

Blog Post

House Judiciary Subcommittee Holds Hearing on Proposed CVS/Aetna Merger

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On February 27, the House Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law held a hearing to consider the implications of the proposed CVS/Aetna merger. The transaction, valued at approximately \$69 billion, was announced in December and is currently under regulatory review by the United States Department of Justice Antitrust Division and antitrust and insurance regulators in a number of states.

If consummated, the transaction would combine one of the nation's largest pharmacy benefits manager (PBM) entities, CVS's Caremark subsidiary, with one of the nation's largest health insurers, Aetna. However, unlike some of the recently proposed insurance industry mergers (such as Anthem/Cigna and Aetna/Humana), the proposed CVS/Aetna merger is largely a "vertical" merger between two entities that currently do not compete with one another in any significant way. In assessing the competitive consequences of a vertical merger, antitrust regulators typically focus on whether the combined entity would have the ability to increase barriers to entry in any of the markets in which the combined entity would operate and/or whether the combined entity could effectively foreclose competitors in those markets from competing effectively. These principles are based upon guidance in the DOJ/FTC 1984 Merger Guidelines.

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While Congress plays no direct role in the antitrust review of proposed mergers, it has become increasingly common for Congress to hold hearings to consider the potential implications of significant mergers, and the CVS/Aetna transaction certainly meets that standard.

As is typical, a representative from each of the merging parties was invited to testify at the hearing, and Thomas J. Sabatino, Jr. (Aetna's General Counsel) and Thomas M. Moriarty (CVS's General Counsel) both testified at the hearing and submitted written statements. Others testifying and/or submitting written statements for the Subcommittee to consider included representatives from the Consumer Union, the American Medical Association and the International Center for Law & Economics.

Testifying in strong support of the proposed transaction, Thomas Moriarty expressed the view that CVS's "acquisition of Aetna will enhance competition in the healthcare marketplace by creating significant consumer benefits and spurring innovation in an industry that desperately needs it." He also stated that "competition in the PBM industry is robust, and will remain so after the merger," and that "competition in the pharmacy industry will continue to thrive" post-merger. Thomas Sabatino expressed a similar sentiment concerning competition in the insurance industry, stating that "combining these companies will help consumers receive simpler, better, more affordable [health] care, and offer an improved overall experience" for consumers. In addition, largely echoing the sentiments of the CVS and Aetna representatives, an economist, Dr. Lawrence Wu, testified that the proposed transaction has the "potential to improve consumer welfare" by providing new avenues for how healthcare is delivered to patients. Advocates supporting the merger have also noted that a similar transaction was approved by antitrust regulators in 2015, when UnitedHealth was permitted to acquire Catamaran (a large PBM that UnitedHealth has subsequently rebranded as Optum RX).

In addition, *unlike* the case when Congress held hearings on the proposed Aetna/Humana and Anthem/Cigna mergers in 2016, at which representatives for the AMA and other groups strongly opposed the transactions, the other witnesses testifying concerning the proposed CVS/Aetna deal struck a more measured tone. For example, while the AMA expressed the view that the proposed transaction “has the potential to worsen competition,” it stopped short of urging a challenge, and instead advocated only for a “rigorous review” of the deal by antitrust regulators. Striking a similar chord, a representative of the Consumer Union acknowledged that the proposed deal might create a combined entity that, despite its size, could “integrate its resources in new ways to bring costs down and improve the quality of services,” conduct that would be “good for consumers, and good for the overall economy.” However, like the AMA representative, he cautioned that the Justice Department should carefully assess whether these benefits are likely to be passed on to consumers.

As noted above, ultimately it is the DOJ Antitrust Division, and not Congress, that will decide whether the proposed transaction can proceed, and the DOJ’s decision on that issue is likely still several months away. However, expressing a degree of optimism regarding the prospects for approval, the merging parties continue to state that they expect the transaction to close in the second quarter of 2018. Whether that assessment proves correct remains to be seen, particularly given that they require approval not only from the DOJ, but numerous state regulators as well. Stay tuned.

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