

December 1, 2016

BY FEDERAL EXPRESS

The Honorable William Baer
Assistant Attorney General
United States Department of Justice Antitrust Division
650 Pennsylvania Ave., NW
Washington, DC 20530

**Re: Proposed Acquisition by Aetna of Humana --
Impact on 340B Safety Net Providers and Their Patients**

Dear Assistant Attorney General Baer:

We are writing to support the lawsuit filed by the Department of Justice (DOJ) to block the proposed acquisition of Humana, Inc. (Humana) by Aetna because the acquisition would exacerbate current practices by Humana that are detrimental to safety net healthcare providers that participate in the federal 340B drug discount program and to the patients that they serve.

The undersigned organizations represent hundreds of health care providers that qualify for and participate in the 340B program. Eligibility for the 340B program is limited to community health centers, Ryan White HIV clinics, hemophilia treatment centers, family planning clinics and other federal grantees, hospitals that serve a large number of uninsured and underinsured patients and federally qualified health center “look-alikes.” In short, only providers that are committed to serving low-income and vulnerable patient populations may participate in the 340B program. The federal 340B program requires drug manufacturers to provide discounts on the sale of outpatient drugs to these qualified safety net providers and was created to help safety net providers fulfill their mission of serving uninsured, underinsured, and underserved patient populations. Safety net providers rely on the savings generated from the program to help finance their mission of serving low-income patients.

For at least five years now, Humana has been sporadically offering terms under its participation agreements with 340B providers and their contract pharmacies that include reimbursement rates for drugs below the rates paid to non-340B pharmacies. Based solely on a

provider's participation in the 340B program, Humana lowers its reimbursement rates for drugs furnished by these 340B providers. We are concerned that Humana's pricing policies may be adopted by Aetna should it acquire Humana. In short, consolidation of two of the largest insurers in the health care market will increase the risk of discriminatory reimbursement of 340B pharmacies.

The legislative history of the 340B statute states that the purpose of the legislation is to enable qualified providers to stretch their scarce resources so that they may "reach more patients" and furnish "more comprehensive services."¹ Nothing in the 340B statute or its legislative history suggests that the program was intended to benefit private insurers. Passing the benefit of 340B discounts to private insurers through reduced reimbursement rates thwarts the purpose of the program. The Health Resources and Services Administration (HRSA), the agency that administers the 340B program, shares our concerns about this threat to the 340B program and its eligible providers. According to HRSA, the 340B program provides additional financial resources to covered entities without increasing the federal budget by lowering drug acquisition costs while maintaining the providers' revenue from health insurance reimbursements.² The difference between a 340B drug's lower acquisition cost and standard non-340B reimbursement represents the very benefit that Congress intended to give covered entities when it established the 340B program. HRSA explains that if "covered entities were not able to access resources freed up by the drug discounts when they . . . **bill private health insurance**, their programs would receive no assistance from the enactment of section 340B and there would be no incentive for them to become covered entities."³

A significant loss of 340B savings might force covered entities to dramatically reduce the valuable services they provide to their low-income patients, such as deeply discounted prescriptions and medication therapy management.⁴ Moreover, while lower 340B reimbursement might result in lower costs for health plans and their enrollees, there is no guarantee that the company would not simply pocket the savings, leaving no benefit to consumers. In any case, the 340B program is intended to help safety net providers in their mission to care for indigent and underserved patient populations, not health care consumers in general.

We believe the unprecedented market dominance of a combined Humana-Aetna would allow the new company to force 340B providers to accept reduced reimbursement rates.⁵ The

¹ H.R. Rep. 102-384, pt.2, at 12 (1992).

² Health Res. and Servs. Admin., Hemophilia Treatment Center Manual for Participating in the Drug Pricing Program Established by Section 340B of the Public Health Service Act (2005), <http://www.hrsa.gov/hemophiliatreatment/340Bmanual.htm>.

³ *Id* (emphasis added).

⁴ See Safety Net Hospitals for Pharmaceutical Access, Demonstrating the Value of the 340B Program to Safety Net Hospitals and the Vulnerable Patients They Serve (June 29, 2011), http://www.340bhealth.org/images/uploads/340B_Value_Report_06-29-11.pdf.

⁵ The combined company would be the largest Medicare Advantage insurer in the county. The next largest insurer, United Health Care, would have one million fewer members. Anna Wilde Mathews, Liz Hoffman, Dana Mattioli, *With Merger Deal, Aetna, Humana Get Ahead of the Pack*, Wall Street Journal (July 6, 2015) (the combined companies "would have about a million more members in Medicare Advantage... than their next-closest competitor,

combined entity's market power would enable it to discriminate against 340B providers with impunity. Faced with losing a substantial amount of their business, 340B pharmacies would have no choice but to accept whatever reimbursement terms are offered by the company, depriving covered entities of the savings they need to fulfill their safety-net mission. As you observed in remarks regarding the alleged cost efficiencies that would result from health insurance mergers, "consumers do not benefit when sellers . . . merge simply to gain bargaining leverage."⁶ Similarly, as Attorney General Loretta E. Lynch stated when she announced the DOJ's lawsuit to block the purchase of Humana by Aetna (as well as Anthem's proposed acquisition of Cigna), "[t]hese mergers would restrict competition for health insurance products sold in markets across the country and would give tremendous power over the nation's health insurance industry to just three large companies."⁷ Again, this tremendous bargaining power could force a 340B provider to accept lower reimbursement rates to the detriment of its safety net missions and patients.

In addition, Humana's practice of forcing 340B providers and their contract pharmacies to accept reduced reimbursement rates potentially violates state "any willing provider laws" and certainly runs counter to the spirit of those laws. These laws generally require insurers to accept providers into their networks who agree to the insurer's established terms and conditions. Many of these laws explicitly prohibit discrimination against different types of providers, which includes differences in reimbursement. For example, Kentucky's any willing provider law prohibits insurers from discriminating against any provider who is located within the geographic coverage area of a health benefit plan.⁸ In Virginia, insurers cannot set terms and conditions for preferred provider status that discriminate unreasonably against or among providers.⁹ Arkansas's any willing provider law prohibits insurers from directly or indirectly imposing a monetary penalty, which includes a reduction in reimbursement for services, that would affect a beneficiary's choice of providers.¹⁰

UnitedHealth"), available at <http://www.wsj.com/articles/with-merger-deal-aetna-humana-get-ahead-of-the-pack-1436143581>.

⁶ Speech by Assistant Attorney General Bill Baer, Remarks as Prepared for the Delivery at the New Health Care Industry Conference: Integration, Consolidation, Competition in the Wake of the Affordable Care Act at Yale University (Nov.13, 2015).

⁷ Department of Justice Press Release dated July 21, 2016, available at: <https://www.justice.gov/opa/pr/justice-department-and-state-attorneys-general-sue-block-anthem-s-acquisition-cigna-aetna-s>.

⁸ Ky. Rev. Stat. Ann. § 304.17A-270.

⁹ Va. Code Ann. § 38.2-3407(B). Differences in prices among hospitals or other institutional providers produced by a process of individual negotiations with providers or based on market conditions, or price differences among providers in different geographic regions do not constitute unreasonable discrimination. *Id.*

¹⁰ Ark. Code Ann. § 23-99-204(a)(1)(A).

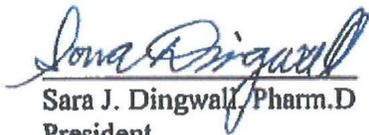
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For the above reasons, we support the DOJ's decision to oppose the proposed acquisition. If the DOJ successfully blocks the acquisition, the DOJ would have been instrumental in helping to protect and support the ability of 340B covered entities to continue treating their disadvantaged patient populations. If you have any questions or need additional information, please do not hesitate to contact Barbara Straub Williams at (202) 872-6733 or Barbara.Williams@PowersLaw.com. Thank you for the opportunity to comment on this important matter.

Sincerely,



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cc: The Honorable Sylvia Burwell
Secretary, Department of Health and Human Services