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Via Email: Christopher.Brennan@dobi.nj.gov

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Office of Solvency Regulation
New Jersey Department of Banking and Insurance
20 West State Street
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Re: CVS-AETNA 2018 Hearing

Dear Mr. Brennan,
We urge the Department to reject the acquisition of control of Aetna Health Insurance Company of New York by CVS Health Corporation and CVS Pharmacy, Inc. (together "CVS").

AIDS Healthcare Foundation (AHF) is the largest nonprofit provider of care and treatment to people with HIV and AIDS in the world, serving 1,000,000 patients in 41 countries. In the US, we serve patients nationally, including in New Jersey, through our healthcare centers and pharmacies, and we have Medicaid and Medicare managed care plans in California, Florida, and Georgia.

Representing a special needs population, we are profoundly troubled by the conglomeration of the health care industry, especially when the payors, the pharmacy benefits manager (PBM), and the providers become one and the same. This letter focuses on five concerns: (1) minute clinics, (2) mail order coercion and customer foreclosure, (3) oppressive pharmacy reimbursements, (4) anticompetitive effects in health insurance markets, and (5) confidentiality. We are aware that Aetna is divesting its stand-alone Medicare Part D plans as a condition of approval by the Department of Justice, but that does not mitigate our concerns.

Minute Clinics
The rise of minute clinics, especially within CVS retail establishments, is of particular concern. Minute clinics replace fundamental elements of the patient-physician relationship with cookie cutter treatment administered by non-physicians. This structure takes on another level of compulsion when the insurer has the potential (and bottom line-driven motivation) to coerce a

patient to visit a minute clinic (instead of the patient's personal physician) owned by the company that owns the insurer. In too many cases, the patient is no longer making his or her own decision about which medical provider or type of medical provider to see.

While there are many cases in which receiving services from a minute clinic makes sense, the more the insurer is determining where a patient should go, the closer it gets to financial decisions that are medically inappropriate or even dangerous. Treatment for a person with HIV must be comprehensive and under the watchful eye of the patient's primary care physician/HIV specialist. Even the most routine services are not routine for a person with HIV; a minute clinic delivering a flu shot to a person with HIV is risking the health of a person whose immune system might be vulnerable to a partial live virus vaccine.

Forced Mail Order/Customer Foreclosure

AHF is also concerned about PBMs requiring patients to utilize mail order pharmacy services to obtain medication. It is becoming less and less a choice for many patients, as PBMs either outright mandate use of mail order or make it much more expensive to obtain medications from an independent pharmacy, or make it very difficult for members to opt out of mail order. This is not theoretical. CVS is currently in litigation over the lawfulness of mandated mail order.[1]

For people with HIV, the loss of direct access to a pharmacist complicates a person's treatment regimen. Control of the virus is dependent on rigid adherence to a drug treatment plan and adherence is dependent on routine contact with multiple touch points in the health care delivery system. The pharmacist is one of those key touch points and mail order delivery distances the patient from that touch point. The acquisition of Aetna by CVS will increase CVS's captive population to whom it can force the use of mail order services, thus denying this population the benefits of direct access to a pharmacist.

Even in instances where a combined CVS/Aetna does not mandate mail order, it will have the incentive to shift all Aetna subscribers to CVS pharmacies, thus foreclosing independent pharmacies like AHF from servicing Aetna subscribers. Such foreclosure would have a significant detrimental effect not only on independent pharmacies like AHF but also on pharmacy competition in general. Independent pharmacies will be forced to either raise drug prices or exit the market altogether. Either way, members will suffer.

In short, when the business that controls the insurer and the pharmacy also controls the PBM, there is an increasing risk that mail order delivery becomes obligatory, even for those for whom pharmacist interaction is necessary, and that competing pharmacies will be driven out of networks, to the harm of members with special needs and chronic conditions.

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[1] https://www.law.com/nationallawjournal/2018/02/26/whatleykallas-nonprofit-consumer-group-go-after-cvs-for-mandatory-mail-order-program/

Oppressive Pharmacy Reimbursements

AHF is also concerned about CVS's aggressive tactics in narrowing its networks to exclude small and specialty pharmacies. The merger exacerbates this concern, as a combined CVS/Aetna will be able to use its increased leverage to take anticompetitive measures such as driving down reimbursement rates and dispensing fees to uncompetitive levels. This is already happening. For example, the Arkansas Attorney General is currently investigating a scheme in which CVS Caremark is alleged to be providing unprofitable reimbursement arrangements to independent pharmacies, rendering the pharmacies unable to remain in operation, and then offering to buy out these pharmacies for pennies on the dollar. The Arkansas Attorney General has announced that it is investigating whether such practices are in violation of the state's Deceptive Trade Practices Act and other applicable laws.[2]

AHF and other pharmacies have experienced another form of oppressive reimbursements by CVS in the form of Direct and Indirect Remuneration (DIR) fees, imposed as a "clawback" - that is, a recoupment of reimbursements months after the services were rendered - for supposed failure to meet vague performance standards that do not apply to HIV patients like those served by AHF. Again, the detrimental effects of CVS/Aetna's increased leverage on pharmacy competition and elimination of competition would naturally lead to higher drug prices, to the members' harm.

Anticompetitive Effects in Health Insurance Markets

A combined CVS/Aetna raise significant market concerns. CVS as a PBM would have the power and financial incentive to offer Aetna larger drug rebates or other significant discounts. This would allow CVS/Aetna to lure policyholders away from those insurers to Aetna. AHF is one of those small carriers without an affiliated PBM that would be disadvantaged by this conduct, which would have anticompetitive effects in the health insurance market nationally.

Confidentiality concerns

CVS Health is currently being sued for revealing the HIV-positive status of up to 6,000 Ohioans through a mailing about prescriptions to their homes.[3] This follows a 2017 breach by Aetna that revealed the HIV status of patients across several states, including New Jersey. AHF is concerned that these episodes reflect an overall insensitivity – shared by both parties to the merger – to the special needs of people with HIV and the stigma they still face today.

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[2] https://arkansasag.gov/media-center/news-releases/rutledge-to-investigate-reimbursement-rates-from-cvs-caremark/

[3] https://www.daytondailynews.com/news/local/cvs-accused-revealing-hiv-status-ohioans/ZUo9ItEAQmioHjygGVtiMN/

In sum, allowing one company to control both ends of the service spectrum for a person with HIV interferes with patients' control over their treatment, eliminates choice by reducing competition, and will likely increase prices. For these reasons, AHF has significant concerns about the transaction and respectfully requests that you consider these concerns as you proceed with your review.

Sincerely,

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