

STATE OF NEW JERSEY
DEPARTMENT OF BANKING AND INSURANCE

IN THE MATTER OF THE ACQUISITION OF)	
CONTROL OF AETNA HEALTH INC.,)	
AETNA BETTER HEALTH INC., AND)	ORDER APPROVING
AETNA DENTAL INC. BY CVS HEALTH)	ACQUISITION
CORPORATION)	
)	

I have read the Hearing Officer’s report dated November 20, 2018 regarding the above-captioned matter, and I concur with the recommendation contained therein. Accordingly, pursuant to N.J.S.A. 17:27A-2, I hereby approve the proposal of CVS Health Corporation to acquire control of Aetna Health Inc., Aetna Better Health Inc., and Aetna Dental Health Inc., subject to CVS and Aetna complying with all applicable laws regarding the dissolution of Hudson Merger Sub Corp., an entity established for the purpose of merging with Aetna for the purposes of this acquisition.

11/20/18
Date

Marlene Caride
Marlene Caride
Commissioner

STATE OF NEW JERSEY
DEPARTMENT OF BANKING AND INSURANCE

IN THE MATTER OF THE ACQUISITION OF)	
CONTROL OF AETNA HEALTH INC.,)	
AETNA BETTER HEALTH INC., AND)	HEARING OFFICER'S
AETNA DENTAL INC. BY CVS HEALTH)	REPORT
CORPORATION)	
)	

Procedural History

In accordance with N.J.S.A. 17:27A-2, by a filing dated January 11, 2018, CVS Health Corporation (“CVS Health” or “the applicant”), filed with the Department of Banking and Insurance (“the Department”) an application to acquire control (“the Form A filing”) of Aetna Health Inc., Aetna Better Health Inc., and Aetna Dental Inc. (collectively, “Aetna Companies”). Aetna Health Inc. and Aetna Better Health Inc. are New Jersey domiciled health maintenance organizations (“HMOs”). Aetna Dental Inc. is a New Jersey domiciled dental plan organization (“DPO”). The Aetna Companies are indirect wholly owned subsidiaries of, and are controlled by, Aetna, Inc. (“Aetna”). Aetna is a publicly traded Pennsylvania holding company for health insurance companies, HMOs, DPOs, and other related organizations.

This transaction is part of an agreement whereby CVS Health would acquire control of Aetna. As a result, Aetna would become a direct wholly-owned subsidiary of CVS Pharmacy, Inc. (“CVS Pharmacy”) and an indirect wholly-owned subsidiary of CVS Health. CVS Pharmacy is a direct wholly-owned subsidiary of CVS Health.

Pursuant to N.J.S.A. 17:27A-2(d), a public hearing was held on the Form A filing on November 5, 2018. Pursuant to N.J.A.C. 11:1-35.6(g), the public hearing was conducted based on the documents filed. The hearing panel and Department staff determined that the documents filed

in connection with the proposed acquisition satisfied the requirements of N.J.S.A. 17:27A-2b. Public comments were allowed to be submitted through the close of business on November 5, 2018. The Department received two comments regarding the proposed acquisition.

One comment was received via e-mail dated October 25, 2018 from “jeanpublic1” (“jeanpublic”). It is unclear whether this commenter is an individual or an entity. The Department also received a comment via letter dated November 5, 2018 from Aids Healthcare Foundation (“AHF”). AHF is a nonprofit provider of care and treatment to people with HIV and AIDS. Both commenters expressed concerns and requested that the Commissioner disapprove the proposed acquisition. The comments are addressed fully later in this Report.

No other documents were required and the record was closed on November 5, 2018.

Findings of Fact

The Aetna Companies are health insurance companies that work with a vast network of physicians and hospitals. CVS Health is a pharmacy health care company that has more than 9,700 CVS Pharmacy locations which dispense medications, and many have associated MinuteClinics where nurse practitioners and physician assistants diagnose and treat non-threatening conditions, perform health screenings, monitor chronic conditions, and provide vaccinations. CVS Health also has CVS Specialty Pharmacies which support individuals with chronic or genetic diseases which require complex and expensive drug therapies. CVS Health’s Coram provides infusion services through 85 infusion centers and delivery of home infusion services. CVS Health provides pharmacy services to long-term care facilities through Omnicare. Lastly, CVS Health provides mail-order pharmacy services, retail pharmacy network management services, prescription management services, and disease management services through CVS Caremark. CVS

Caremark's customers include employers, unions, health plans, and federal, state, and local governments.

Pursuant to the Agreement and Plan of Merger dated December 3, 2017, ("the Merger Agreement"), included as part of the Form A Filing, Hudson Merger Sub Corp., a Pennsylvania domiciled company and direct subsidiary of CVS Pharmacy and an indirect wholly-owned subsidiary of CVS Health, will merge with Aetna ("the merger"). Hudson Merger Sub Corp. was established specifically for this purpose. Aetna will be the surviving entity of the merger and will become an indirect wholly-owned subsidiary of CVS Health. CVS Health will become the ultimate parent company of Aetna and the Aetna Companies. Together, these actions will be referred to as "the transaction."

The applicant stated that together itself and Aetna will provide high quality care at an affordable cost by joining CVS Health's pharmacies, clinics, and retail assets with Aetna's expertise in medical benefits and services. The applicant stated that the combined company will offer an array of health care services, will use pharmacy and medical data integration, localized care, coordinated care across providers, and cost management tools to provide affordable and appropriate care.

The applicant stated that after the transaction, Aetna's CEO and Chairman, Mark T. Bertolini, and two other individuals from Aetna's Board of Directors, will become members of the CVS Health Board of Directors. Further, members of Aetna's management team will play significant roles in the newly combined company. Aetna will operate as a business unit within the CVS Health enterprise and will continue to be led by current members of their management team. The applicant further stated that it has no plans to liquidate the Aetna Companies, to sell any material portion of their assets, to merge it with any person or persons, or to make any other

material change in their business operations, corporate structure, management, or general plan of operations. The Aetna Companies will maintain their separate corporate existence and will be indirect wholly-owned subsidiaries of CVS Health.

The applicant stated that it agreed to pay \$69 billion for Aetna, but will assume Aetna's debt such that the total value of the transaction will be \$77 billion. CVS Health intends to fund the cash portion of the transaction through a combination of cash on hand and debt financing. The applicant stated that the proposed acquisition is not dependent upon its ability to obtain financing. The debt will be the responsibility of CVS Health and not the Aetna Companies.

The applicant is a publicly traded company. Based on the consolidated financial statements filed by the applicant, the applicant had shareholders' equity of approximately \$37.2 billion in 2015, \$36.8 billion in 2016, and \$37.7 billion in 2017. In addition, the applicant had net before-tax income of approximately \$8.6 billion in 2016 and \$8.3 billion in 2017.

Analysis

N.J.S.A. 17:27A-2(d)(1) provides that the Commissioner shall approve an acquisition of control of a domestic insurer unless he or she finds that one or more of the seven disqualifying factors set forth therein exist. The statute provides in pertinent part:

(1) The Commissioner shall approve any merger or other acquisition of control ... unless, after a public departmental hearing thereon, he [or she] finds that:

(i) After the change of control the domestic insurer ... would not be able to satisfy the requirements for the issuance of a license to write the line or lines of insurance for which it is presently licensed;

(ii) The effect of the merger or other acquisition of control would be substantially to lessen competition in insurance in this State or tend to create a monopoly therein ... [applying the competitive standard as set forth in the statute];

(iii) The financial condition of any acquiring party is such as might jeopardize the financial stability of the insurer, or prejudice the interest of its policyholders;

(iv) The financial condition of any acquiring party is such that (a) the acquiring party has not been financially solvent on a generally accepted accounting principles basis, or if an insurer, on a statutory accounting basis, for the most recent three fiscal years immediately prior to the date of the proposed acquisition (or for the whole of such lesser period as such acquiring party and any predecessors thereof shall have been in existence); (b) the acquiring party has not generated net before-tax profits from its normal business operations for the latest two fiscal years immediately prior to the date of acquisition (or for the whole of such lesser period as such acquiring party and any predecessors thereof shall have been in existence); or (c) the acquisition debt of the acquiring party exceeds 50 percent of the purchase price of the insurer;

(v) The plans or proposals which the acquiring party has to liquidate the insurer, sell its assets or consolidate or merge it with any person, or to make any other material change in its business or corporate structure or management, are unfair and unreasonable to policyholders of the insurer and not in the public interest;

(vi) The competence, experience and integrity of those persons who would control the operation of the insurer are such that it would not be in the interest of policyholders of the insurer and of the public to permit the merger or other acquisition of control; or

(vii) The acquisition is likely to be hazardous or prejudicial to the insurance buying public.

Upon a thorough review of the documents submitted into evidence and the comments submitted, the hearing panel and Department staff have determined that none of the seven disqualifying factors set forth above should result if the proposed acquisition is effectuated. Each of these conditions is discussed below.

First, after the acquisition, the Aetna Companies will continue to meet the requirements to transact the business for which they are presently licensed pursuant to Titles 17, 17B and 26 of the New Jersey Statutes. There is nothing in the record to indicate that after the proposed transaction the Aetna Companies would not be able to continue to satisfy the requirements to transact the business for which they are presently licensed.

Second, it does not appear that the acquisition of the Aetna Companies will substantially lessen competition in the New Jersey insurance market or tend to create a monopoly therein. N.J.S.A. 17:27A-2(d)(1)(ii) provides that in applying this competitive standard, the standard set forth in N.J.S.A. 17:27A-4.1d shall apply. That statute utilizes a complex formula based on the market shares of the insurers involved in the transaction. CVS Health is a pharmacy health care company. The Aetna Companies are health insurance companies that work with a vast network of physicians and hospitals. The statute by its terms does not apply if, as an immediate result of the acquisition, there would be no increase in the overall market share of the involved insurers after the acquisition. See N.J.S.A. 17:27A-4.1(b)(2)(d). As the applicant and its subsidiaries and the Aetna Companies do not compete against each other in New Jersey, there would be no increase post-acquisition in the market share of the involved insurers in the New Jersey insurance market. Accordingly, the acquisition will not violate the competitive standard set forth in N.J.S.A. 17:27A-4.1. Thus, it does not appear that the acquisition of the Aetna Companies will substantially lessen competition in New Jersey or tend to create a monopoly therein.

Third, it does not appear that the financial condition of the applicants will jeopardize the financial condition of the Aetna Companies. As reported in the applicable financial statements filed by the applicant, the applicant had shareholders' equity of approximately \$37.2 billion in 2015, \$36.8 billion in 2016, and \$37.7 billion in 2017. In addition, the Applicant had net before-tax income of approximately \$8.6 billion in 2016 and \$8.3 billion in 2017. Further, as a part of the transaction, the applicant will assume Aetna's debt.

Fourth, it appears that the financial condition of the applicant is such that it has been solvent on a basis of generally accepted accounting principles for the three-year period immediately prior to the date of the proposed acquisition. As set forth above, based upon the filing the applicant had

substantial shareholders' equity for the most recent three-year period, indicating it has been in a sound and viable financial condition for the relevant period. To the extent debt is utilized to fund the consideration for the transaction, the applicant stated that no debt will be used to acquire the Aetna Companies in excess of 49 percent of the purchase price. Specifically, CVS Health represents that it will allocate an amount of cash on hand from CVS Health necessary to reduce the debt allocated to the New Jersey Domestic Insurers to an amount that will not exceed 50% of the purchase price allocated to the New Jersey Domestic Insurers. Therefore, CVS Health will reduce the allocated debt to the New Jersey Domestic Insurers by \$72,100,000, which is calculated as the difference between \$313,600,000 (the allocated debt to the New Jersey Domestic Insurers) minus \$241,500,000 (half the allocated purchase price of \$483,000,000, which is based on the ratio of covered lives in New Jersey to covered lives nationwide, to the New Jersey Domestic Insurers). This will ensure that the debt allocated to the acquisition of the New Jersey Domestic Insurers will not exceed half of the allocated purchase price in compliance with N.J.S.A. 17:27A-2(d)(1)(iv)(c). In addition, in order to further enhance its financial strength, CVS Health indicated that it has suspended its share repurchase program. We also note that the Department will continue its statutory review of the Domestic Insurer's financial position through various means, including routine financial examinations and analyses, and review of transactions within an insurance holding company system pursuant to N.J.S.A. 17:27A-4.

Fifth, the applicant does not propose to liquidate the Aetna Companies or sell their assets. As set forth above, the applicant does not intend to change the Aetna Companies' business operations, corporate structure, management, or general plan of operations. Aetna will continue to maintain its separate corporate existence. As noted above, the applicant stated that after the transaction, Aetna's CEO and Chairman, and two other individuals from Aetna's Board of

Directors, will become members of the CVS Health Board of Directors. Further, members of Aetna's management team will play significant roles in the newly combined company. Aetna will operate as a business unit within the CVS Health enterprise and will continue to be led by current members of their management team.

Sixth, there is nothing in the record from which it may be concluded that the competence, experience, and integrity of the persons who will control the operations of the Aetna Companies are such that it would not be in the interest of the policyholders and of the public to permit the acquisition of control. The Aetna Companies will continue to be led by current members of their management team. In addition, the persons who will control the Aetna Companies have had substantial experience in the healthcare insurance services business, and current members of Aetna's board will have seats on the board of CVS to provide input and direction for the Aetna Companies post-transaction.

Seventh, there is nothing in the record from which it may be concluded that the acquisition is likely to be hazardous or prejudicial to the insurance buying public for the reasons set forth above.

Further, for the following reasons, upon review of the comments submitted, the hearing panel and Department staff find there is no basis upon which to find that one of the seven disqualifying factors set forth above exist.

The commenter jeanpublic stated that the Commissioner should not allow the proposed acquisition because large businesses could be "bigger than our [government]" and could have too much influence to commit nefarious deeds, including "violence against people." The commenter did not cite any of the disqualifying factors in N.J.S.A. 17:27A-2(d)(1). Further, the commenter's concerns and stated possible consequences of the proposed acquisition were both vague and

speculative. They do not provide any basis upon which the hearing panel and Department may find one of the seven statutory disqualifying factors exist.

AHF raised five concerns regarding the merger. First, AHF raised concerns that Aetna could require covered persons to receive care at MinuteClinics, which would be operated by their parent company, CVS, rather than a covered person's personal physician. AHF also raises concerns that covered persons would be forced to obtain their prescription medications through mail-order and be foreclosed from obtaining prescribed medicines from pharmacies other than CVS. AHF is also concerned that CVS/Aetna would drive down reimbursement rates to low levels to hurt competition, particularly from small and specialty pharmacies. Further, AHF is concerned that CVS, as a pharmacy benefit manager ("PBM") would have the power to offer Aetna larger drug rebates and other significant benefits that may draw policyholders from other companies to Aetna. Lastly, AHF is concerned that both CVS and Aetna had previously revealed the HIV status of consumers and that this reflects a lack of sensitivity regarding the stigma and needs faced by people with HIV. The hearing panel and Department staff do not find that these concerns provide a basis upon which to find that any one of the seven disqualifying factors exist.

AHF's concerns that the acquisition will prejudice policyholders by requiring them to receive care at MinuteClinics, which would be operated by their parent company, CVS, rather than a covered person's personal physician is speculative. CVS stated in the Form A filing that it does not intend to make any changes to the insurer's operations, and that any changes that may be undertaken in the future will be subject to all applicable regulatory approvals. MinuteClinics provide care that is akin to that provided by urgent care facilities. There is no evidence indicating that CVS intends to seek to require Aetna to provide coverage only for services at its MinuteClinics. Such facilities do not provide the full range of primary and specialty care required

to be rendered under State and Federal law. As noted above, the current plans for operation of the insurance entities will remain in place. Any change would be subject to review to determine compliance with all applicable law, including, but not limited to, network adequacy. See N.J.A.C. 11:24-6.1 to -6.3 and N.J.A.C. 11:24A-4.10.

Regarding the concerns that covered persons would be forced to obtain their prescription medications through mail-order only and be foreclosed from obtaining prescribed medicines from pharmacies other than CVS, it must be reiterated that after the proposed acquisition Aetna will continue to be required to comply with all applicable New Jersey law governing health insurance. Under N.J.S.A. 17B:26-2.1i., N.J.S.A. 17B:37-46.1i, and N.J.S.A. 26:2J-4.7, persons covered by plans issued by group and individual insurance companies and by health maintenance organizations must be permitted to select a pharmacy, provided the pharmacist or pharmacy is registered, and cannot be required to use a mail-order pharmacy. Moreover, these statutes contain an “any willing pharmacy/pharmacist requirement” which provides that no pharmacy or pharmacist can be denied the right to participate in the carrier’s pharmacy network provided that the pharmacist or pharmacy accepts the terms and conditions of the carrier.

Regarding the concerns that policyholders could be harmed because CVS, as a pharmacy benefit manager (“PBM”), would have the power to offer Aetna larger drug rebates and other significant benefits that may draw policyholders from other companies to Aetna, these concerns are not likely to result in consumer harm.

AHF also raised a concern that CVS could use “oppressive pharmacy reimbursements” to harm competing pharmacies, and ultimately consumers. However, there are statutes and other materials that may address these concerns. The Department issued Bulletin No. 18-11 to clarify enforcement of N.J.S.A. 17B:27F-1 to -46.1 regarding multiple source generic drug pricing, which

would likely address some of the issues raised regarding PBMs. Further, the Health Claims Authorization, Processing and Payment Act (“HCAPPA”), N.J.S.A. 17B:26-9.1(d)(10), (d)(11), and (e); N.J.S.A. 17B:27-44.2(d)(10), (d)(11), and (e); and N.J.S.A. 26:2J-8.1(d)(10), (d)(11), and (e), limits recoupments of overpayments by limiting so-called “claw backs” to 18 months from the date of payment, restricting extrapolation and establishing an internal appeal and binding arbitration process for payment disputes. By providing these appeal and arbitration processes, HCAPPA will act to limit some of the tactics of which AHF expressed concern.

AHF is also concerned that both CVS and Aetna had previously revealed the HIV status of consumers and that this reflects a lack of sensitivity regarding the stigma and needs faced by people who have been diagnosed with HIV. These allegations against Aetna were resolved in settlement and the allegations against CVS are pending. Both CVS and Aetna are bound, and will continue to be bound, by the Health Insurance Portability and Accountability Act (“HIPAA”) and other State and Federal confidentiality laws. Any person aggrieved by the alleged conduct has recourse by filing a complaint of a HIPAA violation with the Office of Civil rights at <https://www.hhs.gov/hipaa/filing-a-complaint/index.html> or by filing a consumer complaint with the Department at <https://www.state.nj.us/dobi/consumer.htm>. While the failure to maintain required confidentiality may be of concern, the hearing panel and Department staff do not believe, and the commenter does not assert, that this event supports a finding that one of the seven disqualifying factors in N.J.S.A. 17:27A-2 exist.

Recommendation

Based on the foregoing analysis, the hearing panel and Department staff recommend that the proposed acquisition be approved.

Upon a thorough review of the foregoing, I concur with the findings, analysis and recommendations of the hearing panel and Department staff. I therefore recommend that the proposed acquisition be approved.

11-20-18
Date


Jacqueline Dilks-Brotman
Hearing Officer

jd Aetna by CVS HO Rpt Form A/orders

Exhibits List

IN THE MATTER OF THE ACQUISITION OF CONTROL OF AETNA HEALTH INC., AETNA BETTER HEALTH INC., AND AETNA DENTAL INC. BY CVS HEALTH CORPORATION

Exhibit 1 – July 3, 2018 Amendment No. 1 to Form A

Exhibit 2 – August 2, 2018 – CONFIDENTIAL Amendment No. 2 to Form A

Exhibit 3 – September 13, 2018 – Amendment No. 3 to Form A

Exhibit 4 – October 5, 2018 – Amendment No. 4 to Form A

Exhibit 5 – January 11, 2018 Form A filing

(For Exhibits 6-15, below, all Notices of Hearing were published on October 26, 2018, except for Exhibit 13, which was published on October 25, 2018):

Exhibit 6 – Affidavit of Publication of Notice of Hearing in Star-Ledger

Exhibit 7 - Affidavit of Publication of Notice of Hearing in Asbury Park Press

Exhibit 8 – Affidavit of Publication of Notice of Hearing in Courier Post

Exhibit 9 – Affidavit of Publication of Notice of Hearing in Atlantic City Press

Exhibit 10 – Affidavit of Publication of Notice of Hearing in Bergen Record

Exhibit 11 – Affidavit of Publication of Notice of Hearing in Jersey Journal

Exhibit 12 – Affidavit of Publication of Notice of Hearing in New Jersey Herald

Exhibit 13 – Affidavit of Publication of Notice of Hearing in Hunterdon County Democrat

Exhibit 14 – Affidavit of Publication of Notice of Hearing in Home News Tribune

Exhibit 15 – Affidavit of Publication of Notice of Hearing in Trenton Times

Exhibit 16 – Waiver of 20-day notice of hearing submitted by attorney Tim Farber, Esq., (Locke Lord), October 31, 2018 on behalf of CVS Health

Exhibit 17 – Waiver of 20-day notice of hearing submitted by Edward C. Lee (Aetna), dated October 31, 2018

**Exhibit 18 – November 20, 2018 letter supplemental clarification to Amendment No. 4
to Form A**