

May 31, 2016

The Honorable Pam Bondi  
Office of Attorney General  
State of Florida  
The Capitol PL-01  
Tallahassee, FL 32399-1050

Re: Pending Merger of Aetna with Humana

Dear Attorney General Bondi:

In our letter to you of March 11, 2016, we expressed our thoughts and serious concerns regarding the Florida Office of Insurance Regulation (OIR) Report and Consent Order (Report) issued in its review and approval, subject to certain remedies, of the Aetna/Humana merger. As you recall, OIR found that in numerous commercial insurance markets, the merger would increase market concentrations by amounts that under the 2010 Federal Trade Commission and U.S. Department of Justice Horizontal Merger Guidelines (Horizontal Merger Guidelines) would be either presumed likely to enhance market power or potentially raise significant competitive concerns, particularly in more populous regions. But even more troublesome are OIR's findings of the merger's structural competitive effects in Medicare Advantage (MA) markets. There, the OIR concluded that the Herfindahl–Hirschman Index (HHIs) in five metropolitan statistical areas (MSAs) are now moderately concentrated, *and the remainder are in the highly concentrated range*. Moreover, “when the post-merger HHIs were calculated, only one MSA continued to be considered moderately concentrated. The remaining four that were previously moderately concentrated migrated into the highly concentrated range, in most cases substantially so.”<sup>1</sup> Faced with this structural damage to competition in MA, the OIR devotes many pages to its erroneous conclusion that MA competes directly with Traditional Medicare (TM) such that any small but significant and non-transitory increase in the quality adjusted price of MA demanded by a combined Aetna/Humana would be defeated by the government as a competitor offering TM.

Recognizing the importance of this issue for elderly patients in the need for health care access, quality and affordability, the American Medical Association (AMA) this month asked a prominent health economist, University of California, Santa Barbara Economics Professor H.E. Frech, for guidance on determining the relevant markets in which to assess the likely competitive effects of the Aetna/Humana and Anthem/Cigna mergers (Frech report). Professor Frech's numerous articles and books have focused on health insurance, particularly on issues involving antitrust and regulation. In producing the attached report that addresses the question of whether MA is a market separate and distinct from TM, Professor Frech obtained helpful comments from distinguished health economists, including Wharton Professor Mark Pauly, and University of California (Berkeley) Professor Richard Scheffler. He also consulted with

---

<sup>1</sup> Report at 15.

St. Louis University Law Professor Tim Greaney, a nationally-recognized expert on antitrust and health care.

Professor Frech concludes that seniors are not likely to switch away from MA plans to TM in sufficient numbers to make an anticompetitive Aetna price increase or reduction in quality unprofitable. In MA plans, Medicare pays most or all of the premiums to a private insurer.<sup>2</sup> Most MA plans are health maintenance organizations (HMOs).<sup>3</sup> In return for reduced choice of providers and utilization review, the Medicare beneficiary obtains more complete coverage. A Medicare beneficiary who wants to join an HMO has no other practical choice. TM is a very different type of plan than MA plans.<sup>4</sup> It has no panels and no serious utilization review.<sup>5</sup> Indeed, TM is the only surviving large-scale example of traditional indemnity insurance.<sup>6</sup>

TM provides unrestricted choice of provider, but its benefit design exposes a beneficiary to risk of high out-of-pocket responsibilities. In 2013-14, 16 percent of Medicare beneficiaries faced out-of-pocket responsibilities that exceeded 20 percent of their annual income.<sup>7</sup> Purchase of a private Medicare supplement can reduce the risk of high out-of-pocket responsibilities, but at a fairly high cost.<sup>8</sup> MA insurance, on the other hand, leads to less risk of high out-of-pocket responsibilities. MA plans cover more services than TM and they are required to have an out-of-pocket maximum that limits the risk exposure of beneficiaries. In MA plans, the average out-of-pocket maximum was \$5,014 per year per beneficiary in 2015.<sup>9</sup>

The combination of richer benefits and one stop shopping accounts for the strong preference by many seniors for MA plans. Over the long-term, MA plans are slowly increasing in share, attracting 31 percent of Medicare beneficiaries in 2015.<sup>10</sup> Research is consistent with the idea that beneficiaries treat MA plans as distinctly preferable to TM. Analysis of MA enrollees who were terminated because their plan left the market overwhelmingly (95 percent) actively sought another MA plan.<sup>11</sup>

Professor Frech further observes that MA utilization control for hospitals appears to be quite strict, lending force to the idea that MA and TM are functionally different products.<sup>12</sup> A recent study has found that when MA beneficiaries had to switch to TM, their hospital utilization and costs rose substantially.<sup>13</sup>

Consequently, the closest competition to one MA insurer's plan is another insurer's MA plan and the presence of many competing MA insurers is what keeps quality and price competitive. This conclusion is buttressed by a recent study finding that when Humana offers a MA plan in the same county as Aetna, Aetna's premium is lower than in counties where Humana does not offer a plan.<sup>14</sup> Additional research indicates that where there are fewer MA insurers, premiums are higher, showing that neither TM nor

---

<sup>2</sup> See, Comments of H.E. Frech III PhD, Professor of Economics, University of California, Santa Barbara to the California Department of Insurance (May 19, 2016) (Comments of Professor Frech) at 12. (Exhibit A.)

<sup>3</sup> Id.

<sup>4</sup> Id.

<sup>5</sup> Id.

<sup>6</sup> Id.

<sup>7</sup> Id.

<sup>8</sup> Id.

<sup>9</sup> Id at 12-13.

<sup>10</sup> See, Comments of Prof. Frech at 12

<sup>11</sup> Id. at 13.

<sup>12</sup> Id. at 13.

<sup>13</sup> Id at 13.

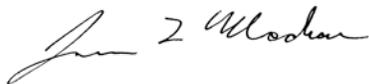
<sup>14</sup> Spiro, Calsyn, O'Toole, "Bigger is not Better: Proposed Insurer Mergers are Likely to Harm Consumers and Taxpayers," Center for American Progress (Jan. 21, 2016)

commercial insurance is a serious constraint on MA pricing, regardless of the number or concentration of other insurers, in that market.<sup>15</sup>

In sum, Aetna and Humana compete for consumers in an MA product market that is separate and distinct from TM. This was the conclusion reached this week by the Missouri Department of Insurance, Financial Institutions and Professional Registration (the department) on Aetna's application to acquire Humana. After considering an exhaustive record that included the comments of consumer and provider groups and the testimony of the merging parties and expert health economists, the department found that MA satisfied all of the practical indicia of a relevant antitrust product market.<sup>16</sup> The department further concluded that an Aetna/Humana merger in the MA markets would violate the competitive standard established under state insurance law. Accordingly, the department ordered that if Aetna merged with Humana, the merged firm could not do business in either the group MA market in Missouri or the individual MA markets in sixty-five Missouri counties, including counties containing large metropolitan areas, such as St. Louis and Kansas City.

On behalf of our physician and medical student members, we once again respectfully request that you block Aetna's proposed acquisition of Humana to preserve competition and to protect Florida's elderly patients and other consumers.

Sincerely,



James L. Madara, MD

Enclosures

cc: Florida Medical Association  
Florida Osteopathic Medical Association

---

<sup>15</sup> See, Comments of Prof. Frech at 13-14.

<sup>16</sup> See Findings of Fact, Conclusions of Law and Order, Missouri Department of Insurance, In Re Division of Insurance Company Regulation v. Aetna Inc. and Humana Inc. (May 24, 2016) (Exhibit B)