limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, HP Inc., Houston, TX; and Quatius Ltd., Kwai Chung, HONG KONG–CHINA, have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and UHD Alliance intends to file additional written notifications disclosing all changes in membership.

On June 17, 2015, UHD Alliance filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on July 17, 2015 (80 FR 42537).

The last notification was filed with the Department on June 7, 2018. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on July 9, 2018 (83 FR 31775).

Suzanne Morris,

Chief, Premerger and Division Statistics Unit, Antitrust Division.

[FR Doc. 2018–22543 Filed 10–16–18; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

United States v. CVS Health Corporation and Aetna Inc.; Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that a proposed Final Judgment, Stipulation, and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in *United States of America v. CVS Health Corporation and Aetna Inc.,* Civil Action No. 1:18–cv–02340. On October 10, 2018, the United States filed a Complaint alleging that CVS Health Corporation's proposed acquisition of Aetna Inc. would violate Section 7 of the Clayton Act, 15 U.S.C. 18. The proposed Final Judgment, filed at the same time as the Complaint, requires the merging parties to divest Aetna's individual prescription drug plan business.

Copies of the Complaint, proposed Final Judgment, and Competitive Impact Statement are available for inspection on the Antitrust Division's website at *http://www.justice.gov/atr* and at the Office of the Clerk of the United States District Court for the District of Columbia. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, including the name of the submitter, and responses thereto, will be posted on the Antitrust Division's website, filed with the Court, and, under certain circumstances, published in the **Federal Register**. Comments should be directed to Peter Mucchetti, Chief, Healthcare and Consumer Products Section, Antitrust Division, Department of Justice, 450 Fifth Street NW, Suite 4100, Washington, DC 20530 (telephone: 202–307–0001).

Patricia A. Brink,

Director of Civil Enforcement.

United States District Court for the District of Columbia

United States Of America, U.S. Department of Justice, Antitrust Division, 450 5th Street NW, Suite 4100, Washington, DC 20530, State of California, 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102, State of Florida, PL–01, The Capitol, Tallahassee, FL 32399–1050, State of Hawaii, 425 Queen Street, Honolulu, HI 96813, State of Mississippi, P.O. Box 22947, Jackson, MS 39225, and *State of Washington, 800 Fifth Avenue, Suite 2000, Seattle, WA 98104–3188,* Plaintiffs, v., *CVS Health Corporation, 1 CVS Drive, Woonsocket, RI 02895,* and *AETNA Inc., 151 Farmington Avenue, Hartford, CT 06156,* Defendants.

Case No. 1:18–cv–02340
Judge Richard J. Leon

COMPLAINT

The United States of America, acting under the direction of the Attorney General of the United States, and the States of California, Florida, Hawaii, Mississippi, and Washington (''Plaintiff States''), bring this civil antitrust action to prevent CVS Health Corporation from acquiring Aetna Inc.

I. Introduction

1. CVS's proposed $69 billion acquisition of Aetna would combine two of the country's leading sellers of individual prescription drug plans, also known as individual PDPs. More than 20 million individual beneficiaries—primarily seniors and persons with disabilities—rely on these government-sponsored plans for prescription drug insurance coverage. Competition between CVS and Aetna to sell individual PDPs has resulted in lower premiums, better service, and more innovative products. The proposed acquisition would eliminate this valuable competition, harming beneficiaries, taxpayers, and the federal government, which pays for a large portion of beneficiaries' prescription drug coverage.

2. While CVS and Aetna compete throughout the United States, they are particularly strong in 16 geographic regions established by the Centers for Medicare & Medicaid Services (''CMS''). In these 16 regions, over 9.3 million people are enrolled in individual PDPs. Competition between CVS and Aetna is particularly important in these regions because they compete for similar customers by lowering prices and improving products. Moreover, they are two of the largest and fastest-growing competitors. Individuals in these 16 regions will experience harm, including price increases and quality reductions, from the loss of competition between CVS and Aetna.

3. Because the transaction likely would substantially lessen competition between CVS and Aetna for individual PDPs in these 16 regions, the proposed acquisition violates Section 7 of the Clayton Act, 15 U.S.C. § 18, and should be enjoined.

II. Background

A. Medicare Drug Coverage

4. Medicare is a federal program that provides health insurance to qualified beneficiaries. Medicare offers coverage for outpatient prescription drugs under the Medicare Part D program, which harnesses competition between private insurance companies in order to lower prescription drug costs for Medicare beneficiaries and taxpayers, enhance plan designs, and improve quality of coverage.

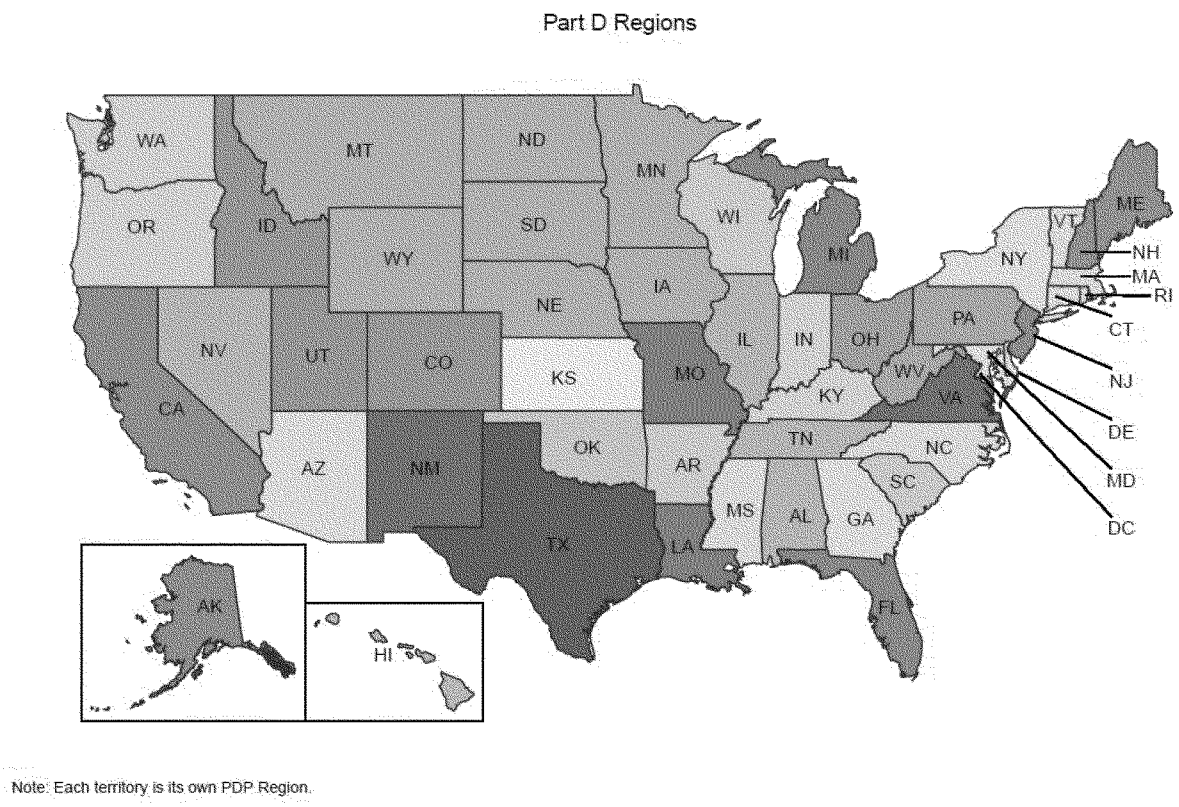
5. Medicare beneficiaries obtain individual drug coverage in two main ways, depending on the type of medical insurance they have. Beneficiaries enrolled in Original Medicare, a fee-for-service program offered directly through the federal government, can enroll in a standalone individual PDP. Beneficiaries enrolled in Medicare Advantage, a type of private insurance offered by companies that contract with the federal government, can enroll in a plan that includes drug coverage.

6. No matter how beneficiaries obtain Medicare drug coverage, the federal government subsidizes the cost of that coverage. As explained in greater detail below, the federal government also provides additional subsidies to low-income beneficiaries under the low-income subsidy (''LIS'') program.

B. Individual PDPs

7. Individual PDPs provide beneficiaries with insurance coverage for a set of prescription drugs (the ''formulary''), a network of pharmacies where beneficiaries may fill prescriptions, and a set schedule of defined premiums and cost-sharing rates.

8. To offer individual PDPs, insurers must be approved by CMS. CMS has divided the 50 states and the District of Columbia into 34 Part D regions. To offer an individual PDP in a Part D region, the insurer must offer the plan at the same price to all individuals in the region and have a pharmacy network that is adequate to serve individuals throughout the region. No Part D region is smaller than a state, and some Part D regions encompass multiple contiguous states. Beneficiaries can enroll only in individual PDPs offered in the Part D region where they reside. The following map shows the Part D regions:



9. Within each Part D region, an insurer may generally offer up to three individual PDPs. An insurer must offer one ''basic'' individual PDP that is actuarially equivalent to the minimum coverage required by statute but may vary in terms of premiums, deductibles, formularies, and pharmacy networks. Insurers may also offer up to two ''enhanced'' individual PDPs that provide additional coverage compared to the insurer's basic individual PDP.

10. Individual PDPs vary in terms of premiums, cost sharing, drug formularies, pharmacy networks, and other characteristics. Insurers can use these different plan designs to target different types of Medicare beneficiaries based on their health, income, price sensitivity, and other factors.

11. Each fall, Medicare has an annual open-enrollment period in which beneficiaries may change their individual PDP. When comparing plans, beneficiaries consider a number of factors, including premiums, cost sharing, whether their drugs are on the formulary, and whether their preferred pharmacies are in network.

C. The Low-Income Subsidy Program

12. Most low-income beneficiaries do not have to pay a premium for their individual PDP because Medicare pays their premium up to a certain threshold called the ''LIS benchmark.'' Under CMS rules, beneficiaries eligible for the low-income subsidy who do not affirmatively select an individual PDP or a Medicare Advantage plan (''auto-enrollees'') are automatically enrolled in a basic individual PDP, but only one that has premiums set below the regional LIS benchmark. These auto-enrollees are assigned in proportion to the number of basic plans below the LIS benchmark. For example, if three basic individual PDPs are below the LIS benchmark in a Part D region, then each plan receives a third of new auto-enrollees in that region.

13. The LIS benchmark has important consequences for insurers. As long as an insurer's individual PDP remains below the LIS benchmark each year, the plan keeps its existing auto-enrollees and is eligible to receive a portion of new auto-enrollees. If an insurer's basic individual PDP is priced over the LIS benchmark, however, then it generally loses all of its auto-enrollees and is not eligible to receive any new auto-enrollees that year. The one exception is when an insurer's monthly premium is within a *de minimis* amount, currently $2, above the LIS benchmark, in which case the insurer can keep its auto-enrollees if it waives the premium amount above the LIS benchmark, but the insurer is not eligible to receive any new auto-enrollees. If an insurer loses its auto-enrollees, its beneficiaries are reassigned to an individual PDP below the LIS benchmark in the same manner that new auto-enrollees are assigned.

14. As with the Part D program generally, the LIS program is designed to promote competition between insurers to lower costs for beneficiaries and taxpayers.

III. The Defendants and the Merger

15. CVS, based in Woonsocket, Rhode Island, is one of the largest companies in the United States. It operates the nation's largest retail pharmacy chain; owns a large pharmacy benefit manager called Caremark; and is the nation's second-largest provider of individual PDPs, with over 4.8 million members. CVS offers individual PDPs under the brand name SilverScript in all 50 states and the District of Columbia. In 2017, CVS earned revenues of approximately $185 billion.

16. Aetna, based in Hartford, Connecticut, is the nation's third-largest health-insurance company and fourth-largest individual PDP insurer, with over 2 million individual PDP members. Like CVS, Aetna offers individual PDPs in all 50 states and the District of Columbia. In 2017, the company earned revenues of $60 billion.

17. On December 3, 2017, CVS agreed to acquire Aetna for approximately $69 billion.

IV. Jurisdiction and Venue

18. The United States brings this action, and this Court has subject-matter jurisdiction over this action, under Section 15 of the Clayton Act, 15 U.S.C. § 25, to prevent and restrain the defendants from violating Section 7 of the Clayton Act, 15 U.S.C. § 18.

19. The Plaintiff States bring this action under Section 16 of the Clayton Act, 15 U.S.C. § 26, to prevent and restrain the defendants from violating Section 7 of the Clayton Act, 15 U.S.C. § 18. The Plaintiff States, by and through their respective Attorneys General, bring this action as parens patriae on behalf of and to protect the health and welfare of their citizens and the general economy of each of their states.

20. Defendants are engaged in, and their activities substantially affect, interstate commerce. CVS and Aetna sell individual PDPs, as well as other products and services, to numerous customers located throughout the United States and that insurance covers beneficiaries when they travel across state lines.

21. This Court has personal jurisdiction over each defendant under Section 12 of the Clayton Act, 15 U.S.C. § 22. CVS and Aetna both transact business in this District.

22. Venue is proper in this District under Section 12 of the Clayton Act, 15 U.S.C. § 22, and under 28 U.S.C. § 1391. Defendants have also consented to venue and personal jurisdiction in the District of Columbia.

V. The Relevant Markets

A. The Sale of Individual PDPs Is a Relevant Market

23. The sale of individual PDPs is a relevant market and line of commerce under Section 7 of the Clayton Act.

24. For the vast majority of beneficiaries enrolled in individual PDPs, the main alternative for prescription drug coverage—Medicare Advantage plans that include drug coverage—is not a close substitute. Beneficiaries who have enrolled in an individual PDP have, by definition, chosen Original Medicare over Medicare Advantage. These beneficiaries rarely switch between the two programs, and they are even less likely to switch to obtain alternative prescription drug coverage. Indeed, only about two percent of individual PDP members convert to Medicare Advantage plans each year during open enrollment, and an even smaller percentage of individuals convert from Medicare Advantage plans to individual PDPs.

25. Because Medicare Advantage is not a close substitute for beneficiaries enrolled in individual PDPs, CVS, Aetna, and other industry participants treat individual PDPs as distinct from other products. For example, CVS offers individual PDPs but does not offer Medicare Advantage plans. Insurers that offer Medicare Advantage plans and individual PDPs, including Aetna, separately monitor and report their individual PDP enrollment, premiums, benefits, market share, and financial performance, both internally and to investors.

26. For these reasons, individual PDPs satisfy the well-accepted ''hypothetical monopolist'' test set forth in the U.S. Department of Justice and Federal Trade Commission's *2010 Horizontal Merger Guidelines.* A hypothetical monopolist selling all individual PDPs would likely impose a small but significant and non-transitory price increase because an insufficient number of beneficiaries would switch to alternatives to make that price increase unprofitable.

B. The relevant geographic markets are 16 Part D regions.

27. As noted, a Medicare beneficiary may enroll only in the individual PDPs that CMS has approved in the Part D region where the beneficiary resides. Therefore, competition in each Part D region is limited to the insurers that CMS has approved to operate in that region.

28. For the same reason, a hypothetical monopolist selling individual PDPs in a specific Part D region could profitably impose a small but significant and non-transitory price increase because an insufficient number of beneficiaries would or could switch to alternatives outside the Part D region to make that price increase unprofitable.

29. As explained below, the proposed acquisition would likely harm competition in 16 of the 34 Part D regions: Arkansas, California, Florida, Georgia, Hawaii, Kansas, Louisiana, Mississippi, Missouri, New Mexico, North Carolina, Ohio, Oklahoma, South Carolina, Wisconsin, and the multistate region of Iowa, Minnesota, Montana, Nebraska, North Dakota, South Dakota, and Wyoming. Each of these Part D regions is a relevant geographic market for the sale of individual PDPs.

VI. CVS's acquisition of Aetna will substantially lessen competition in the sale of individual PDPs in 16 Part D regions.

30. Consumers will be harmed by the transaction in 16 Part D regions covering 22 states. Over 9.3 million people are enrolled in individual PDPs in the 16 regions, 3.5 million of whom have coverage from CVS or Aetna.

31. The proposed acquisition would substantially lessen competition and harm consumers by eliminating significant head-to-head competition between CVS and Aetna. Indeed, throughout the country, CVS and Aetna have been close competitors. For example, in 2016 and 2018, CVS found that individuals leaving its individual PDPs went to Aetna more often than to any other competitor. CVS's and Aetna's individual PDPs are also among the fastest growing individual PDPs, with new-to-Medicare enrollees choosing CVS and Aetna plans at rates higher than their current market shares.

32. CVS and Aetna have sought to win individual PDP customers in various ways. For example, CVS and Aetna routinely consider each other's prices and formularies when setting prices and coverage amounts for their plans. This price competition between CVS and Aetna drives them to lower premiums, copayments, coinsurance, and deductibles.

33. CVS and Aetna have also sought to win individual PDP customers from each other by improving the quality of their services and coverage. This competition has led the companies to improve drug formularies, offer more attractive pharmacy networks, and create enhanced benefits for individuals. For example, in recent years, Aetna has made several changes to improve the coverage of its formulary and pharmacy networks to win business from CVS. That competition gave beneficiaries access to certain drugs at more affordable prices.

34. In 12 Part D regions—Arkansas, California, Florida, Georgia, Hawaii, Kansas, Louisiana, Mississippi, Missouri, New Mexico, Ohio, and South Carolina—CVS and Aetna will account for at least 35 percent of individual PDP enrollment in highly concentrated markets, making the merger presumptively anticompetitive. *See United States v. Anthem, Inc.,* 855 F.3d 345, 349 (D.C. Cir. 2017) (holding that market concentration can establish a presumption of anticompetitive effects).

35. In five of these Part D regions (Arkansas, Georgia, Kansas, Mississippi, Missouri), as well as four additional regions (North Carolina, Oklahoma, Wisconsin, and the multistate region of Iowa, Minnesota, Montana, Nebraska, North Dakota, South Dakota, and Wyoming), the merged company will account for 35 percent or more of LIS-eligible beneficiaries. When combined with other market factors, this share of low-income subsidiary beneficiaries will likely result in an additional loss of competition. Competition between CVS and Aetna in these regions has led them to lower premiums to be below the regional LIS benchmarks and *de minimis* thresholds and thus qualify for LIS auto-enrollees. These lower premiums have in turn led to lower regional LIS benchmarks because the LIS benchmarks are based on the premiums that CVS, Aetna, and other companies receive for providing Medicare drug coverage. Lower LIS benchmarks reduce taxpayer costs and costs to non-LIS beneficiaries who choose to enroll in these plans.

36. If CVS acquires Aetna, these valuable forms of competition will be lost, resulting in higher premiums for consumers and lower-quality services. In addition, because the LIS benchmark is calculated as an LIS-enrollment-weighted-average for each individual PDP region, in Part D regions where CVS and Aetna have a high percentage of LIS enrollees, the merged company would have a greater ability to influence the LIS benchmark and will be incentivized to increase its prices for individual PDPs. Higher prices increase the amount that non-LIS beneficiaries pay as well as the subsidies that the federal government pays for LIS enrollees. As a result, the merger will likely increase costs to beneficiaries, the federal government, and, ultimately, to taxpayers.

VII. Countervailing factors do not offset the anticompetitive effects of the transaction.

37. Entry of new insurers or expansion of existing insurers into the sale of individual PDPs in any Part D region is unlikely to prevent or remedy the proposed merger's anticompetitive effects. Effective entry into the sale of individual PDPs requires years of planning, millions of dollars, access to qualified personnel, and competitive contracts with pharmacies and pharmaceutical manufacturers. Because of these barriers to entry, entry or expansion into the sale of individual PDPs is unlikely to be timely or sufficient to remedy the anticompetitive effects from this merger.

38. The proposed merger is also unlikely to generate verifiable, merger-specific efficiencies sufficient to outweigh the anticompetitive effects that are likely to occur in the sale of individual PDPs in the relevant Part D regions.

VIII. Violation Alleged

39. The effect of the proposed merger, if consummated, likely would be to lessen competition substantially in the sale of individual PDPs in each of the relevant Part D regions, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

40. In the sale of individual PDPs in each of the relevant Part D regions, the merger likely would:

(a) eliminate significant present and future head-to-head competition between CVS and Aetna;

(b) reduce competition generally;
(c) raise prices to Medicare beneficiaries and taxpayers;
(d) reduce quality; and
(e) lessen innovation.

IX. Request for relief

41. Plaintiffs request that the Court:
(a) adjudge CVS's proposed acquisition of Aetna to violate Section 7 of the Clayton Act, 15 U.S.C. § 18;
(b) permanently enjoin and restrain the Defendants from carrying out the planned acquisition or any other transaction that would combine the two companies;
(c) award Plaintiffs the costs of this action; and
(d) award Plaintiffs other relief that the Court deems just and proper.

Dated: October 10, 2018.

Respectfully submitted,

FOR PLAINTIFF UNITED STATES OF AMERICA:

Makan Delrahim,
Assistant Attorney General for Antitrust.

Bernard A. Nigro, Jr., (D.C. Bar #412357),
Deputy Assistant Attorney General.

Patricia A. Brink,
Director of Civil Enforcement.

Peter J. Mucchetti,
Chief, Healthcare and Consumer Products Section.

Scott I. Fitzgerald,
Assistant Chief, Healthcare and Consumer Products Section.

Jay D. Owen,
Jesús M. Alvarado-Rivera
Don Amlin (D.C. Bar #978349)
Barry L. Creech (D.C. Bar #421070)
Justin M. Dempsey (D.C. Bar #425976)
Emma Dick
Matthew C. Hammond
John A. Holler
Barry Joyce
Kathleen S. Kiernan (D.C. Bar #1003748)
Daphne Lin
Cerin M. Lindgrensavage
Michael T. Nash
Andrew J. Robinson (D.C. Bar #1008003)
Rebecca Valentine (D.C. Bar #989607)
Bashiri Wilson (D.C. Bar #998075)
Attorneys for the United States,
U.S. Department of Justice, Antitrust Division, 450 Fifth Street NW, Suite 4100, Washington, D.C. 20530, Tel.: (202) 598–2987, Fax: (202) 616–2441, E-mail: Jay.Owen@usdoj.gov.

FOR PLAINTIFF STATE OF CALIFORNIA:

Xavier Becerra,
Attorney General.

Emilio Varanini,
Deputy Attorney General, Office of the Attorney General of California, 455 Golden Gate Avenue, Suite 11000, San Francisco, California 94102, Phone: (415) 510–3541, Fax: (415) 703–5480, E-mail: Emilio.Varanini@doj.ca.gov.

FOR PLAINTIFF STATE OF FLORIDA:

Pamela Jo Bondi,
Attorney General.

Patricia A. Conners,
Deputy Attorney General.
Lizabeth A. Brady,
Chief, Multistate Enforcement.
Christopher R. Hunt,
Assistant Attorney General.
Rachel Michelle Steinman,
Assistant Attorney General, Office of the Attorney General of Florida, PL–01, The Capitol, Tallahassee, FL 32399–1050, Phone: (850) 414–3851, Fax: (850) 488–9134, liz.brady@myfloridalegal.com.

FOR PLAINTIFF STATE OF HAWAII:

Russell Suzuki,
Attorney General.

Rodney I. Kimura,
Deputy Attorney General, Office of the Attorney General of Hawaii, 425 Queen Street, Honolulu, HI 96813, Phone: (808) 586–1180, Fax: (808) 586–1205, rodney.i.kimura@hawaii.gov.

FOR PLAINTIFF STATE OF MISSISSIPPI:

Jim Hood,
Attorney General, State of Mississippi.

Crystal Utley Secoy,
Consumer Protection Division, Mississippi Attorney General's Office, P.O. Box 22947, Jackson, Mississippi 39225, Phone: (601) 359–4213, cutle@ago.state.ms.us.

FOR PLAINTIFF STATE OF WASHINGTON:

Robert W. Ferguson,
Attorney General.

Luminita Nodit,
Assistant Attorney General, Attorney General's Office, 800 Fifth Avenue, Suite 2000, Seattle, WA 98104–3188, Phone: (206) 254–0568, Fax: (206) 464–6338, luminitan@atg.wa.gov.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

United States of America, et al.
Plaintiffs, v.
CVS Health Corporation,
and
AETNA Inc.
Defendants.

Case No. 1:18–cv–02340
Judge Richard J. Leon

PROPOSED FINAL JUDGMENT

WHEREAS, Plaintiffs United States of America and the States of California, Florida, Hawaii, Mississippi, and Washington (collectively, ''Plaintiff States''), filed their Complaint on October 10, 2018;

AND WHEREAS, Plaintiffs and Defendants, CVS Health Corporation (''CVS'') and Aetna Inc. (''Aetna''), have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law;

AND WHEREAS, Defendants agree to be bound by the provisions of this Final Judgment pending its approval by the Court;

AND WHEREAS, the essence of this Final Judgment is the prompt and certain divestiture of certain rights and assets by Defendants to assure that competition is not substantially lessened;

AND WHEREAS, Plaintiffs require Defendants to divest certain assets for the purpose of remedying the loss of competition alleged in the Complaint;

AND WHEREAS, Defendants have represented to Plaintiffs that the divestiture required below can and will be made and that Defendants will not raise claims of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions contained below;

NOW THEREFORE, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of the parties, it is ORDERED, ADJUDGED, AND DECREED:

I. JURISDICTION

The Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against Defendants under Section 7 of the Clayton Act, 15 U.S.C. § 18.

II. DEFINITIONS

As used in this Final Judgment:

A. ''Acquirer'' means WellCare or another entity approved by the United States in its sole discretion to whom Defendants divest the Divestiture Assets.

B. ''Aetna'' means Defendant Aetna Inc., a Pennsylvania corporation with its headquarters in Hartford, Connecticut; its successors and assigns; and its subsidiaries, divisions, groups, affiliates (for purposes of this definition, CVS is not deemed an affiliate of Aetna), partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

C. ''Aetna Brands'' means Aetna's and Aetna's current affiliates' names, marks, logos, colors, and copyrights, including, ''Aetna,'' ''Aetna Medicare,'' ''Aetna Medicare Rx,'' ''Aetna Medicare Solutions,'' ''Aetna Coventry,'' ''Aetna Medicare Rx Value Plus (PDP).''

D. ''Aetna's Individual PDP Business'' means Aetna's ongoing business of offering PDP plans to individual Medicare beneficiaries under CMS contracts S–5768 and S–5810.

E. ''Broker Contract'' means a valid contract with a third-party to sell PDPs under CMS contracts S–5768 or S–5810.

F. ''CMS'' means the Centers for Medicare and Medicaid Services, an agency within the U.S. Department of Health and Human Services.

G. ''CVS'' means Defendant CVS Health Corporation, a Delaware corporation with its headquarters in Woonsocket, Rhode Island; its successors and assigns; and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

H. ''Divestiture Assets'' means Aetna's Individual PDP Business, including:

(1) all rights and obligations relating to Aetna's Individual PDP Business, including the right to offer individual PDPs to enrollees under CMS contracts S–5768 and S–5810 and the right to receive from CMS a per member per month payment in exchange for providing or arranging for the benefits offered under CMS contracts S–5768 and S–5810; and

(2) copies of all books, records, and data, both current and historical, relating to CMS contracts S–5768 and S–5810. Where books, records, or data relate to the CMS contracts S–5768 or S–5810, but not solely to these contracts, Defendants must provide all excerpts relating to the S–5768 and S–5810 contracts.

I. ''PDP'' means a standalone prescription drug plan option available to Medicare beneficiaries under Medicare Part D that subsidizes the costs of prescription drugs for enrollees.

J. ''Relevant Personnel'' means every person providing pharmacy network, product development, and actuarial support for Aetna's Individual PDP Business.

K. ''WellCare'' means WellCare Health Plans, Inc., a Delaware corporation with its headquarters in Tampa, Florida; its successors and assigns; and its subsidiaries.

III. APPLICABILITY

A. This Final Judgment applies to each Defendant and all other persons in active concert or participation with any Defendant who receive actual notice of this Final Judgment by personal service or otherwise.

B. If, before complying with Section IV and Section VI of this Final Judgment, Defendants sell or otherwise dispose of all or substantially all of their assets or of lesser business units that include the Divestiture Assets, Defendants must require the purchasers to be bound by the provisions of this Final Judgment. Defendants need not obtain such an agreement from the Acquirer of the assets divested under this Final Judgment.

IV. DIVESTITURE

A. Within 30 calendar days after the filing of the Complaint in this matter, Defendants must divest the Divestiture Assets in a manner consistent with this Final Judgment to an Acquirer acceptable to the United States, in its sole discretion, after consultation with the Plaintiff States. The United States in its sole discretion may agree to one or more extensions of this time period not to exceed 90 calendar days in total and must notify the Court in such circumstances. Defendants must use their best efforts to divest the Divestiture Assets as expeditiously as possible.

B. If Defendants attempt to divest the Divestiture Assets to an Acquirer other than WellCare, Defendants must promptly make known, by usual and customary means, the availability of the Divestiture Assets. Defendants must inform any person making an inquiry regarding a possible purchase of the Divestiture Assets that they are being divested in accordance with this Final Judgment and provide that person with a copy of this Final Judgment.

C. Defendants must obtain all regulatory approvals relating to the Divestiture Assets as expeditiously as possible. If applications for approval have been filed with the appropriate governmental units within five calendar days after the United States has provided written notice under Paragraph VII(C) that it does not object to a proposed divestiture, but these required approvals have not been issued or become effective before the end of the period permitted for divestiture, the period for divestiture is extended until five business days after all necessary government approvals have been received. With respect to this Paragraph, an application for CMS approval is deemed to have been filed when Defendants have given CMS advance notice of a possible change in ownership under 42 C.F.R. § 423.551–552, as long as Defendants timely submit all materials required by CMS for approval.

D. Defendants must permit the Acquirer to have reasonable access to personnel and access to any and all financial, operational, or other documents and information customarily provided as part of a due diligence process.

E. Defendants may not take any action that will impede in any way the permitting, operation, or divestiture of the Divestiture Assets.

F. The divestiture under Section IV or VI of this Final Judgment must include the entire Divestiture Assets unless the United States, in its sole discretion, after consultation with the Plaintiff States, otherwise consents in writing. The divestiture must be accomplished in such a way as to satisfy the United States, in its sole discretion, after consultation with the Plaintiff States, that the Divestiture Assets can and will be used by the Acquirer as part of a viable, ongoing individual PDP business. Defendants will divest the Divestiture Assets in a manner that demonstrates, to the sole satisfaction of the United States after consultation with the Plaintiff States, that the Divestiture Assets will remain viable and that the divestiture of such assets will remedy the competitive harm alleged in the Complaint. The divestiture, whether under Section IV or Section VI of this Final Judgment,

(1) must be made to an Acquirer that, in the United States' sole judgment, after consultation with the Plaintiff States, has the intent and capability (including the necessary managerial, operational, technical, and financial capability) of competing effectively in the business of selling individual PDPs; and

(2) must be accomplished so as to satisfy the United States, in its sole discretion, after consultation with the Plaintiff States, that none of the terms of any agreement between an Acquirer and Defendants give Defendants the ability unreasonably to raise the Acquirer's costs, to lower the Acquirer's efficiency, or otherwise to interfere in the ability of the Acquirer to compete effectively.

G. Defendants must communicate and cooperate fully with the Acquirer to work in good faith with CMS to implement a novation process that is efficient and adheres to CMS's requirements. This cooperation includes: (i) preparing and filing as promptly as practicable with any governmental authority or other third party all documentation to effect all necessary, proper or advisable filings; (ii) obtaining as promptly as practicable and maintaining all consents required to be obtained from any governmental authority or other third party that are necessary, proper, or advisable to consummate the transactions contemplated by this Final Judgment; (iii) to the extent permitted by applicable law, furnishing as promptly as practicable to one another or any governmental authority any information or documentary materials reasonably requested or required in connection with obtaining and maintaining such consents; and (iv) communicating and cooperating with the other party and its affiliates in connection with such matters.

H. At the option of the Acquirer, Defendants must execute an administrative services agreement, and fully perform the duties and obligations of that agreement until at least December 31, 2019. The services to be provided by Defendants to the Acquirer under the administrative services agreement must encompass all services necessary to operate the Divestiture Assets, including: (1) pharmacy network management and contracting; (2) prescription drug claims processing and run-out of claims processing; (3) utilization review and quality management; (4) data collection, reporting and submission; (5) rebate management; (6) formulary administration; (7) eligibility (including retro-eligibility) and enrollment; (8) billing and invoicing; (9) prescription drug event file management and submission; (10) medication therapy management services; (11) disease management; (12) clinical safety and drug adherence programs; (13) print and fulfillment services; (14) customer service; (15) appeals and grievances; (16) coordination of benefits; (17) record retention; (18) transition services; (19) run-out services; (20) oversight compliance activities; (21) reporting activities; (22) audit support activities; and (23) the provision of actuarial bid data. The terms and conditions of such an agreement must be acceptable to the United States in its sole discretion.

I. Defendants must grant the Acquirer a non-exclusive, royalty-free license, under which the Acquirer is permitted to use the Aetna Brands for the limited purposes of marketing of the Divestiture Assets, transition to a future branded PDP, communications with enrollees regarding benefits and coverage under the Divestiture Assets, and other materials that are necessary for operation of the Divestiture Assets through December 31, 2019, as permitted by CMS in accordance with all laws and regulations.

J. During the 2020 plan year (January 1, 2020, through December 31, 2020), Defendants may not directly, or indirectly through an affiliate, offer individual standalone Medicare Part D products under the Aetna Brands.

K. Except in connection with marketing of the Divestiture Assets for the 2019 plan year (January 1, 2019 through December 31, 2019), Defendants may not use any PDP enrollee data relating to the Divestiture Assets for Part D or Medicare Advantage marketing purposes (including direct mail, email campaigns,

outbound Medicare Advantage cross-selling activities, and other similar marketing and retention communications), nor may Defendants instruct brokers to do so.

L. Defendants must assign to the Acquirer all current and valid Broker Contracts (or a duplicate of those Contracts) concerning the Divestiture Assets and must provide the Acquirer with contact information (name, principal address, key contact, email address, and telephone number) and the terms of PDP-related compensation for each such broker.

M. During the 90-day period following the closing of the sale of the Divestiture Assets, Defendants must use reasonable best efforts to obtain written consent from retail pharmacy entities with 20 or more locations and pharmacy services administrative organizations to disclose to the Acquirer the rates relating to the Divestiture Assets by basic and enhanced benefit plan, and by PDP contract, including: (1) for the 2019 benefit year, the generic rate, the generic guarantee, the brand rate, the brand guarantee, dispensing fees, any price concessions or direct and indirect remuneration, and any conditions or limitations agreed to in order to achieve these reimbursement rates; and (2) for the 2018 benefit year, any price concessions or direct and indirect remuneration. Defendants must provide the Acquirer with periodic updates and information regarding its efforts to obtain consent from such entities. If the entities provide such consent after the 90-day period has expired, but before January 1, 2020, Defendants are still obligated to disclose the reimbursement rates to the Acquirer. Within 30 days of the closing of the sale of the Divestiture Assets, Defendants must provide aggregate average reimbursement rates by class of trade (national chains, mass merchandisers, grocers, and pharmacy services administrative organizations) and by basic and enhanced benefit plan under the PDP contracts.

N. Defendants must use all reasonable efforts to maintain and increase the sales and revenues of the Divestiture Assets, and must maintain at 2018 or previously approved levels for 2019, whichever are higher, all promotional, advertising, sales, technical assistance, marketing, and merchandising support for the Divestiture Assets.

V. EMPLOYEES

A. No later than 10 business days following the filing of the Complaint in this matter, Defendants must provide to the Acquirer, the United States, and the Plaintiff States organization charts covering all Relevant Personnel.

B. Unless the United States otherwise consents in writing after consultation with the Plaintiff States, upon request of the Acquirer, Defendants must make Relevant Personnel available for interviews with the Acquirer during normal business hours at a mutually agreeable location. Defendants may not interfere with any negotiations by the Acquirer to employ any Relevant Personnel. Interference includes but is not limited to offering to increase the salary or benefits of Relevant Personnel other than as part of an increase in salary or benefits granted in the ordinary course of business as part of the annual compensation cycle.

C. For any Relevant Personnel who elect employment with the Acquirer during the recruitment period agreed upon by Acquirer and Defendants, Defendants must waive all non-compete and non-disclosure agreements (except as noted in Paragraph V(E)); vest all unvested pension benefits; vest pro-rata any equity rights that do not vest on an installment basis; vest pro-rata any equity rights that would vest on an installment basis for 2018 or 2019, with the pro-rata basis for installment-based equity rights being the number of days the employee was employed by Defendants in the year that the installment would vest; and provide all benefits that Relevant Personnel would be provided if transferred to a buyer of an ongoing business.

D. For a period of one year from the date of filing of the Complaint in this matter, Defendants may not solicit to hire, or hire, any Relevant Personnel who was hired by the Acquirer, unless (a) the individual is terminated or laid off by the Acquirer or (b) the Acquirer agrees in writing that Defendants may solicit or hire that individual.

E. Nothing in Section V prohibits Defendants from maintaining any reasonable restrictions on the disclosure by any employee who accepts an offer of employment with the Acquirer of Defendants' proprietary non-public information that is (a) not otherwise required to be disclosed by this Final Judgment, (b) related solely to Defendants' businesses and clients, and (c) involving a business other than the Divestiture Assets.

F. The Acquirer's right to hire personnel under Section V lasts for a period of 60 days after the divestiture closing date.

VI. APPOINTMENT OF DIVESTITURE TRUSTEE

A. If Defendants have not divested the Divestiture Assets within the time period specified in Paragraph IV(A), Defendants must notify the United States and the Plaintiff States of that fact in writing. Upon application of the United States, the Court will appoint a Divestiture Trustee selected by the United States and approved by the Court to effect the divestiture of the Divestiture Assets.

B. After the appointment of a Divestiture Trustee becomes effective, only the Divestiture Trustee has the right to sell the Divestiture Assets. The Divestiture Trustee will have the power and authority to accomplish the divestiture to an Acquirer acceptable to the United States, in its sole discretion, after consultation with the Plaintiff States, at such price and on such terms as are then obtainable upon reasonable effort by the Divestiture Trustee, subject to the provisions of Sections IV, V, VI, and VII of this Final Judgment, and will have any other powers that the Court deems appropriate. Subject to Paragraph VI(D) of this Final Judgment, the Divestiture Trustee may hire at the cost and expense of Defendants any agents, investment bankers, attorneys, accountants, or consultants, who will be solely accountable to the Divestiture Trustee, reasonably necessary in the Divestiture Trustee's judgment to assist in the divestiture. Any such agents or consultants will serve on such terms and conditions as the United States approves, including confidentiality requirements and conflict of interest certifications.

C. Defendants will not object to a sale by the Divestiture Trustee on any ground other than the Divestiture Trustee's malfeasance. Any such objection by Defendants must be conveyed in writing to the United States and the Divestiture Trustee within 10 calendar days after the Divestiture Trustee has provided the notice required under Paragraph VI(A).

D. The Divestiture Trustee will serve at the cost and expense of Defendants under a written agreement, on such terms and conditions as the United States approves, including confidentiality requirements and conflict of interest certifications. The Divestiture Trustee will account for all monies derived from the sale of the assets sold by the Divestiture Trustee and all costs and expenses so incurred. After approval by the Court of the Divestiture Trustee's accounting, including fees for any of its services yet unpaid and those of any professionals and agents retained by the Divestiture Trustee, all remaining money will be paid to Defendants and the trust will then be terminated. The compensation of the Divestiture Trustee and any professionals and agents retained by the Divestiture Trustee will be reasonable in light of the value of the Divestiture Assets and based on a fee arrangement that provides the Divestiture Trustee with incentives based on the price and terms of the divestiture and the speed with which it is accomplished, but the timeliness of the divestiture is paramount. If the Divestiture Trustee and Defendants are unable to reach agreement on the Divestiture Trustee's or any agents' or consultants' compensation or other terms and conditions of engagement within 14 calendar days of the appointment of the Divestiture Trustee, the United States may, in its sole discretion, take appropriate action, including making a recommendation to the Court. The Divestiture Trustee will, within three business days of hiring any other agents or consultants, provide written notice of such hiring and the rate of compensation to Defendants and the United States.

E. Defendants must use their best efforts to assist the Divestiture Trustee in accomplishing the required divestiture. The Divestiture Trustee and any agents or consultants retained by the Divestiture Trustee will have full and complete access to the personnel, books, records, and facilities of the business to be divested, and Defendants must provide or develop financial and other information relevant to such business as the Divestiture Trustee may reasonably request, subject to reasonable protection for trade secrets; other confidential research, development, or commercial information; or any applicable privileges. Defendants may not take any action to interfere with or to impede the Divestiture Trustee's accomplishment of the divestiture.

F. After its appointment, the Divestiture Trustee will file monthly reports with the United States and, as appropriate, the Court, setting forth the Divestiture Trustee's efforts

to accomplish the divestiture ordered under this Final Judgment. To the extent such reports contain information that the Divestiture Trustee deems confidential, such reports will not be filed in the public docket of the Court. Such reports will include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring any interest in the Divestiture Assets and will describe in detail each contact with any such person. The Divestiture Trustee will maintain full records of all efforts made to divest the Divestiture Assets.

G. If the Divestiture Trustee has not accomplished the divestiture ordered under this Final Judgment within six months after its appointment, the Divestiture Trustee will promptly file with the Court a report setting forth (1) the Divestiture Trustee's efforts to accomplish the required divestiture; (2) the reasons, in the Divestiture Trustee's judgment, why the required divestiture has not been accomplished; and (3) the Divestiture Trustee's recommendations. To the extent such report(s) contain information that the Divestiture Trustee deems confidential, such report(s) will not be filed in the public docket of the Court. The Divestiture Trustee will at the same time furnish such report to the United States, which will have the right to make additional recommendations consistent with the purpose of the trust. The Court thereafter will enter such orders as it deems appropriate to carry out the purpose of the Final Judgment, which may, if necessary, include extending the trust and the term of the Divestiture Trustee's appointment by a period requested by the United States.

H. If the United States determines that the Divestiture Trustee has ceased to act or failed to act diligently or in a reasonably cost-effective manner, the United States may recommend the Court appoint a substitute Divestiture Trustee.

VII. NOTICE OF PROPOSED DIVESTITURE

A. Within two business days following execution of a definitive divestiture agreement, Defendants or the Divestiture Trustee, whichever is then responsible for effecting the divestiture required herein, must notify the United States and the Plaintiff States of any proposed divestiture required by Section IV or Section VI of this Final Judgment. If the Divestiture Trustee is responsible, the Divestiture Trustee must similarly notify Defendants. The notice must set forth the details of the proposed divestiture and list the name, address, and telephone number of each person not previously identified who offered or expressed an interest in or desire to acquire any ownership interest in the Divestiture Assets, together with full details of the same.

B. Within 15 calendar days of receipt by the United States of such notice, the United States, in its sole discretion, after consultation with the Plaintiff States, may request from Defendants, the Acquirer, any other third party, or the Divestiture Trustee, if applicable, additional information concerning the proposed divestiture and the Acquirer. Defendants and the Divestiture Trustee must furnish any additional information requested within 15 calendar days of the receipt of the request, unless the parties otherwise agree.

C. Within 30 calendar days after receipt of the notice or within 20 calendar days after the United States has been provided the additional information requested from Defendants, the Acquirer, any third party, and the Divestiture Trustee, whichever is later, the United States will provide written notice to Defendants and the Divestiture Trustee, if there is one, stating whether or not it objects to the proposed divestiture. If the United States provides written notice that it does not object, the divestiture may be consummated, subject only to Defendants' limited right to object to the sale under Paragraph VI(C) of this Final Judgment. Absent written notice that the United States does not object to the proposed Acquirer or upon objection by the United States, a divestiture proposed under Section IV or Section VI may not be consummated. Upon objection by Defendants under Paragraph VI(C), a divestiture proposed under Section VI must not be consummated unless approved by the Court.

VIII. FINANCING

Defendants may not finance all or any part of any purchase made under Section IV or Section VI of this Final Judgment.

IX. ASSET PRESERVATION

Until the divestiture required by this Final Judgment has been accomplished, Defendants must take all steps necessary to comply with the Asset Preservation Stipulation and Order entered by the Court. Defendants may not take any action that would jeopardize the divestiture ordered by the Court.

X. AFFIDAVITS

A. Within 20 calendar days of the filing of the Complaint in this matter, and every 30 calendar days thereafter until the divestiture has been completed under Section IV or Section VI, Defendants must deliver to the United States and the Plaintiff States an affidavit, signed by each Defendant's chief financial officer and general counsel, which describes the fact and manner of Defendants' compliance with Section IV or Section VI of this Final Judgment. Each affidavit must include the name, address, and telephone number of each person who, during the preceding 30 calendar days, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Assets, and must describe in detail each contact with any such person during that period. Each affidavit must also include a description of Defendants' efforts to solicit buyers for the Divestiture Assets, and to provide required information to prospective Acquirers, including the limitations, if any, on such information. Assuming the information set forth in the affidavit is true and complete, any objection by the United States, in its sole discretion, after consultation with the Plaintiff States, to information provided by Defendants, including limitation on information, must be made within 14 calendar days of receipt of such affidavit.

B. Within 20 calendar days of the filing of the Complaint in this matter, Defendants must deliver to the United States and the Plaintiff States an affidavit that describes in reasonable detail all actions Defendants have taken and all steps Defendants have implemented on an ongoing basis to comply with Section IX of this Final Judgment. Defendants must deliver to the United States and the Plaintiff States an affidavit describing any changes to the efforts and actions outlined in Defendants' earlier affidavits filed under this Section within 15 calendar days after the change is implemented.

C. Defendants must keep all records of all efforts made to preserve and divest the Divestiture Assets until one year after the divestiture has been completed.

XI. APPOINTMENT OF MONITORING TRUSTEE

A. Upon application of the United States, the Court will appoint a Monitoring Trustee selected by the United States, after consultation with the Plaintiff States, and approved by the Court.

B. The Monitoring Trustee will have the power and authority to monitor Defendants' compliance with the terms of this Final Judgment and the Asset Preservation Stipulation and Order entered by the Court and will have any other powers that the Court deems appropriate. The Monitoring Trustee must investigate and report on the Defendants' compliance with this Final Judgment and the Asset Preservation Stipulation and Order, and Defendants' progress toward effectuating the purposes of this Final Judgment, including the implementation and execution of the agreements contemplated in Paragraphs IV(G)–(H) and the hiring of employees under Section V.

C. Subject to Paragraph XI(E) of this Final Judgment, the Monitoring Trustee may hire at the cost and expense of Defendants any agents, investment bankers, attorneys, accountants, or consultants, who will be solely accountable to the Monitoring Trustee, reasonably necessary in the Monitoring Trustee's judgment. These agents, investment bankers, attorneys, accountants, or consultants will serve on terms and conditions approved by the United States, including confidentiality requirements and conflict-of-interest certifications.

D. Defendants may not object to actions taken by the Monitoring Trustee in fulfillment of the Monitoring Trustee's responsibilities under any Order of the Court on any ground other than the Monitoring Trustee's malfeasance. Any such objection by Defendants must be conveyed in writing to the United States and the Monitoring Trustee within 10 calendar days after the action taken by the Monitoring Trustee giving rise to Defendants' objection.

E. The Monitoring Trustee will serve at the cost and expense of Defendants, under a written agreement with Defendants and on such terms and conditions as the United States approves, including confidentiality

requirements and conflict of interest certifications. The compensation of the Monitoring Trustee and any agents or consultants retained by the Monitoring Trustee will be on reasonable and customary terms commensurate with the individuals' experience and responsibilities. If the Monitoring Trustee and Defendants are unable to reach agreement on the Monitoring Trustee's or any agents' or consultants' compensation or other terms and conditions of engagement within 14 calendar days of the appointment of the Monitoring Trustee, the United States may, in its sole discretion, take appropriate action, including making a recommendation to the Court. The Monitoring Trustee will, within three (3) business days of hiring any agents or consultants, provide written notice of such hiring and the rate of compensation to Defendants and the United States.

F. The Monitoring Trustee will have no responsibility or obligation for the operation of Defendants' businesses.

G. Defendants will use their best efforts to assist the Monitoring Trustee in monitoring Defendants' compliance with their individual obligations under this Final Judgment and under the Asset Preservation Stipulation and Order. The Monitoring Trustee and any agents or consultants retained by the Monitoring Trustee will have full and complete access to the personnel, books, records, and facilities relating to compliance with this Final Judgment, subject to reasonable protection for trade secrets; other confidential research, development, or commercial information; or any applicable privileges. Defendants may not take any action to interfere with or to impede the Monitoring Trustee's accomplishment of its responsibilities.

H. After its appointment, the Monitoring Trustee must file reports every 90 days, or more frequently as needed, with the United States, the Plaintiff States, and, as appropriate, the Court setting forth Defendants' efforts to comply with Defendants' obligations under this Final Judgment and under the Asset Preservation Stipulation and Order. To the extent these reports contain information that the Monitoring Trustee deems confidential, the reports may not be filed in the public docket of the Court.

I. At the discretion of the United States, the Monitoring Trustee may serve until the expiration of the administrative services agreement described in Paragraph IV(H), or January 1, 2020, whichever is later.

J. If the United States determines that the Monitoring Trustee has ceased to act or failed to act diligently or in a reasonably cost-effective manner, it may recommend the Court appoint a substitute Monitoring Trustee.

XII. COMPLIANCE INSPECTION

A. For the purposes of determining or securing compliance with this Final Judgment, or of any related orders such as any Asset Preservation Stipulation and Order, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time authorized representatives of the United States, including agents and consultants retained by the United States, must, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division and on reasonable notice to Defendants, be permitted:

(1) access during Defendants' office hours to inspect and copy or, at the option of the United States, to require Defendants to provide electronic copies of all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of Defendants relating to any matters contained in this Final Judgment; and

(2) to interview, either informally or on the record, Defendants' officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews are subject to the reasonable convenience of the interviewee and without restraint or interference by Defendants.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, Defendants must submit written reports or responses to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in Section XII may be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If, when Defendants furnish information or documents to the United States, Defendants represent and identify in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and Defendants mark each pertinent page of such material, ''Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure,'' then the United States must give Defendants 10 calendar days' notice before divulging such material in any legal proceeding (other than a grand jury proceeding).

XIII. NO REACQUISITION OR RECOMBINATION OF DIVESTITURE ASSETS

Defendants may not reacquire any part of the Divestiture Assets during the term of this Final Judgment. The Acquirer may not purchase or otherwise obtain from Defendants during the term of this Final Judgment any assets or businesses that compete with the Divestiture Assets.

XIV. RETENTION OF JURISDICTION

The Court retains jurisdiction to enable any party to this Final Judgment to apply to the Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

XV. ENFORCEMENT OF FINAL JUDGMENT

A. The United States retains and reserves all rights to enforce the provisions of this Final Judgment, including the right to seek an order of contempt from the Court. Defendants agree that in any civil contempt action, any motion to show cause, or any similar action brought by the United States regarding an alleged violation of this Final Judgment, the United States may establish a violation of the decree and the appropriateness of any remedy therefor by a preponderance of the evidence, and Defendants waive any argument that a different standard of proof should apply.

B. The Final Judgment should be interpreted to give full effect to the procompetitive purposes of the antitrust laws and to restore all competition harmed by the challenged conduct. Defendants agree that they may be held in contempt of, and that the Court may enforce, any provision of this Final Judgment that, as interpreted by the Court in light of these procompetitive principles and applying ordinary tools of interpretation, is stated specifically and in reasonable detail, whether or not it is clear and unambiguous on its face. In any such interpretation, the terms of this Final Judgment should not be construed against either party as the drafter.

C. In any enforcement proceeding in which the Court finds that Defendants have violated this Final Judgment, the United States may apply to the Court for a one-time extension of this Final Judgment, together with such other relief as may be appropriate. In connection with any successful effort by the United States to enforce this Final Judgment against a Defendant, whether litigated or resolved before litigation, that Defendant agrees to reimburse the United States for the fees and expenses of its attorneys, as well as any other costs including experts' fees, incurred in connection with that enforcement effort, including in the investigation of the potential violation.

XVI. EXPIRATION OF FINAL JUDGMENT

Unless the Court grants an extension, this Final Judgment expires 10 years from the date of its entry, except that after five years from the date of its entry, this Final Judgment may be terminated upon notice by the United States to the Court and Defendants that the divestiture has been completed and that the continuation of the Final Judgment no longer is necessary or in the public interest.

XVII. PUBLIC INTEREST DETERMINATION

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, any comments thereon, and the United States' responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and responses to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date: _____

[Court approval subject to procedures of Antitrust Procedures and Penalties Act, 15 U.S.C. § 16]

United States District Judge

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

United States of America, et al. Plaintiffs, v. *CVS Health Corporation,* and *AETNA Inc.* Defendants.

Case No. 1:18–cv–02340
Judge Richard J. Leon

COMPETITIVE IMPACT STATEMENT

Plaintiff United States of America files this Competitive Impact Statement under Section 2(b) of the Antitrust Procedures and Penalties Act (''APPA'' or ''Tunney Act''), 15 U.S.C. § 16(b), relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. Nature and Purpose of the Proceeding

On December 3, 2017, CVS Health Corporation agreed to acquire Aetna Inc. for approximately $69 billion. The United States filed a civil antitrust Complaint on October 10, 2018, seeking to enjoin the proposed acquisition. The Complaint alleges that the likely effect of this acquisition would be to lessen competition substantially for the sale of standalone individual Medicare Part D prescription drug plans (''individual PDPs''), resulting in increased premiums and increased out-of-pocket costs paid by Medicare beneficiaries, higher subsidies paid by the federal government (and ultimately, taxpayers), and a lessening of service quality and innovation, all in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

At the same time that it filed the Complaint, the United States also filed a proposed Final Judgment and Asset Preservation Stipulation and Order, which are designed to prevent the merger's likely anticompetitive effects. Under the proposed Final Judgment, which is explained more fully below, Defendants are required to divest Aetna's individual PDP business. Until the divestiture is complete, the Asset Preservation Order requires Defendants to take certain steps to ensure that, while the required divestitures are pending, all of the divestiture assets will be preserved.

The United States and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. Description of the Events Giving Rise to the Alleged Violation

A. *Defendants and the Proposed Transaction*

CVS, based in Woonsocket, Rhode Island, is involved in numerous areas of the healthcare delivery chain. CVS operates the nation's largest retail pharmacy chain; owns Caremark, a large pharmacy benefit manager, which, among other things, connects health plans or employers to pharmacies and drug manufacturers in the pharmacy services supply chain; and sells Medicare Part D prescription drug plans to individuals and groups under the brand name SilverScript. SilverScript plans are available in all 50 states and the District of Columbia, and have the second-largest enrollment in individual PDPs nationwide. CVS's overall 2017 revenues were approximately $185 billion.

Aetna is based in Hartford, Connecticut, and is the nation's third-largest health insurance company, providing commercial health insurance; plans under the Medicare Advantage, Medicare Supplement, and Medicaid programs; Medicare Part D prescription drug plans; and pharmacy benefit management services. Like CVS, Aetna offers individual PDPs in all 50 states and the District of Columbia. Aetna is the fourth-largest provider of individual PDPs nationwide. Aetna's 2017 revenues were approximately $60 billion.

On December 3, 2017, CVS agreed to acquire Aetna for approximately $69 billion. This acquisition is the subject of the Complaint and proposed Final Judgment filed by the United States on October 10, 2018. The proposed transaction would lessen competition substantially in markets for the sale of individual PDPs. In recognition of the significant competitive concerns raised by the proposed merger, Defendants have agreed to divest Aetna's individual PDP business.

B. The Competitive Effects of the Transaction on Individual PDP Markets

1. Relevant Markets

As alleged in the Complaint, individual PDPs are a relevant product market under Section 7 of the Clayton Act. For the vast majority of Medicare beneficiaries, prescription drug coverage is determined by how they obtain medical coverage: beneficiaries who have chosen Original Medicare can enroll in an individual PDP, and beneficiaries enrolled in Medicare Advantage, a private insurance option that replaces Original Medicare, can enroll in a plan that includes drug coverage.

Once beneficiaries have chosen between Original Medicare and Medicare Advantage, they are very unlikely to switch between the two programs. *See United States v. Aetna,* 240 F. Supp. 3d 1, 27–29 (D.D.C. 2017). As the Complaint alleges, only about two percent of individual PDP members convert to Medicare Advantage plans each year during open enrollment, and an even smaller percentage of individuals convert from Medicare Advantage plans to individual PDPs. As a result, a hypothetical monopolist of individual PDPs could profitably raise prices by a small but significant amount on individual PDPs without risking loss of substantial membership to Medicare Advantage plans.

The Complaint alleges that the relevant geographic markets under Section 7 of the Clayton Act for individual PDPs are Medicare Part D regions. The Centers for Medicare & Medicaid Services (''CMS''), a component of the Department of Health and Human Services, has divided the country into 34 Part D regions, none of which is smaller than a single state. CMS requires the companies that sell individual PDPs, also known as Part D plan sponsors, to offer the same plans at the same price across the entire Part D region. Individuals can only purchase PDPs that are offered in the region where they reside. Thus, a prospective purchaser of an individual PDP would be unable to turn to plan sponsors outside of the Part D region in response to a price increase.

2. Competitive Effects

Competition is an essential element of individual PDP markets. Congress designed the Medicare Part D program to rely on competition among multiple private plan sponsors to keep annual bids—which form the basis for federal government subsidies and beneficiary premiums—low.

The proposed merger is likely to cause a significant increase in concentration and result in highly concentrated markets in 12 of the regions identified in the Complaint: Arkansas, California, Florida, Georgia, Hawaii, Kansas, Louisiana, Mississippi, Missouri, New Mexico, Ohio, and South Carolina. In each of these regions, the merger would eliminate significant head-to-head competition between CVS and Aetna. As alleged in the Complaint, CVS's and Aetna's individual PDPs are among the fastest growing plans in the country, and competition between them has led not only to lower premiums and out-of-pocket expenses but also improved drug formularies (lists of drugs that govern an enrollee's coverage and required copayments), more attractive pharmacy networks, enhanced benefits, and innovative product features. Following the proposed transaction, the merged firm would control at least 35% of the individual PDP market in each region, with a high of 53.5% in Hawaii. In each of these regions, the combination of CVS and Aetna would surpass the thresholds necessary to establish a presumption of enhanced market power and a substantial lessening of competition. *See United States v. Anthem, Inc.,* 855 F.3d 345, 349 (D.C. Cir. 2017) (holding that market concentration can establish a presumption of anticompetitive effects).

In addition, in five of the Part D regions discussed above (Arkansas, Georgia, Kansas, Mississippi, and Missouri), as well as four additional regions (North Carolina, Oklahoma, Wisconsin, and the multistate region of Iowa, Minnesota, Montana, Nebraska, North Dakota, South Dakota, and Wyoming), the merged company will account for between 35% and 55% of all low-income-subsidy-eligible beneficiaries, including those who enroll in Medicare Advantage plans with prescription drug benefits. When combined with other market factors, these increases in the share of low-income subsidy beneficiaries suggests that the merger would likely result in further loss of competition.

Specifically, the merger would likely increase the merged company's ability to influence a critical feature of the Medicare Part D program called the low-income subsidy (''LIS'') benchmark, which in turn would increase premiums and out-of-pocket expenses for basic individual PDPs—those plans that provide an equivalent to the minimum coverage set forth in 42 U.S.C. § 1395w–102 and in which LIS beneficiaries can enroll (or be auto-enrolled) for free. As explained in the Complaint, plan sponsors

submit bids for their basic plans each year, and CMS calculates a region-by-region, LIS enrollment-weighted average of these bids to determine the low-income benchmark and low-income subsidy. When bids are higher, the low-income subsidy—paid by the federal government—is higher, as are the premiums paid by those who do not receive a low-income subsidy.

The LIS benchmark also, as a practical matter, encourages plan sponsors to offer lower bids. If plan sponsor bids above the low-income benchmark, it risks not only losing thousands of new enrollees but also risks having CMS transfer tens or even hundreds of thousands of current enrollees to a below-benchmark competitor. The uncertainty and risk associated with missing the low-income benchmark, especially by more than a de minimis amount, contribute to keeping bids low.

3. Entry and Expansion

Neither entry nor expansion is likely to solve the competitive problems created by the merger between CVS and Aetna. Recent entrants into individual PDP markets have been largely unsuccessful, with many subsequently exiting the market or shrinking their geographic footprint. Effective entry into the sale of individual PDPs requires years of planning, millions of dollars, access to qualified personnel, and competitive contracts with retail pharmacies and pharmaceutical manufacturers, and companies must establish sufficient scale quickly to keep their plans' costs down. Because of these barriers to entry, entry or expansion into the sale of individual PDPs is unlikely to be timely or sufficient to remedy the anticompetitive effects from this merger.

III. Explanation of the Proposed Final Judgment

The divestiture mandated by the proposed Final Judgment will resolve the United States' concerns about the likely anticompetitive effects of the acquisition by requiring CVS to divest Aetna's individual PDP business nationwide. To ensure that the acquirer of Aetna's business will replace Aetna as an effective competitor and innovator in each of the 16 markets in which the Complaint alleges that the proposed merger would harm competition, the United States carefully scrutinized Defendants' businesses to identify a comprehensive package of assets for divestiture.

A. Scope of the Divestiture

In evaluating a remedy, the United States' fundamental goal is to preserve competition. *See United States v. E.I. du Pont de Nemours & Co.,* 366 U.S. 316, 324 (1961) (''The key to the whole question of an antitrust remedy is of course the discovery of measures effective to restore competition.''). This goal is most directly accomplished through a divestiture of the overlapping products. Because the goal of a divestiture is to create a viable entity that will effectively preserve competition, in certain cases, the divestiture must include assets that are beyond the affected relevant market.

Guided by these principles, the United States identified a divestiture package that remedies the various dimensions of harm threatened by the proposed merger:

- First, the proposed Final Judgment requires CVS to divest both of Aetna's individual PDP contracts with CMS, which is the portion of Aetna's business that vigorously competes head-to-head with CVS today. Divestiture of Aetna's nationwide individual PDP business—and not just Aetna's business in the regions identified in the Complaint—will provide the acquirer with the scale and ability to implement a national strategy comparable to Aetna's current strategy. That is because contracts with pharmacy benefit managers, retail pharmacy networks, and pharmaceutical companies are almost all negotiated on a national basis, with the number of Medicare beneficiaries covered by the plan sponsor being a key factor in the rates that the plan sponsor receives. Thus, a national divestiture helps provide the acquirer with the ability to replicate Aetna's cost structure and approach to the market.
- Defendants are also required to transfer data relating to Aetna's individual PDP business, information regarding the amount that Aetna pays to retail pharmacies in exchange for filling prescriptions for Aetna members, and any contracts with brokers that currently sell Aetna's individual PDPs, including information regarding how much Aetna currently pays these brokers. The transfer of this data and information will help ensure that the acquirer has sufficient knowledge and supporting information that it can use to negotiate comparable retail-pharmacy rates and contracts with brokers moving forward.
- The divestiture buyer also will have the opportunity to interview and hire Aetna's current employees with expertise related to the individual PDP business, and Defendants have agreed to waive any non-compete, confidentiality, or non-disclosure employment provisions that would otherwise prevent these employees from accepting positions with the individual PDP business of the acquirer. These employees and their knowledge of drug-manufacturer rebates (volume-based discounts on the price of brand name drugs) will provide the acquirer with the option of continuing Aetna's approach to the market.

Taken together, these assets constitute the entirety of Aetna's individual PDP business and will provide the acquirer with a similar ability and incentive to compete as Aetna has today.

Because the divested assets will be separated from Aetna and incorporated into the acquirer's business, the proposed Final Judgment includes provisions to foster the seamless and efficient transition of the assets. At the acquirer's option, Defendants are required to enter into an administrative services agreement to provide the acquirer all services required to manage the divestiture assets through the remainder of the 2018 plan year and through the 2019 plan year, which ends on December 31, 2019. This provision of the proposed Final Judgment provides continuity to members who purchase an Aetna individual PDP during the open-enrollment period running from October through December 2018. Because CMS has already reviewed and approved Aetna's proposed 2019 plans, requiring Aetna to continue to provide the requisite support and services for these plans will ensure that members receive the products that they have chosen. Among other things, the proposed Final Judgment allows the acquirer to rely on Aetna to assemble and contract with pharmacy networks, administer the plans' formularies, and provide back-office support and claims administration functions in 2019. Additionally, CVS and Aetna must allow the acquirer to use the Aetna brand for the divestiture assets through at least December 31, 2019, and CVS and Aetna are prohibited, through 2020, from using the Aetna brand for the CVS individual PDP business that they are retaining. This will provide the acquirer with a window to establish a relationship with current Aetna individual PDP beneficiaries which will help avoid consumer confusion.

B. The Divestiture Process

The proposed Final Judgment requires CVS and Aetna, within 30 days of the filing of the Complaint, to divest, as a viable ongoing business, Aetna's individual PDP business. The proposed Final Judgment also requires CVS and Aetna expeditiously to obtain all regulatory approvals necessary to complete the divestiture, specifying that they must apply for these approvals within five calendar days of the United States' approval of a divestiture buyer. CVS and Aetna have already entered into an agreement to sell the divestiture assets to WellCare, a health insurance company, and the United States has determined that WellCare is a suitable buyer for the divestiture assets. WellCare already has experience providing individual PDPs throughout the United States. The divestiture assets, when combined with WellCare's existing business, will allow WellCare to become more competitive for both low-income subsidy and non-low-income subsidy Medicare beneficiaries by providing WellCare with increased scale and the opportunity to incorporate and build upon Aetna's existing strategy by hiring current Aetna employees.

Should the sale of the divestiture assets to WellCare not be completed, the assets must be divested in a way that satisfies the United States in its sole discretion that the assets can and will be operated by another company as a viable, ongoing business that can compete effectively in the relevant markets. CVS and Aetna must take all reasonable steps necessary to accomplish the divestiture quickly and to cooperate with prospective buyers.

If Defendants do not accomplish the divestiture within the 30 days prescribed in the proposed Final Judgment, the proposed Final Judgment provides that the Court will appoint a Divestiture Trustee, selected by the United States and paid for by CVS and Aetna, to effect the divestiture. After the Divestiture Trustee is appointed, the Trustee will file monthly reports with the United States and, as appropriate, the Court, setting forth his or her efforts to accomplish the divestiture. At

the end of six months, if the divestiture has not been accomplished, the Divestiture Trustee and the United States will make recommendations to the Court, which will enter such orders as appropriate under the circumstances.

C. *Provisions to Ensure Compliance*

To ensure a smooth transition process for the divestiture assets, particularly during the temporary period when they will be managed by CVS, the proposed Final Judgment provides that the United States may appoint a Monitoring Trustee with the power and authority to investigate and report on Defendants' compliance with the terms of the Final Judgment and the Asset Preservation Stipulation and Order during the pendency of the divestiture. The Monitoring Trustee would not have any responsibility or obligation for the operation of Defendants' businesses. The Monitoring Trustee would serve at Defendants' expense, on such terms and conditions as the United States approves, and Defendants must assist the Trustee in fulfilling his or her obligations. The Monitoring Trustee would file reports with the United States and, as appropriate, the Court, every 90 days and would serve until the later of January 1, 2020 or the expiration of the administrative services agreement described in Paragraph IV(H) of the Final Judgment.

The proposed Final Judgment also contains provisions designed to promote compliance and make the enforcement of Division consent decrees as effective as possible. The proposed Final Judgment provides the United States with the ability to investigate Defendants' compliance with the Final Judgment and expressly retains and reserves all rights for the United States to enforce the provisions of the proposed Final Judgment, including its rights to seek an order of contempt from the Court. Defendants have agreed that in any civil contempt action, any motion to show cause, or any similar action brought by the United States regarding an alleged violation of the Final Judgment, the United States may establish the violation and the appropriateness of any remedy by a preponderance of the evidence and that Defendants have waived any argument that a different standard of proof should apply. This provision aligns the standard for compliance obligations with the standard of proof that applies to the underlying offense that the compliance commitments address.

Paragraph XV(B) provides additional clarification regarding the interpretation of the provisions of the proposed Final Judgment. The proposed Final Judgment was drafted to restore competition that would otherwise be harmed by the merger. Defendants agree that they will abide by the proposed Final Judgment and that they may be held in contempt of this Court for failing to comply with any provision of the proposed Final Judgment that is stated specifically and in reasonable detail, as interpreted in light of this procompetitive purpose.

Should the Court find in an enforcement proceeding that Defendants have violated the Final Judgment, the United States may apply to the Court for a one-time extension of the Final Judgment, together with such other relief as may be appropriate. In addition, in order to compensate American taxpayers for any costs associated with the investigation and enforcement of violations of the Final Judgment, Defendants agree to reimburse the United States for attorneys' fees, experts' fees, and costs, including fees and costs relating to the investigation of the potential violation, incurred in connection with any successful effort by the United States to enforce the Final Judgment against a Defendant, whether litigated or resolved before litigation.

The Final Judgment will expire ten years from the date of its entry. After five years, however, the United States may request that the Court terminate the Final Judgment if the divestitures have been completed and the continuation of the Final Judgment is no longer necessary or in the public interest.

IV. Remedies Available To Potential Litigants

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Defendants.

V. Procedures Available for Modification of the Proposed Final Judgment

The United States and Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within 60 days of the date of publication of this Competitive Impact Statement in the **Federal Register**, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States, which remains free to withdraw its consent to the proposed Final Judgment at any time before the Court's entry of judgment. The comments and the response of the United States will be filed with the Court. In addition, comments will be posted on the U.S. Department of Justice, Antitrust Division's internet website and, under certain circumstances, published in the **Federal Register**.

Written comments should be submitted to:

Peter Mucchetti,
Chief, Healthcare and Consumer Products Section,
Antitrust Division,
United States Department of Justice,
450 Fifth Street NW, Suite 4100,
Washington, DC 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. Alternatives to the Proposed Final Judgment

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against CVS's acquisition of Aetna. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition for the sale of individual PDPs in the relevant markets identified by the United States. Thus, the proposed Final Judgment would achieve all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

VII. Standard of Review Under the APPA for the Proposed Final Judgment

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 60-day comment period, after which the court shall determine whether entry of the proposed Final Judgment ''is in the public interest.'' 15 U.S.C. § 16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

(A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

(B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to ''broad discretion to settle with the defendant within the reaches of the public interest.'' *United States v. Microsoft Corp.,* 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States v. SBC Commc'ns, Inc.,* 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States v. U.S. Airways Group, Inc.,* 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (noting the court has broad

discretion of the adequacy of the relief at issue); *United States v. InBev N.V./S.A.,* No. 08–1965 (JR), 2009–2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, at *3, (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires ''into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable'').[1]

As the U.S. Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft,* 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the decree, a court may not ''engage in an unrestricted evaluation of what relief would best serve the public.'' *United States v. BNS, Inc.,* 858 F.2d 456, 462 (9th Cir. 1988) (quoting *United States v. Bechtel Corp.,* 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft,* 56 F.3d at 1460–62; *United States v. Alcoa, Inc.,* 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev,* 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

[t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is ''*within the reaches of the public interest.*'' More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[2] In determining whether a proposed settlement is in the public interest, a district court ''must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations.'' *SBC Commc'ns,* 489 F. Supp. 2d at 17; *see also U.S. Airways,* 38 F. Supp. 3d at 75 (noting that a court should not reject the proposed remedies because it believes others are preferable); *Microsoft,* 56 F.3d at 1461 (noting the need for courts to be ''deferential to the government's predictions as to the effect of the proposed remedies''); *United States* v. *Archer-Daniels-Midland Co.,* 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. ''[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.' '' *United States* v. *Am. Tel. & Tel. Co.,* 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland* v. *United States,* 460 U.S. 1001 (1983); *see also U.S. Airways,* 38 F. Supp. 3d at 74 (noting that room must be made for the government to grant concessions in the negotiation process for settlements (citing *Microsoft,* 56 F.3d at 1461)); *United States* v. *Alcan Aluminum Ltd.,* 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States ''need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.'' *SBC Commc'ns,* 489 F. Supp. 2d at 17.

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to ''construct [its] own hypothetical case and then evaluate the decree against that case.'' *Microsoft,* 56 F.3d at 1459; *see also U.S. Airways,* 38 F. Supp. 3d at 74 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev,* 2009 U.S. Dist. LEXIS 84787, at *20 (''[T]he 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged.''). Because the ''court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place,'' it follows that ''the court is only authorized to review the decree itself,'' and not to ''effectively redraft the complaint'' to inquire into other matters that the United States did not pursue. *Microsoft,* 56 F.3d at 1459–60. As this Court recently confirmed in *SBC Communications,* courts ''cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power.'' *SBC Commc'ns,* 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that ''[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.'' 15 U.S.C. § 16(e)(2); *see also U.S. Airways,* 38 F. Supp. 3d at 75 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: ''[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.'' 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's ''scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings.'' *SBC Commc'ns,* 489 F. Supp. 2d at 11.[3] A court can make its public interest determination based on the competitive impact statement and response to public comments alone. *U.S. Airways,* 38 F. Supp. 3d at 75.

VIII. Determinative Documents

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: October 10, 2018.

Respectfully submitted,

Jay D. Owen,
Andrew J. Robinson, U.S. Department of Justice, Antitrust Division, 450 Fifth Street NW, Suite 4100, Washington, DC 20530, Tel.: (202) 598–2987, Fax: (202) 616–2441, E-mail: *Jay.Owen@usdoj.gov.*

[FR Doc. 2018–22665 Filed 10–16–18; 8:45 am]

BILLING CODE 4410–11–P

[1] The 2004 amendments substituted ''shall'' for ''may'' in directing relevant factors for courts to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. § 16(e) (2004), *with* 15 U.S.C. § 16(e)(1) (2006); *see also SBC Commc'ns,* 489 F. Supp. 2d at 11 (concluding that the 2004 amendments ''effected minimal changes'' to Tunney Act review).

[2] *Cf. BNS,* 858 F.2d at 464 (holding that the court's ''ultimate authority under the [APPA] is limited to approving or disapproving the consent decree''); *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to ''look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass''). *See generally Microsoft,* 56 F.3d at 1461 (discussing whether ''the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest' '').

[3] *See United States* v. *Enova Corp.,* 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the ''Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone''); *United States* v. *Mid-Am. Dairymen, Inc.,* No. 73–CV–681–W–1, 1977–1 Trade Cas. (CCH) ¶ 61,508, at 71,980, *22 (W.D. Mo. 1977) (''Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.''); S. Rep. No. 93–298, at 6 (1973) (''Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.'').