

# PUBLICATION

---

## Congress Takes Long Look at Proposed Health Insurance Mergers

November 2, 2015

While the Department of Justice Antitrust Division is responsible for reviewing the proposed Anthem/Cigna and Aetna/Humana mergers for any potential competitive concerns, Congress jumped into the process with both feet in September, holding no less than three hearings focused on the mergers. Whether these hearings will ultimately influence the DOJ's views of the mergers, which would transform the current "big five" national health insurers into a "big three" – with United Healthcare being the other insurer – remains to be seen; at a minimum, however, the hearings provided an opportunity for both the merging parties and those opposed to the deals to make their views known to Congress and the public.

The first hearing was held September 10, by the House Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law, and was ostensibly intended to cover a wide range of health care antitrust issues, not just the proposed mergers. However, the focus of the hearing quickly changed, as representatives of the American Hospital Association (AHA) and the American Medical Association (AMA) seized the opportunity to express their views of the insurance deals. Summarizing arguments the AHA and AMA had advanced in detailed written submissions made to the committee members earlier in September, AHA CEO Richard Pollock stated that the AHA had "serious concerns" about the deals. With respect to the Anthem deal, Pollock contended that the deal "threatens to reduce competition in markets serving 45 million consumers," and claimed that the Aetna deal would "further concentrate Medicare Advantage markets that are already suffering from a lack of competitive alternatives." A representative of AHIP (America's Health Insurance Plans), who also testified at the hearing, challenged those views, but it quickly became clear that Congress would want to hear from the merging parties themselves, and the second and third hearings provided just that opportunity.

Accordingly, when the second hearing was conducted (by the Senate Judiciary Committee's Subcommittee on Antitrust, Competitive Policy and Consumer Rights) on September 22, the witnesses included Aetna Chairman Mark Bertolini and Anthem CEO Joseph Swedish. Richard Pollack, from the AHA, also returned to express the AHA's views to the Senate subcommittee members. Opening the hearing, Senator Grassley, who chairs the Judiciary Committee, stated that he would be "listening carefully to learn how these transactions will benefit ordinary, hard-working Americans," and Ranking Member Senator Leahy made clear that the Judiciary Committee's "efforts augment the detailed review that will be taken by the antitrust authorities."

First up was the Aetna Chairman, Mark Bertolini, to address the competitive implications of the proposed Aetna/Humana deal. Responding to claims that the deal would leave Aetna with market power in the Medicare Advantage market, Bertolini contended that only 8 percent of all Medicare beneficiaries would get coverage from a combined Aetna/Humana, given that two out of three seniors continue to receive their benefits through the traditional fee-for-service Medicare plan. Similarly, Anthem's CEO disputed the claims that the Anthem/Cigna deal would have anticompetitive effects, stating that "every service [Anthem] provides distills down to a local arrangement," and that the transaction would "uniquely benefit consumers" by expanding access to care and generating significant cost savings and synergies at local levels. In addition, in response to a statement from Senator Richard Blumenthal (D-CT) about perceived "barriers to entry" in insurance markets, both witnesses pointed to Oscar Health Insurance Corp., a start-up health insurer in New York that has attracted 40,000 members in that state, had recently announced plans to expand to California, and had also recently gained a significant financial investment from Google.

Perhaps not surprisingly, Bertolini and Swedish were subsequently called back for a return engagement, this time before the House subcommittee that had considered the mergers without them on September 10. In a hearing on September 29, the Aetna and Anthem executives largely repeated the claims that they had made a week earlier to the Senate subcommittee members, focusing on the potential benefits of the transactions for consumers.

Since the hearings, the DOJ Antitrust Division has not provided any further information regarding the status of its review, and the merging parties themselves have announced that they don't anticipate regulatory approval until sometime in 2016. However, on October 20, Aetna and Humana announced that their shareholders had "overwhelmingly" approved the proposed transaction. With this development, it is likely that all parties have settled in for a long review of the transaction. Stay tuned.