



June 22, 2018

**VIA ELECTRONIC MAIL (mergercomments@insurance.ca.gov)**

Hon. Dave Jones  
Insurance Commissioner  
c/o Bruce Hinz, Attorney IV  
California Department of Insurance  
45 Fremont Street, 23rd Floor  
San Francisco, California 94105

***Re Proposed Merger of Aetna, Inc. into CVS Health Corp.***

Dear Commissioner Jones:

The California Medical Association (“CMA”) respectfully submits the following comments concerning the proposed acquisition of Aetna, Inc. (“Aetna”) by CVS Health Corp. (“CVS”). CMA is a not-for-profit, professional association for California physicians with approximately 45,000 members. CMA physician members practice medicine in all specialties and modes of practice throughout California. For more than 150 years, CMA has promoted the science and art of medicine, the care and well-being of patients, the protection of public health, and the betterment of the medical profession.

Recent mergers and acquisitions activities among industry giants in the health insurance and managed care<sup>1</sup> sectors have raised alarms. CMA has long been concerned that such consolidation threatens to reduce market competition and results in negative impacts on quality, cost, and access to care. To improve health care, CMA believes competitive health markets must be encouraged in order to provide ample choice, high quality, and transparency. In this context, broad scrutiny of the proposed CVS – Aetna merger is warranted. While CMA strongly agrees with others, including the American Medical Association (“AMA”), that have rightfully raised antitrust and fair competition concerns in opposing the proposed merger, CMA herein wishes to focus the Commissioner’s attention on a different

---

<sup>1</sup>Hereinafter, the terms health plan and health insurer are used interchangeably in the context of discussing the merger and consolidation of companies that provide health insurance and health plan products.

sort of problem posed by a combined CVS – Aetna venture. CVS has avowed and detailed its intentions to use the tremendous vertical market leverage it would gain to become the “front door” to the health care system. Such plans implicate well-established California law designed to protect patients and maintain high quality of care by banning the corporate practice of medicine. CMA explains our serious concerns stemming from the corporate bar below.

Given the serious problems related to the corporate bar and the likely anticompetitive harms that have been forcefully raised by the AMA and the American Antitrust Institute, among others, CMA concludes after careful consideration that the proposed merger of Aetna into CVS should be blocked. Such a conclusion is founded upon our belief that a CVS-Aetna venture will cause irredeemable harm to California consumers and a diminishment in quality of care and access to care for all.

#### **A. Antitrust Concerns**

The AMA, Consumers Union, and the American Antitrust Institute have each articulated serious concern about the proposed merger. These leading voices have emphasized the need to scrutinize vertical mergers such as the proposed CVS – Aetna merger. They have raised concerns based on the resulting consolidation of market power in two different competition levels and leverage that CVS could wield when the nation’s second largest retail pharmacy chain – which owns the largest pharmacy benefit management (“PBM”) service – acquires the nation’s third largest health insurer. Such an unprecedented combination of industry giants in different vertical sectors of the health care market could have a deleterious impact on competition, fairness, cost of health care, including pharmaceutical pricing for patients<sup>2</sup>, and ultimately access to care and quality of care.

---

<sup>2</sup>For example, Anthem Blue Cross is currently embroiled in protracted litigation with Express Scripts, Inc., involving claims of manipulative and unfair practices that increase patient costs for pharmaceutical products. While such litigation is ongoing, Anthem Blue Cross has announced plans to start its own PBM unit and signed a 5-year deal with CVS’s PBM business. *See* Jacklyn Wille, “Anthem, Express Scripts Shake Would-Be Benefits Class Action,” *Bloomberg Law* (Jan. 9, 2018), online at <https://www.bna.com/anthem-express-scripts-n73014473960/>.

CMA agrees with the analysis presented by the AMA and shares its concerns that the proposed CVS – Aetna merger would worsen competition and harm consumers in four separate areas: Medicare Part D, PBM services, local health insurance, and retail and specialty pharmacies. CMA finds merit to the conclusion that the alignment of CVS's industry-leading PBM service with Aetna's insurance business under one roof could create an insurmountable barrier to entry of other market competitors, not to mention removing Aetna itself as a competitor from the market. Furthermore, CMA believes that a CVS – Aetna venture could lead to unequal treatment of the venture's competitors in both the PBM market and the health care insurer market. Ultimately, CMA supports the conclusion that the proposed merger would lead to more concentrated health care markets in California to the detriment of California consumers.

### **B. California's Bar on the Corporate Practice of Medicine**

The proposed CVS – Aetna merger also threatens to violate California law, known as the bar on the corporate practice of medicine ("Corporate Bar"), that has served well to protect patients for more than a century. CVS currently owns 10,000 retail pharmacy chain stores and another 1,100 "MinuteClinics" within these stores. Aetna and CVS claim that they could keep health care costs down under their proposed merger by routing patients needing basic urgent care to the MinuteClinics, away from hospital emergency departments or urgent care centers staffed by physicians. The CVS clinics, however, are staffed by nurse practitioners and physician assistants who provide routine preventative and diagnostic care. "Think of these stores as a hub of a new way of accessing healthcare services across America," says CVS Chief Executive Officer Larry Merlo. "We're bringing healthcare to where people live and work."<sup>3</sup> CVS further claims that its pharmacists could deliver preventive care since they see patients more often than do physicians.

The Corporate Bar prohibits lay individuals, organizations, and corporations from practicing medicine. *See* Bus. & Prof. Code §§2052 and 2400. Lay persons and entities generally are prohibited from hiring or employing physicians to provide medical care, or from otherwise interfering with or controlling a physician's practice

---

<sup>3</sup>"CVS to Buy Aetna for 67.5 Billion, Remaking Health Sector," Bloomberg Markets (December 3, 2017), online at <https://www.bloomberg.com/news/articles/2017-12-03/cvs-is-said-to-buy-aetna-for-67-5-billion-remaking-industry>.

of medicine. The underlying rationale of the Corporate Bar can be found in decisional law as early as 1938:

We are unable to agree that the policy of the law may be circumvented by technical distinctions in the manner in which doctors are engaged, designated or compensated by the corporation. The evils of divided loyalty and impaired confidence would seem to be equally present whether the doctor received benefits from the corporation in the form of salary or fees. Any freedom of choice is destroyed, and the elements of solicitation of medical business and lay control of the profession are present whenever the corporation seeks such business from the general public and it turns it over to a special group of doctors.

*People v. Pacific Health Corp.* (1938) 12 Cal. 2d 156, 158–159. “While the principal evils of the corporate practice of medicine may arise from the stress the profit motive places on physicians, the courts have also noted the danger of lay control—a danger that attends all types of corporations.” *California Physicians’ Serv. v. Aoki Diabetes Research Inst.*, 163 Cal. App. 4th 1506, 1516 (2008).

In practice, the Corporate Bar has been interpreted to prohibit lay persons and entities from directly or indirectly engaging in the practice of medicine. *See, e.g., California Physicians’ Service*, 163 Cal. App. 4th at 1518 (non-profit corporation formed to, among other things, provide treatment for persons with diabetes illegal under corporate practice of medicine bar); *Conrad v. Medical Board*, 48 Cal. App. 4th 1038, 1049 (1996) (hospital district may not employ physicians); *Pacific Employers Ins. Co. v. Carpenter*, 10 Cal. App. 2d 592, 594–596 (1935) (holding that for-profit corporation may not engage in business of providing medical services and stating that “professions are not open to commercial exploitation as it is said to be against public policy to permit a ‘middle-man’ to intervene for a profit in establishing a professional relationship between members of said professions and the members of the public”).

The Corporate Bar also has been applied to prohibit direct or indirect influence over the practice of medicine or a physician’s judgment. For example, in *People v. Superior Court (Cardillo)*, 218 Cal. App. 4th 492 (2013), lay owners and operators of medical marijuana clinics were held to criminally violate the Corporate Bar where they controlled the operations of the clinics by employing licensed physicians to issue recommendations for medical marijuana, setting the physicians’

hours, soliciting and scheduling patients, collecting fees from the patients, and paying the physicians a percentage of those fees. According to the court, the fact that neither lay owners examined any patients or prescribed medical marijuana to them does not absolve them of criminal liability for practicing medicine without a license. Section 2052 clearly prohibits an unlicensed person from either “practicing ... any system or mode of treating the sick or afflicted” or diagnosing, treating, or prescribing for any disease or ailment. *Id.* at 498.

The Medical Board of California explains that “[t]he policy expressed in [the Corporate Bar] is intended to prevent unlicensed persons from interfering with or influencing the physician’s professional judgment. . . From the Medical Board’s perspective, the following health care decisions should be made by a physician licensed in the State of California and would constitute the unlicensed practice of medicine if performed by an unlicensed person:

- Determining what diagnostic tests are appropriate for a particular condition.
- Determining the need for referrals to, or consultation with, another physician/specialist.
- Responsibility for the ultimate overall care of the patient, including treatment options available to the patient.
- Determining how many patients a physician must see in a given period of time or how many hours a physician must work.”

See Website of Medical Board of California at [www.mbc.ca.gov/Licensees/Corporate\\_Practice.aspx](http://www.mbc.ca.gov/Licensees/Corporate_Practice.aspx).

CVS’s MinuteClinics, to the extent they engage non-physicians such as nurse practitioners or pharmacists to practice medicine, sometimes perhaps beyond the scope of their professional license, poses substantial concerns under the Corporate Bar. The increased reliance on these practices as a claimed efficiency of the proposed CVS – Aetna merger should raise serious red flags.

It is not enough that the MinuteClinics in California may be individually physician-owned, as has been suggested by CVS during public testimony. The Corporate Bar prohibits not only direct control over the practice of medicine (such as through employment of physicians or contracts for medical services) but also

indirect modes of control and indirect influence. The Corporate Bar presumes that certain business arrangements per se can result in the unlawful lay control of the practice of medicine. Accordingly, lay entities may not have an economic interest in the net profits of a medical practice. *See* 55 Ops. Cal. Atty. Gen. 103 (1972). Lay entities also may not contract with physicians on an employment or independent contract basis for the provision of medical services (except for Knox-Keene health care service plans). *See* 54 Ops. Cal. Atty. Gen. 126 (1971) (hospital may not employ physicians to provide professional services); 65 Ops. Cal. Atty. Gen. 223 (1982) (general business corporation may not lawfully engage licensed physicians to treat employees even though physicians act as independent contractors and not as employees). In both situations, the lay entity has too much control over the manner or means by which medical care is provided.

In *California Association of Dispensing Opticians v. Pearle Vision Center, Inc.*, 143 Cal. App. 3d 419 (1983), the court held that subtle forms of control exercised by a lay franchiser over the business aspects of an optometry practice violated the Corporate Bar, including (i) control over office location and specifications, (ii) control over inventory and supplies, (iii) required use of the corporation's name and business and advertising, (iv) required submission of periodic reports, and (v) payment to the corporation of a percentage of gross revenue. The court held such forms of control over licensed professionals effectively enabled the lay corporation to engage in the profession, in violation of the Corporate Bar. The Medical Board of California has published a list of business and management decisions and activities that would similarly result in unlawful control over a physician's practice of medicine in violation of the Corporate Bar:

- Ownership is an indicator of control of a patient's medical records, including determining the contents thereof, and should be retained by a California licensed physician.
- Selection (hiring/firing as it relates to clinical competency or proficiency) of professional, physician extender, and allied health staff.
- Setting the parameters under which the physician will enter into contractual relationships with third-party payers.
- Decisions regarding coding and billing procedures for patient care services.

- Approval of the selection of medical equipment for the medical practice.

See Website of Medical Board of California at [www.mbc.ca.gov/Licensees/Corporate\\_Practice.aspx](http://www.mbc.ca.gov/Licensees/Corporate_Practice.aspx).

In an unpublished opinion, an appellate court refused to condone the formation of “straw man” corporations to attempt to facilitate compliance with the Corporate Bar. See *San Joaquin Community Hospital v. San Joaquin Valley Medical Group*, case no. F039938, 2004 WL 1398551 (Cal. Ct. App., 5th App. Dist., June 24, 2004). In that case, physician owners “friendly” to a hospital held 58% of the interest in a medical corporation. Their interest, however, was held in trust for the hospital. Noting that the Corporate Bar applies to “indirect” control over the practice of medicine, the court observed, “[t]he ‘principal evils’ thought to spring from the corporate practice of medicine are ‘the conflict between the professional standards and obligations of doctors and the profit motive of the corporation employer.’” *Id.*, 2004 WL 1398551, at \*18 (quoting *Conrad v. Medical Bd. of Cal.*, 48 Cal. App. 4th 1038, 1041 n.2 (1996)). Even though there was no evidence that agents of the hospital interfered in a physician’s medical decisionmaking, the court found that the Corporate Bar prohibited certain arrangements per se. It concluded, “[w]e cannot imagine any consideration of public policy that would cause us to impute to the Legislature the intent to, on the one hand, ban corporate ownership of medical practices and, on the other, permit such ownership through mere ‘straw men’ acting on behalf of the corporation.” *Id.*

While CVS suggests that physician ownership of its retail clinics may enable it to provide physician services by pharmacists, physician assistants, and nurse practitioners, CVS has never explained how such a scheme complies with the concerns of the Corporate Bar against undue lay interference with physician judgment. CVS has never publicly disclosed all ownership and beneficial interests over MinuteClinics and any other clinic through which medical care is provided in California. Nor has CVS ever explained how lay entities and individuals do not in fact have direct or indirect control over patient care at MinuteClinics or other similar clinics in California. Rather, it appears more likely that CVS executives or other lay administrators will exert direct control over the MinuteClinics to realize their claimed efficiency for the merger. Such lay control over physician judgment and services, while necessary for the proposed merger to work effectively as CVS and Aetna claim, would violate the Corporate Bar.

Page 8 of 8

Thank you for the opportunity to provide comments on the proposed CVS – Aetna merger. CMA believes the anticompetitive harm that would result and the violations of California law protecting patients and physician autonomy outweigh any efficiencies that may be realized out of the merger. Accordingly, CMA opposes the CVS – Aetna proposed merger.

Sincerely,

A handwritten signature in black ink, appearing to read "Francisco J. Silva". The signature is stylized and cursive.

Francisco J. Silva  
General Counsel and Senior Vice-President  
Centers for Legal Affairs, Health Policy, &  
Economic Services