

September 8, 2016

Mark T. Bertolini  
Chairman & CEO  
Aetna  
151 Farmington Avenue  
Hartford, CT 06156

Dear Mr. Bertolini:

We are writing with regard to Aetna's August 2016 announcement that the company will withdraw from Affordable Care Act (ACA) public exchanges in 11 of the 15 states in which it currently operates.<sup>1</sup> Over 11 million individuals and families across the country receive health coverage through plans sold on ACA exchanges.<sup>2</sup> We are particularly troubled that Aetna's decision to leave the ACA exchanges appears to have been motivated by the Justice Department's decision to challenge Aetna's proposed \$37 billion merger with Humana<sup>3</sup>—a deal that the Justice Department and many experts predicted would harm competition in the health insurance market and negatively impact the cost and quality of health care.

Aetna could not have been surprised at the concerns raised by regulators about this merger. Before Aetna announced that it had entered into a definitive agreement to purchase Humana, analysts and experts publicly commented that the deal would face close scrutiny by the Justice Department.<sup>4</sup> Following the announcement, analysts described the deal as a “huge bet” that would face extensive “scrutiny from antitrust regulators.”<sup>5</sup> For Aetna, the deal would be “the largest transaction in the company's history.”<sup>6</sup> Such scrutiny was widely anticipated because

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<sup>1</sup> News Release, *Aetna to Narrow Individual Public Exchange Participation* (Aug. 15, 2016), available at <https://news.aetna.com/news-releases/aetna-to-narrow-individual-public-exchange-participation/>; Tami Luhby, *Aetna to pull out of most Obamacare exchanges*, CNN Money, August 16, 2016, available at <http://money.cnn.com/2016/08/15/news/economy/aetna-obamacare/>.

<sup>2</sup> U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, *ASPE Issue Brief: Health Insurance Marketplaces 2016 Open Enrollment Period: January Enrollment Report*, January 7, 2016, available at <https://aspe.hhs.gov/sites/default/files/pdf/167981/MarketPlaceEnrollJan2016.pdf>.

<sup>3</sup> News Release, *Aetna to Acquire Humana for \$37 Billion, Combined Entity to Drive Consumer-Focused, High-Value Health Care*, July 3, 2015, available at <https://news.aetna.com/2015/08/aetna-to-acquire-humana/>.

<sup>4</sup> Brent Kendall and Anna Wilde Mathews, *DOJ Girds for Strict Review of Any Health-Insurer Mergers*, Wall Street Journal, Jun. 28, 2015, available at <http://www.wsj.com/articles/doj-girds-for-strict-scrutiny-of-health-insurer-mergers-1435524588>.

<sup>5</sup> Liz Hoffman, Dana Mattioli, and Anna Wilde Mathews, *Aetna Agrees to Buy Humana for \$34.1 Billion*, Wall Street Journal, July 3, 2015, available at <http://www.wsj.com/articles/aetna-nears-deal-to-buy-humana-1435883861>.

<sup>6</sup> Aetna (AET) Mark T. Bertolini on Q4 2015 Results - Earnings Call Transcript (Feb. 4, 2016).

antitrust laws prohibit mergers that substantially lessen competition<sup>7</sup>—and decreased consumer choice, decreased quality of care, and skyrocketing consumer costs were all identified as potential consequences of approval.<sup>8</sup> Analysts cited the Medicare Advantage market as a particular concern. Humana boasts the nation’s second largest Medicare Advantage membership, and Aetna is one of Humana’s top competitors.<sup>9</sup> The Justice Department concluded that a merger of these two competitors would result in less competition in this important and growing market.

Despite the risk that the merger would not be approved, Aetna agreed to pay Humana a break-up fee of \$1 billion in the event that the acquisition was not completed by December 31, 2016.<sup>10</sup> These fees are not unusual in merger agreements, and they are frequently offered to insure against the risk that the deal may fall through for regulatory reasons and to make certain that the buyer takes the risks seriously.<sup>11</sup> But the inclusion of this \$1 billion fee now appears to be an expensive and risky bet on a highly uncertain outcome, an outcome with consequences that could limit competition in the marketplace and have a negative impact on consumer choice in the states affected by this change.

Moreover, until the Justice Department indicated that it might challenge the merger, Aetna had repeatedly expressed its commitment to remaining in the public exchanges, and it had even discussed the possibility of expanding its ACA exchange footprint to more states in 2017.<sup>12</sup> In October 2015, you personally told investors that Aetna’s ACA exchange business comprised a

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<sup>7</sup> 15 U.S.C. § 18.

<sup>8</sup> Leemore Dafny, *Health Insurance Industry Consolidation: What Do We Know From the Past, Is It Relevant in Light of the ACA, and What Should We Ask?*, Testimony before the Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy, and Consumer Rights, “” Sep. 22, 2015, available at <https://www.judiciary.senate.gov/imo/media/doc/09-22-15%20Dafny%20Testimony%20Updated.pdf>; Robert Pear, *Doctors’ Association Sees harm in Insurance Mergers*, New York Times, Sept. 8, 2015, available at <http://www.nytimes.com/2015/09/08/business/doctors-association-sees-harm-in-insurance-mergers.html?ref=business>; Leslie Small, *AHA16: Experts say insurer mergers bad for providers, consumers*, FierceHealthcare, May 3, 2016, available at <http://www.fiercehealthcare.com/payer/aha16-experts-say-insurer-mergers-bad-for-providers-consumers>.

<sup>9</sup> Complaint at 8, *U.S. v. Aetna* (D.C. Cir. July 21, 2016), available at <https://www.justice.gov/opa/file/877881/download> (hereinafter “Complaint”).

<sup>10</sup> See Aetna, 2015 Aetna Annual Report, Financial Report to Shareholders (Form 10-K), at 45, available at <http://www.aetna.com/investors-aetna/assets/documents/2016-annual-meeting/2015-aetna-annual-report-financial-report.pdf>; Complaint. at 7.

<sup>11</sup> Afra Afsharipour, *Transforming the Allocation of Deal Risk Through Reverse Termination Fees*, 63 Vand. L. Rev. 1161, 1180-81, 1194-95 (2010), available at <http://www.axial.net/wp-content/uploads/2013/11/Transforming-the-Allocation-of-Deal-Risk-Through-Reverse-Termination-Fees.pdf>.

<sup>12</sup> Anna Wilde Mathews and Stephanie Armour, *Aetna Not Withdrawing From Any Health-Law Insurance-Exchange States*, Wall Street Journal, May 11, 2016, available at <http://www.wsj.com/articles/aetna-not-withdrawing-from-any-health-law-insurance-exchange-states-1462994266>.

fraction of its operating revenue and presented an “opportunity to play.”<sup>13</sup> Aetna continued making similarly supportive statements this year. In an April 2016 call with investors, you said that Aetna’s exchange business was a “good investment,” adding that the company was dedicated to “working constructively with the administration and lawmakers” to ensure the long-term future of the program.<sup>14</sup> Aetna executives also explained that the demographics of the company’s new on-exchange membership “look[ed] very similar” to its previous membership, and that it was seeing growth primarily in markets where Aetna had “a very good cost structure,” including Florida, Georgia, and North Carolina.<sup>15</sup> The following month, Aetna spokesman T.J. Crawford said that Aetna planned to continue selling plans on the ACA exchanges in all 15 states where it currently operated, and noted that it might expand its exchange business into additional states in 2017.<sup>16</sup> In none of these statements did Aetna indicate that its continued participation in the exchanges was contingent upon federal government approval of its merger with Humana.

But as the Justice Department began to raise questions about the merger, Aetna changed its tune. In a July 5, 2016, letter to the Justice Department, Aetna expressly conditioned its continued participation in the public exchanges on the Justice Department’s approval of its merger with Humana, stating that a challenge to or successful blockage of its acquisition “would impair Aetna’s ability to continue its support” for the public exchanges.<sup>17</sup> Aetna specified that if the federal government challenged or stopped the merger, Aetna would “immediately take action to reduce [its] 2017 exchange footprint” and would withdraw from at least five states. If, however, the deal were approved, Aetna wrote that it would explore ways to increase its support for the public exchanges.<sup>18</sup>

Aetna’s decision regarding its participation in the ACA exchanges appears to be an effort to pressure the Justice Department into approving a merger that the Department has alleged violates antitrust law and has the potential to significantly harm consumers all across the country.

The July 5, 2016 letter described the main reason why Aetna would suddenly pull back its participation in the ACA exchanges:

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<sup>13</sup> Aetna Q3 2015 Results - Earnings Call Transcript (Oct. 29, 2015).

<sup>14</sup> Aetna Q1 2016 Results - Earnings Call Transcript (Apr. 29, 2016).

<sup>15</sup> *Id.*

<sup>16</sup> Anna Wilde Mathews and Stephanie Armour, *Aetna Not Withdrawing From Any Health-Law Insurance-Exchange States*, Wall Street Journal, May 11, 2016, available at <http://www.wsj.com/articles/aetna-not-withdrawing-from-any-health-law-insurance-exchange-states-1462994266>.

<sup>17</sup> Letter from Mark T. Bertolini, Chairman & CEO, Aetna, to Ryan M. Kantor, Assistant Chief, Litigation I Section, Department of Justice Antitrust Division (July 5, 2016), available at <http://big.assets.huffingtonpost.com/AetnaDOJletter.pdf>.

<sup>18</sup> *Id.*

Should the deal be blocked the challenges will be exacerbated as we are facing significant unrecoverable costs including carrying costs of the debt required to finance the deal . . . significant unrecoverable transaction and integration costs . . . plus a . . . breakup fee and . . . litigation expenses if the DOJ sues to enjoin the transaction.<sup>19</sup>

Aetna's letter delivers a clear message: The costs it incurred in its pursuit of this merger—including carrying costs and break-up fees in the event the merger was blocked or delayed—were so extraordinary that, unless the merger were quickly approved, the company would be forced to withdraw from public exchanges. Aetna's letter describes a dangerous and irresponsible bet that the Justice Department would not block the deal because Aetna had structured the deal in a way that would cause significant damage to itself and, by extension, to the public exchanges, if it was blocked.

Because the risks of the merger were obvious from the beginning, these actions are both inexplicable and irresponsible. You now must answer both to your shareholders and to the thousands of Americans who trusted Aetna with their health coverage.

In order to better understand Aetna's questionable decisions, we request that you please answer the following questions:

- What exact costs will Aetna incur now that the Justice Department has challenged the merger? What costs will Aetna incur if the merger is ultimately blocked?
- Why did Aetna agree to a deal that included a \$1 billion break-up fee? When the company agreed to this condition, did Aetna conduct an internal assessment of the risk of a DOJ challenge? When Aetna agreed to pay this fee, was Aetna aware that it would endanger participation in the ACA exchanges?
- What steps did Aetna take, prior to July 2016, to mitigate the risk that the Justice Department would challenge or successfully block its proposed acquisition of Humana?
- When did Aetna first determine that its participation in the public exchanges would be contingent upon federal government approval of its proposed acquisition of Humana?
- When did Aetna first inform investors that its participation in the public exchanges would be contingent upon federal government approval of its proposed acquisition of Humana? What other risks did the company disclose to investors?
- What criteria did Aetna use in determining the states from which to withdraw in 2016?
- During Aetna's April 29, 2016, Q1 2016 earnings call, Aetna said that it had a "very good cost structure" in states in which it had experienced growth in its ACA exchange population, including Florida, Georgia, and North Carolina.<sup>20</sup> Why is Aetna withdrawing

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<sup>19</sup> *Id.*

<sup>20</sup> Aetna Q1 2016 Results - Earnings Call Transcript (Apr. 29, 2016).

from states in which it had a “very good cost structure” or where Aetna has performed well in the past?

- How many enrollees have contacted Aetna over its decision to withdraw from the ACA exchanges? What materials and resources is Aetna making available to assist consumers in selecting new health insurance coverage?

Please provide responses on or before September 15, 2016. Thank you in advance for your immediate attention to this request.

Sincerely,

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Elizabeth Warren  
United States Senator

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Bernard Sanders  
United States Senator

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Edward J. Markey  
United States Senator

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Sherrod Brown  
United States Senator

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Bill Nelson  
United States Senator