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February 9, 2012

Gary P. Timin, Esq.
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200 South Biscayne Boulevard, Suite 4100
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RE: Proposed Acquisition of Arcadian Health Plan, Inc. by Humana Inc.
Docket No. 12-0010

Dear Mr. Timin:

Thank you for your January 24, 2012, response to the two issues contained in my letter of January 23. I know you recognize that every effort has been made to accommodate your request for an early hearing in this matter. In an effort to clarify the status of this matter I have addressed both items discussed in these letters in reverse order below.

Item 2. With regard to the second issue in my January 23 letter and your January 24 response regarding publication of the materials reviewed by the Washington State Attorney General in considering whether he has antitrust concerns, pursuant to your request and response, your letter of November 11, 2011, and Exhibit A only will be published. The other exhibits, which primarily concern competitive statistics, will not be published.

Item 1. The first issue in my January 23 letter concerns Humana Inc.'s ("Humana") statement in its Form A that it has filed an appropriate pre-merger notification statement under the Hart-Scott-Rodino Act with the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC), and that Humana requested that the DOJ and FTC grant it early termination of the waiting period. In my January 23 letter I asked Humana for written confirmation that it has

indeed filed an appropriate pre-merger notification statement with the DOJ and FTC, and that the DOJ and FTC have granted Humana's request for early termination of the waiting period.

In your response, you state that on September 8, 2011, Humana did file the Hart-Scott-Rodino notification with the DOJ and FTC, and that on request of the DOJ, Humana withdrew that original filing and on October 12 submitted a second filing. You advise that subsequently, on November 14, the DOJ sent Humana and Arcadian Management ("Arcadian") each a "Second Request" letter requiring Humana and Arcadian to submit additional materials and extending the waiting period, determining that the proposed acquisition may not be consummated until 30 days *after* receipt by the DOJ/FTC of the additional materials it requested on November 14. You advise that you and Arcadian Management received the DOJ's November 14 request for additional materials and are currently in the process of gathering and submitting these additional materials to the DOJ/FTC. Presumably once they receive all additional materials from Humana and Arcadian Management, they can conduct their review and make their final determination regarding their anticompetitive concerns.

The above activities are consistent with what I understand are the procedures under the Hart-Scott-Rodino Act. As you know, an early termination action by the DOJ and FTC signifies that they have determined that they have received all materials they need for their review and have determined not to take any enforcement action during the waiting period. My understanding is that early termination is granted for most transactions, and within two weeks from the beginning of the waiting period. In this case, however, DOJ/FTS has determined not to grant early termination and have instead taken the second step of issuing a "Second Request" letter to Humana and Arcadian requiring them both to submit additional information and documents, traditionally in order to assist the investigative team in examining a variety of legal and economic questions. This presumably means that the DOJ/FTC has at least some concerns about the anticompetitive effects of this transaction.

Pursuant to RCW 48.31C.030(5)(a), *The commissioner shall approve an acquisition of control ... unless ... he or she finds that: ... (ii) The antitrust section of the office of the attorney general and any federal antitrust enforcement agency has chosen not to undertake a review of the proposed acquisition and the commissioner pursuant to his or her own review finds that there is substantial evidence that the effect of the acquisition may substantially lessen competition or tend to create a monopoly in the health coverage business.* [Emphases added.]

Recognizing that the DOJ and FTC have denied your request for early termination of the waiting period but instead have chosen to undertake a review of the proposed acquisition (including requiring Humana and Arcadian to submit additional materials which you advise are still being gathered and submitted to them for their further review), it would be difficult for the Washington State Insurance Commissioner to proceed with this administrative hearing at this time. Washington State is the state of domicile of Arcadian, which means it has primary jurisdiction and accountability to make a responsible decision in this matter. This includes the responsibility to independently decide that there is not *"substantial evidence that the effect of*

the acquisition may substantially lessen competition or tend to create a monopoly in the health coverage business." My specific concerns are these:

- First and certainly most importantly, for the above reasons, it would be inappropriate for this state to independently make a finding on this issue and approve this transaction, knowing that the DOJ and FTC have chosen not to simply grant your request for early termination, but instead to conduct an investigation of the very issue upon which this state is required to make a finding.

- Second, the Washington State Attorney General's December 13, 2011, letter stating that *there does not appear to be sufficient evidence to conclude that the proposed acquisition ... warrants legal action by the Attorney General's Office* is of little help given the fact that the DOJ/FTC are sufficiently concerned to be taking the actions they are, and given that the above statute refers to *substantial evidence that the effect of the acquisition may substantially lessen competition or tend to create a monopoly* <u>*in the health coverage business*</u> and does not refer to just a finding concerning the effect of the acquisition *"in Washington State."* Clearly, the very few documents reviewed by the Washington State Attorney General were only related to its business in Washington State and his conclusions were presumably in relation to the effect in Washington State – providing another reason why it is best to await the federal decision, which naturally will include an area greater than Washington State.

- Third, on February 3, 2012, you filed a First Amendment to Agreement and Plan of Merger dated January 31, adding a new Section 4.4 to the Merger Agreement. New Section 4.4 sets forth the parties' agreements regarding consequences of the divestiture or retention of certain specified assets of Humana and of Arcadian *depending on whether those assets are divested or retained as a result of negotiations with federal antitrust authorities that are continuing as part of the Hart-Scott-Rodino review process* and you advise that *because those negotiations* [with the DOJ and FTC] *are continuing the parties are not now able to predict exactly when or on what terms* [the DOJ and FTC] *will ultimately conclude.*

- While not particularly relevant, you advised that Texas (which considers itself obviously not the state of domicile of Arcadian but a state of "commercial domicile") had already reviewed and granted Humana's request for approval of this acquisition some time before the request was even filed with the Hearings Unit here, and without conditioning its approval upon the decision of Arcadian Health Plan Inc.'s actual state of domicile, Washington. I have not previously seen a non-domiciliary state make such a decision not conditioned upon approval of the domiciliary state and do not understand that process. As to any finding Texas may have made regarding anticompetitive issues, I can only speculate that when reviewing the Form A and reading that Humana had filed an appropriate pre-merger notification statement under the Hart-Scott-Rodino Act,

Texas assumed that early termination had been granted and so asked no more questions and therefore did not know about the continuing federal inquiry.

For the above reasons, my decision is that it is in the best interests of all parties to await the DOJ's and FTC's final decision after completion of their review of the documents you advise me that you are still gathering and submitting to them. After the DOJ and FTC make their decision, we can certainly schedule the hearing promptly just as you had originally requested and just as we did before this additional information came to light.

Your efforts, courtesy and professionalism are most appreciated.

Very truly yours,

Patricia D. Petersen
Chief Hearing Officer
Presiding Officer

Copies sent by email to:

Joan O. Lenahan, Vice President & Corporate Secretary, Humana Inc.
Joseph C. Ventura, Legal Counsel & Asst. Corporate Secretary, Humana Inc.
James Novello, Sr. Vice President and General Counsel, Arcadian Management Svcs. Inc.
Robert W. Hoffman, Esq., Record Counsel for Arcadian Health Plan, Inc.
Mike Kreidler, Insurance Commissioner
Michael G. Watson, Chief Deputy Insurance Commissioner
James Odiorne, Deputy Commissioner, Company Supervision Division
Carol Sureau, Deputy Commissioner, Legal Affairs Division
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