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June 16, 2016

The Honorable Loretta E. Lynch
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Ms. Renata B. Hesse
Principal Deputy Assistant Attorney General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

RE: Proposed merger of Anthem, Inc. and Cigna Corporation

Dear Attorney General Lynch and Principal Deputy Assistant Attorney General Hesse:

The Antitrust Division of the United States Department of Justice is reviewing the proposed merger of Anthem, Inc. and Cigna Corporation.

As California's Insurance Commissioner, I regulate California's insurance market, which is the largest insurance market in the United States. Insurers in California collect \$259 billion in premium annually. California also has the largest health insurance market in the United States. Health insurers and managed care plans collect \$122.9 billion in premium annually from Californians.¹

I held a public hearing on this merger and obtained testimony and other information from the public, healthcare providers, experts on health insurance mergers, consumer advocates, and the two insurance companies. I also invited the public and other interested parties to submit written comments.²

As California's Insurance Commissioner I have reviewed the likely effects of the proposed merger on competition in California health insurance markets and concluded that it is more than reasonably probable that it will substantially lessen competition based on the factors recited in

¹ Josh Cothran, *The Private Insurance Market in California, 2013* (Cal. Health Care Found. Feb. 2015), <http://www.chcf.org/publications/2015/02/data-viz-health-plans>.

² The hearing transcript is available at http://www.insurance.ca.gov/01-consumers/110-health/60-resources/upload/CONDENSED_TRANSCRIPT_ANTHEM_CIGNA_MERGER_PUBLIC_HEARING_MARCH_29_2016_-_pdf.

the DOJ and FTC Horizontal Merger Guidelines (Merger Guidelines).³ Specifically, the enhanced market power of the merged companies will permit them to increase premiums, decrease the quality of care provided to their California members in a number of the state's regions, and reduce access to crucially needed insurance products. In addition, the merger will likely result in coordinated actions among them and other California health insurers, generating the same effects. Finally, the merger would increase the monopsony power of the combined entities in purchasing the services of healthcare providers, thus likely decreasing the quality of services and increasing the price of health insurance. Accordingly, I oppose the proposed merger of Anthem and Cigna and strongly recommend that the United States Department of Justice challenge this transaction.

I. There Is Substantial Evidence that the Merger Would Substantially Lessen Competition by Significantly Increasing Concentration and Enhancing Anthem/Cigna's Market Share and Market Power in the Sale of Health Insurance

A. *HHI Analysis Demonstrates that the Merger Would Significantly Increase Concentration Across Product Types in Many California Counties*

Professors Richard M. Scheffler and Brent D. Fulton at the U.C. Berkeley School of Public Health computed county-level HHIs for various product types in California's 58 counties.⁴ They examined three product markets for the sale of insurance—one consisting of preferred provider organizations, exclusive provider organizations, point-of-service plans, and health maintenance organizations (PPO+EPO+POS+HMO); one consisting of PPOs, EPOs, and POSs; and one consisting of only PPOs and EPOs. Based on the Merger Guidelines, the Anthem/Cigna post-merger HHIs and HHI increases would result in determinations of “presumed likely to enhance market power” or “potentially raise significant competitive concerns and often warrant scrutiny” in a large number of counties for each of these markets, as indicated in the following summary of Professors Scheffler and Fulton's results:

1. The PPO+EPO+POS+HMO Market:

- a. The market in 18 of 58 counties would become highly concentrated (HHI >2500) with an HHI increase over 200, and thus the merger would be “presumed likely to enhance market power.”
- b. The market in 31 of 58 counties would become either highly concentrated with HHI increases of 100-200, or moderately concentrated (HHI 1500-2500) with HHI increases over 200, and thus the merger would “potentially raise significant competitive concerns and often warrant scrutiny.” (This category includes California's most populated counties, e.g. Los Angeles, San Diego, Orange, and Riverside.)

³ U.S. Dept. of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* (Aug. 19, 2010), available at <https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf>.

⁴ The written testimony of Dr. Scheffler and Dr. Fulton is available at <http://www.insurance.ca.gov/01-consumers/110-health/60-resources/upload/CDI-Testimony-re-Anthem-and-Cigna-Fulton-Scheffler-and-Arnold-032916-final.pdf>.

2. The PPO+EPO+POS Market:

- a. The market in 41 of 58 counties would become highly concentrated with an HHI increase over 200, and thus the merger would be “presumed likely to enhance market power.”
- b. The market in 14 of 58 counties would become either highly concentrated with HHI increases of 100-200, or moderately concentrated with HHI increases over 200, and thus “potentially raise significant competitive concerns.”

3. The PPO+EPO Market:

- a. The market in 46 of 58 counties would become highly concentrated with an HHI increase over 200, and thus the merger would be “presumed likely to enhance market power.” (This category includes California’s most populated counties, e.g. Los Angeles, San Diego, Orange, and San Bernardino; the HHI increase exceeds 1,000 in each of those most populated counties.)
- b. The market in seven counties would become either highly concentrated with HHI increases of 100-200, or moderately concentrated with HHI increases over 200, and thus the merger would “potentially raise significant competitive concerns and often warrant scrutiny.” (These are relatively unpopulated rural counties.)

These HHI and HHI increase levels, together with relatively high entry barriers, increase the oligopolistic nature of these markets and raise a reasonable probability of coordinated anticompetitive conduct by market participants.

B. Post-Merger Market Share Analysis Demonstrates that the Merger Would Increase Anthem’s Market Power and Ability to Raise Prices

The market share figures developed by Drs. Scheffler and Fulton indicate that Anthem already has substantial market power in a number of California markets. As their report shows, Anthem’s current market share exceeds 50% in numerous product and geographic markets:

1. The PPO+EPO+POS+HMO market—The Anthem/Cigna market share will exceed 50% in nine counties and 40% in 18 counties
2. The PPO+EPO+POS market—The Anthem/Cigna market share will exceed 50% in 21 counties and 40% in 36 counties.
3. The PPO+EPO market—The Anthem/Cigna market share will exceed 50% in 28 counties and 40% in 38 counties.
4. The Administrative Services Only (ASO) Market—In the California state-wide ASO market, Anthem’s current share is 37% and Cigna’s is 24%—a

post-merger share of 61%. This suggests that the merger will result in Anthem's gaining a monopoly-level share and certainly a share sufficient to show that the merger is presumed unlawful. Additionally, the ASO market consolidation will have an impact not only on self-insured employers, but on the group market in California.

While the market-share increases in the broadest product market (PPO+EPO+POS+HMO) are relatively small, any increase in Anthem's already dominant market shares is concerning. And its share increases in the other product markets are significantly larger, particularly in the important PPO+EPO market. Added to this, as I discuss later, Anthem has a history of exercising its market power by significantly increasing prices, and this merger will augment that ability.

C. An Anthem/Cigna Merger Would Substantially Lessen Competition Based on the NAIC's "Competitive Standard"

The Merger Guidelines state that DOJ and FTC may "consider any reasonably available and reliable evidence to address the central question of whether a merger may substantially lessen competition." The National Association of Insurance Commissioners (NAIC) has developed the "Competitive Standard" in the NAIC's Insurance Holding Company System Regulatory Act (HCA) to determine when the effect of a merger may be anticompetitive.⁵ The Competitive Standard comprises, *inter alia*, a general rule and a set of factors to determine whether there is evidence of a *prima facie* violation of the rule. The general rule is that a commissioner will approve an acquisition unless its effect would be substantially to lessen competition in insurance in the state or tend to create a monopoly.⁶ The *prima facie* factors involve calculating the acquiring and target insurers' shares of the market and comparing those shares to limits prescribed by the Competitive Standard.⁷ The Competitive Standard defines "market" to mean "the relevant product and geographical markets."⁸

The limits included in the Competitive Standard vary depending on whether the relevant market is "highly concentrated." Larger post-merger market shares are permitted if the market is not highly concentrated. The Competitive Standard defines a market as highly concentrated when the aggregate share of the four largest insurers is 75% or more.⁹

In California and many other states, and specific geographic markets within states, the health insurance market is highly concentrated. In California, the four largest insurers (which includes

⁵ Insurance Holding Company System Regulatory Act §§ 3D(1)(b) & 3.1D (Nat'l Assn. of Ins. Comm'rs 2015, Model Law 440), <http://www.naic.org/store/free/MDL-440.pdf>.

⁶ *Id.* § 3D(1)(b).

⁷ *Id.* §§ 3D(1)(b)(i) & 3.1(D)(2).

⁸ *Id.* § 3.1D(2)(c)(ii).

⁹ *Id.* § 3.1D(2).

Anthem) controlled 82% of the large-group market statewide, 88% of the small group market, and 93% of the individual market in 2014.¹⁰

Similarly, in California's Health Benefit Exchange (Covered California), the four largest plans (including Anthem) controlled 95% of the individual market in 2014, and 91% of that market in 2015.¹¹ Covered California is the only place where Californians who are eligible for federal premium subsidies and cost-sharing assistance may obtain that financial assistance. The premium subsidies are available to ensure that families who could not otherwise afford to purchase health insurance have access to coverage. And yet, the market power of Anthem in some zip codes in California is such that they have been the only health insurer selling coverage through Covered California in some zip codes, particularly in rural areas. Thus even before the merger, some Californians have been forced to buy Anthem or forgo the federal financial assistance to which they are entitled.

An analysis published in the *Journal of Health Politics, Policy and Law* in December 2015 stated: "The health plan HHIs indicate that the marketplace is highly concentrated in most rating regions. According to the FTC Merger Guidelines, fifteen of the nineteen rating regions are highly concentrated with an HHI above 2,500; these regions include 65 percent of California's population. For example, Anthem Blue Cross dominates rating region 1 (Northern California counties), which has an HHI index of 8,400."¹²

Californians have a small number of health insurers to choose among in the individual market, even if you include the market outside Covered California where no premium subsidy is available, but Cigna is one of the few health insurers left in California's individual market. This merger would further reduce a highly concentrated individual market in California.

According to a Government Accountability Office study, "in 2013, enrollment was concentrated among the three largest insurers in most states. Specifically, in each of the three market segments, the three largest insurers had at least 80 percent of the total enrollment in at least 37 states."¹³

In California, the Anthem/Cigna merger easily exceeds the limits for a *prima facie* violation recited in the Competitive Standard. Across all commercial, comprehensive product types, Anthem had a California statewide market share in 2014 of 19%, while Cigna's share was

¹⁰ California Healthcare Foundation, *California Health Insurers Enrollment* (Jan. 2016), <http://www.chcf.org/~media/MEDIA%20LIBRARY%20Files/PDF/PDF%20Q/PDF%20ORGHealthInsurersEnrollment2016.pdf>.

¹¹ Press Release, Covered California, New Data Show How Covered California Spurs Competition Among Health Insurance Companies (Feb. 17, 2016), available at <http://news.coveredca.com/2016/02/new-data-show-how-covered-california.html>.

¹² Richard Scheffler et al., *Covered California: The Impact of Provider and Health Plan Market Power on Premiums*, 40 J. Health Pol. Pol'y & L. 1179, 1188 (2015).

¹³ U.S. Gov't Accountability Off., GAO-15-101R, *Private Health Insurance: Concentration of Enrollees among Individual, Small Group, and Large Group Insurers from 2010 through 2013*, at 4 (Dec. 1, 2014) available at <http://www.gao.gov/assets/670/667245.pdf>.

3.6%.¹⁴ In the individual market, Anthem had a 33% share, while Cigna had a 3% share. According to the Competitive Standard, when the larger insurer has a market share of 15% in a highly concentrated market, and the smaller insurer has a 1% or more share, the merger is *prima facie* in violation of the Standard.¹⁵

The *prima facie* violation of the Anthem/Cigna merger is most extreme in the administrative services only (ASO) market in California. In that market, as noted before, Anthem has a 37% share statewide, and Cigna has a 24% share, or 61% total. The next largest competitor has a 13% share.

Prima facie violations can be established within California not only looking at all commercial product types collectively for the whole state, but also looking at all commercial product types for particular geographic regions (counties or metropolitan statistical areas (MSAs)) (as discussed immediately below), and specific product types within regions.

In addition to the anti-competitive impact on those employers that self-insure, this reduction in competition has an impact on the group market where employers that don't self-insure must purchase coverage.

D. AMA and AHA Analyses Show Lessened Competition from the Merger

In yet another analysis, the American Medical Association (AMA) reviewed California data on an MSA, rather than county, level. Their analysis evaluated the impact of the proposed merger using the Merger Guidelines and determined that, on a California statewide basis, the merger would raise significant competitive concerns and warrants scrutiny (HHI change from 2014 to 2354). Further, that the competitive effects in California are especially acute in nine MSAs (including Los Angeles), where the HHI increase, ranging from 215 to 596, creates a presumption that the merger is likely to enhance market power. Further, in six other California MSAs, the HHI increase raises significant competitive concerns.¹⁶ The AMA analysis also compared the results to the Competitive Standard. The AMA found that in several highly populated MSAs in California, the merger would violate the Competitive Standard. In each MSA the shares of the four largest insurers total 75% or more, Anthem's market share is 10% or more,

¹⁴ California Healthcare Foundation, *California Health Insurance Enrollment, Reporting by DMHC & CDI, 2012-2014* (Jan. 2016), available at <http://www.chcf.org/resources/download.aspx?id={28429843-199F-49BE-A579-EB54C639A2B6}>.

¹⁵ Insurance Holding Company System Regulatory Act, *supra* note 5, § 3.1D(2)(a)(i).

¹⁶ Am. Med. Ass'n, *Markets where an Anthem-Cigna merger warrants antitrust scrutiny* (Sept. 8, 2015), available at <http://www.insurance.ca.gov/01-consumers/110-health/60-resources/upload/AMA-Anthem-Cigna-merger-warrants-scrutiny.pdf>; Press Release, Am. Med. Ass'n, *AMA Releases Analyses on Potential Anthem-Cigna and Aetna-Humana Mergers* (Sept. 8, 2015), <http://www.ama-assn.org/ama/pub/news/news/2015/2015-09-08-analysis-anthem-cigna-aetna-humana-mergers.page>; Cal. Med. Ass'n, *MSA Merger Map* (Mar. 16, 2016), available at <http://www.insurance.ca.gov/01-consumers/110-health/60-resources/upload/CMA-msa-ca-merger-map.pdf>.

and Cigna's share is 2% or more. In six other MSAs, the merger is *prima facie* anticompetitive in all but one, where the four-firm concentration ratio was 72% rather than the requisite 75%.¹⁷

In a November 11, 2015 letter to the Antitrust Division from the AMA analyzing the effects of the Anthem/Cigna merger nationwide, the AMA concluded that the merger would be presumed under the Merger Guidelines "to enhance market power in 85 commercial (combined HMO + PPO + POS) MSA markets" and in 10 of the 14 states (NH, IN, CT, ME, VA, GA, CO, MO, NV, and KY) in which Anthem is licensed to provide commercial coverage.¹⁸ In the other four states (OH, CA, NY, and WI), the merger would potentially raise significant competitive concerns and warrant scrutiny.

An analysis by the American Hospital Association (AHA) found that in 600 MSAs, in which Anthem and Cigna cover approximately 31 million lives, the merger would result in HHIs over 2500 with a 200 or more point increase. In another 217 MSAs, in which Anthem and Cigna cover another 14 million lives, the merger would yield HHIs over 2500 with a 100-200 point increase.¹⁹

E. The Merger is Likely to Harm Consumers

1. Premiums Will Increase

Numerous articles based on both anecdotal and empirical studies discuss the adverse effects of health insurer consolidation on premiums. Northwestern University Professor Leemore S. Dafny, one of the country's preeminent authorities on the subject, summarized the articles in her September 22, 2015 testimony before the Senate Judiciary Committee, Subcommittee on Antitrust, Competition Policy, and Consumer Rights.²⁰

There are a number of studies documenting lower insurance premiums in areas with more insurers, including on the state health

¹⁷ *Statement of the American Medical Association and the California Medical Association to the California Department of Insurance RE: Anthem Application for the Proposed Acquisition of Cigna*, March 29, 2016, <http://www.insurance.ca.gov/01-consumers/110-health/60-resources/upload/AMA-CMA-statement-March-29-2016.pdf>.

¹⁸ Letter from James L. Madara, Executive Vice President and CEO, American Medical Association, to William Baer, Assistant Attorney General, U.S. Department of Justice, Antitrust Division (Nov. 11 2015), *available at* <http://www.aha.org/content/15/151111-let-doj.pdf>.

¹⁹ Letter from Melinda Reid Hatton, Senior Vice President and General Counsel, American Hospital Association, to William Baer, Assistant Attorney General, U.S. Department of Justice, Antitrust Division (Aug. 5, 2015), *available at* <http://www.aha.org/advocacy-issues/letter/2015/150805-let-acquisitions.pdf>.

²⁰ *Before the S. Comm. on the Judiciary, Subcomm. On Antitrust, Competition Policy, and Consumer Rights, on Health Insurance Industry Consolidation: What Do We Know From the Past, Is It Relevant in Light of the ACA, and What Should We Ask?*, 114th Cong. 11-12 (Sept. 22, 2015) (statement of Leemore S. Dafny, Ph.D, Professor of Strategy, Herman Smith Research Professor of Hospital and Health Services, Director of Health Enterprise Management, Kellogg School of Management, at Northwestern University) (hereinafter, *Dafny Senate Testimony*) (original footnote references renumbered), *available at* <http://www.judiciary.senate.gov/imo/media/doc/09-22-15%20Dafny%20Testimony%20Updated.pdf>.

insurance marketplaces,^[21] the large group market (self- and fully-insured combined),^[22] and Medicare Advantage.^[23] A recent study suggests premiums for employer-sponsored fully-insured plans are increasing more quickly in areas where insurance market concentration is rising, controlling for other area characteristics such as the hospital market concentration.^[24]

Arguably the most relevant research in light of the recent proposed mergers are two studies of consummated mergers. Both found that structural changes in market concentration led to higher insurance premiums.

Anthem seeks approval of this merger with a history of implementing substantial and unreasonable premium increases in California each of the past several years.²⁵ This history convinces me that if the merger were permitted, Anthem would not only fail to pass along to insureds any savings that might result, but would use its enhanced market power to extract more and greater unreasonable premium increases.

Anthem and Cigna have not proffered any credible evidence that the merger will reduce premiums. While they claim the merger will create operating efficiencies, their claims are vague, speculative, impossible to verify, and defy logic. Given that each company is already extremely large individually, it is hard to see how the merger will yield significant (if any) additional economies of scale. As discussed below, when pressed to provide details and quantify how their combination would lead to more efficient use of resources, the companies were unable or

²¹ Steven Sheingold et al., ASPE Issue Brief, U.S. Dept. of Health and Human Services, *Competition and Choice in the Health Insurance Marketplaces, 2014-2015: Impact on Premiums* (July 27, 2015), available at <http://aspe.hhs.gov/basic-report/competition-and-choice-health-insurance-marketplaces-2014-2015-impact-premiums>.

²² Leemore Dafny et al., *Paying a Premium on Your Premium? Consolidation in the US Health Insurance Industry*, 102 Am. Econ. Rev. 1161-1185 (Apr. 2012), available at <https://www.aeaweb.org/articles?id=10.1257/aer.102.2.1161>.

²³ Zirui Song, Mary Beth Landrum, & Michael E. Chernew, "Competitive Bidding in Medicare: Who Benefits From Competition?" 18 Am. J. Managed Care 546-552 (Sept. 2012), available at <http://www.ajmc.com/journals/issue/2012/2012-9-vol18-n9/competitive-bidding-in-medicare-who-benefits-from-competition/P-3>.

²⁴ Erin E. Trish & Bradley J. Herring, "How do Health Insurer Market Concentration and Bargaining Power with Hospitals Affect Health Insurance Premiums?" J. Health Econ., July 2015 (Vol. 42), at 104-114.

²⁵ Under California law, an insurer may implement a rate increase even though I find it to be unreasonable. Anthem has done so on a number of occasions. In 2011, the Department of Managed Health Care found an Anthem rate increase to be unreasonable (filing # [20102521](#)). Similarly, in filings submitted to the Department of Insurance, I have found Anthem's rates to be unreasonable on numerous occasions; however, Anthem has proceeded to implement these rates. In January, 2013, Anthem implemented an unreasonable average rate increase in its small group PPO products of 10.6% (factoring benefit reductions), with a maximum increase of 17.4% (file [HAO-2012-0177](#)). In April, 2014, Anthem implemented an unreasonable rate increase in individual coverage, with an average 12-month increase of 16.4% (file [HAO-2013-0171](#)). Further, in October, 2014, Anthem implemented an unreasonable rate increase in the individual market with an average 12-month rate increase of 9.8% (representing an average 24-month increase of 24.9%) (file [HAO-2014-0192](#)). In January, 2015, Anthem implemented a rate increase for policies in the individual market that I found to be unreasonable because it was unjustified (file [HAO-2014-0200](#)). In April, 2015, Anthem implemented an unreasonable rate increase for individual policies (average 12-month increase of 8.7%, 24-month increase of 26.5%) ([HAO-2014-0253](#)).

unwilling to do so. As stated previously, even if cost savings were to arise from operational efficiencies, the decrease in competition resulting from the merger would permit the merged firm and its owners to retain those benefits rather than pass them on to consumers.

Anthem and Cigna may claim, as have some insurers in the past, that the medical loss ratio (MLR) requirements will prevent unreasonable premium increases. In California, and perhaps other states, the largest impact of the Anthem/Cigna merger in terms of enhanced market power will be in the ASO area, in which the MLR requirements do not apply. Even in the individual and group markets in which the MLR rules do apply, several economic mechanisms limit their constraining effect on price increases. These were concisely summarized in the AMA's letter to DOJ:²⁶

Also, as Professor Dafny has observed, for the regulations to constrain an exercise of market power "they must 'bind:' the statutory floors must be higher than we would otherwise see." Thus, there may be substantial room for profitable merger-related price increases in the individual market in particular, notwithstanding the minimum MLR requirement. She further observes that because the MLR is calculated at the state and market level, it is conceivable that mergers can enable insurers to offset low MLRs in one geographic area or sub-segment with high MLR in another. In addition, the MLR does not address the level of the premium increase, only the percentage used for claims and quality activities. Finally, MLR regulation does not address non-price dimensions of health insurer competition such as product design, provider networks, and customer service. Therefore the MLR does not protect consumers from post-merger harm along "value" dimensions.

As noted above, notwithstanding the existence of the MLR, insurers, including Anthem, have continued to impose rate increases which I, and the Department of Managed Health Care (DMHC) have found to be unreasonable. These continued excessive and unreasonable rate increases demonstrate that the MLR requirements do not effectively restrain Anthem from imposing unreasonable increases on its customers.

In summary, "when insurers merge, there's almost always an increase in premiums."²⁷ If Anthem had a history of restraint with regard to pre-merger premium increases, its assertions that cost savings would accrue and be transferred to buyers might be credible. However, given its history, the opposite seems more likely.

²⁶ Letter from James L. Madara, *supra* note 18, at 12 (footnotes omitted).

²⁷ David Lazarus, *As Health Insurers Merge, Consumers' Premiums are Likely to Rise*, L.A. Times, July 10, 2015, at C1 (quoting Erin Trish, researcher at USC's Schaeffer School for Health Policy and Economics), available at <http://www.latimes.com/business/la-fi-lazarus-20150710-column.html>.

2. Quality Will Decrease

Anthem enters the proposed merger with a record of delivering poor quality to its California members across a number of metrics. Despite this, it has retained essentially constant membership (between its Department of Insurance and DMHC subsidiary licensees) from 2012 to 2014. I believe its ability to continue to maintain membership levels despite poor service quality is due to its entrenched market power.

Post-merger, with enhanced market power, there will be less incentive to maintain or improve quality. Professor Dafny put it this way: “[T]he competitive mechanisms linking diminished competition to higher prices operate similarly with respect to lower quality.”²⁸

Complaints and examinations by my Department indicate a persistent trend of improper denials and claims handling by Anthem Blue Cross in the past few years. A market conduct exam by my Department of Anthem’s health insurance claims from 2012 discovered over 16,000 documented violations of law regarding claims handling, including, but not limited to, failure to adjudicate and pay claims within the timelines required by state law, failure to pay interest on delayed payment of claims, failure to provide timely notification to insureds and providers of adverse benefit determinations, failure to advise insureds of external appeal rights, underpaying claims and making unreasonably low settlement offers, and misrepresenting pertinent facts or insurance policy provisions to claimants. The Department’s examination resulted in over \$409,000 recovered for consumers.

Despite Anthem’s commitments to implement measures to remedy the identified violations, we have seen a continued and increasing pattern of claims handling violations. My Department received over 4,000 consumer complaints regarding Anthem from 2013 to 2015. Based on an investigation of those complaints, my Department found over 5,500 alleged violations²⁹ of state law by Anthem, ranging from improper denials and claims handling, to misrepresentation of facts and policy provisions to claimants, to failure to conduct business under the insurer’s own name, among numerous others. The volume of covered lives in Anthem health insurance products regulated by my Department began to decrease in 2014. Despite that fact, the number of alleged violations by Anthem increased 34% from 2014 to 2015. A significant portion of those violations involved improper claims handling, which also increased during that period.³⁰

²⁸ *Dafny Senate Testimony*, *supra* note 20, at 7.

²⁹ Alleged violations are found by the Department of Insurance following an investigation of consumer complaints. While the identified violations were determined based upon the Department’s review of documentation provided in the course of investigating complaints, they are described as “alleged” violations because they have not undergone a formal administrative or judicial process.

³⁰ From 2014 to 2015, Department investigations of consumer and provider complaints regarding Anthem Blue Cross found a 57% increase in alleged violations of California’s prompt payment statute (Cal. Ins. Code § 10123.12), a 54% increase in alleged violations of our emergency services payment statute (§ 10123.147(a)), a 27% increase in alleged failures to act promptly upon claims communication (and a 133% increase since 2013) (§ 790.03(h)(2)), a 34% increase in alleged failure to respond to claims inquiries from my department (134% increase since 2013) (Cal. Code Regs. tit. 10, § 2695.5(a)), and a 450% increase in alleged violations related to reimbursement of overpayments (Cal. Code Regs. tit. 10, § 2695.11(a)(2)(C)).

My Department has also noted a rising trend from 2013 to 2015 in the proportion of improper denials of care by Anthem based on medical necessity. Of the denials that were reviewed by an independent medical review organization, over 48% were partially or entirely overturned each year in 2013 and 2014. In 2015, almost 59% of denials were partially or entirely overturned.

Similarly, the number of alleged violations by Cigna Health and Life Insurance Company increased by over 173% from 2014 to 2015, largely involving claims handling practices.³¹ In that same period, the number of consumer complaints nearly doubled.

In 2011, the California Department of Insurance issued an Order to Show Cause to Anthem Blue Cross relating to alleged violations of California's Mental Health Parity Act, which resulted in a Settlement Agreement related to Anthem's failure to cover medically necessary treatment for autism.

Also, specific to California, an audit report entitled *Final Report Routine Survey of Blue Cross of California dba Anthem Blue Cross of California* issued by the DMHC on April 3, 2015, documented numerous violations by Anthem of California law regarding treatment of health plan customers.³² DMHC labeled several of the violations "clear" and "uncorrected." These included five types of deficiencies regarding proper handling of grievances. DMHC found that all five types were "uncorrected." That agency also found several types of deficiencies with utilization review. Eighty-seven percent of behavioral health utilization management denial decisions reviewed did not include a clear and concise explanation for the denial, and 100 percent of the applied behavioral analysis/therapy denials did not include a description of the criteria or guideline used in making the decision.

In a DMHC report of complaints it resolved against health plans under its jurisdiction during 2014, Anthem ranked second worst out of ten companies in the overall rate of complaints per 10,000 lives. On "access issues" and "attitude/service of health plan," Anthem ranked worst. On "claims/financial" and "enrollment," Anthem again ranked second worst; on "coordination of care" Anthem ranked third worst.

On May 3, 2016, DMHC fined Anthem \$415,000 for 83 violations in 40 cases involving Anthem's failure "to identify, timely process, and resolve enrollees' grievances" and "to fully

³¹ From 2014 to 2015, investigations of consumer and provider complaints regarding Cigna found a 193% increase of our prompt payments statute (Cal. Ins. Code § 10123.12), a 250% increase in alleged violations of our emergency services payment statute (§ 10123.147(a)), a 168% increase in alleged failure to advise insureds of the right to independent medical review (§ 10169(i)), a 150% increase in alleged unfair claims settlement practices (§ 790.03(h)), and a 111% increase in alleged failure to respond to claims inquiries from my Department (Cal. Code Regs. tit. 10, § 2695.5(a)).

³² Cal. Dept. of Managed Health Care, *Final Report Routine Survey of Blue Cross of California dba Anthem Blue Cross of California* (Apr. 3, 2015), http://dmhc.ca.gov/desktopmodules/dmhc/medsurveys/surveys/303_r_full%20service-behavioral%20health_040315.pdf.

and timely provide information to the Department during the investigation of member complaints.”³³

Both Anthem and Cigna have been criticized for improperly limiting access to physical and occupational therapists through mismanaged utilization review. Anthem’s proposed relationship with a physical and occupational therapy utilization management company has come under fire from consumers, therapists, and referring physicians for improperly restricting treatment, leading DMHC to refuse for many months to approve Anthem’s contract with the company in California.

Adverse effects will also result from the increase in Anthem’s market power in purchasing provider services. Network adequacy, already a problem with Anthem and Cigna, would tend to grow worse post-merger if providers are unable to cover their costs at reimbursement rates offered by an enhanced mega-insurer. In a survey of nearly 1,000 California physician practices conducted by the AMA and California Medical Association (CMA)³⁴:

- 84.5% of physician practices contract with Anthem, the highest percentage of any insurer.
- More practices derive more of their income from Anthem than any other insurer (by far).
- 70.8% of practices stated they “must contract with [Anthem] in order to have a financially-viable practice,” the most of any insurer.
- Less than 11% of practices somewhat or strongly agreed that if “unhappy with fees from an insurer, [they] can choose to turn away from that insurer and recover the lost revenue by treating more Medicare and Medi-Cal patients.” 82.4% somewhat or strongly disagreed.
- 32% of practices stated they had encountered difficulty finding available, Anthem in-network physicians who accept new patients for referrals (most of any listed insurer).
- 53% of practices stated they had encountered formulary limitations with Anthem which prevented optimal treatment (most of any listed insurer).

These findings suggest that Anthem already exercises substantial market power as a purchaser of physician services. The market share and HHI statistics of Drs. Scheffler and Fulton corroborate this for various California county geographic markets. In six of those counties, the Anthem/Cigna market share will exceed 50 percent; in 14, it will exceed 40 percent. With regard to the transaction’s effect on market concentration, the post-merger HHI would exceed 2,500 with a more than 200 point increase in four counties.

³³ Press Release, Cal. Dept. of Managed Health Care, *DMHC Fines Anthem \$415,000 for Grievance System Violations* (May 3, 2016), available at <https://www.dmhc.ca.gov/Portals/0/AbouttheDMHC/NewsRoom/pr050316.pdf>.

³⁴ Cal. Med. Ass’n, *CMA Survey Shows Strong Physician Opposition to Health Insurer Market Consolidation*, (Mar. 28, 2016), available at <http://www.insurance.ca.gov/01-consumers/110-health/60-resources/upload/CMA-merger-survey-results-032816.pdf>.

Poor quality arises from two aspects of a highly concentrated market. First, poor quality ensues when there are so few sellers that they lack incentive to compete to attract or retain customers by improving quality. Second, and more significantly, poor quality results from monopsony power in relation to physicians. The AMA and CMA summarized this in their statement to my Department concerning this merger:³⁵

As Professor Dafny explained in her recent Senate testimony on this merger: “Monopsony is the mirror image of monopoly; lower input prices are achieved by reducing the quantity or quality of services below the level that is socially optimal.”^[36] She further explained that the “textbook monopsony scenario . . . pertains when there is a large buyer and fragmented suppliers.”^[37] This characterizes the market in which dominant health insurers purchase the services of physicians who typically work in small practices with 10 or fewer physicians.^[38] The result is a reduction in compensation leading to diminished physician service and quality of care that harms consumers.^[39]

Moreover, given the combined entity’s market power on the seller side, its ability to obtain lower, monopsony-level prices will not result in lower, but higher, premium prices.

I believe surveys in other states in which Anthem has a substantial market share would replicate the CMA survey results concerning physician vulnerability to Anthem/Cigna monopsony power. Allowing Anthem to increase its already enormous bargaining power will further limit network size and excessively squeeze reimbursement rates, thereby discouraging provider contracting and unacceptably reducing consumer choice and quality of care.

The effect in California of the UnitedHealthcare (UHC)/PacifiCare merger in 2005, the last acquisition of a smaller health insurer by a large insurer in our state, provides an insightful “natural experiment” of the effect of health insurer mergers and how the claimed benefits ultimately are illusory. Notwithstanding commitments to maintain quality service and expand its markets in California, UHC instead failed to honor its commitments, and services deteriorated significantly for both policyholders and providers. UHC justified its acquisition of PacifiCare by

³⁵ *Statement of the American Medical Association and the California Medical Association to the California Department of Insurance, supra* note 17, at 10-11 (original footnote references renumbered).

³⁶ *Dafny Senate Testimony, supra* note 20, at 10.

³⁷ *Id.*

³⁸ Carol K. Kane, Am. Med. Ass’n, *Policy Research Perspectives: Updated Data on Physician Practice Arrangements: Inching Toward Hospital Ownership* (July 2015).

³⁹ See Gregory J. Werden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light*, 74 *Antitrust L.J.* 707 (2007) (explaining reasons to challenge monopsony power even where there is no immediate impact on consumers); Marius Schwartz, *Buyer Power Concerns and the Aetna-Prudential Merger*, Address before the 5th Annual Health Care Antitrust Forum at Northwestern University School of Law 4-6 (Oct. 20, 1999) (noting that anticompetitive effects can occur even if the conduct does not adversely affect the ultimate consumers who purchase the end-product), available at <http://www.usdoj.gov/atr/public/spceches/3924.wpd>.

touting increased efficiencies and cost savings. Indeed it was able to exceed its three-year cost cutting goal of \$350 million dollars 18 months after the merger, but at a significant negative impact on quality of service. I ultimately found a pattern of unfair claims practices, totaling 908,547 violations, as the quality of its services decayed.⁴⁰

Anthem's greater size, and thus its increased bargaining power relative to providers post-merger, may prompt it to reduce provider reimbursements rates to a point at which quality will inevitably be sacrificed. Indeed, Anthem representatives have stated that one purpose for the merger is to reduce payments to providers—when it already is a dominant purchaser of provider services. A larger Anthem may also have less incentive to properly handle provider reimbursements, as occurred with UHC.

By blocking the merger we retain the important possibility that Anthem and Cigna will compete between themselves and with other insurers for members based on the size and quality of their networks and the providers in those networks, as well as on price. By allowing the merger, we lose any hope of such competition. The further loss of competition in California and other states, where health insurance markets are already so consolidated, is sufficient reason alone to oppose this merger.

II. Anthem and Cigna Cannot Rebut the Presumption of Unlawfulness

The levels of post-merger market concentration, the increases in concentration resulting from the merger, and the Anthem/Cigna post-merger market shares, by themselves, raise a rebuttable presumption that the merger is unlawful. The burden of going forward thus shifts to Anthem and Cigna to show that these statistics present an inaccurate indicator of the merger's likely effect on competition. Anthem and Cigna failed to show, at either the hearing I held or in any testimony or documents provided to my Department, that these statistics present an inaccurate indicator of the merger's likely effect on competition.

A. *Barriers to Entry Preclude New Companies from Mitigating the Effect of Anthem/Cigna's Post-Merger Enhanced Market Power*

As your Department recognizes and others have noted in letters to you regarding this merger in particular, it is typically difficult for new health insurers to enter a market. As the Agencies have explained: "Entry barriers ... include: state laws and regulations, economies of scale, and firm reputation."⁴¹ More recently, the Antitrust Division, after studying entry barriers into health insurance markets, concluded that significant barriers exist, including the ability of new entrants to obtain the same level of discounts from providers as larger, more established firms, and the

⁴⁰ *In the Matter of the Order to Show Cause and Accusation Against PacifiCare Life and Health Insurance Company*, Case No. UPA 2007-00004 (Cal. Dept. of Ins. June 9, 2014) (Commissioner's Decision and Order), at 6 and 215 (discussion of cost-cutting goal, and summary table of violations), <http://www.insurance.ca.gov/0250-insurers/0500-legal-info/0600-decision-ruling/0100-precedential/upload/219450.pdf>.

⁴¹ Fed. Trade Comm'n & U.S. Dept. of Justice, *Improving Health Care: A Dose of Competition*, ch. 6, at 8 (July 2004), available at <https://www.justice.gov/atr/improving-health-care-dose-competition-report-federal-trade-commission-and-department-justice#toc>.

reluctance of brokers to recommend or sell the products of companies that lack brand-name recognition in the market.⁴² Added to that is the difficulty new entrants have in contracting with the number of quality providers necessary for an attractive network.

Under the Merger Guidelines, the Agencies consider the extent to which entry of new competitors will be “timely, likely and sufficient” when evaluating the competitive effect of a merger.⁴³ Given the barriers to entry applicable to health insurance, it is highly unlikely that new entrants will timely and sufficiently negate the competitive effects of the Anthem/Cigna merger in California.

Based on my Department’s extensive experience with and expertise regarding the operation of health insurance markets, I concur with, but will not repeat, the AMA’s analysis of how the specific barriers to entry apply to this merger (see the AMA’s November letter, *supra*). I would note, however, that when the AMA wrote to you, only a few of the dozens of insurers formed under the ACA’s Consumer Operated and Oriented Plan (CO-OP) program were operating successfully, i.e. had overcome the barriers to entry that confront any health insurer and the particular barriers that exist within the CO-OP program. The vast majority of co-ops had either collapsed entirely or were struggling financially despite substantial federal loans.⁴⁴ Since the AMA’s letter, two more co-ops have failed, one in Iowa and Nebraska, the other in Tennessee. The co-op experience suggests that barriers to entry, some unique to co-ops, but others generic to any insurer entering an established market, make it unlikely that co-ops, or any new-entrant insurer, will mitigate Anthem/Cigna’s post-merger market power through market entry.

Newly formed or existing private insurers have fared no better than co-ops with regard to market entry. Moda Health Plan, Inc., a well-established, highly regarded and then prosperous Oregon-domiciled carrier recently entered into a new market, ACA coverage. It promptly lost \$31 million in the first nine months of 2015, more than half of its excess capital and surplus.⁴⁵ Moda found it difficult to enter a new health market and make a profit due to the high cost of entry and the adverse selection that new entrants encounter. Moda’s experience not only shows the difficulty of entering into a new product line or distribution channel, it signals to other carriers considering entry that they should think twice about entering. Similarly, SeeChange Insurance Company, a California-based health insurer, sustained significant losses because it could not compete effectively with entrenched, large health insurers, and I ultimately had to place the company into liquidation. It was unable to establish effective provider networks and attract a reasonably healthy book of business in competition with established market participants.

⁴² See Sharis A. Pozen, Acting Asst. Att’y Gen., U.S. Dept. of Justice, Antitrust Division, Competition and Health Care: A Prescription for High-Quality, Affordable Care, Prepared Remarks Before the World Annual Leadership Summit on Mergers and Acquisitions in Health Care (Mar. 19, 2012), available at <https://www.justice.gov/atr/file/518931/download>.

⁴³ *Horizontal Merger Guidelines*, *supra* note 3, §§ 9-9.3.

⁴⁴ Sabrina Corlette et al., *The Affordable Care Act CO-OP Program: Facing Both Barriers and Opportunities for More Competitive Health Insurance Markets*, Commonwealth Fund Blog (Mar. 13, 2015), <http://www.commonwealthfund.org/publications/blog/2015/mar/aca-co-op-program>.

⁴⁵ *In the Matter of Moda Health Plan, Inc.*, Case No. INS 16-13-001 (Or. Dept. of Consumer & Bus. Servs., Div. of Fin. Reg., Jan. 27, 2016) (Order of Immediate Supervision), http://www.cbs.state.or.us/external/ins/admin_actions/actions_2016/insurer_2016/financial_2016/other_2016/16-13-001.pdf.

As the nation's largest health insurance market, containing four highly populated MSAs and large and disparate rural areas, the California health insurance marketplace is differentiated by region, product type and market segment. The barriers to entry vary depending on those regions, types and segments. As difficult as it may be to break into the health insurance business against a large, established competitor in a smaller, relatively homogenous state, it is even more difficult, if not impossible, for a new entrant to gain "timely" and "sufficient" market share in California. Examples of the barriers presented by California's geographic and demographic diversity include the following: The demographics of consumers in rural northern California differ from those of rural southeastern California, and the demographics of rural Californians differ from those of urban Californians, requiring multiple sales and marketing approaches (in a multitude of languages); competitors vary by region, and thus the sales and marketing methods a new company would need to use differ significantly. Furthermore, provider groups and hospital chains present different contract challenges in different regions. All of the aforementioned will present substantial impediments to a new or smaller insurer (or, in fact, any insurer) entering each new geographic and product market relative to a larger, established competitor. Cumulatively these challenges increase a new entrant's costs as it attempts to gain market share, which may make its new regions or products unprofitable for years. The challenges will delay the time it takes to gain market share. The challenges may make it impossible to ever gain "sufficient" market share to mitigate the effects of a merger even if the new entrant has the capital to absorb the short-term losses from new entry costs.

Small health insurers doing business in California have often relied upon CIGNA making their statewide network of medical providers available for rental to them in order to be able to offer coverage in California. If CIGNA is acquired by Anthem, smaller health insurers, including any considering entering California's health insurance market, would no longer have access to rent the CIGNA provider network.

The large Anthem/Cigna post-merger market shares, and the above 2,500 and 200 point increases in HHIs in many California markets, make new entry even more difficult. The same is true of the Blue Cross label, the best-known brand of any health insurer. It is simply impossible to believe that any new entrant, within a two to three year period, would decrease the Anthem/Cigna market share or the HHI statistics to the point that the merger would not be rebuttably presumed unlawful under the Merger Guidelines standards and current case law.

The same is true in the market for ASO services. As previously mentioned, the merger would combine Anthem's 37% market share and Cigna's 24% share. Although entry into ASO markets may be easier than entry into fully insured product markets, successful entry into a market dominated by a firm with a 61% share would be extremely difficult. To offset the effect of the merger, new firms, within a two to three year period, would need to gain 24% of the market, a most unlikely scenario.

B. Anthem and Cigna Have Provided No Reliable Evidence Suggesting that the Asserted Efficiencies Would Counteract the Harm to Competition or Disproving the Likely Harms from the Merger

1. The Companies Have Not Provided Reliable Evidence of Claimed Efficiencies

The Merger Guidelines note that even when a merger increases concentration, it can nevertheless “generate significant efficiencies and thus enhance the merged firm’s ability and incentive to compete,” which may benefit consumers. However, “[e]fficiency claims will not be considered if they are vague, speculative, or otherwise cannot be verified by reasonable means” or if the efficiencies could be achieved unilaterally or by collaborative means short of a merger.

The Agencies typically obtain substantial information about a merger from the parties themselves. When the parties fail to present persuasive evidence about a merger’s benefits, such as actual efficiencies, one can infer that evidence is lacking. At the public hearing I conducted on the Anthem/Cigna merger on March 29, 2015, I had the following exchanges with Anthem’s Vice-President and Counsel:⁴⁶

JAY WAGNER: There will be efficiencies derived from medical network synergies and efficiencies, likely substantial synergies and efficiencies from complementary selling, pharmacy synergies and efficiencies operating expense synergies and efficiencies and other likely synergies and efficiencies. [at 23:4-10]

COMMISSIONER JONES: So, I would like if you can provide it to me separately in writing the allocation of that \$2 billion across these or any other synergies that the company believes will accrue from the merger. [at 40:24-41:3]

I would imagine that since you provided this number to investors, it’s -- it’s more than just a guideline or a range. You’ve got some definitive assessment of what each of these synergies will provide. [at 41:7-11]

COMMISSIONER JONES: But, as I was saying, this was shared with the companies’ investors, correct?

MR. WAGNER: That’s correct.

⁴⁶ Cal. Dept. of Ins., *Public Hearing In Re: Proposed Merger of Cigna Corporation into Anthem, Inc.* (Mar. 29, 2016) (hereinafter *Hearing Transcript*), http://www.insurance.ca.gov/01-consumers/110-health/60-resources/upload/CONDENSED_TRANSCRIPT_ANTHEM_CIGNA_MERGER_PUBLIC_HEARING_MARCH_29_2016_-_pdf.

COMMISSIONER JONES: And you're not backing away from the assertion that there are \$2 billion in synergies, correct?

MR. WAGNER: No, we are not.

COMMISSIONER JONES: And there must be some attribution across these synergies to roll up to the \$2 billion figure, correct?

MR. WAGNER: In -- yes, in some respects. I mean, I will tell you that we're not backing away from the 2 billion, and we have some sense of where we might be able to obtain the synergies from within those categories, but to the extent that certain information is not exchangeable between the companies, there are a lot of assumptions stacked behind those. [at 41:14-42:5]

In the companies' subsequent written response pursuant to this exchange Anthem and Cigna failed to provide the promised numerical estimate, even a heavily qualified one, for a single asserted synergy or efficiency, let alone for each of the synergies and efficiencies that they claim total \$2 billion. The failure to do so indicates that the \$2 billion figure is not credible and that there is no guarantee that any savings that might ultimately occur would benefit policyholders. My staff and I have been unable to find evidence elsewhere in the public record substantiating the basis for the \$2 billion in synergies and efficiencies.

Testimony from the Cigna representative, Thomas Richards, Cigna's global leader for strategy and business development, was just as vague and speculative, suggesting to me that the parties have done little detailed study of any efficiencies the merger is likely to achieve. For example, one slide provided by the parties was labeled "Identifiable and Achievable Synergies" and referenced the claimed \$2 billion in savings. But when asked about it, Mr. Richards stated merely that "it represents . . . the sort of broad categories of synergies *that we thought we might be able to develop* as a result of the transaction"⁴⁷; that "as we continue to plan for the integration, we'll continue to look for areas where we can provide synergies"; that "we have some sense of where we might be able to obtain the synergies"⁴⁸; that "[s]ome of them may turn out to be more efficiencies than we expect and others may turn out to be less."⁴⁹ Statements such as these provide me with no confidence that the merger will actually achieve any benefits for California consumers, and the parties certainly presented no verification that they will.

⁴⁷ *Hearing Transcript, supra* note 46, at 38:17-19 (emphasis added).

⁴⁸ *Id.* at 39:8-11.

⁴⁹ *Id.* at 42:15-17.

2. The Companies Have Provided No Reliable Evidence that Prices Won't Increase (or that Prices Will Decrease)

Anthem's representative and I had another illuminating discussion at my hearing, regarding the extent to which any synergies would result in price decreases.⁵⁰

COMMISSIONER JONES: Are there any specific products sold by any of the entities that will survive after the merger that are selling in California for which it's anticipated that the premium will go down in price?

MR. WAGNER: I can't say that we've had that degree of detail and prognostication into the ability to bring the down in any one particular market segment or not.

COMMISSIONER JONES: Not one?

MR. WAGNER: As I said, what we're trying to do is obviously bend the cost curve. We would assume that that would benefit across all product categories. So, to the extent it does, it will differ from product to product.

COMMISSIONER JONES: So, can you provide any enforceable commitment that at least prices for all of these products sold by all of the entities after the merger will not increase?

MR. WAGNER: No, I would not -- I would say that, again, with the underlying medical costs comprising 90 percent of the premium increases, we don't have a large amount of control over -- over trying to get them flat or decreasing. That's why we're trying to influence a true value based contract to the best of our ability.

COMMISSIONER JONES: Is there any products sold by any of the entities that will survive after the merger that is selling health insurance in the State of California for which you can provide an enforceable guarantee a cost will not go up? Any product?

MR. WAGNER: No, I can't commit to that.

MR. RICHARDS: We would need a, you know, guaranteed commitment from our provider partners in order to do that. I don't know that we have those in terms of multi-year guarantees in the system to be able do that this morning.

⁵⁰ *Id.* at 64:15-67:10.

COMMISSIONER JONES: So none of you can provide any assurance, that any of the health insurance products sold by any of the entities that will continue selling after the merger will not increase in price, but at the same time, you're both very confident that there's going to be 2 billion in savings. So am I to understand from that, that none of that savings will to the benefit of consumers in either maintaining or reducing the price of insurance that they're paying for from any of the merged entities?

MR. WAGNER: Correct. [...]

Again, my staff and I have been unable to find reliable evidence in the public record that this merger will result in price decreases overall. The testimony of Professor Dafny and others that health insurer mergers result in price increases, not price decreases, thus remains effectively unrebutted by the parties. Simple economic theory predicts that if the transaction increases the parties' market power, nothing will force them to pass savings through to consumers.

3. Neither Anthem nor Cigna Have Provided Reliable Evidence that Quality Will Improve

At the hearing before my Department, Anthem's representative spoke only in generalities about quality improvement. Almost all the quality improvement initiatives mentioned involved what Anthem and Cigna are *currently* doing. When questioned about how the *merger* would enhance quality, Anthem testified that it would provide Anthem access to Cigna's best practices. But to the best of my knowledge, there is no significant difference in the quality provided by Anthem and Cigna. Even if there were, Anthem should be able to develop best practices itself; a merger is not necessary. As mentioned above, critics of health insurer mergers contend that quality usually decreases when there are so few insurers that the insurers lack an incentive to compete to attract or retain customers by improving quality, and from monopsony power in relation to physicians. That there is an economic basis for post-merger decreases in quality was mentioned in letters to DOJ regarding the Anthem/Cigna merger by the AMA and others. (See, e.g., AMA's 11/14/15 letter, *supra*). The parties at my hearing provided no evidence that the merger would improve quality other than general statements that the same effects could not be achieved individually.

C. Allowing the Merger Would Prevent Cigna from Challenging Anthem's Already Dominant Position in Many California Markets

Thus far I have focused on how an Anthem/Cigna merger would reduce competition, result in enhanced market power for the merged entities, and thereby bring about higher prices, lower quality of care and other harms. Another reason to block the merger is to allow Cigna to continue as a separate competitor to Anthem and other large carriers. While an Anthem/Cigna merger would worsen the competitive landscape in California, the statewide market and many subsidiary markets are already highly concentrated, as discussed above. We not only need to prevent market concentration from getting worse, we need to make it better.

Based on the most recent, complete data available, Cigna was the fifth largest insurer in California, with 2.1 million covered lives out of 32.3 million total covered lives by all insurers. Cigna has the foothold in California, and the resources nationally, for rapid growth in California markets. (According to the companies, Cigna has a medical membership of 14.5 million people compared to 38.5 million for Anthem.⁵¹ Their respective 2015 revenues were \$37.9 billion⁵² and \$79.2 billion.⁵³) Absent this merger, it should only be a matter of time until Cigna expands into new California regions and products, or grows where its current presence is minimal. Approval of an Anthem/Cigna merger would eliminate Cigna as one of the few remaining companies large enough to be a serious, future competitor to Anthem and other large insurers in California.

D. Divestitures will not fully restore competition or adequately protect Californians

Divestiture of some portions of either or both companies will not remedy or mitigate the anti-competitive impacts and results of this merger. The law requires that any remedies fully restore competition. The necessary divestitures in the commercial market and the ASO market (which impacts both self-insured businesses and the group market) would be close to impossible to accomplish given the scale of the impacted areas in California and in other parts of the country. Additionally, in California, divestiture to one of the few remaining companies with significant market share does not remedy the competitive situation and divestiture to a new entrant would likely fail in short order. A retrospective analysis of mergers indicates that even smaller divestitures don't have the best track record.⁵⁴

III. CONCLUSION

Based on the Merger Guidelines and data from California alone, the proposed merger of Anthem and Cigna will substantially lessen competition in the most populous state containing four of the twenty largest MSAs in the country. Applying the statistics and analysis typically used by the Agencies, the merger will substantially enhance market power in various geographic and product markets. A merger of this size and type, according to authorities on health insurer mergers, will likely lead to increased prices and decreased quality.

For these reasons, I am opposed to the merger of Anthem and Cigna. The Anthem and Cigna merger will harm Californians, California's businesses, and our health insurance market.

Further, I do not believe that partial divestiture or other remedies traditionally used by the Department of Justice will adequately protect consumers or address the adverse consequences of a merger of Anthem and Cigna. Traditional methods to avoid concentration issues will not address poor service qualities, the power to charge excessive rates or the loss of a potential

⁵¹ Anthem & Cigna, *Fact Sheet*, <http://betterhealthcaretogether.com/content/uploads/2015/09/FactSheet.pdf>.

⁵² Press Release, Cigna Corporation, Cigna Reports Strong 2015 Results, Expects Revenue and Earnings Growth in 2016 (Feb. 4, 2016), <http://www.cigna.com/newsroom/news-releases/2016/cigna-reports-strong-2015-results-expects-revenue-and-earnings-growth-in-2016>.

⁵³ NASDAQ, Inc., Anthem, Inc. Revenue & Earnings Per Share (EPS), <http://www.nasdaq.com/symbol/antm/revenue-eps>.

⁵⁴ John Kwoka, *Merger Control, and Remedies: A Retrospective Analysis of U.S. Policy* (MIT Press 2015).

market participant that has the resources to enter into new markets. Accordingly, I urge the United States Department of Justice to block the Anthem/Cigna merger.

Sincerely,

A handwritten signature in blue ink that reads "Dave Jones". The signature is written in a cursive, flowing style with a large initial "D".

DAVE JONES
California Insurance Commissioner

Cc: Joseph Swedish, President and CEO, Anthem
David Cordani, President and CEO, CIGNA Corporation