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to the

Department of Managed Health Care

on the

Proposed Acquisition of Express Scripts Holding Company, Inc. by Cigna Corporation

October 9, 2018

Consumers Union, the advocacy division of Consumer Reports,[1] offers this testimony on the proposed acquisition of Express Scripts Holding Company ("Express Scripts") by Cigna Corporation ("Cigna"). From its founding over 80 years ago, Consumer Reports has worked for a fair, just, and safe marketplace for all consumers, and to empower consumers to protect themselves. One of our top priorities has always been to make high quality healthcare available and affordable for all Americans. One key to empowering consumers to protect themselves is ensuring meaningful consumer choice, through effective competition.

Consumers benefit from competitive marketplaces and meaningful choice, in all parts and all levels of the healthcare marketplace, including where health plans are sold. The past few years are characterized by a notable increase in health plan and health insurer merger filings. We have, as an organization, voiced concerns on a number of occasions when we believed a proposed merger was likely to harm consumers. In California, we urged our insurance and health plan regulators to oppose such mergers and, prior to the finalization of any merger, to institute robust contractual undertakings that safeguard the public interest. Nationally, we support active antitrust enforcement to promote and preserve competition in all parts of the healthcare marketplace, including hospitals, medical practices, health insurers, and pharmaceutical manufacturers.

In our written testimony below, we call to the Department's attention that: (I) most consumers affected by this merger have limited choice or "power of the purse"; (II) the market needs more PBMs, not fewer – this vertical merger does not help address any competition concerns; (III) this merger may benefit the merging parties, but the value for consumers is far from clear.

[1] Consumers Union is the advocacy division of Consumer Reports, an independent, nonprofit membership organization that works side by side with consumers to create a fairer, safer, and healthier world. For 80 years, CR has provided evidence-based product testing and ratings, rigorous research, hard-hitting investigative journalism, public education, and steadfast policy action on behalf of consumers' interests. Unconstrained by advertising or other commercial influences, CR has exposed landmark public health and safety issues and strives to be a catalyst for pro-consumer changes in the marketplace. From championing responsible auto safety standards, to winning food and water protections, to enhancing healthcare quality, to fighting back against predatory lenders in the financial markets, Consumer Reports has always been on the front lines, raising the voices of consumers.

(I) Most consumers affected by this merger have limited choice, emphasizing the importance of rigorous oversight over the merger

Meaningful choice can only exist when there are options from which to choose and enough publicly available, accurate information for consumers to understand and compare those options. In general, when consumers have meaningful choice, businesses are motivated to provide more affordability, better quality, and new thinking, in response to consumers' wants and needs. But the healthcare market is complicated. That holds especially true when it comes to healthcare coverage. Whether a consumer will have access to affordable, high-quality healthcare depends not only on where he lives, but also, potentially, on employment status, and the options provided by the employer.

In California, the decision of whether to enroll in a Cigna plan is largely outside the control of its enrollees. Here, Cigna manages the health benefits of over 1.6 million Californians who are covered by their self-insured employers.[2] Another nearly-half-million Californians have Cigna health insurance coverage in the large group market.[3] For this substantial group of consumers, there is no meaningful choice when it comes to enrolling in health insurance. More so when it comes to Express Scripts, as PBMs notoriously operate in the shadows of the healthcare marketplace, and not directly for consumers. As a result, these consumers will likely have little choice or control over where they bring their business in the future, putting the onus on the Department to ensure that a merger that harms consumers does not take place.

(II) The market needs more PBMs, not fewer – this vertical merger does not help address any competition concerns

The merger of Cigna and Express Scripts is an example of what is often referred to as a vertical merger, because Cigna and Express Scripts do business with each other rather than compete with each other. Some parties attempt to minimize competition concerns regarding this type of merger, citing horizontal mergers as the primary concern. But the potential harm to competition is quite real. It is important that our regulators be vigilant to potential threats to the interest of the public. Vertical mergers are not always harmful to consumers, but they can be.

In an industry where the leading three PBMs control eighty-five percent of the market,[4] further reduction in competition is a major concern. In this proposed merger, we see the specter of reduced competition and choice even if Express Scripts does not completely leave the market and go in-house to serve only Cigna policyholders. Other health plans may be skeptical of Express Scripts's ability or willingness to negotiate lower prescription drug prices for them with the same determination as for its new partner, Cigna.[5] This appearance of a conflict of interest could turn other health plans off to Express Scripts and reduce the number of effective options available to them when it comes to contracting with a PBM. Thus, even if Express Scripts continues to offer its services to other health plans, this merger

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[2] California Health Care Foundation, *The Privacy Insurance Market in California, 2015*, (April 27, 2017). Available at https://www.chcf.org/publication/the-private-insurance-market-in-california-2015/ (accessed September 17, 2018).

[3] *Id*.

[4] The Council of Economic Advisors, *Reforming Biopharmaceutical Pricing at Home and Abroad*, (February 2018) at p.10.

[5] *Public Meeting on the Acquisition of Express Scripts Holding Company by Cigna Corporation*, Department of Managed Health Care, (September 26, 2018) (Testimony of Brian Henry).

could – without formally removing Express Scripts from the market as an independent PBM – result in less choice in the healthcare system. If rival health plans, outside the Cigna-Express Scripts family, cannot count on getting the same level of service, consumers will ultimately pay more.

Finally, despite immediate appearances to the contrary, there is also a horizontal dimension to this merger investigation. One of the attractions of this merger to Cigna is that it would now have its own in-house PBM, in Express Scripts. But it doesn't need a merger to get one. Indeed, in choosing to integrate Express Scripts into its portfolio, Cigna is not only opting to give up its arms-length commercial relationships with unaffiliated PBMs, including but not limited to Express Scripts. In the alternative, if this merger is challenged and doesn't go through, Cigna is also in a position to establish its own new PBM, which could add some much-needed competition to this highly concentrated market sector.

(III) This merger may benefit the merging parties, but the value for consumers is far from clear

<u>Corporate savings from consolidation does not necessarily translate into savings for consumers</u>

In support of this merger, the CEO of Express Scripts promises that "the two companies will, together, be uniquely positioned to do even more to improve healthcare, expand choice and lower costs."[6] This is a familiar picture being painted – in this era of healthcare mega-mergers, we have heard these kinds of claims before. If Cigna-Express Scripts can find new ways to bring down costs and improve quality that wouldn't be possible without the merger – what antitrust calls "efficiencies" – that can be good for consumers and the economy. However, as a leading health antitrust scholar noted, there is "little incentive [for an insurer] to pass along the savings to its policyholders."[7] Furthermore, although it is plausible that stronger market power could strengthen a health plan's negotiating position with providers and pharmaceutical companies, it is not clear that that would lead to any benefits to consumers; in fact, it is more likely that a health plan with greater market power may exercise undue control over the care its members receive, leading to fewer choices and higher prices for that care, and also harm the type, cost, and quality of care that members of competing health plans that use Express Scripts's PBM services, will receive.

Moreover, the prospect of cost savings being passed along to consumers is not supported by empirical research. We are, therefore, skeptical of the recent statement by Cigna to its shareholders, where it quotes Glenview Capital CEO Larry Robbins, saying the financial reward of this merger could be "$20 or 5% per member per month," adding that "since Cigna is mostly an ASO business that'll mostly get passed onto customers. So this merger will actually be pro-competitive and pro-consumer."[8] In reality, if this savings is achieved at all, evidence suggests that it will be limited to small pockets of efficiency. Beyond that, the savings of "more affordable" products could be attributable to lesser quality, reductions in customer service, or excessively narrow provider networks.

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[6] Update on Cigna Deal Progress: Express Scripts Holiday Company. (2018). Form 425. Retrieved from https://www.sec.gov/Archives/edgar/data/1532063/000119312518165281/d568809d425.htm (last accessed October 9, 2018).

[7] Thomas Greaney, *Examining Implications of Health Insurance Mergers*, Health Affairs, 16 July 2015.

[8] Cigna press release, *Cigna Reiterates Support for Proposed Merger with Express Scripts*, (August 7, 2018), avaialable at https://www.cigna.com/newsroom/news-releases/2018/cigna-reiterates-support-for-proposed-merger-with-express-scripts, citing Glenview Capital CEO Larry Robbins, a Cigna and Express Scripts investor, in a CNBC interview (April 23, 2018).

In fact, it is by no means certain that any savings would be passed along. To start with, the opaque nature of the healthcare marketplace makes it unlikely that there would be adequate transparency to trigger the forces of competition. Without this key ingredient, it would be difficult, if not impossible, for consumers to be aware of the upstream savings, and to be able to insist on a share or else take their business elsewhere. Furthermore, as discussed earlier, many of Cigna and Express Scripts enrollees do not have the option to use the power of their purse strings. As Professor Garthwaite, an expert in the economics of strategy and healthcare strategy at Kellogg School of Management, explained, "without a competitive market for health insurance, there will be no incentive for the newly merged firm to transfer value to consumers in the form of lower prices."[9] In addition, if any savings are achieved at all, and if those savings are actually passed along, it will most likely be absorbed by the employer sponsoring the health plan, not shared with the consumers at the end point, who may see their access to prescription drug benefits altered while their health plan premiums and general healthcare costs rise.

Furthermore, efficiencies – which companies proposing to merge will always claim – often ultimately are shown, on further examination, to be unsubstantiated or exaggerated. And importantly for a merger investigation, even the genuine efficiencies can very often be achieved by other means without merging, through arm's-length contractual arrangements. Again, why does Cigna need to merge with Express Scripts to benefit from its PBM services, when Express Scripts is already available to any health plan seeking to contract, including Cigna?

This merger of these two firms would alter their profit-maximizing incentives in ways that could significantly harm competition, consumer choice, and harm quality. At the moment, Express Scripts offers verbal assurances that it will continue to provide the same PBM services to other health plans as it does now.[10] But what happens when a merged Cigna-Express Scripts finds it to its advantage for Express Scripts to negotiate different, better deals on prescription drugs only for those who pay with Cigna insurance? Because of the black box surrounding PBM rebates and side agreements, this area is particularly vulnerable to anticompetitive abuse.

<u>The unfounded linkage of consolidation and innovation</u>

In our mission to improve affordability and access to healthcare, including reducing the high prices of prescription drugs on which more and more consumers rely, we are familiar with the impact of high-cost specialty drugs on consumers. We are also familiar with, and in support of, new ways of paying for care that prioritize quality over quantity. At the same time, though, we question the notion that Cigna must merge with a PBM in order make prescription drugs more affordable, and that doing so will be a means to that end. Rather, as with our skepticism that these corporations could achieve efficiencies only through a merger, we also question why a merger is a necessary component to a major health plan giving its members value from their prescriptions. We support innovation that makes high quality products more affordable, improves health outcomes, and makes significant inroads in reducing disparities. Health plans must be held accountable for assurances such as these so that they are not merely empty, self-interested promises.

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9 Garthwaite testimony, *supra*, at pp.17-18.

10 *Public Meeting on the Acquisition of Express Scripts Holding Company by Cigna Corporation*, Department of Managed Health Care, (September 26, 2018) (Testimony of Brian Henry).

Along the same vein, we are skeptical of Cigna's claim that the merger would better align patients and providers, and thereby provide "a more coordinated approach to an individual's health care journey, reducing complexity and creating better outcomes."[11] As consumer advocates, we know that a strong doctor-patient relationship is the backbone for high quality care. Even assuming that fostering this relationship is the role of health plans – aside from ensuring that network size is sufficient, that coverage benefits are comprehensive, and that reimbursement is timely and straightforward – it is unclear how a merged Cigna-Express Scripts can do this any better than a stand-alone Cigna.

Ultimately, much of the behind-the-scenes dealings in healthcare are difficult to parse. But in addition, the transactions that occur in particular with PBMs operate in a unique black box. As U.S. Food and Drug Administration Commissioner Scott Gottlieb recently explained, "[C]onsolidation and market concentration make the rebating and contracting schemes all that more pernicious. And the very complexity and opacity of these schemes help to conceal their corrosion on our system — and their impact on patients."[12]

Conclusion

As the Department of Managed Health Care stated at the public meeting regarding this acquisition, if the merger is not finalized prior to January 1, 2019, recently enacted California law AB 595 will govern DMHC's oversight of the merger. Under that law, DMHC will be required to obtain an independent analysis of the impact of the merger on subscribers and enrollees, and on the stability of the healthcare delivery system. We strongly urge the Department to obtain an impact analysis even if prior to the date AB 595 becomes effective – the effect of this merger will be widely felt and, once complete, cannot be undone. If the merger is to be approved, we strongly urge the Department to pursue whatever undertakings are warranted to mitigate any deleterious effects on consumers, with an understanding that undertakings cannot with certainty eliminate all potential harmful effects of mergers. (Our suggestions for such undertakings are included in the Appendix.) Californians rely on their regulators to act in their best interest. A merger that is contrary to the interests of consumers must be denied, or remedied to the fullest extent possible.

Sincerely,

Dena B. Mendelsohn

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Consumers Union

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[11] Cigna news release, *Cigna to Acquire Express Scripts for $67 Billion*, (March 2, 2018). Avaialble at https://www.cigna.com/newsroom/news-releases/2018/cigna-to-acquire-express-scripts-for-67-billion (accessed October 3, 2018).

[12] Speech by Scott Gottlieb, MD, remarks prepared for deliver at the America's Health Insurance Plans (AHIP) National Health Policy Conference, *"Capturing the Benefits of Competition for Patients*," (March 7, 2018). Available at https://www.fda.gov/NewsEvents/Speeches/ucm599833.htm.

Appendix: Recommended undertakings

If this merger is finalized, consumers need assurances that the newly combined Cigna-Express Scripts will lift up consumer interests and improve their lot—on access, affordability, and quality—rather than leaving consumers carrying the weight of this deal. Undertakings Consumers Union recommends for your consideration include, but are not limited to:

- Health insurance rates: The merged company should agree to not move forward with rate increases in any market segment that DMHC deems unjustified, or that contain inaccurate or incomplete information to satisfactorily justify the increase. Given the risk that the merger could lead to higher premiums, it should agree to providing greater detail, publicly available, to aid DMHC in especially close rate review, particularly during the first years after the merger, and perhaps beyond. Moreover, it should agree that proposed rate increases will be quantified based on Cigna's prior plan year rates, not as a new health plan altogether. Cigna-Express Scripts must not be permitted to finalize proposed premium rate increases deemed unreasonable or unjustified by the Department, and instead should confer with regulators until a reasonable and justified rate is set. This should apply to all lines of business subject to rate review at the time the rate is filed.
- Upholding profit regulations: To safeguard against circumvention of the medical loss ratio, now set in law in California under AB 2499 (2018), Cigna must commit to permitting inspection by the Department of its expenditures on enrollee healthcare claims, including the portion attributable to prescription drugs, as well as inspection of the records of prices Express Scripts negotiates with prescription drug manufacturers and pharmacies for Cigna and for other health plans.
- Enhancing networks: The merged company should commit to improving the network of providers available to consumers. In addition to confirming that Cigna's networks meet (or exceed) state standards, the Department should also require the plan to improve its consumer satisfaction scores, such as that reported by the Office of the Patient Advocate (OPA). According to the OPA, enrollees in both the PPO and HMO gave Cigna a Poor score for getting care easily, and enrollees in the PPO rated Cigna Poor for satisfaction with plan doctors. We are concerned that the quality of Cigna's products could further erode if they are able to operate from a position of increased market power.
- Quality improvement and cost containment initiatives: Existing state law requires that each plan's rate filing include "any cost containment and quality improvement efforts since the last filing for the same category of health benefits plan. To the extent possible, the plan shall describe any significant new health care cost containment and quality improvement efforts and provide an estimate of potential savings together with an estimated cost or savings for the projection period".[13] That requirement is unfortunately often honored more in the breach than the observance. Cigna-Express Scripts must be required not only to reinvest profits appropriately in quality improvement and cost containment initiatives, but also to provide clear explanations and documentation for those investments, dollar breakdowns, estimated savings,

[13] Cal. Health and Safety Code Section § 1385.03(c)(3) (2018).

and descriptions of how each directly benefits policyholders. Self-insured products do not have the same reporting requirements as other group health coverage; it may be appropriate to contractually create, via undertakings, a similar standard for Cigna's ASO products given the extent of their offerings in California.

- Improved quality and consumer satisfaction ratings: Achieving above-average quality ratings as measured by NCQA, Covered California, the Right Care Initiative, the Office of Patient Advocate Quality Report Card, and the Medi-Cal Managed Care Health Care Options Consumer Guide, by no later than the performance measurement period ending December 31, 2019, should be a required condition.
- Protecting consumer privacy: The merged company should commit to creating a corporate culture that values healthcare information privacy and keeps it top-of-mind, from major decisions down to selecting envelopes for mass mailings. Additionally, prior to acquiring Express Scripts, Cigna must design, and legally bind themselves to undertake, a healthcare data security plan that would, for example, require that the merged company store healthcare data separately from financial data, and not combine data from their retail data collection with data from their healthcare providers and health plan. In addition, Cigna must demonstrate for the Department that it will not have access to data created by Express Scripts in service to third-party health plans – whether created in the past, present, or future.
- Dedicated staffing for transition issues: Whether due to network shifts, information technology glitches or other operational issues, this merger will inevitably have bumps in the road that will affect Cigna and Express Scripts and their customers. Consumers Union recommends that DMHC require dedicated, increased staffing—wherever trouble spots in the company may arise and need to be rectified—such as personnel to craft provider directories, provide customer service, and ensure that protected health information is continuously secured during the transition and thereafter.