From: Moe Auster
To: Mucchetti, Peter
Subject: CVS Acquisition of Aetna
Date: Tuesday, December 11, 2018 6:00:05 PM
Attachments: CVS-Aetna DFS Hearing Testimony.docx
MSSNY Letter to US DOJ.DOCX

Dear Mr. Mucchetti,

Attached please find comments from the Medical Society of the State of New York relative to the consideration of the purchase of Aetna by CVS Health.

Morris Auster
Medical Society of the State of New York
[redacted]

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TESTIMONY OF CHARLES ROTHBERG, MD
IMMEDIATE PAST PRESIDENT
MEDICAL SOCIETY OF THE STATE OF NEW YORK
at a Hearing of the
NYS DEPARTMENT OF FINANCIAL SERVICES
regarding the
PROPOSED CVS ACQUISITION OF AETNA
October 18, 2018

Good morning. I am Dr. Charles Rothberg. I am a practicing ophthalmologist in Suffolk County and the Immediate Past-President of the Medical Society of the State of New York. I thank you for the opportunity to present testify at this hearing today.

As you know, the physicians of New York State have been sounding the alarm for years about the health care delivery consequences of consolidation in the health insurance industry, including most recently the proposal you are examining today for CVS Health to acquire Aetna. MSSNY has issued several public statements and has written to the NYS DFS and New York Attorney General's office urging that they carefully assess the consumer and health care delivery implications that may arise from the purchase of a behemoth health insurance company by a drug store and PBM giant (Caremark). In addition to publicly raising these concerns, MSSNY has been working with the American Medical Association which had written to the United States Department of Justice expressing strong concerns with this merger.

Obviously, we are disappointed that the DOJ has apparently given its green light for this transaction to move forward.

We wish to thank you for your letter to the Connecticut Insurance Commissioner expressing significant concerns with this proposed acquisition. We appreciate your express recognition of a number of concerns with this transaction that physicians share including that:

- If approved, the proposed transaction "would create an incredibly large market share in the health care market for the combined company, in an already concentrated marketplace, and is likely to increase prices for

members and reduce options for consumers, without any discernable increase in quality."

- CVS minute-clinics "might provide unfair competition to other medical providers and hospitals, which when combined with CVS' proposed ownership of a major health insurer creates significant concerns for consumer choice and cost"; and
- The $40 billion in debt that CVS is taking on to finance the transaction "could affect operating performance", "will create pressure on Aetna to raise premiums or take other actions that negatively impact consumers", and "impacting Aetna policyholders and providers alike".

In addition to the AMA and the California Insurance Department, this transaction has also been opposed by the American Association of Physicians & Surgeons, the American Antitrust Institute and various pharmacy associations.

What are particularly alarming are the continuing comments of CVS officials about their desire to be "the front door to health care". The not so subtle implication of this statement is that they believe they can take the place of the services of the physicians who are the backbone of our health care system. It is imperative that DFS and New York policymakers not let out of state corporate interests marginalize the role of New York's care providers, including physician-led medical homes, community pharmacies and our clinics and hospitals. We would further express concerns the Aetna has rejected the public mission that so many other insurers have accepted by refusing to participate in New York's Health Insurance Exchange, as well as rejecting participation with most other states' Exchanges. While it has been many years, many physicians still have not forgotten that Aetna also dropped hundreds of thousands of insureds from its rolls just prior to the implementation of the ACA.

With the recent approval of the purchase of Express Scripts by Cigna, we are greatly concerned that approval of this transaction will further continue the "arms race" already underway in health care where health insurers and hospital systems compete with each other for who will have greater leverage – often at the expense of patients and their physicians who are simply looking to assure their patients can get the care they need.

As you know, recently, the US Department of Justice together with Attorney Generals across the county successfully brought litigation to block the proposed mega-mergers of Aetna with Humana, and Anthem and Cigna. These mergers would have caused significant market concentration in New York's health insurance market, particularly downstate. We thank the NY Department of Financial Services for their significant role in this outcome by holding a hearing and releasing a report that detailed the adverse market consequences of those

mergers going forward. If these mergers had been permitted to go forward, it could have had a profoundly adverse impact upon the ability of patients to get the care they need, as well as greatly decreasing the ability of the patients' treating physicians and other health care providers to advocate for the care needed by their patients.

While the nature of CVS-Aetna transaction differs of course (vertical vs. horizontal), we believe that the consequences of these proposed acquisitions on our health care system are no less profound. Certainly, previous health insurer mergers have not at all led to the cost savings arising from the supposed efficiencies these entities had espoused would occur, and there certainly is no reason to think it would occur with these proposed acquisitions. Again, we thank you for your public recognition of your skepticism regarding their claims of creating efficiencies.

To our best understanding, CVS already owns over 500 retail stores in New York State, while Caremark is the second largest PBM in the country. Moreover, according to recent AMA letter to DOJ and in testimony to Congress, CVS has the status of being one of the nation's two dominant pharmacy chains in a highly concentrated retail pharmacy market. CVS's share of drug sales in the United States is roughly 25%. Together with Walgreens Company (Walgreens), the two chains control 50% of national drug sales. It was also noted that CVS, Walgreens and Express Scripts together control nearly 60% the specialty pharmacy market share.

Meanwhile, according to a recent AMA Competition in Health Insurance report, Aetna is the fourth largest insurer in New York State, insuring approximately 10% of the commercial health insurance market. Certainly, were this immense transaction to be approved, other similar merger and acquisitions proposals will inevitably follow. As such, we are very concerned that these proposed transactions could exacerbate the already fragile nature of New York's healthcare delivery system in a number of ways. What is particular ironic is the significant limitations placed on physicians through Stark and anti-kickback laws that limit the ability of physicians to have an ownership interest in another aspect of the healthcare system.

Our concerns with this and other acquisitions are on a number of fronts.

Reduced Community Pharmacy Access

First, we are very concerned that these transactions will reduce choice of pharmacy for our patients, as it may become even harder for local pharmacies not affiliated with CVS or Walmart to be incorporated into these merged entities' pharmaceutical networks. As you know, such local pharmacies are often preferred by our patients instead of large chains or mail order pharmacies. If this transaction

is to go forward, it is imperative that the DFS and DOH assure that the merged entity maintain a comprehensive network of neighborhood pharmacies not controlled by CVS, so that our patients have continued access to their preferred community pharmacies, and are not coerced to use mail order if they prefer to obtain these prescriptions in person.

Increased Prior Authorization Hassles

Second, we are very concerned that these combined entities will greatly empower their subsidiary PBMs to impose even more burdensome prior authorization hassles for physicians and their staff that already unduly interfere with patient care delivery. Already, New York physicians spend an inordinate amount of time on receiving prior authorizations. For example, a recent study by Milliman noted that insurers' use of burdensome prior authorization and step therapy requirements for many categories of prescription medications nearly doubled between 2010 and 2015. And a recent *Annals of Internal Medicine* study reported, remarkably, that physicians spend two hours on administrative work for every hour with a patient.

Moreover, a recent AMA study found that 84% of responding physicians said the burdens associated with prior authorization were high or extremely high, and 86% believe burdens associated with prior authorization have increased during the past five years. The survey findings also showed that every week a medical practice completes an average of 29.1 prior authorization requirements per physician, which takes an average of 14.6 hours to process - the equivalent of nearly two business days. It should be noted here as well that, according to a CNN report, Aetna was under investigation in California after a medical director admitted that he deferred to non-physician staff and did not look at medical records prior to making decisions to deny coverage for care.

Adding to our concerns is the fact that PBMs are not regulated by the state of New York despite the enormous involvement these entities have in the development of prescription drug plans including determining which drugs will be "preferred", and which drugs will be placed on higher cost-sharing tiers. These decisions are often based upon the financial deals made with drug manufacturers and wholesalers and do not always lead to cost savings. This was further highlighted by Caremark's tactics with the Ohio Medicaid Managed Care program, which caused the State to cancel all of its contracts with PBMs.

As you know, there was a proposal advanced by the Governor for the 2017-18 NYS State Budget to require PBMs to register with the state of New York. However, that provision was not adopted as part of the final Budget. Moreover, some steps have been taken to regulate their practices including prohibiting pharmacist "gag" clauses but more needs to be done.

Therefore, legislation to regulate PBMs needs to be enacted. Furthermore, if this transaction is to go forward, it is imperative that DFS require that the combined entity takes steps to reduce the already excessive prior authorization burden physicians and patients experience in obtaining needed medications

Reduction in Health Insurer Competition

Third, we are concerned that the accumulation of power across the health insurer and PBM industries will disadvantage New York's several regional health insurance companies - that help to provide some competition against health insurance behemoths United, Anthem and Aetna - by in effect forcing them to purchase drug management services from a PBM whose corporate parent who happens to be a competitor. As a result, we are concerned that this dynamic this could impair the functioning of these smaller insurers, and would further exacerbate the already significant market domination of a just a handful of health insurance plans across New York. Moreover, it would further act as a disincentive for a new health insurers interested in entering the New York market, again reducing the possibility of competition among health insurers and further increasing insurer market concentration.

If this transaction is to go forward, it is imperative that there be extensive oversight to assure that CVS-Caremark is not taking steps that will impair regional health insurer competition by harming these smaller insurers' ability to obtain fair pricing for PBM services.

Marginalization of Physician-Owned Medical Homes

Of perhaps greatest concern, we are concerned that these transactions will place additional pressure to enact legislation to permit corporately owned "retail clinics" - staffed by non-physicians - that would likely drive many more independent physician practices out of business, which in turn will endanger the "medical homes" that these practices provide for many patients across New York State. The Legislature has rejected previous proposals, but this merger could cause additional pressure. The enormous scale of these merged entities could create significant financial incentive for these companies to develop patient cost-sharing structures in a way that incentivizes the use of these corporate-owned clinics at the expense of more traditional care settings such as a physician's office. Certainly, there would be also be significant pressure to have such prescriptions written at such clinics to be filled at the store pharmacy.

Again, we appreciate the DFS recognition in its letter of the unfair competition that these retail clinics could pose against community based physicians and the medical homes they provide.

It is hard to overstate the pivotal role that community primary care physicians play in managing patient health, slowing the progression of disease, and preventing avoidable hospitalizations through the management of chronic conditions such as asthma, diabetes and hypertension. They also help to coordinate patient care through specialty care physician referrals, immunizations, medication reminders, and follow up care. They also are a bridge to family members providing accurate information and advice as needed. However, these patients' medical homes and primary care as a profession – which New York is depending upon to help enhance the development of value-based care - will be placed in great jeopardy if these mergers are permitted to go forward. In effect, such retail clinics will promote the "dis-integration" of care rather than promoting the integration of care which has been the goal of so many.

Regardless of whether or not New York approves this acquisition, we urge that New York State maintain its historical position in opposition to corporate-owned health care delivery. Moreover, if this transaction is to go forward, we believe it is essential that conditions be placed to assure that CVS/Aetna is not taking steps to discourage patients from getting care from local physician medical homes.

AMA Concerns With Proposed Cross-Sector Mergers

In addition to MSSNY's concerns about these mergers, we wanted to be sure you had a chance to review the concerns expressed by the American Medical Association regarding the CVS-Aetna transaction that were submitted to the United States Department of Justice this past August, as well as to the United States House of Representatives Judiciary Committee during a February hearing. Their letter to the DOJ is appended. Specifically, their letter noted that "Unless blocked, this merger would likely injure consumers by raising prices, lowering quality, reducing choice and stifling innovation". Many of the concerns raised by the AMA are similar to concerns raised by DFS in its letter:

- Foreclosure of Aetna health insurer competitors requiring local retail pharmacy networks;
- If CVS were to merge with Aetna, then health plan entrants and Aetna rivals seeking PBM partners would essentially be forced to share sensitive information with insurer competitors
- Foreclosure of Aetna's Health Insurer Competitors Requiring PBM Services and Increasing Barriers to Entry in Health Insurance
- Foreclosure of competition in the specialty pharmacy market
- The PBM Market Is So Conducive to Noncompetitive Performance That the Increased Difficulty of Entry Is Likely to Affect Its Performance; and
- Facilitating Collusion among Three Largest PBM Suppliers as Additional Ramification of Vertical Merger

In addition to the AMA, this acquisition has been opposed by the American Antitrust Institute, noting that:

> "Together with the merger of Express Scripts-Cigna, CVS-Aetna would trigger a fundamental restructuring of the U.S. healthcare system. Stronger incentives to exclude rival PBMs and health insurers and to engage in anticompetitive coordination would harm competition and consumers at all levels. Assuming both mergers move forward, the three large integrated PBM-insurer systems (i.e., CVS-Aetna, Express Scripts-Cigna, and Optum Rx-United Healthcare) that would dominate the markets would have weak, if any, incentives to compete. This stands in stark contrast to the competition that is fostered by standalone rivals. Moreover, entry barriers would increase dramatically, scalable only by those players who could enter and compete effectively at two levels – PBM and health insurance. This would effectively lock out competition by standalone PBMs, insurers, and other market participants – competition that is badly needed to foster innovation, to protect the stability of the healthcare supply chain, and promote the welfare of the U.S. consumer.
>
> Any of the anticompetitive effects discussed in this letter would be detrimental to consumers through potentially higher prices, lower quality, less choice, and less innovation in markets for prescription drugs and health insurance. In healthcare, these effects can make the difference between wellness or disease, and life or death. CVS-Aetna should face a high hurdle in explaining how any claimed efficiencies assuage the significant competitive concerns that pervade their merger. Such efficiencies would have to be achievable only through merger; demonstrated in post-merger operations; passed through to consumers in the form of lower prices; and sufficiently large to offset substantial potential competitive harms. This is a tall order – one that CVS-Aetna cannot fulfill. Moreover, there is little evidence that past vertical acquisitions by CVS, including its acquisition of Caremark, have resulted in significant benefits and have even harmed consumers and independent pharmacies. In light of all of this, the only effective remedy is for the government to move to block the proposed merger."

Conclusion

Thank you again for permitting us the opportunity to testify on this issue.

I will add one final note. Earlier this year there were public comments from the Aetna CEO that his business is presently in the businesses of selling a 'warranty card' - if it breaks (I.e. you get sick) Aetna will indemnify you. He seeks to change the model (by means of this transaction) to focus on health and wellness and to leverage CVS retail presence to do that. I question 1) why he has not done more in the past and why he needs a retailer to promote what he should have been doing all along, and 2) as this is a business proposal, whether promotion of wellness, itself a laudable goal, would at all impact the cost drivers of health care (end of life, chronic disease, pharmacy) at all.

Again, we are extremely concerned about the major consolidation in the health care industry this merger would enable. It is our experience that patient care and physicians' ability to deliver this care are never improved when these

consolidations occur. We again thank DFS for its recognition of concerns with this transaction and urge you to reject this acquisition from going forward in New York. At the very least, it is imperative that there are requirements placed on CVS and Aetna to assure that this enormous combined entity preserves access to our community health care providers.

I am happy to answer any questions you may have.

MEDICAL SOCIETY OF THE STATE OF NEW YORK
EXECUTIVE HEADQUARTERS

December 10, 2018

Peter Mucchetti
Chief, Healthcare and Consumer Products Section
Antitrust Division
United States Department of Justice
450 Fifth Street NW, Suite 4100
Washington, DC 20530

Dear Mr. Mucchetti:

On behalf of the over 20,000 physician, resident and student members of the Medical Society of the State of New York, we are writing to your relative to the US Department of Justice's proposed final judgment permitting the acquisition of Aetna, one of the largest health insurance companies in the country, by CVS, owner of one of the largest pharmacy chains in the country and one of largest Pharmaceutical Benefits Manager (PBM) in the country. As is noted in the attached testimony that the Medical Society of the State of New York delivered at a public hearing held by the New York State Department of Financial Services (NYDFS), we are very concerned about the impact to the healthcare system of the confluence of such enormous corporate behemoths.

As you will note, our concerns with the proposed transaction include: reduced community pharmacy access for our patients; reduced health insurer competition in already concentrated health insurance markets; increased prior authorization hassles that will make it harder for patients to receive needed medications; and marginalization of physician-owned medical homes.

To our best understanding, CVS already owns over 500 retail stores in New York State, while Caremark is the second largest PBM in the country. Moreover, according to recent AMA letter to DOJ and in testimony to Congress, CVS has the status of being one of the nation's two dominant pharmacy chains in a highly concentrated retail pharmacy market. CVS's share of drug sales in the United States is roughly 25%. Together with Walgreens Company (Walgreens), the two chains control 50% of national drug sales. It was also noted that CVS, Walgreens and Express Scripts together control nearly 60% the specialty pharmacy market share.

Physicians are extremely worried about the adverse impact to patient care as a result of the increasing consolidation in the health care industry. The merger of corporate behemoths in health care seldom occurs in a vacuum. It almost always prompts "copycats" to counteract the enormous bargaining leverage the newly merged entity will have. As has been noted by many, the efficiencies that are promoted and marketed to supposedly occur are hardly ever borne out after these transactions are consummated. Inevitably, these mergers create market dynamics that almost always result in further administrative burdens placed on physicians seeking to assure their patients receive the care or medication they need.

The result? An ever-growing number of physicians suffering symptoms of "burnout" due to more and more time being diverted from patient care to focus on over-reaching administrative tasks. And this merger proposal – as well as the proposal of health insurance giant Cigna to purchasing PBM giant Express Scripts - will undoubtedly add to this already overwhelming burden.

Concerns from the American Medical Association

In addition to MSSNY's concerns about these mergers, we re-iterate the concerns articulated by the American Medical Association that were submitted to the DOJ this past August, as well as to the United States House of Representatives Judiciary Committee during a February hearing. Specifically, their letter noted that "Unless blocked, this merger would likely injure consumers by raising prices, lowering quality, reducing choice and stifling innovation". These concerns raised by the AMA included:

- Foreclosure of Aetna health insurer competitors requiring local retail pharmacy networks;
- If CVS were to merge with Aetna, then health plan entrants and Aetna rivals seeking PBM partners would essentially be forced to share sensitive information with insurer competitors
- Foreclosure of Aetna's health insurer competitors requiring PBM services and increasing barriers to entry in health insurance
- Foreclosure of competition in the specialty pharmacy market; and
- The PBM Market is so conducive to noncompetitive performance that the increased difficulty of entry is likely to affect its performance.

Concerns from the New York Department of Financial Services

We further note that, while the proposed acquisition was ultimately approved by the NYDFS with several detailed conditions, NYDFS Superintendent Maria Vullo's opening comments for the October 18 hearing (https://dfs.ny.gov/about/statements/st1810181.htm) were noteworthy about the substantial unease she felt about the transaction given its potential harms to the health insurance market and to patients and providers. In particular, she noted her concerns that "Large corporate for-profit conglomerates do not have a good history of serving the public above their shareholders. And, here, we have independent pharmacists, medical providers, the uninsured, consumers suffering from too high pharmaceutical costs, who may suffer from this transaction. While we want to believe the benefits being advocated, it is important that companies are held to account for the advocacy that we are hearing in favor of this transaction – to ensure that it is not just puffery to get the transaction approved. Regulators, including DFS, must have oversight going forward." Among the specific concerns she identified included:

- The unclear impact regarding how these companies' "efficiency" claims supposedly to be achieved through the merger would actually produce lower premiums or other actual savings to New York consumers;
- The impact on pharmaceutical Costs, given the top three PBMs (including Caremark) control 70% of the business in this highly opaque industry. The consolidation of existing PBMs with insurers would make it increasingly difficult for new, independent companies to enter the PBM market. Moreover, "PBMs lack full transparency and are not directly regulated in New York at the present time".
- The concern that Aetna may create cost-sharing structures, network designs, or other incentives for its insureds to utilize CVS services over those of CVS's competitors, creating greater concentration in the retail pharmacy business, and harming independent pharmacies.
- Wishing to avoid an experience similar to the Equifax or Anthem breach by assuring that consumer data is not shared within the post-acquisition entities for the purpose of increasing CVS's and Aetna's market share and profits, given that this transaction would create an even larger corporate organization in the health care space.
- Because the proposed transaction involves a considerable amount of debt – over $40 billion, the concern that this increased debt may create pressure on Aetna to raise premiums or take other actions that negatively impact consumers.
- The concern that the transaction could cause Aetna to not maintain its current health insurance products, and service networks for its current insureds.

Furthermore, we note Superintendent Vullo's letter to the Connecticut Department of Insurance (https://dfs.ny.gov/about/dfs_cl_09172018_acq_aetna.pdf) which highlighting a number of different concerns with this proposed acquisition, including:

- If approved, the proposed transaction "would create an incredibly large market share in the health care market for the combined company, in an already concentrated marketplace, and is likely to increase prices for members and reduce options for consumers, without any discernable increase in quality."
- CVS minute-clinics "might provide unfair competition to other medical providers and hospitals, which when combined with CVS' proposed ownership of a major health insurer creates significant concerns for consumer choice and cost"; and
- The $40 billion in debt that CVS is taking on to finance the transaction "could affect operating performance", "will create pressure on Aetna to raise premiums or take other actions that negatively impact consumers", and "impacting Aetna policyholders and providers alike".

Finally, it is noteworthy that even in its order approving the transaction with several conditions (https://www.dfs.ny.gov/about/press/CVS_final_signed_decision_and_condition.pdf), the NYDFS noted in multiple instances its concerns with the lack of a business plan to achieve the so-called efficiencies the merged entity claims will occur. On p. 3, it was noted that

> "Neither the applicants not the domestic insurer, in their written or oral testimony, provided any concrete analysis that the CVS/Aetna merger would result in specific reduced costs for New York consumers, or any business plan or study of asserted improved health outcomes to benefit New Yorkers. Likewise, the applicants did not set forth specific actions to be taken by CVS Health or Aetna Inc. post transaction, to accomplish the asserted benefits of this transaction in reducing costs to the New York consumer and improving New Yorkers health outcomes".

On p.7, it was noted that:

> "The Applicants claim that the CVS/Aetna merger will result in operational synergies and that the combined companies will achieve substantial cost-savings. In her testimony at the hearing, the CVS Health witness testified that the CVS/Aetna merger would 'benefit consumers in New York and result in meaningful cost savings and other consumer benefits, and importantly, will inject much needed change and innovation into a broken system'. <u>However, CVS did not provide detail to support these claims. In response to questioning at the Hearing regarding a concrete plan to accomplish the goals the Applicants set forth in support of the Proposed Acquisition of Control, Ms. Ferguson responded 'there isn't one right now."</u>

Comments from the American Antitrust Institute

We further note the comments of the American Antitrust Institute (AAI) after the DOJ gave its preliminary approval of this transaction in October. The AAI noted in its comments "We are disappointed that the DOJ did not address a merged CVS-Aetna's enhanced incentives to use their market positions to disadvantage rival PBMs, independent pharmacies, and rival health insurers. Competition will undoubtedly suffer, as will consumers through higher prices, lower quality, less innovation, and less choice."

Moreover, they noted "Within a short period of time, antitrust enforcers have green-lighted a fundamental restructuring of important segments of the healthcare industry in the U.S….Competition now depends almost entirely on having 'enough' rivalry between integrated PBM-insurers. This 'roll-the-dice' model of competition stands in stark contrast to a model of standalone PBMs competing hard to gain insurers' drug plan business and insurers aggressively seeking out competitive PBM services."

It was further noted that "If ever there were a vertical merger that should have been challenged by antitrust enforcers, this would be it…High levels of concentration in the PBM and insurer markets, demonstrated exclusionary conduct by one of the merging parties, and past enforcement actions involving consolidation in these important markets are all powerful indicators that the deal should have been deemed illegal."

Comments from the New York State Assembly
We would further note the letter to the US DOJ from New York State Assembly Insurance Committee Chair Kevin Cahill following a June Assembly hearing (https://nyassembly.gov/mem/Kevin-A-Cahill/story/83311). His letter asserted "that the loss of competition will result in increased prescription drug prices, harm independent pharmacies and diminish provider choice - all of which significantly hurts New York consumers." In particular, he raised concerns similar to concerns raised by many other organizations:

- Allowing CVS and Aetna to merge creates a conglomerate that will be too difficult to regulate and will likely harm patient care
- CVS and Aetna have failed to prove that the public will actually benefit from the merger; and
- Several public interest concerns have not been adequately addressed including how the companies plan to protect patient information and how drug prices will actually be lowered once the merger significantly decreases market competition

In summary, given the substantial number of varied voices raising strong concerns about the adverse impact to the health care delivery system arising from the joining of these health care behemoths, we urge the US DOJ to revisit its decision to grant approval for this enormous transaction.

Sincerely,

THOMAS MADEJSKI, MD

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