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to the

California Department of Managed Health Care

on the

Proposed material modification concerning the acquisition of Humana, Inc. by Aetna, Inc.

January 8, 2016

Consumers Union, the public policy and advocacy arm of nonprofit Consumer Reports, is pleased to offer comments on the proposed merger of Aetna and Humana. From our vantage point advocating for California consumers on a number of health access, cost, and quality issues—including health insurance rate setting, network adequacy, and health insurance benefit design—we are keenly attuned to the burden on consumers of the cost of health care and coverage.

In our mission to work for a fair, just, and safe marketplace for all consumers, we have examined proposed mergers in health insurance and other markets to assess whether they threaten to impede the competitive nature of the marketplace, potentially reducing choice as well as affordability, quality, and the incentive to innovate. We, therefore, turn to the Department of Managed Health Care (DMHC) to ensure that when health plans such as Aetna and Humana propose to merge, the sum of the two plans is at least equal to, but ideally better than, what consumers get when the plans stand alone.

In our written testimony below, we evaluate: (1) the potential impact of this proposed merger on the California health insurance market, (2) the impact on health plan quality should the plans merge, and (3) the implications of long-distance management of a California health plan. We close with recommended undertakings to ensure that any proposed merger will be in the best interest of consumers.

I. Impact of the Aetna-Humana Merger on the California Health Insurance Market

Market Background

If finalized, this deal would combine the third- and fourth-largest insurers nationwide by revenue,[i] creating a merged corporation with operating revenue of $115 billion and 33 million health plan enrollees.[ii] It would fold Humana—which has traditionally focused on the Medicare market—into a much more diversified insurance portfolio and potentially confer to Aetna access to Humana's

proprietary care coordination technology and ancillary services. The merger could also disrupt the Medicare market nationally and, according to one analysis, reduce Medicare market competitiveness in eight California counties.[iii] While the benefits of a merger of these two corporations may be evident for the plans themselves, the benefit to consumers is far murkier.

Whether Market Consolidation Translates to Savings for Consumers

Some say that health plan mergers are necessary responses to increased concentration in provider markets. Indeed, in our work on health insurance rate review, we witness a growing chasm between rate increases for northern California versus rate change in southern California[iv], due at least in part to the consolidation of providers in northern California. However, we are not convinced that the antidote to provider consolidation is plan consolidation. Rather, we adopt the view of a leading health antitrust scholar regarding such health plan mergers that there is "little incentive [for an insurer] to pass along the savings to its policyholders."[v] Furthermore, although it is plausible that stronger market power will strengthen health plans' negotiating position with providers, it is also likely that having a high concentration of health insurers, as in other consolidated industries, will result in higher prices. This theory is borne out by experience. As explained by a health economist at USC's Schaeffer School for Health Policy and Economics, "When insurers merge, there's almost always an increase in premiums."[vi] For example, when Aetna and Prudential merged in 1999, premiums rose seven percentage points.[vii] While this example precedes the ACA and its significant impact on the insurer landscape, we believe the outcome is still telling.

A second justification for merging—in addition to stronger negotiating position—is the promise of cost-savings to be passed along to consumers. However, research on the subject reveals a dearth of evidence supporting those assurances. It is, therefore, with skepticism that we approach the recent statement of Aetna's Executive Vice President and CFO, who claimed: "The complementary nature of our two companies provides us with a significant synergy opportunity, furthering Aetna's efforts to increase its operating efficiency. … These cost efficiencies will support our efforts to drive costs out of the system and offer more affordable products."[viii] It may be that plans do achieve savings from combining some aspects of their operations and launching new programs. However, evidence suggests that savings from these programs will be limited to "small pockets of inefficiency."[ix] Beyond that, the savings of "more affordable" products could be attributable to lesser quality, reductions in customer service, or excessively narrow provider networks.

Whether Market Strength May Adversely Influence the Plan's Rate Setting Practices

Aetna has a notably poor track record when it comes to rate setting in California. In fewer than three years, DMHC deemed four Aetna rate requests unreasonable, unsubstantiated, and unjustified. In fact,

in 2015, "[t]wo thirds of the Department's unreasonable premium rate findings have been for Aetna rate increases."[x] DMHC described Aetna's pattern of unreasonable increases as "price gouging in today's market."[xi] Each request impacted over 75,000 members, for a total of in excess of 300,000 affected consumers. Upon finding the most recent rate request by Aetna unjustified, DMHC noted that the Plan "failed to provide the DMHC with timely and adequate documentation that would justify the rate increase."[xii] Despite the Department's objections, Aetna proceeded with each of its "unreasonable" rate increases. Large rate increases by Aetna are not limited to its Knox-Keene products. According to a report issued by the California Healthcare Foundation, Aetna increased individual health insurance premiums for some of its California Department of Insurance (CDI) products at a rate higher than average in 2011, 2012, 2013.[xiii] With increased market power from a merger, it seems highly unlikely that the larger company would improve its responsiveness to regulators or sensitivity to consumer rate burdens.

Recommendation

This proposed merger clearly calls for rigorous regulatory oversight. We urge DMHC to craft undertakings that not only assure that the asserted "efficiencies" are passed to consumers, but also that any cost savings will not be achieved via reductions in the availability or quality of services. We also urge the Department to pursue undertakings that hold Aetna accountable for any unjustified rate increases, to compel the Plan to provide all the required documentation—as defined by state and federal rate review regulations—and to be responsive to regulators throughout the rate setting process.

II. Impact of Aetna-Humana Merger on Incentives to Improve Quality

In addition to the specter of health insurance premiums and other out-of-pocket costs increasing under a consolidated health plan marketplace, Consumers Union is also concerned that greater market power will erode incentives for the newly merged plan to provide high quality health insurance coverage, care and customer service to its members. Concurrently, we question whether the net effect of a company with Aetna's record combining with a plan such as Humana—with high quality scores according to CMS[xiv]—will be negative for consumers.

Aetna's quality ratings and reports gives reason to be concerned.

- According to a recently issued report by the California Office of the Patient Advocate ("OPA"), Aetna PPO policyholders rated the plan the lowest score possible when asked whether they got accurate information on plan costs and claims payment during 2013 and 2014, when they contacted their plan.[xv] Aetna HMO policyholders awarded the lowest score possible to the plan

for the relative ease at which they could get doctor appointments, tests, and treatment during the 2014 plan year. Thus, both information and access to care were deemed problematic.

- Drilling down to specific medical care ratings, both Aetna's PPO and HMO failed to achieve any four-star ratings.[xvi] In fact, its PPO earned only two-stars or below in eight of the ten measures, three of which garnered the plan a single star.[xvii] At least one of those receiving a single star is for diabetes, the seventh leading cause of death in the United States[xviii] and an increasingly prevalent condition that disproportionately affects communities of color.[xix] Another single-star condition affects only women and is the highest volume of all hospitalizations: maternity care.[xx] The HMO fared worse on nearly every measure than the PPO, with all medical care ratings falling to two-stars or fewer.[xxi]

- In a Routine Medical Survey of Aetna Health of California, Inc., a wholly owned subsidiary of Aetna, conducted in 2012, DMHC identified three deficiencies: (1) quality management[xxii], (2) grievances and appeals[xxiii], and (3) utilization management[xxiv]. A year later, the Plan had yet to correct any of the cited deficiencies. Aetna had 14-16 months before DMHC's follow-up review of the Plan.[xxv] Three years after the original report, Aetna still had not resolved all of its deficiencies; the plan continued to fail to address its website's inadequate grievance information.[xxvi] Although the Plan provided to DMHC details of how the website would be improved, DMHC found that "the proposed changes to the Plan's website and grievance form have not been implemented."[xxvii] Further, DMHC noted that "[n]either the public nor the enrollee website allow the enrollee to preview the grievance before submission" and that "the process for an enrollee to submit an online grievance through either the public or the member log-in web portals is not easily accessible."[xxviii]

- DMHC's 2013 Independent Medical Review Results report shows that there were 1.17 independent medical reviews requested for every 10,000 Aetna members—this ratio is in the highest quarter by frequency for all full service plans regulated by DMHC and is the third highest ratio for full service plans regulated by DMHC with over 400,000 enrollees.[xxix] For perspective, Aetna's 1.17/10,000 is more than four-times the rate of LA Care Health Plan, which has a rate of 0.28 per 10,000 members.[xxx] Of the cases reviewed for medical necessity, nearly-half were overturned by IMR, while another nearly-20% were reversed by the Plan.[xxxi] Of the Emergency Room (ER) reimbursements that underwent independent review, another two-thirds were reversed, with 45.8% overturned by IMR and another 20.8% reversed by the Plan.[xxxii]

- In 2014, DMHC fined Aetna $200,000 for its failure to process claims and provider disputes in a timely manner.[xxxiii] The plan was also subject to sixty-five additional enforcement actions between 2010 to 2015, totaling over a half-million dollars in fines. The majority of these enforcement actions related to Aetna's handling of patient grievances and improper conduct related to independent medical review.[xxxiv]

- For both 2013 and 2014, the most common complaints filed with DMHC against Aetna were related to benefits and coverage, raising questions about the overall quality of its products.[xxxv]

Recommendation

We urge DMHC to impose an undertaking on the merger that raises the bar for medical and customer service quality. This may include more consumer-friendly benefits and coverage design,[xxxvi] and enhanced grievance processes, including resolving its remaining deficiency and making it easier for policyholders to understand the availability of and make use of the grievance process.

III. Impact of Long-Distance Management of California-based Health Plans

After closing on this merger, Aetna will headquarter its Medicare, Medicaid, and TRICARE products, along with a number of corporate positions, in Louisville, KY, where Humana was founded and is currently based.[xxxvii] We expect Aetna will continue to operate out of Connecticut with its subsidiaries based in California.[xxxviii]

Aetna's truculence in responding to deficiencies and findings of unreasonable rate requests paint a picture of a corporation that is already poorly responsive to California regulators. The legal requirements in this state are intricate, with extensive consumer protections and a unique regulatory framework of having two regulators as well as an active purchaser Exchange. It is unlikely that the newly formed corporation will undergo a culture transformation and become more sensitive to our state-specific rules and regulations once its market power increases. We therefore urge DMHC to oblige Aetna-Humana to install "local management" comprised of high level executives and regulatory specialists with prior experiences of considerable depth in California insurance regulations and operations. Not only should management be local, but customer service operations should be conducted within the state, and the newly merged Plan should prioritize practices that truly put consumers first.

IV. Recommended Undertakings

If this merger is finalized, consumers need assurances that the newly combined Aetna-Humana corporation will lift up consumer interests and improve their lot—on access, affordability, and quality—rather than leaving consumers carrying the weight of this deal. Some undertakings Consumers Union recommends for your consideration include, but are not limited to:

- Health insurance rates: The merged company should agree to not move forward with rate increases in any market segment that DMHC deems unjustified or that contain inaccurate or

incomplete information. Given the high risk that the bigger merged company will have higher premiums, it should agree to providing even greater detail, publicly available, to aid DMHC in especially close rate review for the first years after the merger. Moreover, it should agree that proposed rate increases will be quantified based on either Aetna or Humana rates for the 2016 plan year (depending on which offered the product in 2016). Aetna-Humana must not be permitted to finalize proposed premium rate increases deemed unreasonable or unjustified by the Department and instead should confer with regulators until a reasonable and justified rate is set. This should apply to all lines of business subject to rate review at the time the rate is filed.

- Quality improvement and cost containment initiatives: Existing state law requires that each plan's rate filing include "any cost containment and quality improvement efforts since the last filing for the same category of health benefits plan. To the extent possible, the plan shall describe any significant new health care cost containment and quality improvement efforts and provide an estimate of potential savings together with an estimated cost or savings for the projection period".[xxxix] That requirement is often honored more in the breach than the observance. Aetna-Humana must be compelled not only to reinvestment profits in quality improvement and cost containment initiatives, but also to provide clear explanations and documentation of those investments, dollar breakdowns, estimated savings, and descriptions of how each directly benefits policyholders.
- Improved quality and consumer satisfaction ratings: Achieving above average quality ratings as measured by NCQA, Covered California, the Right Care Initiative, the Office of Patient Advocate Quality Report Card, and the Medi-Cal Managed Care Health Care Options Consumer Guide, by no later than the performance measurement period ending December 31, 2017, should be a required condition.
- Improved provider directory: Making available to consumers, policyholders and non-policyholders, an accurate provider directory that is easily accessible and regularly updated is essential. The issue of provider directory inaccuracies is a serious one and likely to be exacerbated by a merged company combining IT systems and networks.
- Maintaining presence in the commercial market at least commensurate with Aetna's current participation: The aim of this suggested undertaking is to ensure that competition remains vigorous, both in the number and variety of insurance products offered.
- Adequate, dedicated staffing in California: We urge that high level staff for the newly merged company—Medical Director, Customer Service, and Legal Compliance personnel—be located in California and comprised of individuals with a depth of expertise in our state in order to be responsive to the regulatory and consumer protection environment in California.

- Dedicated staffing for transition issues: Whether due to network shifts, information technology glitches or other operational issues, mergers inevitably have bumps in the road which will affect Aetna-Humana and the newly merged company's customers. Consumers Union recommends that DMHC require dedicated, increased staffing—in California and anywhere else trouble spots in the company may arise and be rectified—such as personnel to craft provider directories, provide customer service, and to ensure that protected health information is continuously secured through the transition and thereafter.

Conclusion

The competitive and relatively stable California commercial health insurance marketplace has historically worked to consumers' advantage. Consolidation in that marketplace—from this and other pending mergers—is worrisome both for marketplace stability, pricing, and access to high quality plans and health care for consumers. We appreciate DMHC holding a public forum on this proposal and the Department's openness to input. If approved, Consumers Union urges your close scrutiny, imposition of undertakings for this deal, and ongoing monitoring for the protection of consumer interests.

Sincerely,

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[i] Wall Street Journal, Justice Department Delays Ruling on Aetna-Humana Merger, 18 Sept 2015. Available at http://www.wsj.com/articles/justice-department-delays-ruling-on-aetna-humana-merger-1442615133.

[ii] Modern Healthcare, *Intensified Price Competition Driving Aetna-Humana Deal*, 7 July 2015. Available at http://www.modernhealthcare.com/article/20150707/NEWS/150709936.

[iii] Those counties are Fresno, Kern, Los Angeles, Orange, Riverside, San Bernadino, San Diego, and Ventura. Cattaneo & Stroud, Inc., *Effect of Proposed California HMO Acquisitions*, presentation to the Financial Standards Solvency Board Meeting, 9 September 2015, slide 13.

[iv] For the 2016 plan year, for example, Covered California reported that the "weighted average increase for Southern California consumers who stay in their current plan is … 1.8 percent, while for consumers in Northern California it is 7 percent. Consumers in Southern California can save an average of nearly 10 percent by moving to a lower-cost plan in the same metal tier, while consumers in Northern California would potentially be able to limit their rate increase to an average of 1 percent if they did the same." Covered California press release, 27 July 2015, available at http://news.coveredca.com/2015/07/covered-california-holds-rate-increases_27.html.

[v] Thomas Greaney, *Examining Implications of Health Insurance Mergers*, Health Affairs, 16 July 2015. Available at http://healthaffairs.org/blog/2015/07/16/examining-implications-of-health-insurance-mergers.

[vi] Erin Trish, researcher at USC's Schaeffer School for Health Policy and Economics, as quoted by David Lazarus, *As Health Insurers Merge, Consumers' Premiums are Likely to Rise*, 10 July 2015. Available at http://www.latimes.com/business/la-fi-lazarus-20150710-column.html.

[vii] Leemore Dafny, Mark Duggan and Subramaniam Ramanarayanan, *Paying a Premium on your Premium? Consolidation in the U.S. Health Insurance Industry*, NBER Working Paper No. 15434, Issued October 2009.

[viii] BusinessWire, *Aetna to Acquire Humana for $37 Billion, Combined Entity to Drive Consumer-Focused, High-Value Health Care*, 3 July 2015. Available at http://www.businesswire.com/news/home/20150702005935/en/Aetna-Acquire-Humana-37-Billion-Combined-Entity.

[ix] Mark Pauly, an expert in the economics of healthcare at the Wharton School of the University of Pennsylvania. Available at http://www.ibtimes.com/aetna-humana-merger-major-insurers-seek-programs-improve-care-reduce-costs-2192875.

[x] DMHC Press Release, 16 July 2015, available at https://www.dmhc.ca.gov/Portals/0/AbouttheDMHC/NewsRoom/2015/pr071615.pdf.

[xi] *Id*.

[xii] *Id.*

[xiii] California HealthCare Foundation, Individual Health Insurance Premium Growth in California, available at http://www.chcf.org/publications/2015/11/individual-premiums-growth-california. In the same timeframe, Aetna increased premiums at a rate below average for three of its smaller products.

[xiv] CMS awarded four stars (out of five) for Humana's Medicare HMO product in California for each of its measurement categories: overall, health plan, and drug plan. www.medicare.gov.

[xv] State of California Office of the Patient Advocate, PPO Quality Ratings Summary 2015-2016 Edition. Available at http://reportcard.opa.ca.gov/rc/pporating.aspx.

[xvi] State of California Office of the Patient Advocate, Aetna PPO 2015-2016 Edition Medical Care Ratings and Aetna HMO 2015-2016 Edition Medical Care Ratings. Available at http://reportcard.opa.ca.gov/rc/profile.aspx?EntityType=PPO&Entity=AETNA_PPO and http://reportcard.opa.ca.gov/rc/profile.aspx?EntityType=HMO&Entity=AETNA.

[xvii] The Aetna PPO earned two stars for *PPO Provides Recommended Care, Asthma and Lung Disease Care, Checking for Cancer, Treating Adults*, and *Treating Children.* The plan earned a single star for *Diabetes Care*, *Heart Care*, and *Maternity Care*.

[xviii] Centers for Disease Control and Prevention. National diabetes fact sheet: national estimates and general information on diabetes and prediabetes in the United States, 2011. Atlanta, GA: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, 2011. Available at http://www.familydocs.org/f/CDC%20Diabetes%20fact%20sheet-2011.pdf.

[xix] *Id*.

[xx] Agency for Healthcare Research and Quality, *Statistical Brief #148: Most Frequent Conditions in U.S. Hospitals, 2010*, January 2013. Available at http://www.hcup-us.ahrq.gov/reports/statbriefs/sb148.pdf.

[xxi] The Aetna HMO earned two stars for *HMO Provides Recommended Care*, *Checking for Cancer*, *Chlamydia Screening*, *Diabetes Care*, *Behavioral and Mental Health Care*, *Treating Adults*, and *Treatment Children*. The plan earned a single star for *Asthma and Lung Disease Care*, *Heart Care*, and *Maternity Care*.

[xxii] Quality management as defined as "The Plan does not consistently ensure that the quality of care provided is being reviewed, that problems are being identified, that effective action is taken to improve care where deficiencies are identified, and that follow-up is planned where indicated."

[xxiii] The grievances and appeals deficiency is described as "The Plan's Internet Web site does not contain adequate grievance information that meets statutory requirements."

[xxiv] The utilization management deficiency is described as "The Plan does not consistently apply criteria or guidelines that are consistent with statutory and regulatory requirements, and clinical principles and processes, in its determination of whether to approve, modify, or deny requests by providers for speech therapy services."

[xxv] DMHC Final Report Routine Medical Survey of Aetna Health of California, Inc., 25 October 213 (issued to plan) 4 November 2013 (issued to public file). Available at https://www.dmhc.ca.gov/desktopmodules/dmhc/medsurveys/surveys/176fs110413.pdf.

[xxvi] DMHC Routine Survey Follow-up Report of Aetna Health of California, Inc., 11 August 2015, at 2. Available at http://www.dmhc.ca.gov/desktopmodules/dmhc/medsurveys/surveys/176fsfu082115.pdf.

[xxvii] *Id*. at 8.

[xxviii] *Id*.

[xxix] California Department of Managed Health Care 2013 Independent Medical review Summary Report. Available at http://www.dmhc.ca.gov/Portals/0/FileAComplaint/DMHCDecisionsAndReports/AnnualComplaintAndIMRDecisions/2013.pdf.

[xxx] *Id.* LA Care Health Plan has the lowest sum total IMR per 10,000 enrollees of the plans in California with in excess of 400,000 enrollees. Kaiser Permanente, with the second lowest ratio, has 0.47 IMR per 10,000 enrollees, less than half that of Aetna.

[xxxi] The breakdown is 28.8% were overturned by IMR and 37.0% were reversed by the plan. California Department of Managed Health Care 2013 Independent Medical review Summary Report. Available at http://www.dmhc.ca.gov/Portals/0/FileAComplaint/DMHCDecisionsAndReports/AnnualComplaintAndIMRDecisions/2013.pdf.

[xxxii] *Id.* The breakdown is 11.1% were overturned by IMR and 55.6% were reversed by the plan. California Department of Managed Health Care 2013 Independent Medical review Summary Report.

[xxxiii] The Department of Managed Health Care, *2014 Annual Report*, at 14. Available at http://dmhc.ca.gov/Portals/0/FileAComplaint/DMHCDecisionsAndReports/AnnualComplaintAndIMRDecisions/2014.pdf.

[xxxiv] Data exported from the DMHC Web Portal: Search Enforcement Actions, available at http://wpso.dmhc.ca.gov/enfactions/actionSearch.aspx.

[xxxv] In 2014, over-half of consumer complaints of Aetna were related to benefits and coverage, according to the Department of Managed Health Care, *2014 Annual Report*, "2014 Complaint Results by Category and Health Plan."

In 2013, complaints related to benefits and coverage was the most frequent complaint against the Plan. DMHC "*2013 Independent Medical Review Summary Report Overview*."

[xxxvi] In 2014, over-half of consumer complaints of Aetna were related to benefits and coverage, according to the Department of Managed Health Care, *2014 Annual Report*, "2014 Complaint Results by Category and Health Plan." In 2013, complaints related to benefits and coverage was the most frequent complaint against the Plan. DMHC *2013 Independent Medical Review Summary Report Overview*.

[xxxvii] BusinessWire, *Aetna to Acquire Humana for $37 Billion, Combined Entity to Drive Consumer-Focused, High-Value Health Care*, 3 July 2015. Available at http://www.businesswire.com/news/home/20150702005935/en/Aetna-Acquire-Humana-37-Billion-Combined-Entity.

[xxxviii] Although Aetna has a local presence in California, those Aetna entities are wholly owned subsidiaries of the larger Aetna corporation, which is based in Hartford, Connecticut.

[xxxix] California Health and Safety Code Section 1385.03(c)(3).