

**BY HAND DELIVERY**

July 8, 2016

Attorney General 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:

We are writing to you as Florida consumer organizations urging that you block the merger between Aetna and Humana. We have earlier expressed a number of concerns about the merger to the Office of Insurance Regulation (OIR) and attach our letter to the OIR to this letter. We urge you to read those comments and reiterate all the issues raised in them.

We write now to take exception more specifically to one finding of the Florida Office of Insurance Regulation in its review of the merger. Although the OIR found that the merger would increase concentration in insurance markets, it declined to block the merger in part because “minimum loss ratio requirements effectively limit the ability” of the insurers “to exercise market power. . . .”

The Affordable Care Act required insurers to meet minimum medical loss ratios of 80 percent in the individual and small group market and 85 percent in the large group market. It required the federal Department of Health and Human Services, advised by the National Association of Insurance Commissioners, to establish definitions and methodologies for calculating those ratios. Consumer advocates were actively involved in the NAIC drafting process. We continue to be strong advocates for a vigorous implementation and oversight of MLR requirements, and in fact vigorously urged imposing medical loss ratios on Medicaid managed care insurers as well.

The MLR is not a substitute, however, for vigorous competition in insurance markets. It does not, standing alone, guarantee the protection of consumer interests or an effective constraint of insurer premiums or profits. It should not become an excuse for approving otherwise anticompetitive insurance mergers.

This is true for a number of reasons. First, the ACA’s MLR requirements impose a minimum, not an optimal, floor on insurers expenditures for claims and quality improvement activities. It does not prevent insurers with market power from spending less on claims and taking more in profits than they would have in a competitive market. In fact, average MLRs nationally exceed the MLR minimum requirements. An insurer that spends 85 percent of premiums on claims and quality improvement in a non-

competitive market may have spent 90 percent had the market been competitive—and brought premiums down accordingly.

Second, the MLR does not address the non-price dimensions of insurance coverage. It does not address the responsiveness of consumer services, the adequacy of networks, or the willingness of insurers to innovate in providing better quality coverage to consumers. Competition is necessary to improve these dimensions of coverage.

Third, the ACA's MLR requirements only require insurers to pay a certain percentage of their premium income for claims and quality improvement expenses. It does not in itself address the level of premiums charged by insurers or premium increases. Insurers with sufficient market power can simply raise their premiums, paying higher rates to providers (who may themselves possess market power), but capturing greater profits because they are able to retain the same percentage of a higher level of premium revenue.

Fourth, the medical loss ratio does not protect consumers in all market. Specifically, it does not protect employees of self-funded employers, who constitute the majority of covered employees. Insurers that offer administrative services-only contracts to self-funded employers are not subject to MLR requirements, but if they have market power can charge excessively high rates.

Fifth, MLRs are calculated on the basis of insurer performance across entire states and markets—for example on the basis of an insurer's total performance in a single state in the individual market. Individual plans or policies may have premiums that vary widely from that average. Insurers can offset low MLRs in some local markets with higher MLRs in other local markets. Only vigorous competition in all markets can ensure that premiums are not excessive across markets.

Sixth, the definitions and methodologies used for calculating MLRs under the ACA have exceptions and limitations that can permit excessive premiums in noncompetitive markets. First, since 2014 MLRs have been based on three-year averaging, allowing low MLRs in some years to be offset by higher MLRs in others. Second, insurers, and in particular large national insurers, have significant discretion in allocating their central administrative expenses across their plans. The definitions of "quality improvement activity" expenses that insurers can claim in the numerator of their MLR calculations allow insurers to claim some expenses, prospective utilization review for example, as quality improvement expenses that might be better categorized as administrative expenses. Insurers also have some flexibility to downstream some administrative functions to providers and thus claim these expenses as medical claims.

Finally, we question whether MLR reporting is subject to sufficient oversight to ensure that insurers are complying with all requirements. To date HHS has only reported audit results for eight insurers for one year (2013),<sup>1</sup> and all but one of these audits raised concerns. States also audit medical loss ratios, but the extent to which they do so and the findings of their audits are not readily available to consumers.

For all these reasons we urge you not to rely on federal or state MLR requirements as a substitute for market competition in reviewing insurance company mergers. For all the reasons expressed in our attached letter, we urge you to block the Aetna Humana merger. Emeritus Washington and Lee Law School Professor Timothy Jost, an NAIC consumer representative who worked extensively on the NAIC MLR rule, advised us in drafting this letter and would be pleased to provide further information on the issues it addresses. He can be reached at [jostt@wlu.edu](mailto:jostt@wlu.edu).

Sincerely,

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<sup>1</sup> The audits are available at [https://www.cms.gov/CCIIO/Programs-and-Initiatives/Health-Insurance-Market-Reforms/MLR\\_examinations\\_reports.html](https://www.cms.gov/CCIIO/Programs-and-Initiatives/Health-Insurance-Market-Reforms/MLR_examinations_reports.html)