

In the Matter of
the Application by CVS Health Corporation and
CVS Pharmacy, Inc. for Approval to Acquire
Control of Aetna Health Insurance
Company of New York

DECISION AND ORDER

BACKGROUND

On January 18, 2018, the New York State Department of Financial Services (the “Department”) received an application by CVS Health Corporation (“CVS Health”), a Delaware corporation, for approval from the New York State Superintendent of Financial Services (the “Superintendent”), pursuant to New York Insurance Law (the “Insurance Law”) § 1506, to acquire control of Aetna Health Insurance Company of New York (the “Domestic Insurer”), a New York domestic stock accident and health insurance company (the “Proposed Acquisition of Control”). On March 9, 2018, the Department received an amended and restated application seeking approval of the Proposed Acquisition of Control, which, among other things, added CVS Pharmacy, Inc., a Rhode Island corporation, as an applicant (together with CVS Health, the “Applicants”).

The Department has thoroughly examined the Proposed Acquisition of Control and has engaged in ongoing communications with the Applicants in order to obtain additional information and seek an understanding of the terms and asserted benefits of the proposed transaction to the People of the State of New York. As part of its review, the Department has regularly communicated its questions and concerns regarding the Proposed Application of Control to the Applicants and the Domestic Insurer. On numerous occasions, the Department has requested additional documents and explanations from the Applicants and the Domestic Insurer with regard to various aspects of the proposed transaction. The Department has received supplemental documents, amendments, and explanations from the Applicants, and the Domestic Insurer or its ultimate parent, Aetna Inc., in response to the Department’s requests (these supplemental materials, together with the original application and the amended and restated application, the “Application”). In addition, the Department has met with the Applicants, the Domestic Insurer and their counsel on numerous occasions, during which meetings the Department has posed questions, and the Applicants and the Domestic Insurer have made representations, on a range of issues related to the Proposed Acquisition of Control.

By letter dated September 17, 2018, the Superintendent provided comments to the Connecticut Insurance Department in connection with its review of the acquisition by CVS Health of Aetna Life Insurance Company (“ALIC”), an insurer domiciled in Connecticut and licensed by the Department. Concerns the Superintendent raised in her letter included (1) the effects on competition in various markets, specifically over the potential unfair competitive advantage that Aetna Inc. may gain, the level of concentration in the pharmacy benefit manager (“PBM”) market, and an increase in the concentration of the Medicare Part D market;

and (2) the potential harm to consumers from increased premiums and drug prices and data privacy lapses, particularly given that the Applicants have made no commitment to lower premiums or pass on savings to consumers.

On September 21, 2018, the Department noticed a public hearing on the Proposed Acquisition of Control, pursuant to Financial Services Law §§ 304-a, 305 and 306, and Insurance Law § 1506 (the “Hearing”).

On October 10, 2018, the United States Department of Justice (“DOJ”) announced that its Antitrust Division had reached a settlement (the “DOJ Settlement”) with CVS Health and Aetna Inc. (the Domestic Insurer’s ultimate parent) regarding CVS Health’s acquisitions of Aetna Inc. subsidiaries throughout the country (collectively, “the CVS/Aetna Merger”). Pursuant to the DOJ Settlement, Aetna Inc. entered into an agreement on September 26, 2018 to sell its individual Medicare Part D prescription drug plan business to a subsidiary of WellCare Health Plans, Inc. (the “Divestiture”) effective 11:59 p.m. on December 31, 2018.¹ However, the DOJ Settlement did not address competitive or consumer effects of the transaction with respect to the remainder of Aetna Inc.’s business or with CVS Health’s subsidiary PBM, CVS Caremark, or the PBM and retail pharmacy markets.

It is important to note the specific application before the Department for determination today. The Department does not have approval authority over the entire CVS/Aetna Merger; such a determination is within the province of DOJ which has previously approved the transaction. Rather, for the Department’s consideration, the Applicants presently seek to acquire control of Aetna Health Insurance Company of New York, which is domiciled in the State of New York, and whose ultimate parent is Aetna Inc. The overwhelming majority of insurance business written by Aetna in New York is written by ALIC, a Connecticut domiciled insurance company; the Connecticut Insurance Department has previously approved the change of control application for ALIC. ALIC and other Aetna Inc. affiliates hold foreign insurer licenses from DFS to write insurance in New York subject to annual renewal of such licenses pursuant to Insurance Law § 1103(b) and to examination by the Department pursuant to Insurance Law § 309 and other provisions. These foreign insurer licenses are not currently up for renewal, and therefore are not being addressed in this Decision and Order.²

As set forth below, the Department has carefully and thoroughly examined the entire record of information before the Department, including all of the comments of the public, both at the public hearing held before the Department and in written comments received, the representations made by the Applicants and other relevant parties, and the requirements of the Insurance Law and Financial Services Law. As described in detail below, as a result of this review and given the specifics of the Application before the Department, the Superintendent has determined that the interests of the People of the State of New York are best served by approving the Proposed Application of Control with the conditions set forth in the substantial commitments that the

¹ Notably, WellCare Health Plans, Inc. uses CVS Caremark as its pharmacy benefit manager.

² Going forward, ALIC, as with any other insurance company writing insurance business in New York, whether as a domiciliary or foreign licensed insurer, is subject to DFS regulation. In addition, under New York’s holding company statutes, DFS will have full authority post-merger to audit and examine all companies under the holding company structure, including CVS Caremark and CVS Pharmacy.

Department has obtained from the Applicants that are in the Addendum attached to this Decision and Order (the “Commitments”), along with the Department’s ongoing regulatory oversight.

THE PUBLIC HEARING

On October 18, 2018, the Department held its Hearing. The Department heard from all persons who asked to be heard regarding the Proposed Acquisition of Control. At the Hearing, 13 witnesses testified. After testimony from the representatives of the Applicants and the Domestic Insurer, the following individuals testified: Assemblymember Richard Gottfried, Chair of the Assembly Committee on Health; a representative of Consumers Union; the Immediate Past President of the Medical Society of the State of New York; two Representatives of the Pharmacists Society of the State of New York; a representative of Healthcare for Rural New York; a representative of the AIDS Healthcare Foundation; a representative of Consumer Action; a representative of the Center for Independence of the Disabled in New York; the owner of an independent pharmacy; and a representative of the Business Council of New York State (the “Business Council”).

The Applicants presented two witnesses at the Hearing in support of the Proposed Acquisition of Control, one from CVS Health and one from Aetna Inc. These witnesses, in their oral and written testimony, asserted that the Proposed Acquisition of Control should be approved because, among other things, it would result in reduced costs and improved health outcomes for consumers. Specifically, Elizabeth Ferguson, Deputy General Counsel and Senior Vice President of CVS Health, testified, “The [CVS/Aetna Merger] will benefit consumers in New York and result in a meaningful cost savings and other consumer benefits.” In their testimony, the witnesses made promises with regard to greater access to healthcare, data privacy, and cost savings. Aetna Inc.’s representative at the Hearing, Steve Logan, President of the New York and New Jersey Market, characterized the CVS/Aetna Merger as “one of the most promising healthcare developments[.]” Mr. Logan further testified that Aetna Inc.’s goal in the CVS/Aetna Merger is to “grow our New York footprint and remain committed to New York.”

Neither the Applicants nor the Domestic Insurer, in their written and oral testimony, provided any concrete analysis that the CVS/Aetna Merger would result in specific reduced costs for New York consumers, or any business plan or study of the asserted improved health outcomes to benefit New Yorkers. Likewise, the Applicants did not set forth specific actions to be taken by CVS Health or Aetna Inc. post-transaction to accomplish the asserted benefits of the transaction in reducing costs to the New York consumer and improving New Yorkers’ health outcomes.

Following the testimony of the Applicants and the Domestic Insurer, all but one witness who testified at the Hearing urged the Department to reject the Proposed Acquisition of Control. The 10 witnesses who testified in opposition to the transaction expressed a range of concerns about the overall CVS/Aetna Merger. These concerns included both vertical and horizontal competitive issues, PBM practices, lack of any specific business plans by CVS Health

or Aetna Inc. to demonstrate that any promised benefits would materialize, and concerns for data privacy and security.

Several witnesses raised concerns that the CVS/Aetna Merger would give the combined entity greater power in the health insurance, PBM, and retail pharmacy markets. Some witnesses testified that current PBM practices raise significant concerns, including lack of transparency and the ability to offer what were characterized take-it-or-leave-it style contracts, particularly to small pharmacies. Witnesses testified that PBMs manage formularies and design benefits to favor their own affiliated pharmacies, raising the concern that the increased power to prefer affiliated pharmacies may reduce competition and allow PBMs to dictate healthcare delivery. Witnesses also expressed concern that the merger would reduce any incentive of Aetna Inc. as owner of health insurers to control PBM costs or address PBM business practices for the benefit of the consumer.

Further, certain witnesses raised significant concerns about data protection. They expressed concerns about firewall policies and the sharing of data between CVS Caremark and CVS Pharmacy, Inc., and now with Aetna Inc.

Witnesses also pointed out that the Applicants have not specified how they plan to provide cost savings and improved health outcomes. They referred to New York state actions to improve health outcomes and indicated that these efforts should be further supported and required careful planning and effective tailoring to the various communities in the state.

The Department accepted Public Comments both before the Hearing and for a period of five business days after the Hearing. The Department has received 83 written comments from interested parties, the overwhelming majority of whom expressed concerns with the CVS/Aetna Merger. In addition to the witnesses who testified at the Hearing, the persons that submitted comments represented a range of interests, and included: Assemblymember James Skoufis, chair of the Task Force on People with Disabilities; the Healthcare Association of New York State; the Greater New York Hospital Association; the Hispanic Federation; the National Urban Fellows; the Arts & Business Council of New York; the Asian American Business Development Center; owners of independent pharmacies; individual health care providers; and individual consumers. Many of these comments relayed personal and professional experiences bearing upon the CVS/Aetna Merger.

In total, 75 of the 83 Public Comments expressed opposition to the CVS/Aetna Merger and echoed the concerns witnesses raised in their testimony at the Hearing. Only eight comments were received from writers who support approval.

On October 25, 2018, the record of the Hearing was closed.

APPLICABLE LEGAL STANDARDS

The Application was filed pursuant to Insurance Law § 1506 and 11 NYCRR § 80-1.6 of Insurance Regulation 52. Insurance Law § 1506(a) provides:

No person, other than an authorized insurer, shall acquire control of any domestic insurer, whether by purchase of its securities or otherwise, unless:

- (1) it gives twenty days' written notice to the insurer, or such shorter period of notice as the superintendent permits, of its intention to acquire control, provided that the notice shall include an agreement by the person seeking to acquire control that the person will provide the annual report specified in section one thousand five hundred three of this article for so long as control exits; and
- (2) it receives the superintendent's prior approval.

Because the Applicants are not "authorized insurers" within the meaning of Insurance Law § 107(a)(10), the Applicants cannot acquire control of the Domestic Insurer without the Superintendent's prior approval.

Insurance Law § 1506(b) directs that "the [S]uperintendent shall disapprove [an] acquisition [of control] if [s]he determines, after notice and an opportunity to be heard, that such action is reasonably necessary to protect the interests of the people of this state." Section 1506(b) further guides the Superintendent's inquiry into whether to disapprove of an acquisition by providing an exclusive list of factors to be considered. Those factors are:

- (1) the financial condition of the acquiring person and the insurer;
- (2) the trustworthiness of the acquiring person or any of its officers or directors;
- (3) a plan for the proper and effective conduct of the insurer's operations;
- (4) the source of the funds or assets for the acquisition;
- (5) the fairness of any exchange of shares, assets, cash or other consideration for the shares or assets to be received;
- (6) whether the effect of the acquisition may be substantially to lessen competition in any line of commerce in insurance or to tend to create a monopoly therein; and
- (7) whether the acquisition is likely to be hazardous or prejudicial to the insurer's policyholders or shareholders.

Insurance Regulation 52 (11 NYCRR Part 80) lists information that an applicant must furnish to the Superintendent when applying for approval of an acquisition of control. The required information includes the identity and background of the applicant; financial statements for the applicant; a description of the nature, source, and amount of consideration to be used in effectuating the acquisition; and a description of the applicant's objectives in acquiring control. *See* 11 NYCRR § 80-1.6.

Financial Services Law § 301(c) provides that the Superintendent has "the power to protect users of financial products and services," including health insurance. Financial Services Law § 201(b) further directs that the Superintendent "shall take such actions as the [S]uperintendent believes necessary to":

- (1) foster the growth of the financial industry in New York and spur state economic development through judicious regulation and vigilant supervision;

- (2) ensure the continued solvency, safety, soundness and prudent conduct of the providers of financial products and services;
- (3) ensure fair, timely and equitable fulfillment of the financial obligations of such providers;
- (4) protect users of financial products and services from financially impaired or insolvent providers of such services;
- (5) encourage high standards of honesty, transparency, fair business practices and public responsibility;
- (6) eliminate financial fraud, other criminal abuse and unethical conduct in the industry; and
- (7) educate and protect users of financial products and services and ensure that users are provided with timely and understandable information to make responsible decisions about financial products and services.

ANALYSIS

The Scale of the Merger

The CVS/Aetna Merger is a significant financial transaction that could have a significant impact on the future of health insurance and health care delivery. The overall CVS/Aetna Merger will cost CVS Health approximately \$69 billion, and when the assumption of Aetna Inc.'s debt is added to that figure, the total value of the overall Merger is \$77 billion. The cash amount of the consideration is \$4.1 billion, while \$44.8 billion will be financed in new debt, including in the form of senior notes and term loans. New equity will also be issued to finance the transaction in an amount totaling approximately \$21 billion.

In 2017, CVS Health reported net revenues of \$184.8 billion. In the first six months of 2018, CVS Health reported net revenues of \$92.4 billion. In New York alone, CVS Health, or its subsidiaries, own 573 retail pharmacies, a specialty pharmacy, 24 "MinuteClinics," 4 Coram Infusion Facilities, 6 long term care "OmniCare" facilities, and a pharmaceutical distribution center.

In 2017, Aetna Inc. reported total revenues of \$60.5 billion. In the first six months of 2018, Aetna Inc. reported total revenues of \$30.9 billion. In 2017, Aetna Inc. companies, including the Domestic Insurer, wrote approximately \$3.5 billion in direct premiums for New York alone. In the first half of 2018, Aetna Inc. companies, including the Domestic Insurer, have reported approximately \$2 billion in New York direct premiums.

Consideration of the Insurance Law § 1506(b) Factors

When viewed from a market competition and consumer standpoint, the overall CVS/Aetna Merger raises important issues. In considering this transaction and in obtaining the attached Commitments, the Department has considered all the factors enumerated in New York's Insurance Law, and discusses each below.

Financial Condition

The CVS/Aetna Merger involves a considerable amount of debt – over \$40 billion – that the Applicants would be assuming to finance this transaction. The Department has expressed its concern that this increased debt may create pressure on Aetna Inc. to raise premiums in New York or to take other actions that negatively impact New York consumers. CVS Health has represented to the Department that it – and only it – will bear the responsibility for the debt used to finance the transaction, and that it will use CVS Health’s revenues from other business operations, as well as what otherwise would be dividends and share repurchases, to pay down the debt.

The Department seeks to ensure that New Yorkers will not pay to finance this acquisition, in insurance premiums or otherwise. The Applicants have made certain representations about their overall financial stability, but those representations alone do not address fully the impact of the assumed debt on the companies’ dedication to pro-consumer investments and reduction in premiums. Accordingly, in the Commitments set forth in the Addendum, the Applicants have agreed to certain requirements to ensure that insurance premiums are not utilized to pay down the debt assumed by this transaction, that the company uses income from other operations to reduce its leverage in a relatively short period of time, and certain dividend and restrictions and risk-based-capital requirements subject to the Superintendent’s approval.

Trustworthiness

A preliminary review of the biographical affidavits of the officers and directors of the Applicants that were submitted with the Application did not reveal any issues regarding the backgrounds of such individuals that would indicate untrustworthiness. The biographical affidavits have been forwarded to the Department’s Albany office for further investigation. The Department has been furnished with a commitment that the Applicants will promptly replace any present and/or future principal officer or director of the Applicants or the Domestic Insurer that the Department has deemed to be untrustworthy upon conclusion of its investigation. Under the Insurance Law, the Department can always seek removal of an officer or director if its investigation reveals untrustworthiness.

Plan of Operations

The Applicants claim that the CVS/Aetna Merger will result in operational synergies and that the combined companies will achieve substantial cost savings. In her testimony at the Hearing, the CVS Health witness testified that the CVS/Aetna Merger would “benefit consumers in New York and result in meaningful cost savings and other consumer benefits and, importantly, will inject much-needed change and innovation into a broken system.” However, CVS Health did not provide detail to support these broad claims. In response to questioning at the Hearing regarding a concrete plan in place to accomplish the goals the Applicants set forth in support of the Proposed Acquisition of Control, Ms. Ferguson responded, “There isn’t one right now.” Accordingly, the Commitments include requirements of post-transaction reporting to the Department with respect to the claimed reduced costs and improved health outcomes, commitments assuring that benefits fairly reach all New York communities, and public service commitments, including financial

commitments, for health insurance education and enrollment and health care transformation measures.

The Applicants must also address the concerns with the relationship that would result among Aetna Inc., on the one hand, and one of the largest PBMs in the country, CVS Caremark, on the other hand. The Department is particularly concerned about data privacy and cybersecurity. CVS Health, through its PBM subsidiary, currently has access to drug claims data, patient electronic medical records, and other member information from insurers that use its PBM services and that presently compete with the Domestic Insurer and its affiliates. The Applicants must ensure that the transaction will not compromise consumers' data by committing to strong safeguards to protect and prevent the inappropriate sharing of consumers' data. A data breach could have devastating consequences for consumers, and could further have material financial and operational impacts on Aetna Inc. Accordingly, the Commitments include substantial commitments to the Department's cybersecurity requirements, as well as the commitment to an independent audit of the companies' firewall policies and protections.

Source of Funds

As discussed above, the Department has raised concerns about the amount of debt the Applicants will be assuming to finance this transaction and the need to repay the debt from sources of funds other than insurance premiums and drug prices. As already noted, the Department has required the Applicants to provide enforceable Commitments, set forth in the attached, that New Yorkers will not pay to finance this acquisition, in insurance premiums, drug prices or otherwise.

Fairness of Consideration

According to the Application, the nature and amount of the consideration for the CVS/Aetna Merger were determined by arm's length negotiations among the parties. The Department's review has not raised any concerns with the consideration to be paid from the perspective of the fairness of the purchase price for the stock of Aetna Inc.

Effect on Competition

The CVS/Aetna Merger would have significant impacts on competition in various ways. First, through the proposed transaction, Aetna Inc. plans may create structures, network designs, or other incentives for their insureds to use services offered by the Applicants over those of their competitors. This could increase CVS Health's market share in the retail pharmacy industry, and potentially lead to a reduction in competition that could result in the loss of small businesses and/or higher drug prices passed on to consumers, including New York policyholders of other insurance companies regulated by the Department.

Second, the inverse may also occur, creating additional market concentration in the health insurance market. Given the relative size and prevalence of the Applicants' pharmacies throughout the State, this would represent a potential increase in the already considerable New York market share of Aetna Inc. companies. The Department has also raised its substantial concerns that Aetna

policies written to New Yorkers are primarily written out of a company that is domiciled in another state.

Third, pharmaceutical costs represent the single largest driver of premium increases today. Today, the top three PBMs control 70% of the business in this highly opaque industry. CVS Caremark is one of the three PBMs with this dominant market power, and the CVS/Aetna Merger would further concentrate its market power by removing Aetna Inc. as a potential competitor in the PBM market. Moreover, CVS Caremark, as a PBM, would have the power to offer Aetna Inc. companies larger rebates or reduced fees than offered to other insurers. This would give Aetna Inc. an artificial competitive advantage that would draw policyholders away from other insurers and create an even larger market share for the enterprise. As a result, small and regionally-based carriers, without an affiliated PBM, would be disadvantaged, thereby harming markets and consumers.

Fourth, PBMs repeatedly are criticized for their lack of transparency and oversight. Without commitments to address these concerns, CVS Caremark, with Aetna Inc. in the same affiliate chain of companies, could create the risk of increased costs of pharmaceuticals and insurance premiums paid by New York consumers.

Accordingly, the attached Commitments include substantial measures related to Aetna Inc.'s commitment to New York policyholders, agreements that Aetna will not receive preferential pricing from CVS Caremark and addressing independent pharmacies, required reporting to the Department regarding pharmaceutical rebates, and commitments to PBM transparency.

Potential Hazard or Prejudice to Policyholders

A number of the foregoing concerns also are relevant to the evaluation of the final statutory factor relating to potential hazards or prejudice to policyholders. These concerns include the transaction's impact on premiums; impact on pharmaceutical costs; impact on PBM pricing and transparency; impact on data privacy and cybersecurity; and impact on the Domestic Insurer and its affiliates with respect to the pressure to repay debt used to finance the transaction.

Without a proper and effective plan to ensure that promised cost savings for policyholders are actually realized, the merger would be prejudicial to policyholders. Without greater transparency and oversight, PBMs' pricing models could result in higher medical-claims-related costs, potentially increasing premiums. As already noted, cybersecurity is a growing threat and institutions must commit to strong protections. Moreover, the Applicants have a substantial retail pharmacy operation that is present in many communities across New York State. The Applicants have claimed that the transaction will benefit consumers who will be able to use CVS Pharmacy stores to obtain better access to certain health care services.

Accordingly, to address these concerns, the Department has required the Applicants to commit to implementing their stated objectives across New York State, in a manner that serves New York's communities fairly and equitably, including those communities most in need of affordable health care services, as well as the uninsured. As set forth above, the conditions set

forth in the Addendum also include reporting obligations, measures to address competition and cost concerns, data privacy protections and public service financial commitments.

Weighing of Insurance Law § 1506(b) Factors

As set forth above, an evaluation of the New York Insurance Law factors requires certain commitments in order for approval of the Proposed Application of Control to be justified. In evaluating this transaction, the Department is mindful of the concerns raised by hospital, medical, pharmacy and consumer groups and individuals. The Department has evaluated the transaction based upon the nature of the Application that is before the Department, recognizing that the Department does not have an application before it with respect to the overall CVS/Aetna Merger nor for the proposed change of control of the Aetna Inc. insurance companies that write substantial business in the State of New York.

The Department is committed to ensuring that New Yorkers have quality, affordable health care and a competitive insurance market that protects consumers. Given the discussion above, the Department believes that disapproving the Proposed Acquisition of Control is unlikely to provide any tangible benefits to the People of this State. Accordingly, the Department has engaged in substantial discussions with both CVS Health and Aetna Inc. to address the concerns set forth above and in the public comments received. These concerns include the level of debt assumed in the transaction and the impact of such assumed debt on premiums and other costs; post-transaction oversight of the promises being made by the Applicants with respect to claims of reduced costs and improved health outcomes; commitments to New Yorkers' health care needs and reducing the number of uninsured New Yorkers; Aetna Inc.'s commitment to the State of New York and New York policyholders; data privacy and cybersecurity protections; and the lack of transparency and practices of PBMs.

The Department has determined that obtaining commitments from CVS Health and Aetna Inc. to address these concerns better serves the People of the State of New York than would disapproval of the Application that is before the Department. Accordingly, as conditions to approval, and as set forth in the discussion above, the Department has required the Applicants to make significant commitments to the Department that address each of the Insurance Law factors that might otherwise weigh against approval. Those Commitments, signed by both CVS Health and Aetna Inc., are conditions to the Department's approval and are attached in the Addendum and fully incorporated into this Decision and Order.

The Department notes that it has a range of regulatory tools to ensure the realization of the promises that have been made by the Applicants in seeking the Department's approval and to ensure the continued protection of New York consumers. The promises made to the Department throughout the application process, as well as in the Commitments incorporated and attached as the Addendum to this Decision and Order, are subject to review and enforcement by the Department to ensure compliance and otherwise to protect the public.

In addition, under New York's holding company statute, the Department has the broad authority to conduct examinations of entities within a holding company, here to now include CVS entities. Insurance Law § 1504(b) provides that "[e]very holding company and every controlled

person within a holding company system shall be subject to examination by order of the superintendent if the superintendent has cause to believe that the operations of such persons may materially affect the operations, management or financial condition of any controlled insurer within the system, including by posing enterprise risk to the insurer[.]” Accordingly, under existing law, the Department has the power to examine any entity owned by a holding company, where it has cause to believe such entity can affect the operations, management or financial condition of any insurer licensed in New York. As a result of the CVS/Aetna Merger, CVS Health and CVS Pharmacy will become holding companies subject to examination by the Department. In addition, CVS Caremark, as a controlled person in the CVS Health holding company that, as set forth above, will be in a position to materially affect the operations, management or financial condition of multiple New York licensed insurers, including ALIC, will also be subject to examination by the Department.

The Department’s powers also include, but are not limited to, the power to examine any licensed insurer pursuant to Insurance Law § 309, including any Aetna insurer writing business in the State of New York such as ALIC; the power to seek special reports from any licensed insurer about any matter related to its transactions or condition or any matter connected therewith pursuant to Insurance Law § 308; the power to suspend or revoke an insurer’s license under Insurance Law § 1104; the power to impose fines on a holding company or any entity within a holding company for violating the holding company act or for doing or causing to be done anything for an insurer that would violate the Insurance Law under Insurance Law §§ 1509-10; and the broad powers under the Financial Services Law to subpoena any provider of financial services or products, conduct investigations and take other necessary actions to protect consumers in New York State.

The Department will use these regulatory tools to review the past and future conduct of Aetna Inc. and its relevant subsidiaries, CVS Health, CVS Pharmacy, and CVS Caremark. The Department will take any actions necessary to ensure that the representations made in the course of this approval were accurate and that the parties keep all commitments made to the Department, as the Department relied on the representations and commitments in granting this approval.

Finally, the Department has previously advocated for state legislation to require that all PBMs operating in the State of New York must obtain a license from DFS and be examined and regulated by DFS. While the Department will have full powers to examine CVS Health entities under New York’s holding company statutes, the Department’s proposed legislation to license PBMs is a necessary additional step. The Department notes that at the Hearing, as well as in the course of negotiating the Commitments, the Applicants committed that CVS Health and its subsidiaries will take no action to oppose such legislation.

ORDER

WHEREAS, the Department has reviewed the complete record before the Department, which includes the Application; representations made by the Applicants and Aetna Inc. and its subsidiaries in the course of the Department’s extensive review of the Application; the record of the Hearing, including all testimony given and comments received; and the opinions of the expert staff of the Department; and

WHEREAS, upon that record, the relevant provisions of the Insurance Law and Financial Services Law, the parameters of the specific application before the Department, the Commitments made by CVS Health and Aetna Inc. as set forth in the Addendum, and the Department's regulatory and enforcement powers over future matters regarding CVS Health and Aetna Inc., the Superintendent has found that disapproval of the Proposed Acquisition of Control is not necessary to protect the interests of the People of this State;

NOW, THEREFORE, I, Maria T. Vullo, Superintendent of Financial Services of the State of New York, having found that disapproval is not necessary to protect the interests of the People of New York, based upon the Application and documents and testimony furnished in connection therewith and in reliance upon the commitments and representations made to the Department, and the Department's regulatory authority under the New York Insurance Law with respect to all controlled persons within a holding company of all insurers, domestic or foreign, licensed in New York, and the Department's authority under the Financial Services Law, do hereby APPROVE the Proposed Acquisition of Control, subject to the Commitments set forth in the Addendum.

Dated: November 26, 2018

SO ORDERED:



Maria T. Vullo
Maria T. Vullo
Superintendent of Financial Services

Addendum

CVS-Aetna: Conditions for DFS Approval

CVS Health Corporation, Aetna Inc. and their subsidiaries agree to the following commitments:

Financial Condition

- 1. No New York Funds for Acquisition.** Upon consummation of the Proposed Acquisition of Control, the Applicants shall: (a) *Assets*: not dispose of or otherwise use assets of the Domestic Insurer or Aetna Life Insurance Company (ALIC) or any other insurance subsidiaries of the Applicants that are licensed to transact comprehensive health insurance business in New York, and all insurance affiliates of the Domestic Insurer licensed to transact insurance business in New York including any managed care organizations certified in New York (collectively "Foreign NY Insurers") for the purpose of repaying any debt incurred to finance the Proposed Acquisition, use no part of the assets of the Domestic Insurer or Foreign NY Insurers to pay, reimburse, or otherwise fund both the cash financing portion of the Proposed Acquisition of Control and the substantial debt related to the financing of the CVS/Aetna Merger except as approved by the relevant agency with regulatory authority; (b) *Costs*: not pass onto the Domestic Insurer, Foreign NY Insurers or New York insureds any acquisition costs or other consideration, including without limitation executive compensation paid to or accrued for the benefit of any executive officers of the Applicants or Aetna in connection with, or triggered by, the CVS/Aetna Merger; (c) *Rates*: not seek premium rate increases applicable to New York insureds that are intended to be used, or are used, to pay for the cost of the Proposed Acquisition of Control. Applicants represent and warrant that premiums and cost-sharing obligations payable (including copayments and deductibles) by New York insureds for products offered by the Domestic Insurer and Foreign NY Insurers shall not increase as a result of costs incurred in financing, analyzing and/or consummating the Proposed Acquisition of Control ("Acquisition Costs"). (Such Acquisition Costs include, but are not limited to, attorneys' and investment bankers' fees, travel expenses, due diligence expenses, and expenses related to current or future acquisitions by the Applicants.); (d) *No Dividends*: cause the Domestic Insurer to refrain from declaring and/or paying any dividends (ordinary or extraordinary), without the express prior approval of the Superintendent for a period of three years from the consummation of the Proposed Acquisition of Control.
- 2. Prompt De-Lever.** The Applicants have represented in the Application that the combined entity will de-lever quickly to an adjusted debt to adjusted EBITDA ratio of approximately 3.75x through disciplined financial policies. As such, upon the consummation of the CVS/Aetna Merger, the Applicants will provide to the Department semi-annual reports on the status of the plans to de-lever with regards to the debt financing obligations. Such semi-annual reports shall be submitted to the Department as a separate document and shall include the current leverage ratio.
- 3. Maintain RBC.** Applicants shall cause the Domestic Insurer, to maintain a minimum Risk Based Capital (RBC) level of 300% at all times. Beginning five years following the

consummation of the Proposed Acquisition, the Applicants may ask the Department to revise the 300% requirement, and if so requested, the Department will consider the request in good faith.

Plan of Operation

4. **Document Synergies.** The Applicants have represented in the Application that certain synergies will be achieved as a result of the CVS/Aetna Merger. As such, the Applicants shall provide to the Department annual reports for three years documenting details of the progress toward achieving such estimated synergies annually (i.e., cost savings in terms of premium reductions, out of pocket costs savings to the consumer, etc.), specific to the Domestic Insurer, and the New York business of Foreign NY Insurers.

Commitment to New York Insureds

5. **Maintain Products, Services Area, Networks.** The Applicants agree that the Domestic Insurer and Foreign NY Insurers shall, for a period of three years from consummation of the Proposed Acquisition of Control (a) continue to offer their current products, if any, throughout their current service area in New York, except to the extent that changes to such products or service areas are otherwise approved by the Department; and (b) use reasonable efforts to maintain their current networks of providers, including pharmacies, without material changes, except to the extent such changes are otherwise approved by the Department. Nothing herein shall preclude the Domestic Insurer or Foreign NY Insurers from offering new products with different networks.
6. **New York Business.** Within two years from the consummation of the CVS/Aetna merger, the Applicants shall offer, through an existing or new insurer domiciled in New York, one or more new products available to the small and large group markets. Applicants will make good faith efforts to develop and fully market such products in New York, including but not limited to offering any such product with a producer commission structure similar to comparable group products, as well as engaging in comparable advertising and sales efforts.
7. **No Material Change to Business.**
 - (a) Upon the consummation of the CVS/Aetna Merger, the Applicants shall refrain from the following actions: (i) liquidating the Domestic Insurer; (ii) selling any material portion of the assets of the Domestic Insurer; (iii) merging the Domestic Insurer with any other person or persons; or (iv) making any other material change with regard to business, corporate structure, management or general plan of operations of the Domestic Insurer, all without the express prior approval of the Superintendent.
 - (b) Except to the extent authorized or required by a regulatory authority with applicable jurisdiction, upon the consummation of the CVS/Aetna Merger, the Applicants shall refrain from the following actions: (i) liquidating any Foreign NY Insurer; (ii) selling any material portion of the assets of any Foreign NY Insurer; or (iii) merging any Foreign NY Insurer with any other person or persons.

Commitment to New York's Improved Health Outcomes

8. **Care Improvements.** The Applicants shall roll out throughout New York State, and in scale that is reflective of New York State's market share of Applicants' business, the enhanced care model as presented as part of the Application – such as improved readmission prevention, emergency room avoidance, and drug adherence at CVS pharmacies or other locations to the extent that New York State statutes and regulations are amended or otherwise deemed to permit innovative pharmacy solutions. Applicants shall also provide an annual report for a period of three years from consummation of the Proposed Acquisition of Control, detailing quality metrics applied and measured at CVS pharmacies or other locations along with additional details indicating improved health outcomes.
9. **Public Service.** The Applicants agree to pay \$40 million over three years to New York State, subject to a plan approved by the Superintendent of Financial Services and the Director of the Division of the Budget. Such plan shall include, but not be limited to: (i) funds paid to organizations to support health insurance education and enrollment activities; and (ii) funds to strengthen New York health care transformation activities, which may include payments to the New York State Health Care Transformation Fund.

The Applicants shall further make available, at no charge, reasonable access to CVS's New York retail stores, in compliance with CVS's existing operating procedures, for such funded community-based organizations to engage in health insurance education and enrollment activities.

Data Privacy

10. **Firewalls and Data Use.** No later than one year following the date of the CVS/Aetna merger, the Applicants shall submit to the Department a copy of an audit conducted by an independent big four accounting firm to assess that Aetna employees have not accessed the Confidential Information in violation of the firewall policies submitted to the Department pursuant to this condition.

The Applicants shall submit to the Department a copy of the firewall policies creating appropriate functional separation between Aetna employees and Caremark and CVS pharmacy information concerning individual pricing and rates paid by other health plans and clients for PBM and retail pharmacy services ("Confidential Information"). Following the submission of such policies, the Department shall provide the Applicants with comments on such policy. In addition, the Applicants shall submit to the Department a copy of the firewall training taken by CVS and Aetna employees regarding the firewall policies.

11. **Adherence to New York Cybersecurity Regulation.** The Domestic Insurer, ALIC and Caremark Rx, L.L.C. shall adhere to New York's cyber-security regulations (23 NYCRR Part 500) and have submitted and will submit the required annual certificates of compliance to the Department.

Competition

12. **No Preferential Pricing.** CVS Health and its subsidiaries agree not to provide pricing to any Aetna-affiliated health insurer licensed in New York, including any managed care organization certified in New York, that takes into account the fact that the health insurer is Aetna-affiliated.

13. **Independent Pharmacies.** For a period of three years from consummation of the Proposed Acquisition of Control, the Domestic Insurer, and every Foreign NY Insurer, shall ensure that participating provider networks for insured products maintain access to non-chain New York pharmacies. Such access shall be comparable on an aggregated statewide basis to the ratio of non-chain pharmacies at the time of consummation of the proposed Acquisition of Control. Nothing in this condition suggests the Department will review specific contract negotiations between Applicants and individual non-chain pharmacies. The Domestic Insurer and Foreign NY Insurers shall annually report to the Department the percentage of non-chain New York pharmacies in their New York pharmacy networks.

Pharmaceutical Costs

14. **Pharmacy Rebates to Policyholders.** The Applicants shall provide to the Department an annual report describing all pharmacy rebates received by or credited to the Domestic Insurer, as well as those pharmacy rebates received or credited to any Foreign NY Insurer in connection with New York business insured or administered by such affiliates. The report shall include at a minimum, by line of business, the volume of rebates returned to employers or insureds, the volume of rebates credited at the point of sale, and the volume of rebates retained by the insurer. Nothing herein shall preclude Applicants from asserting that such reports are exempt from disclosure pursuant to the provisions of the Public Officers Law.



CVS Health Corporation

By: **Thomas S. Moffatt**
Vice President Assistant Secretary
Assistant General Counsel

11/23/2018
Date

Aetna Inc.

By:

Date

Competition

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CVS Health Corporation
By:

Date

Aetna Inc.

By: *Edward C. Lee*
Assistant Corporate Secretary

November 23, 2018
Date