December 10, 2018

Peter Mucchetti
Chief, Healthcare and Consumer Products Section
Antitrust Division
United States Department of Justice
450 Fifth Street NW, Suite 4100
Washington, DC 20530

Dear Mr. Mucchetti:

On behalf of the over 20,000 physician, resident and student members of the Medical Society of the State of New York, we are writing to your relative to the US Department of Justice’s proposed final judgment permitting the acquisition of Aetna, one of the largest health insurance companies in the country, by CVS, owner of one of the largest pharmacy chains in the country and one of largest Pharmaceutical Benefits Manager (PBM) in the country. As is noted in the attached testimony that the Medical Society of the State of New York delivered at a public hearing held by the New York State Department of Financial Services (NYDFS), we are very concerned about the impact to the healthcare system of the confluence of such enormous corporate behemoths.

As you will note, our concerns with the proposed transaction include: reduced community pharmacy access for our patients; reduced health insurer competition in already concentrated health insurance markets; increased prior authorization hassles that will make it harder for patients to receive needed medications; and marginalization of physician-owned medical homes.

To our best understanding, CVS already owns over 500 retail stores in New York State, while Caremark is the second largest PBM in the country. Moreover, according to recent AMA letter to DOJ and in testimony to Congress, CVS has the status of being one of the nation’s two dominant pharmacy chains in a highly concentrated retail pharmacy market. CVS’s share of drug sales in the United States is roughly 25%. Together with Walgreens Company (Walgreens), the two chains control 50% of national drug sales. It was also noted that CVS, Walgreens and Express Scripts together control nearly 60% the specialty pharmacy market share.

Physicians are extremely worried about the adverse impact to patient care as a result of the increasing consolidation in the health care industry. The merger of corporate behemoths in health care seldom occurs in a vacuum. It almost always prompts “copycats” to counteract the enormous bargaining leverage the newly merged entity will have. As has been noted by many, the efficiencies that are promoted and marketed to supposedly occur are hardly ever borne out after these transactions are consummated. Inevitably, these mergers create market dynamics that almost always result in further administrative burdens placed on physicians seeking to assure their patients receive the care or medication they need.
The result? An ever-growing number of physicians suffering symptoms of “burnout” due to more and more time being diverted from patient care to focus on over-reaching administrative tasks. And this merger proposal – as well as the proposal of health insurance giant Cigna to purchasing PBM giant Express Scripts - will undoubtedly add to this already overwhelming burden.

**Concerns from the American Medical Association**

In addition to MSSNY’s concerns about these mergers, we re-iterate the concerns articulated by the American Medical Association that were submitted to the DOJ this past August, as well as to the United States House of Representatives Judiciary Committee during a February hearing. Specifically, their letter noted that “Unless blocked, this merger would likely injure consumers by raising prices, lowering quality, reducing choice and stifling innovation”. These concerns raised by the AMA included:

- Foreclosure of Aetna health insurer competitors requiring local retail pharmacy networks;
- If CVS were to merge with Aetna, then health plan entrants and Aetna rivals seeking PBM partners would essentially be forced to share sensitive information with insurer competitors
- Foreclosure of Aetna’s health insurer competitors requiring PBM services and increasing barriers to entry in health insurance
- Foreclosure of competition in the specialty pharmacy market; and
- The PBM Market is so conducive to noncompetitive performance that the increased difficulty of entry is likely to affect its performance.

**Concerns from the New York Department of Financial Services**

We further note that, while the proposed acquisition was ultimately approved by the NYDFS with several detailed conditions, NYDFS Superintendent Maria Vullo’s opening comments for the October 18 hearing (https://dfs.ny.gov/about/statements/st1810181.htm) were noteworthy about the substantial unease she felt about the transaction given its potential harms to the health insurance market and to patients and providers. In particular, she noted her concerns that “Large corporate for-profit conglomerates do not have a good history of serving the public above their shareholders. And, here, we have independent pharmacists, medical providers, the uninsured, consumers suffering from too high pharmaceutical costs, who may suffer from this transaction. While we want to believe the benefits being advocated, it is important that companies are held to account for the advocacy that we are hearing in favor of this transaction – to ensure that it is not just puffery to get the transaction approved. Regulators, including DFS, must have oversight going forward.” Among the specific concerns she identified included:

- The unclear impact regarding how these companies’ “efficiency” claims supposedly to be achieved through the merger would actually produce lower premiums or other actual savings to New York consumers;
- The impact on pharmaceutical Costs, given the top three PBMs (including Caremark) control 70% of the business in this highly opaque industry. The consolidation of existing PBMs with insurers would make it increasingly difficult for new, independent companies to enter the PBM market. Moreover, “PBMs lack full transparency and are not directly regulated in New York at the present time”.
- The concern that Aetna may create cost-sharing structures, network designs, or other incentives for its insureds to utilize CVS services over those of CVS’s competitors, creating greater concentration in the retail pharmacy business, and harming independent pharmacies.
- Wishing to avoid an experience similar to the Equifax or Anthem breach by assuring that consumer data is not shared within the post-acquisition entities for the purpose of increasing CVS’s and Aetna’s market share and profits, given that this transaction would create an even larger corporate organization in the health care space.
- Because the proposed transaction involves a considerable amount of debt – over $40 billion, the concern that this increased debt may create pressure on Aetna to raise premiums or take other actions that negatively impact consumers.
- The concern that the transaction could cause Aetna to not maintain its current health insurance products, and service networks for its current insureds.
Furthermore, we note Superintendent Vullo’s letter to the Connecticut Department of Insurance (https://dfs.ny.gov/about/dfs_cl_09172018_acq_aetna.pdf) which highlighting a number of different concerns with this proposed acquisition, including:

- If approved, the proposed transaction “would create an incredibly large market share in the health care market for the combined company, in an already concentrated marketplace, and is likely to increase prices for members and reduce options for consumers, without any discernable increase in quality.”
- CVS minute-clinics “might provide unfair competition to other medical providers and hospitals, which when combined with CVS’ proposed ownership of a major health insurer creates significant concerns for consumer choice and cost”; and
- The $40 billion in debt that CVS is taking on to finance the transaction “could affect operating performance”, “will create pressure on Aetna to raise premiums or take other actions that negatively impact consumers”, and “impacting Aetna policyholders and providers alike”.

Finally, it is noteworthy that even in its order approving the transaction with several conditions (https://www.dfs.ny.gov/about/press/CVS_final_signed_decision_and_condition.pdf), the NYDFS noted in multiple instances its concerns with the lack of a business plan to achieve the so-called efficiencies the merged entity claims will occur. On p. 3, it was noted that

“Neither the applicants not the domestic insurer, in their written or oral testimony, provided any concrete analysis that the CVS/Aetna merger would result in specific reduced costs for New York consumers, or any business plan or study of asserted improved health outcomes to benefit New Yorkers. Likewise, the applicants did not set forth specific actions to be taken by CVS Health or Aetna Inc. post transaction, to accomplish the asserted benefits of this transaction in reducing costs to the New York consumer and improving New Yorkers health outcomes”.

On p.7, it was noted that:

“The Applicants claim that the CVS/Aetna merger will result in operational synergies and that the combined companies will achieve substantial cost-savings. In her testimony at the hearing, the CVS Health witness testified that the CVS/Aetna merger would ‘benefit consumers in New York and result in meaningful cost savings and other consumer benefits, and importantly, will inject much needed change and innovation into a broken system’. However, CVS did not provide detail to support these claims. In response to questioning at the Hearing regarding a concrete plan to accomplish the goals the Applicants set forth in support of the Proposed Acquisition of Control, Ms. Ferguson responded ‘there isn’t one right now.”

**Comments from the American Antitrust Institute**

We further note the comments of the American Antitrust Institute (AAI) after the DOJ gave its preliminary approval of this transaction in October. The AAI noted in its comments “We are disappointed that the DOJ did not address a merged CVS-Aetna’s enhanced incentives to use their market positions to disadvantage rival PBMs, independent pharmacies, and rival health insurers. Competition will undoubtedly suffer, as will consumers through higher prices, lower quality, less innovation, and less choice.”

Moreover, they noted “Within a short period of time, antitrust enforcers have green-lighted a fundamental restructuring of important segments of the healthcare industry in the U.S....Competition now depends almost entirely on having ‘enough’ rivalry between integrated PBM-insurers. This ‘roll-the-dice’ model of competition stands in stark contrast to a model of standalone PBMs competing hard to gain insurers’ drug plan business and insurers aggressively seeking out competitive PBM services.”

It was further noted that “If ever there were a vertical merger that should have been challenged by antitrust enforcers, this would be it...High levels of concentration in the PBM and insurer markets, demonstrated exclusionary conduct by one of the merging parties, and past enforcement actions involving consolidation in these important markets are all powerful indicators that the deal should have been deemed illegal.”
Comments from the New York State Assembly

We would further note the letter to the US DOJ from New York State Assembly Insurance Committee Chair Kevin Cahill following a June Assembly hearing (https://nyassembly.gov/mem/Kevin-A-Cahill/story/83311). His letter asserted “that the loss of competition will result in increased prescription drug prices, harm independent pharmacies and diminish provider choice - all of which significantly hurts New York consumers.” In particular, he raised concerns similar to concerns raised by many other organizations:

- Allowing CVS and Aetna to merge creates a conglomerate that will be too difficult to regulate and will likely harm patient care
- CVS and Aetna have failed to prove that the public will actually benefit from the merger; and
- Several public interest concerns have not been adequately addressed including how the companies plan to protect patient information and how drug prices will actually be lowered once the merger significantly decreases market competition

In summary, given the substantial number of varied voices raising strong concerns about the adverse impact to the health care delivery system arising from the joining of these health care behemoths, we urge the US DOJ to revisit its decision to grant approval for this enormous transaction.

Sincerely,

THOMAS MADEJSKI, MD