IN THE GENERAL ASSEMBLY STATE OF

Regulation and Approve Health Insurance Mergers

Be it enacted by the People of the State of ____________, represented in the General Assembly:

Section 1. Title. This act shall be known as and may be cited as “Regulation and Approval of Health Insurance Mergers.”

Section 2. Purpose. The Legislature hereby finds and declares that:

(a) Concentrated health insurance markets result in anticompetitive consequences including increased health insurance premiums, increasing patient financial responsibility for larger co-pays and deductibles, coverage exclusions and reduced access to care;

(b) Applying the Department of Justice/Federal Trade Commission merger guideline standards, the AMA has found that 70 percent of the Metropolitan Statistical Areas (MSA) of the 388 examined were highly concentrated, and in 89 percent of those MSAs, a single health insurer holds at least a 30 percent share of the commercial market.

Drafting Note: If local or state conditions show higher concentrations than the national data, then State Medical Association should include additional language documenting competitive market information.

(c) Physicians have virtually no bargaining power with dominant health insurers in a position to exert monopsony power. To maintain relationships with their patients, physicians can
be forced to accept inadequate reimbursement rates likely to lead to a reduction in the
dAmount of time physicians can spend with their patients and ultimately, a reduction in the
supply of physician services;

(d) Increased state oversight, regulation, and independent investigation to determine a
proposed merger’s impact on competition will protect competition among insurance
companies in this state;

(e) Competition among health insurers will lead to lower premiums, enhanced customer
services, and innovative ways to improve quality while lowering costs; and

(f) While the federal and state antitrust enforcement authorities have broad responsibilities,
the State Insurance Commissioner has greater resources to focus specifically on the
state’s health insurance market. To that end, the State Insurance Department must
conduct a comprehensive, open analysis of proposed mergers and their impact on health
care markets, consumers, physicians and non-physician providers.

Section 3. Definitions.

(a) Acquisition” Any agreement, arrangement or activity that results in a person acquiring,
directly or indirectly, the control of health insurer and includes, but is not limited to, the
acquisition of voting securities, the acquisition of assets, bulk reinsurance and mergers.

(b) “Health Insurer” means any entity, including an insurance company authorized to issue
health insurance, a Health Maintenance Organization (HMO), or any other entity
providing a plan of health insurance, health benefits or health care services that is subject
to the insurance laws and regulations of this state or subject to the jurisdiction of the
Commissioner of Insurance of this State and contracts or offers to contract to provide,
deliver, arrange for, pay for or reimburse any of the costs of health care services.
(c) “Insurer-Applicant” An insurer-applicant is an insurer seeking permission from the State Insurance Department to acquire or be acquired by another insurer.

(d) “Relevant Market” The relevant market has two dimensions. The first is the product market that consists of the products or services with which each of the insurer-applicant’s products or services effectively competes. The second is the geographic area within which the insurer-applicant practically competes in marketing each of its products or services.

(e) “Market or Monopoly Power” Market or monopoly power is the ability of a seller to increase its profits by reducing output and charging a price above a competitive level. It has also been described as the power to control prices or exclude competition.

(f) “Monopsony Power” Monopsony power is the ability of a buyer to force suppliers to sell to it at a lower price than would prevail in a competitive market. An insurer has monopsony power when physicians and non-physician providers have little opportunity to sell their services other than to the monopsonist.

(g) “Market Concentration” Market concentration refers to the size, size distribution and number of firms in a market. A highly concentrated market is one in which the share of the four largest insurers is 75 percent or more of the market.

(h) “Collusion” Collusion is a secret activity undertaken by two or more persons for an anticompetitive purpose, such as price fixing.

(i) “Market Conduct Examination” A market conduct examination reviews the business practices of insurers and producers and is designed to monitor marketing, advertising, policyholder services, underwriting, rating, claims practices, covered lives, medical expense ratio and any anticompetitive, exclusionary or collusive behavior.
(j) “Financial Examination Reports” A financial examination report is a financial examination that is performed on insurance companies licensed within this state. A financial examination looks at the company's financial condition as of a particular date, to determine whether it meets the financial requirements to continue doing business in the state. In addition, the examiners review the insurance company's compliance with some of the many insurance laws under which it operates.

Section 4. Approval Required. No entity subject to the jurisdiction of the Insurance Commissioner that provides or seeks to provide health insurance in this state may acquire control of, merge or consolidate with another insurer unless the acquisition has been approved by the State Insurance Commissioner after the Commissioner has held public hearings concerning the proposed acquisition at which all persons and individuals requesting to participate in the hearings have been given an opportunity to be heard. Each insurer that seeks to acquire, be acquired, merge or consolidate with another insurer must file an application as prescribed by the Commissioner.

Section 5. Standards and Factors to Consider when Determining Approval of Proposed Merger. The State Insurance Department shall enter an order prohibiting a proposed merger if there is substantial evidence that the effect of the acquisition may be substantially to lessen competition in any line of commerce in this state or tend to create a monopoly or monopsony therein. In determining whether a proposed merger would violate this standard, the State Insurance Department shall consider the following:

(a) Any acquisition involving two or more insurers is prima facie evidence that the merger may substantially lessen competition or tend to create a monopoly or monopsony as follows:
1) If the relevant market for health insurance before the merger is highly concentrated and if the involved insurers possess the following shares of the market:

<table>
<thead>
<tr>
<th>Insurer A</th>
<th>Insurer B</th>
</tr>
</thead>
<tbody>
<tr>
<td>4 percent</td>
<td>4 percent or more</td>
</tr>
<tr>
<td>10 percent</td>
<td>2 percent or more</td>
</tr>
<tr>
<td>15 percent</td>
<td>1 percent or more</td>
</tr>
</tbody>
</table>

2) If the relevant market for health insurance is not highly concentrated and the involved insurers possess the following shares of the market:

<table>
<thead>
<tr>
<th>Insurer A</th>
<th>Insurer B</th>
</tr>
</thead>
<tbody>
<tr>
<td>5 percent</td>
<td>5 percent or more</td>
</tr>
<tr>
<td>10 percent</td>
<td>4 percent or more</td>
</tr>
<tr>
<td>15 percent</td>
<td>3 percent or more</td>
</tr>
<tr>
<td>19 percent</td>
<td>1 percent or more</td>
</tr>
</tbody>
</table>

3) If the relevant market for health insurance before the merger is not highly concentrated, and would become highly concentrated if the merger is consummated.

(b) Even though an acquisition is not a prima facie violation, pursuant to (a) above, the State Insurance Department may find a violation of the competitive standard or in the event of a prima facie violation, an insurer-applicant may rebut the prima facie violation pursuant to (a) above, based on the following mitigating or aggravating factors:

1) The purpose, intent, or motive for the merger or acquisition;
2) A determination of the relevant market, market shares of the merging parties and concentration and trend toward concentration in the relevant market;

3) Barriers to and ease of entry into the relevant market for competitors;

4) The opportunity for collusion in the industry, the homogeneity of products, the number of buyers and sellers and the history of collusive behavior in the market;

5) Probable effects of the merger on consumers and on suppliers of health;

6) Whether the financial condition of any acquiring party may negatively affect the financial stability of the insurer, or prejudice the interests of its policyholders or the interests of any remaining security holders who are unaffiliated with the acquiring party; and

7) The terms of the offer, request, invitation, agreement or acquisition and whether it is fair and reasonable to the security holders of the insurer.

(c) Investigation Documents. Each insurer-applicant shall provide the following information to the State Insurance Department along with its application to acquire or be acquired. This information must be provided for each of the most recent five years, and for the state as a whole, for each metropolitan statistical area within the state, and, if possible, for each county within the state:

1) Enrollment by product category;

2) Per member per month (PMPM) charges by product category, as well as average premium renewal rate, gross administrative fee as a percentage of medical payment, underwriting margins and increases for different customer segments;
3) Medical expense ratio by product category;

4) Total utilization data by product category for emergency room (number of emergency department visits per 1000);

5) The average contracted compensation rate paid to physicians by product category and specialty as a percentage of the current Medicare fee schedule;

6) The number of physicians by product category and specialty in the insurer-applicant’s directly contracted network; and

7) If an insurer applicant has a not-for-profit status, contribution to local community projects, tax benefits received, months in reserves and amount of surplus.

(d) **Investigation Process.** The State Insurance Department shall conduct an independent investigation of the proposed consolidation that shall include:

1) The market conduct examination and financial examination reports, or equivalent, for this state and any other state where the insurers do business;

2) The consumer complaint information and any relevant records maintained by the division or any state or federal agency related to the insurer-applicant; and

3) Any other research the State Insurance Department feels relevant to the investigation and decision-making process.

(e) **Investigation Report.** The State Insurance Department shall complete an investigation report as follows:

1) An investigation report shall describe the investigation process, all criteria and facts analyzed and the reasoning for the decision; and
2) The investigation report and an executive summary of that report must be made available to the public as soon as it is completed. All data, reports and any information related to the proposed merger shall be available to the public.

(f) **Merger Evaluation Process.** The State Insurance Department shall ensure that the following requirements are met prior to issuing a decision on a merger application:

1) Conspicuous public notice of any application filing no later than five days after receipt of the application an all newspapers of general circulation in the state (whether in paper or electronic form), and such notice must include at least one Sunday edition of said newspapers;

2) Conspicuous public notice of the first required hearing shall be made not less than 60 days and no more than 90 days from date of application receipt. The notice must be made for at least three consecutive days in all newspapers of general circulation in the state, (whether in paper or electronic form) and must include at least one Sunday edition of said newspapers,

3) Conspicuous public notice of the second required hearing shall be no less than 30 days after and no more than 90 days from the first hearing. The notice must be made for at least three consecutive days in all newspapers of general circulation in the state, (whether in paper or electronic form) and must include at least one Sunday edition of said newspapers;

4) The State Insurance Department shall schedule further public hearings if it deems appropriate;
5) The State Insurance Department must exclusively dedicate a specific section of its website to the proposed mergers where consumers and other interested parties and individuals may readily access documents and other information concerning the proposed merger. The State Insurance Department must, on the first page of its website, conspicuously direct website visitors to this section of its website.

6) The State Insurance Department shall make no final determination of the merger approval until all public testimony has been considered;

7) Public notice must include the hearing date, place, time, subject matter, a link to all merger materials available for public review and the deadline for submitting public comments;

8) At the hearings, the insurer-applicants, any person to whom notice of hearing was sent and any other person whose interests may be affected thereby have the right to present evidence, examine and cross-examine witnesses and offer oral and written arguments and, in connection therewith, are entitled to conduct discovery proceedings in the same manner as is presently allowed in the district courts of this state;

9) The State Insurance Department may retain, at the insurer-applicant’s expense, any attorneys, actuaries, accountants and other experts as may reasonably be necessary to assist the State Insurance Department in reviewing the proposed acquisition;

10) The State Insurance Department shall review all testimony, written comments and other information;
11) The State Insurance Department shall make public all discovery, application and any other relevant documents within 24 hours of receipt;
12) The State Insurance Department shall consider all decision-making criteria specified in this section; and
13) The State Insurance Department may not rely solely on the information submitted by the insurers in making this determination.

Section 6. Effective. This Act shall become effective immediately upon being enacted into law.

Section 7. Severability. If any provision of this Act is held by a court to be invalid, such invalidity shall not affect the remaining provisions of this Act, and to this end the provisions of this Act are hereby declared severable.