Blog Post

DOJ Approves CVS/Aetna Merger, Contingent on the Sale of Aetna's Medicare Part D Business

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The United States Department of Justice Antitrust Division announced on October 10, 2018, that it was conditionally approving the CVS/Aetna merger, a $69 billion transaction that combines the nation's largest retail pharmacy chain and the nation's third largest health insurer. The deal, which was announced late last year, has been under review by the Antitrust Division (and state regulators) since that time. The approval is contingent upon the sale of Aetna's Medicare Part D Individual Prescription Drug business to WellCare, which Aetna recently announced it was prepared to do to gain regulatory approval. Accordingly, while some additional state approvals are still required, the deal now appears poised to close before the end of the year.

In announcing the decision, Assistant Attorney General Makan Delrahim stated that "Today's settlement resolves competition concerns posed by this transaction and preserves competition in the sale of Medicare Part D prescription drug plans for individuals." Delrahim continued: "The divestitures required here allow for the creation of an integrated pharmacy and health benefits company that has the potential to generate benefits by improving the quality and lowering the costs of the healthcare services that American consumers can obtain."

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The announcement was accompanied by the filing of a civil complaint in the United States District Court for the District of Columbia that set forth the Antitrust Division's concerns about the transaction, together with a proposed settlement outlining the required divestiture. The filing was made both on behalf of the United States and the attorneys general offices of California, Florida, Hawaii, Mississippi and Washington.

In an accompanying document entitled "Questions and Answers for the Public," the Antitrust Division addressed whether the vertical integration of CVS and Aetna was of concern. In response, the Antitrust Division indicated that it had "thoroughly considered whether the merger would raise the cost of (i) CVS/Caremark's PBM services or (ii) retail pharmacy services to Aetna's health insurance rivals," and "after a careful analysis, the Division determined that the merger is unlikely to cause CVS to increase costs to Aetna's health insurance rivals due to competition from other PBMs and retail pharmacies." The response continues: "The evidence also showed that CVS is unlikely to be able to profitably raise its PBM or retail pharmacy costs post-merger because it would lose customers and Aetna would not be able to offset those loses by capturing additional health insurance customers." For these reasons, the Antitrust Division concluded that "no remedy beyond the divestiture of the individual PDP business" was required.

Notably, the Antitrust Division's approval of the CVS/Aetna deal comes only weeks after its approval of Cigna/Express Scripts, another large "vertical" transaction in healthcare. In that matter, the Antitrust Division similarly concluded that the vertical elements of the transaction did not raise competitive concerns.

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