

Blog Post

New Jersey Congressman Calls for a Hearing on the Proposed Cigna/Express Scripts Merger

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Recently, Cigna announced its plan to purchase pharmacy benefit manager (“PBM”) Express Scripts. In a March 14, 2018 letter to the chair of the House Committee on Energy and Commerce, Gregory Walden (R-Oregon), Congressman Frank Pallone (D-New Jersey) called for a hearing on the proposed merger. In the letter, Congressman Pallone notes that the combination would combine the nation’s largest PBM with one of the nation’s largest health insurers, and that the deal would be “just one of many recent mergers and acquisitions in American health care delivery.”

Indeed, as Congressman Pallone states, the proposed Cigna/Express Scripts transaction is only the latest in a recent string of significant proposed “vertical mergers” that would combine a health insurer with a PBM; other recently announced transactions include the pending CVS/Aetna and Centene/RxAdvance deals. In addition, all of these proposed deals follow UnitedHealth’s previously completed acquisition of a PBM, Catamaran, in 2015, and the creation of Prime Therapeutics – another PBM – by a group of Blue Cross Blue Shield entities over the last ten years.

While “vertical mergers” — transactions in which the merging parties do not currently compete with one another — have not typically been a significant cause for concern for antitrust regulators, such

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mergers have become an increasingly significant area of interest under the Trump administration. Notably, the DOJ Antitrust Division is set to go to trial next week in federal district court in Washington, D.C., seeking to derail a proposed vertical merger between AT&T and Time Warner. The resolution of that case, and the legal principles that are likely to come out of it, could have much to say about whether challenges to vertical mergers, in healthcare and other industries, are here to stay or are more of a rare occurrence (as they have more typically been over the years). In the interim, however, it has already been widely reported that CVS has received a “Second Request” from the DOJ Antitrust Division, requiring that it produce additional information to the Antitrust Division about its proposed merger with Aetna, signaling that the Antitrust Division is not slowing down, at least for now, in its scrutiny of vertical mergers. Accordingly, it would not be surprising – particularly in light of the attention that Congressman Pallone’s request for a hearing will generate – if the Cigna/Express Scripts transaction also results in a “Second Request” as well.

Notably, Congressman Pallone’s request for a hearing on the Cigna/Express Scripts transaction comes only weeks after the House Energy and Commerce Subcommittee on Oversight and Investigations held a hearing on the impact of health care consolidation generally, and a House Judiciary subcommittee held a hearing specifically on the CVS/Aetna deal on February 27th. At the House Judiciary subcommittee hearing, representatives of both CVS and Aetna testified in support of their deal, stating that the transaction will create efficiencies that would lead to consumer benefits, including lower prices.

While congressional hearings on proposed mergers can be informative, both for the public and the members of Congress, ultimately Congress has no formal role in deciding whether an antitrust challenge to any of these deals is warranted; that

decision is solely the province of the DOJ Antitrust Division or the Federal Trade Commission – depending upon which entity takes on the examination of the transaction. Stay tuned.

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