United States v. CVS and Aetna
Questions and Answers for the General Public

The Transaction and the Merging Parties:

1. What is the underlying transaction?

On December 3, 2017, CVS agreed to acquire Aetna for approximately $69 billion.

2. Who are the merging parties?

CVS operates the nation's largest retail pharmacy chain and is the nation's second-largest provider of individual prescription drug plans ("individual PDPs"), with approximately 4.8 million members.

Aetna is the nation's third-largest health-insurance company and fourth-largest individual PDP insurer, with over 2 million PDP members.

The Enforcement Action:

3. What are individual PDPs?

Individual PDPs are prescription drug plans that offer coverage for a set of prescription drugs to beneficiaries enrolled in Original Medicare. There are approximately 21 million individual PDP enrollees in the United States.

The Centers for Medicare and Medicaid Services ("CMS") established 34 Part D regions in the United States, covering the 50 states and the District of Columbia. No Part D region is smaller than a state, and some Part D regions encompass multiple contiguous states.

Beneficiaries can only enroll in individual PDPs offered in the Part D region where they reside.

4. What is the nature of the Division's competition concerns?

CVS and Aetna compete throughout the United States to provide Medicare-eligible beneficiaries with individual PDPs under Medicare's Part D program.

CVS and Aetna are particularly close competitors in 16 geographic regions comprising 22 states: Arkansas, California, Florida, Georgia, Hawaii, Kansas, Louisiana, Mississippi, Missouri, New Mexico, North Carolina, Ohio, Oklahoma, South Carolina, Wisconsin, and the multistate region of Iowa, Minnesota, Montana, Nebraska, North Dakota, South Dakota, and Wyoming.

The merging parties compete to create individual PDPs with better coverage and lower premiums.

By eliminating competition between CVS and Aetna and combining their businesses, the proposed transaction would result in higher prices, less innovation, fewer choices, and lower-quality products for American senior citizens and Americans with disabilities in these regions.

5. In which relevant markets is the merger likely to cause harm?

As originally structured, the proposed acquisition of Aetna by CVS would have substantially lessened competition in the sale of individual PDPs in 16 Part D regions in the United States covering 22 states: Arkansas, California, Florida, Georgia, Hawaii, Kansas, Louisiana, Mississippi, Missouri, New Mexico, North Carolina, Ohio, Oklahoma, South Carolina, Wisconsin, and the multistate region of Iowa, Minnesota, Montana, Nebraska, North Dakota, South Dakota, and Wyoming.

6. When did CVS and Aetna start selling individual PDPs?

Since 2006, CVS has sold its individual PDPs through a wholly-owned subsidiary called SilverScript Insurance Company.

Similarly, Aetna has sold its individual PDPs since 2006.

7. How big is the PDP business for CVS? And for Aetna?

CVS has 4.8 million individual PDP enrollees across the United States. In some Medicare Part D regions, CVS has as many as 500,000 enrollees.

Aetna has almost 2.1 million individual PDP enrollees across the United States. In some Part D regions, Aetna has as many as 200,000 enrollees.

8. What is the low-income subsidy? Why was the Division concerned about it?

The low-income subsidy ("LIS") is a program that helps Medicare beneficiaries with particularly low incomes pay for their drugs. The LIS program is designed to encourage insurers who sell individual PDPs to keep their premiums low.

Because of how the LIS benchmark is set, however, the merger would have given CVS and Aetna the ability and incentive to influence the LIS benchmark, likely leading to price increases in individual PDPs.

9. Why didn't the Division block the merger?

The Division's complaint, in fact, seeks to block the merger based on its extensive investigation, which showed that the merger is likely to lead to anticompetitive effects in individual PDPs—a horizontal overlap between the merging parties. The proposed divestiture resolves the competition concerns in the sale of individual PDPs by requiring Aetna to divest its nationwide individual PDP business to a buyer approved by the United States.

The Division's investigation did not identify other horizontal or vertical competition concerns. Accordingly, the Division did not require a remedy beyond the divestiture of the individual PDP business.

<u>The Remedy</u>:

10. What are the key aspects of the divestiture?

There are three major features of the divestiture:

(1) Aetna must divest assets comprising its nationwide individual PDP business to WellCare, an approved buyer.

- CVS and Aetna compete to provide individual PDPs throughout the United States. The complaint alleges that they are particularly close competitors in 16 Medicare Part D regions covering 22 states.
- A divestiture of the national business is necessary to ensure that WellCare has the same scale and capabilities as Aetna had before the merger.
- The standard for an acceptable divestiture is that it restore competition to pre-merger levels.

(2) Aetna must provide WellCare with the opportunity to hire employees who are currently associated with Aetna's individual PDP business.

- Providing WellCare with access to key Aetna employees will help WellCare utilize the business expertise that has made Aetna an important competitor over the last several years for the benefit of competition.

(3) Aetna must provide WellCare with data related to its individual PDPs, including data related to its contracts with brokers and pharmacies.

- This information will enable WellCare to negotiate with brokers and retail pharmacies on the same footing as Aetna, helping WellCare replicate Aetna's cost structure and "step into Aetna's shoes" post-closing.

11. Why did the Division approve WellCare as an upfront buyer?

Today, WellCare offers individual PDP products in all 34 Medicare Part D regions across the United States.

The divestiture will allow WellCare to enhance its existing individual PDP business by receiving all of the assets that comprise Aetna's individual PDP business such that WellCare will be able to compete vigorously.

The combination of divestiture lives, assets, and experience will allow WellCare to become an even stronger competitor and replicate the competition that the merger would have eliminated.

12. Why does the remedy include national contracts with CMS that go beyond the regions where the Division alleges harm in the complaint?

A nationwide divestiture of the assets comprising Aetna's individual PDP business was required in order to restore competition to pre-merger levels in individual PDPs in the 16 geographic markets identified in the complaint. In particular, it will give WellCare business assets and national scale to enable it to compete more aggressively post-merger.

The Division has a preference for structural remedies that create an effective competitor. The goal of a divestiture is not to simply remove the offending combination; it is to promote and protect competition by preserving the current competitive dynamic in the market. To better replicate the competition that would be lost as a result of the merger, the divestiture needed to include all of Aetna's individual PDP business.

13. Can WellCare be expected to compete aggressively against the combined CVS/Aetna, given that CVS provides pharmacy benefit management services to WellCare?

Yes. Aetna was able to compete aggressively in the individual PDP market while relying on CVS for pharmacy benefit management ("PBM") services. The divestiture will give WellCare additional scale and key assets to grow and improve its ability to compete in the individual PDP market going forward. Like many other companies in the healthcare industry, WellCare uses a PBM to provide some services but controls its business strategy.

14. What is the process for approving the settlement?

Under the Antitrust Procedures and Penalties Act, also known as the Tunney Act, the Division must file the proposed Final Judgment and Competitive Impact Statement in the *Federal Register* and certain newspapers.

The Act allows for a 60-day public comment period. Any person who wishes to comment should do so within 60 days; instructions for doing so can be found in the competitive impact statement filed today in the U.S. District Court for the District of Columbia, and on the Division's website. During the 60-day period, the Division will consider, and at the close of that period respond to, any comments that it has received, and it will publish the comments and the Division's responses in the *Federal Register* or the Division's website.

After the expiration of the sixty-day period, the Division will file with the court the public comments and the Division's responses, and it may ask the court to enter the proposed Final Judgment.

15. Did the Division work with CMS?

The Division worked closely with CMS to understand the industry and to make sure CMS is able to work with CVS, Aetna, and WellCare to complete the divestiture and ensure that the divestiture meets the requirements outlined in CMS's regulations.

Vertical Case:

16. Did the Division investigate whether the vertical integration of CVS and Aetna would reduce competition?

Yes. The Division thoroughly considered whether the merger would raise the cost of (i) CVS/Caremark's PBM services or (ii) retail pharmacy services to Aetna's health insurance rivals.

After a careful analysis, the Division determined that the merger is unlikely to cause CVS to increase costs to Aetna's health insurance rivals due to competition from other PBMs and retail pharmacies.

The evidence also showed that CVS is unlikely to be able to profitably raise its PBM or retail pharmacy costs post-merger because it would lose customers and Aetna would not be able to offset those losses by capturing additional health insurance customers.

Cigna-ESI:

17. Why is the Division suing CVS and Aetna after clearing the Cigna/ESI merger? How are these mergers different? Did the Division look at these mergers together or separately?

We evaluated each transaction on its own merits and analyzed whether either would substantially reduce competition and harm consumers. We also considered the cumulative effect of both transactions.

The CVS/Aetna and Cigna/ESI mergers presented some common issues. For instance, both involved the vertical integration of a PBM with a health insurance company. Our investigation showed that neither merger was likely to substantially reduce competition because of this vertical integration.

An important difference between these mergers, however, is that CVS and Aetna are two of the country's leading sellers of individual PDPs and their merger would likely substantially reduce competition for that product. Cigna and Express Scripts did not have significant horizontal overlaps in the sale of individual PDPs or any other products.