, 114th Cong. 15 (Sept. 22, 2015) (testimony of Professor Leemore Dafny, Professor Northwestern University), *available at* http://goo.gl/mhExI6.
[28] 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://goo.gl/GNIvVj.
[29] *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).

John Kwoka finds that divestitures often fail to restore competition to the marketplace.[30] Indeed, skepticism regarding divestiture has led DOJ, the Federal Trade Commission ("FTC"), and the courts to reject divestitures as a remedy in other merger enforcement matters. In their reviews of the proposed mergers of Comcast-Time Warner Cable and Sysco-US Foods, the enforcement agencies rejected the divestitures offered as remedies, and instead blocked the mergers. When Sysco pursued its merger anyway, the court agreed with the FTC and enjoined the merger.[31]

Regarding health insurance markets, there is little evidence that the benefits of competition are effectively restored after divestitures. In fact, in the previously cited two 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.[32] Additionally, for any divestiture in these matters 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.[33] With the lack of competition in a number of California markets already, it may be difficult to genuinely preserve the competitive benefits of the pre-merger market structure through divesting subscribers or operations to a competitor.

While the DOJ (and the California Attorney General's Office, using its own antitrust authority) may be considering divestitures, the DMHC is also 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 California Attorney General.

Regulatory remedies also have their shortcomings for effectively protecting competition and consumers against the abuse of market power resulting from a merger.[34] Nevertheless, such remedies could play an important role in limiting harm to consumers and to the health care marketplace. In the event Aetna-Humana merger is permitted to go forward, we recommend the California Department of Managed Health Care consider recommendations made by Consumers Union in their comment to the DHMC on the Aetna-Humana merger.

Conclusion

Consumer Action is troubled by the consolidation within the health industry and its impact on price, access, and quality of care. Mergers between Aetna-Humana, as well as Anthem-Cigna

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[30] John Kwoka, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S POLICY, MIT PRESS (2015).
[31] 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* http://goo.gl/msZq6f; *see also* Press Release, FTC, Following Sysco's Abandonment of Proposed Merger with US Foods, FTC Closes Case (July 1, 2015), *available at* https://goo.gl/XfwPsW.
[32] Dafny, *supra* note 19; Guardado, *supra* note 20.
[33] *See* Greaney, *supra* note 44.
[34] Dep't of Justice, *Antitrust Division Policy Guide to Merger Remedies* (2011), *available at* http://goo.gl/cm0gBI (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.").

and Centene-Health Net of California, could further eliminate health insurance competition in California. While the merging companies have argued supposed benefits associated with these mergers, available scholarly evidence suggests that consumers will see limited to no benefits and instead will face higher costs, less innovation, and potentially lower quality of care.

For these reasons, we strongly urge the California Department of Managed Health Care to use the remainder of the merger review period to carefully analyze this merger. 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

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