

# PUBLICATION

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## Health Insurers Announce Merger Plans; Congress Announces Intention to Review

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In the last few months, several of the largest commercial health insurers in the nation have announced their intentions to merge. First, Aetna (currently the nation's third largest health insurer by revenue) announced its intention to combine with Humana (the fourth largest) in a deal reportedly valued at more than \$35 billion. Shortly thereafter, Anthem (the second largest) announced a merger with Cigna (the fifth largest) in a \$54 billion deal. If these transactions are consummated, the current "big five" national health insurers will become a new "big three" (with United Healthcare, currently the nation's largest health insurer, being the third).

Given the size and scope of these mergers, federal and state antitrust regulators can be expected to review these proposed transactions carefully to assess the competitive implications of the deals. As has been the case in prior health insurer transactions (Wellpoint/Anthem, Aetna/Prudential, etc.), the regulators are likely to focus on overlaps in service by the merging parties both geographically and with respect to the insurance products they offer (large and small group products, individual products, Medicare Advantage products, etc.) At the same time, state insurance departments will also be reviewing the transactions for non-antitrust issues. For all of these reasons, it is not surprising that the parties have announced that they don't anticipate being able to close the deals until sometime in 2016.

As expected, the merging parties followed the announcement of the deals with statements explaining how the combinations would enhance competition and benefit consumers. Cigna CEO David Cordani, for example, stated to the national media that – referring to Cigna's deal with Anthem – the transaction should be approved because the two companies are "largely complementary" in their scope of operations and that the combined entity will be "focused on partnering with physicians and individuals to improve health quality and improve health costs." Cordani also stated that, as a result of the Affordable Care Act, "the market works differently than it did a half-dozen years ago," and that many employers now operate with self-funded plans, rather than insurer-funded plans, adding greater "transparency" to the process. On the other hand, both the American Hospital Association and the American Medical Association denounced the mergers, with AMA President Steven Stack expressing the view that "the recently proposed mergers threaten to increase health insurer concentration, reduce competition and decrease choice."

Ultimately, the Department of Justice (DOJ) Antitrust Division will be reaching its own conclusions on the potential competitive implications of the proposed deals. And, in circumstances where the DOJ (and/or state antitrust enforcers) believe that the transactions present significant anticompetitive concerns, they are likely to engage in extended discussions with the insurers on these issues before approving them to proceed. Typically, if the merging parties cannot persuade the regulators that their concerns are misplaced, the parties will be asked to commit to the divestiture of some assets to obtain regulatory approval. For example, when Anthem acquired Amerigroup in 2013, Anthem agreed to divest Amerigroup's Northern Virginia Medicaid operations to gain regulatory approval from the DOJ. Where divestitures are not possible, or agreeable to the merging parties, the potential results include litigation in federal court or the parties' abandonment of the deal. Notably, however, given that the parties' agreements reportedly included hefty "busted deal" payments by the buyer to the seller if the deal can't be consummated, it appears – at least at this point – that the insurers are confident that the deals will ultimately be consummated, in some form or fashion.

Given the importance of health care to the U.S. economy, it was not surprising that within weeks of the announcement of the deals both House and Senate representatives announced their intentions to hold hearings on the proposed deals. On July 31, Senators Mike Lee (R-UT) and Amy Klobuchar (D-MN) announced that the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights would hold a hearing to consider the mergers on September 22, and invited the CEOs of the merging parties to testify before them at the hearing. House Judiciary Committee Chairman Bob Goodlatte (R-VA) also announced that a hearing would be held on the mergers by the House, indicating that the mergers would be addressed in the second of a series of four hearings on health care scheduled for later this year. The dates for those hearings have not yet been announced.

While Congress plays no formal role in the antitrust approval process, its ability to draw attention to the issues raised by the mergers and to compel testimony from the merging parties ensures that these mergers will be the subject of significant attention over the next few months. Stay tuned.