



March 4, 2016

Director Shelly Rouillard  
California Department of Managed Health Care  
980 9th Street, Suite 500  
Sacramento, CA 95814-2725

Re: Public Comment on Public Meeting on the Acquisition of Cigna by Anthem Blue Cross

Director Rouillard:

Consumer Action and the California Reinvestment Coalition represent a wide variety of consumers across the State of California and have long been concerned with the competitive landscape in the health care industry. We believe competition within different health care markets that offers ample choice, high quality, and transparency is essential to ensuring accessible and affordable care to patients. We also believe competition between health insurers is essential to ensuring lower premiums, improving quality of care, and promoting access and choice.

We thank the Director and the California Department of Managed Health Care (“DHMC”) for holding a public meeting to analyze the merger of Anthem Blue Cross (“Anthem”) and Cigna. In particular, we urge the DMHC to carefully analyze the potential adverse competitive effects of the Anthem-Cigna merger and of health insurance consolidation generally.<sup>1</sup>

The below comment will address (1) concentration and the impact of the Anthem-Cigna merger, (2) a merger’s impact on consumer costs, (3) concerns regarding network adequacy, (4) the unlikelihood of health insurance merger efficiencies, and (5) divestitures and other remedies.

## **I. The Merger of Anthem and Cigna Will Have a Significant Impact on California’s Health Insurance Markets**

Health insurance markets in California are highly concentrated. According to 2014 data from the California HealthCare Foundation, the three largest insurers control 68 percent of the entire commercial health insurance market.<sup>2</sup> Within the individual insurance market, the three largest insurers control 82 percent of the market, with Anthem being the dominant insurer with a 33 percent market share.<sup>3</sup>

---

<sup>1</sup> As the Department of Managed Health Care is well aware, there are two other pending health insurance mergers in the State of California, Aetna’s proposed merger with Humana and Centene’s proposed acquisition of Health Net.

<sup>2</sup> *California Health Insurers Enrollment 2014*, CAL. HEALTHCARE FOUND. (Jan. 2016), available at <http://goo.gl/FbVUjE>.

<sup>3</sup> *Id.*

Data analyzing market share data and concentration levels show that the proposed merger of Anthem and Cigna raises serious concerns under both federal antitrust law and the standards under California's antitrust and insurance statutes. The merger between Anthem and Cigna would create an entity that covers 8.2 million lives, making it the largest insurer in California.<sup>4</sup> According to the American Medical Association, along with lessening competition statewide, the Anthem-Cigna merger would substantially harm competition for different commercial insurance products in metropolitan statistical areas of Santa Cruz-Watsonville, Santa Ana-Anaheim-Irvine, Santa-Barbara-Santa Maria, Salinas, Oxnard-Thousand Oaks-Ventura, Los Angeles-Long Beach-Glendale, Bakersfield, El Centro, and Modesto.<sup>5</sup>

Lastly, the merger between Anthem-Cigna would also substantially lessen competition within the administrative-services-only ("ASO") market, where larger employers cover their employees' health care costs, but purchase access to provider networks and other services from insurers. A combination of Anthem and Cigna would create an entity with 61 percent market share of the 6.4 million lives in the California ASO market.<sup>6</sup>

## **II. The Merger is Likely to Result in Higher Consumer Costs Throughout California**

Consumers across the country are concerned about higher health care costs, including rising costs associated with health insurance. For Californians, health insurance premiums continue to rise. From 2011 to 2016, premiums in the California individual market have gone up on average 8.5 percent per year.<sup>7</sup> Anthem, the largest insurer on the Covered California Exchange operating in all 19 regions, received double-digit rate increases for products in five different regions.<sup>8</sup> With prices steadily increasing in highly concentrated California insurance markets, this proposed merger could exacerbate this trend, leading to even higher consumer costs.

There is little dispute that there is a direct correlation between health insurer concentration and higher premiums.<sup>9</sup> According to one health economics expert at the University of Southern California's Schaeffer Center for Health Policy and Economics, "when insurers merge, there's almost always an increase in premiums."<sup>10</sup> Two separate, retrospective economic studies on health insurance mergers found significant premium increases for consumers post-merger. One study found that the 1999 Aetna-Prudential merger had resulted in an additional seven percent premium increase in 139 separate markets throughout the United States.<sup>11</sup> Another study found

---

<sup>4</sup> *Id.* Anthem has 6.1 million lives and Cigna has 2.1 million lives across a number of products. Post-merger, Kaiser would be the second largest insurer in the state with 7 million covered lives.

<sup>5</sup> American Medical Association, *Markets where an Anthem-Cigna merger warrants antitrust scrutiny* (Sept. 8, 2015).

<sup>6</sup> *California Health Insurers Enrollment 2014*, *supra* note 2.

<sup>7</sup> See Katherine B. Wilson, *Individual Health Insurance Premium Growth in California*, CAL. HEALTHCARE FOUND. (Nov. 2015), available at <http://goo.gl/0WD2Ti> (for 2016, rates increased by 3.8 percent).

<sup>8</sup> See Covered California, *Health Insurance Companies and Plan Rates for 2016* (Oct. 29, 2015), available at <https://goo.gl/RpVk3J> (Anthem along with California Blue Shield are the only two insurers to offer individual insurance products in all 19 regions on the Covered California Exchange).

<sup>9</sup> See Leemore Dafny, *Are Health Insurances Markets Competitive?*, 100 AM. ECON. REV. 1399 (2010).

<sup>10</sup> David Lazarus, *As Health insurers merge, consumers' premiums are likely to rise*, L.A. TIMES (July 10, 2015 4:00 AM), <http://goo.gl/nF7HRS>.

<sup>11</sup> See Leemore Dafny *et al.*, *Paying a Premium on Your Premium? Consolidation in the US Health Insurance Industry*, 102 AM. ECON. REV. 1161 (2012).

that the 2008 United-Sierra merger had resulted in an additional 13.7 percent premium increase in Nevada.<sup>12</sup> There is also economic evidence that a dominant insurer can increase rates 75 percent higher than smaller insurers competing in the same state.<sup>13</sup> The insurance mergers could also impact out-of-pocket costs as patients see increases in deductibles or other insurance-related costs.<sup>14</sup>

In contrast, there are no economic studies or evidence indicating that insurance mergers lead to lower prices for consumers. However, that has not prevented the merging companies from suggesting that their mergers will create cost savings which they will pass along to consumers.<sup>15</sup> Much of these supposed savings are attributed to the new merged firm's expected greater buying power, also known as monopsony power. According to proponents of the mergers, a dominant insurer can use monopsony power to lower provider reimbursement rates and pass the savings along to consumers.<sup>16</sup> But, there is no evidence consumers actually receive any of these potential savings. In fact, Professor Thomas Greaney, a health antitrust scholar, has noted that the insurer "has little incentive to pass along the savings to its policyholders."<sup>17</sup> More likely, the now-dominant insurer would exploit its monopsony power to benefit only itself, closing off choices, and pressuring providers to cut corners on quality of care in order to meet its demands – the opposite of what consumers need.<sup>18</sup> As the American Antitrust Institute, the leading non-profit antitrust think tank, recently concluded, economic studies and evidence indicate that "consumers do not benefit from lower healthcare costs through enhanced bargaining power."<sup>19</sup>

Current market regulations will not deter an insurer from raising consumer costs. Supporters of the merger have argued that the medical loss ratio ("MLR") "limit the profit margins that

---

<sup>12</sup> See Jose Guardado et al. *The Price Effects of a Large Merger of Health Insurers: A Case Study of United-Sierra*, 1(3) HEALTH MANAGEMENT, POL'Y & INNOVATION 1 (2013).

<sup>13</sup> Eugene Wang and Grace Gee, *Larger Insurers, Larger Premium Increases: Health insurance issuer competition post-ACA*, TECH. SCI. (Aug. 11, 2015), available at <http://goo.gl/918ULo>.

<sup>14</sup> See generally Leemore Dafny, *Evaluating the Impact of Health Insurance Industry Consolidation: Learning from Experience*, COMMONWEALTH FUND (Nov. 20, 2015), <http://goo.gl/xRYb5x>; see also Korin Miller, 6 Ways the Big Health Insurance Mergers Will Affect Your Coverage, YAHOO HEALTH (July 24, 2015), <https://goo.gl/qLioCy> (noting that "out-of-pocket payments could increase" because insurance coverage could limit certain services or number of visits forcing patients to pay more).

<sup>15</sup> See *Effects on Competition of Proposed Health Insurer Mergers: Hearing before Comm. on the Judiciary Subcomm. on Regulatory Reform, Commercial and Antitrust Law*, 114th Cong. (Sept. 29, 2015) (testimony of Joseph Swedish, President & CEO of Anthem, Inc.), available at <http://goo.gl/B0sy5T> (the merger will "lower costs" and "encourage greater cost and quality competition among providers.").

<sup>16</sup> See Victoria R. Fuchs and Peter V. Lee, *A Health Side of Insurer Mega-Mergers*, WALL ST. J. (Aug. 26, 2015, 6:36 PM), <http://goo.gl/hMhuzL>.

<sup>17</sup> See Thomas Greaney, *Examining Implications of Health Insurance Mergers*, HEALTH AFFS. (July 16, 2015), <http://goo.gl/ETT1DB>.

<sup>18</sup> See *Health Insurance Industry Consolidation: Hearing before the Sen. Comm. on the Judiciary, Subcomm. on Antitrust, Competition Policy, and Consumer Rights*, 114th Cong. (Sept. 22, 2015) (testimony of George Slover, Consumers Union), available at <https://goo.gl/fgvF2o> ("[b]ut a dominant insurer could force doctors and hospitals to go beyond trimming costs, to cut costs so far that it begins to degrade the care and service they provide below what consumers value and need").

<sup>19</sup> Letter from the American Antitrust Institute, Thomas Greaney, and Diana Moss, to William J. Baer, Assistant Attorney General Dep't of Justice (Jan. 11, 2016), available at <http://goo.gl/BD1zTL>.

insurers can make,” thus protecting consumers from price increases.<sup>20</sup> While MLR is an important tool that requires health insurers spend 80 to 85 percent of net premiums on medical services and quality improvements, it will not adequately protect consumers from anticompetitive harm. Along with MLR not applying to self-insured plans, and the potential for MLR to be gamed by insurers to reduce consumer welfare, MLR, as health antitrust expert Professor Jamie King has observed, “does not guarantee that dominant insurers will not raise premiums and as such, it is not a substitute for the pressures toward lower costs and higher quality created by a competitive market.”<sup>21</sup>

### **III. There are Significant Concerns over Network Adequacy**

Consumers are concerned that the mergers would restrict their choice of and access to an adequate number of providers. For many consumers, the provider networks offered in a plan are as important a consideration as cost. The merging insurance companies have claimed that the mergers will “expand ... access” for consumers “through a more extensive network of hospitals, physicians, services, and health care professionals.”<sup>22</sup> We are concerned, however, that the opposite will happen: That consumers will find their options limited to plans with overly restricted provider networks and/or lose access to an adequate number of providers in their local area.

These concerns are not speculative. Network adequacy is an issue in California. A recent study by the Leonard Davis Institute of Health Economics and the Robert Wood Johnson Foundation found that 75 percent of silver level plans offered on the Covered California Exchange use narrower networks that only include 25 percent or fewer of all area providers.<sup>23</sup> For these reasons, we request that DMHC analyze and consider network adequacy issues in the Anthem-Cigna merger.

### **IV. Health Insurance Merger Efficiencies are Highly Unlikely in California**

As a general matter, one potential benefit of mergers is the enhancement of the new company’s ability to compete, by strengthening its capacity to bring down price, improve quality, enhance services, or create new products – collectively referred to as “efficiencies.”<sup>24</sup>

---

<sup>20</sup> E.g. Mara Lee, *Anthem Merger Filing: No Plans to Cut Cigna Workers ‘In Any Material Respect’*, HARTFORD COURANT (Sept. 25, 2015 6:45 PM), <http://goo.gl/6OXe2T> (quoting Anthem’s application to the Connecticut Insurance Department to acquire Cigna).

<sup>21</sup> *Effects on Competition of Proposed Health Insurer Mergers: Hearing Before Comm. on the Judiciary Subcomm. on Regulatory Reform, Commercial and Antitrust Law*, 114th Cong. (Sept. 29, 2015) (testimony of Jamie S. King, Professor University of California, Hastings College of Law), available at <http://goo.gl/Gje3Ci>.

<sup>22</sup> See *Healthy Competition? An Examination of the Proposed Health Insurance Mergers and the Consequent Impact on Competition: Hearing before Comm. on the Judiciary Subcomm. on Regulatory Reform, Commercial and Antitrust Law*, 114th Cong. (Sept. 29, 2015) (testimony of Joseph Swedish, President & CEO of Anthem, Inc.), available at [http://judiciary.house.gov/\\_cache/files/7ec53173-463e-4d15-a1da-f9db48349b0d/swedish-testimony.pdf](http://judiciary.house.gov/_cache/files/7ec53173-463e-4d15-a1da-f9db48349b0d/swedish-testimony.pdf).

<sup>23</sup> Dana Polsky & Janet Weiner, *State Variation in Narrow Networks on the ACA Marketplaces*, LEONARD DAVIS INST. HEALTH ECON. (Aug. 2015), available at <http://goo.gl/2SVXsI>.

<sup>24</sup> U.S. Dep’t. of Justice & Fed. Trade Comm’n, *Horizontal Merger Guidelines at § 6.4* (2010), available at <https://goo.gl/Hh3dks>.

The insurers involved in this merger have argued that their merger would create substantial efficiencies leading to improved health care quality and lower costs.<sup>25</sup> But these kinds of efficiencies cannot help justify a merger unless (1) it is really necessary for the insurers to merge to achieve the stated efficiencies, and (2) the stated efficiencies will actually benefit consumers.<sup>26</sup>

Moreover, while the merging insurers have offered little details about these supposed savings, the bigger question is if consumers would see any benefit themselves from these savings, if they do result, in the form of lower costs or greater value. There is no evidence or scholarly studies showing that insurance mergers lead to savings for consumers. In fact, as previously noted, evidence indicates that health insurance mergers lead to higher consumer costs, not increased consumer savings.<sup>27</sup>

A more abstract argument raised by the merging insurers is that the mergers will allow them to improve innovation. Innovation in health care delivery is critical. For one thing, there is a need to change health care from the current volume-based system to a patient-oriented, value-based delivery model that incentivizes insurers and providers to improve care and lower costs. But we are concerned that, in California, these mergers will further entrench Anthem's preexisting market power, reducing their incentives to compete and improve care. As noted by the American Antitrust Institute, excessive concentration created by the proposed mergers *is likely to reduce incentives* for engaging in innovation.<sup>28</sup>

Furthermore, the insurers have not offered sufficient details or analysis demonstrating how innovation will improve post-mergers. In fact, reviewing their testimony and data, Professor Dafny found speculative their claims that the mergers would enhance their ability to develop and implement new value-based payment agreements, noting that there was no evidence that merger was necessary for carrying out such initiatives.<sup>29</sup> Moreover, in a recent piece in *Health Affairs*, Professor Dafny and Christopher Ody further noted that statistical evidence shows concentrated insurance markets often have less innovative insurance product offerings, meaning mergers between insurers will not likely lead to higher quality or more innovative insurance products.<sup>30</sup>

## V. Divestitures and Other Remedies

It is also important for the California Department of Managed Health Care to consider what actions would help properly protect consumers and ensure the proposed merger, if approved, is in the public interest. If the DHMC decides that a merger is not in the public interest, it has the

---

<sup>25</sup> See Swedish, *supra* note 15 (section labeled "Improving quality and affordability").

<sup>26</sup> Horizontal Merger Guidelines, *supra* note 24 at § 10 (to rebut a presumption of competitive harm, efficiencies must be merger-specific, cognizable, and substantiated); *St. Alphonsus Med. Ctr. v. St. Luke's Health Sys.*, 778 F.3d 775, 789 (9th Cir. 2015) (efficiencies must demonstrably prove "that a merger is not, despite the evidence of a prima facie case, anticompetitive").

<sup>27</sup> See Section II.

<sup>28</sup> Greaney & Moss, *supra* note 19 (emphasis added).

<sup>29</sup> *Health Insurance Industry Consolidation: Hearing before the Sen. Comm. on the Judiciary, Subcomm. on Antitrust, Competition Policy, and Consumer Rights*, 114th Cong. 15 (Sept. 22, 2015) (testimony of Professor Leemore Dafny, Professor Northwestern University), available at <http://goo.gl/mhExI6>.

<sup>30</sup> Leemore Dafny & Christopher Ody, *New Health Care Symposium: No Evidence that Insurance Market Consolidation Leads To Greater Innovation*, HEALTH AFFS. (Feb. 24, 2016), <http://goo.gl/ddqqRo>.

power to simply disapprove the merger. The DHMC has also approved health insurance mergers conditioned on the imposition of specific remedies. In the recent Blue Shield acquisition of Care 1st, the DHMC approved the merger but required the parties make a number of improvements to California's health care delivery system, including a \$200 million investment from the parties to "strengthen the health care delivery system, particularly in Medi-Cal."<sup>31</sup>

In contrast, in nearly every health insurance merger enforcement action during the last two decades, the Department of Justice ("DOJ") has relied on the structural remedy of divestiture to address competition problems.<sup>32</sup> Divestitures require that the merging insurance companies spin off subscribers or operations to another, independent insurance company fully capable of restoring the same competition. Given the potential size and scope of divestitures that would be required, including those that would likely be required in California, the American Antitrust Institute has come out against the mergers of both Anthem-Cigna and Aetna-Humana, urging the DOJ to "just say no."<sup>33</sup>

Unfortunately, there is little evidence that the benefits of competition are effectively restored after divestitures. In fact, in the previously cited two retrospective studies on health insurance mergers, both matters involved divestitures of covered lives for different insurance products, but the merged companies were still able to raise premiums by significant margins.<sup>34</sup> Additionally, for any divestiture in these matters to be successful, the purchaser of the assets will need to have and maintain a cost-competitive and attractive network of hospitals and physicians; ensuring this will require scrutiny and continued monitoring from DOJ.<sup>35</sup> With the lack of competition in a number of California markets already, it may be difficult to genuinely preserve the competitive benefits of the pre-merger market structure through divesting subscribers or operations to a competitor.

Most recently, the Florida Office of Insurance Regulation ("OIR") disregarded divestitures as a potential remedy to health insurance mergers. In their consent order to the Aetna-Humana merger, the OIR noted that the divestitures were "not in the best interests of Florida policyholders and also may be short term in nature."<sup>36</sup> The OIR noted that such divestitures may "result in unwanted changes in quality of services [and] benefits," and furthermore, that

---

<sup>31</sup> Press Release, Dep't of Managed Health Care, Department of Managed Health Care Approves Blue Shield Acquisition of Care 1st (Oct. 8, 2015), available at <https://goo.gl/cN988T>.

<sup>32</sup> See, e.g., Revised Final Judgment, *United States v. Aetna Inc. and Prudential Insurance Co. of Am.*, No. 3-99-cv-1398-H (N.D. Tex. Dec. 7, 1999); Final Judgment, *United States v. UnitedHealth Group Inc. and Sierra Health Servs. Inc.*, No: 1:08-cv-00322 (D.D.C. Sept. 24, 2008); Final Judgment, *United States v. Humana Inc.*, No. 1:12-cv-00464 (D.D.C. March 27, 2012).

<sup>33</sup> Greaney & Moss, *supra* note 19.

<sup>34</sup> Dafny, *supra* note 11; Guardado, *supra* note 12.

<sup>35</sup> *The State of Competition in the Health Care Marketplace: The Patient Protection and Affordable Care Act's Impact on Competition*, Comm. on the Judiciary Subcomm. on Regulatory Reform, Commercial and Antitrust Law, 114th Cong. (Sept. 10, 2015) (testimony by Professor Thomas Greaney, Saint Louis University School of Law), available at <http://goo.gl/bceVxi>.

<sup>36</sup> Consent Order at 8, In the Matter of Application for the Indirect Acquisition of Humana by Aetna, No. 125926-16-C0 (Feb. 15, 2016), available at <http://goo.gl/AvXzED>.

policyholders can switch insurance every year, which would “lessen the effectiveness of divestitures as a means to manage market concentration.”<sup>37</sup>

The DOJ (and the California Attorney General’s Office, using its own antitrust authority) may be considering divestitures, as an alternative to opposing the merger outright. But as previously noted, the DHMC has, in the past, developed additional remedies for a health insurance merger. These remedies can be in addition to any remedies, including divestitures, ordered by the DOJ or the California Attorney General.

In the event that the Anthem-Cigna merger is permitted to go forward, here is a short list of possible regulatory steps the California Department of Managed Health Care might consider, among others that could help limit competitive harm:

- (1) Requiring premium stability or heightened rate control for a number of years post-merger.
- (2) Requirements ensuring that the merged company cannot scale back plan benefits and options.
- (3) Improving access to providers throughout the state and within local areas.
- (4) Ensuring that the merged company continues to provide the differentiated insurance products offered previously by the two companies, within the state and local areas, for a number of years.
- (5) Ensuring that consumer access to adequate networks and network options is preserved and strengthened, including in rural and underserved areas.
- (6) Requiring that the merged company pass along any cost savings associated with the merger to consumers, in the form of lower premiums and deductibles.

## **Conclusion**

The undersigned organizations are concerned by the potential for this merger, between two of the largest, most dominant national health insurers, to substantially lessen competition for different insurance products in the State of California and adversely impact price, access, and quality of care. Although the merging companies are claiming various supposed benefits associated with the merger, all scholarly evidence suggests that consumers will see limited to no benefits and instead will face higher costs, less innovation, and potentially lower quality of care.

With the prospect that the Anthem-Cigna merger might go forward, and recognizing the shortcomings of divestitures as an effective remedy, we urge the California Department of Managed Health Care and Director to carefully analyze this merger and to be prepared to consider imposing additional requirements to better protect consumers from harm.

We would be happy to address any of the points raised in this comment. Please do not hesitate to contact us with any questions.

---

<sup>37</sup> *Id.* at 9.

Respectfully submitted,

Consumer Action  
California Reinvestment Coalition

Counsel of record for this comment is:

David A. Balto  
James Kovacs  
The Law Offices of David A. Balto  
1325 G. St.  
Suite 500  
Washington, DC 20005  
202-577-5424  
David.balto@dcantitrustlaw.com  
James.kovacs@dcantitrustlaw.com