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*By Facsimile and Federal Express*

August 13, 2015

The Honorable William Baer  
Assistant Attorney General  
United States Department of Justice Antitrust Division  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530

Dear Assistant Attorney General Baer:

We are the lead counsel for a nationwide class of healthcare providers challenging the anticompetitive practices of Blue Cross and Blue Shield licensees in *In re Blue Cross Blue Shield Antitrust Litigation*, MDL No. 2406, No. 13-cv-20000 (N.D. Ala.). As the Department of Justice evaluates the competitive effects of a merger between Anthem and Cigna, it should keep in mind two crucial aspects of Anthem's business. First, Anthem has agreed with all Blue Cross and Blue Shield licensees that it will not compete in their "service areas" using the Blue marks and that it will limit the amount of revenue it earns in their service areas, whether or not using the Blue marks. Second, Anthem competes with other commercial insurers, including Cigna, for national accounts, in which plan members may be spread throughout the country—not just in Anthem's service areas. As we explain below, failure to consider these two aspects of Anthem's business will cause the Department to substantially underestimate the merger's effect on competition.

The insurers known as the "Blues" are not members of a single entity, but are 36 independent companies that coordinate their activities through the Blue Cross and Blue Shield Association (the "Association"). The Association owns the Blue Cross and Blue Shield trademarks (the "Blue marks"), which it licenses to the Blues. These licenses are limited to 67 "service areas," in which only one Blue may operate using the Blue marks, with limited exceptions.<sup>1</sup> Most service areas cover an entire state, and some Blues, including Anthem, hold licenses for multiple service areas.

The Blues' license agreements severely restrict the Blues' ability to compete with each other. First, each Blue is prohibited from using the Blue marks outside its service area.<sup>2</sup> For example, Blue Cross and Blue Shield of Alabama may not solicit business from providers, subscribers, or employers under the Blue marks in any state other than Alabama, and none of the other 35 Blues may solicit business under the Blue marks in Alabama. In effect, the license agreements

<sup>1</sup> Two Blues compete against each other in California, Idaho, Washington, and parts of Pennsylvania and New York.

<sup>2</sup> Each Blue is permitted to contract with healthcare providers in counties contiguous to its service area, but in practice the use of "gentlemen's agreements" limits this activity.



eliminate the possibility of interstate competition using the Blue marks. When one considers that two of the largest four and 15 of the largest 25 health insurers in the country are Blues, it becomes obvious that this noncompetition agreement severely limits competition in the health insurance industry throughout the country. The limits on competition are exacerbated when one considers that the same license agreements restrict the Blues' ability to do business across state lines under any mark, Blue or not. Each Blue agrees that at least two-thirds of the annual revenue generated by it or its subsidiaries (or two-thirds of its enrollment), excluding Medicare and Medicaid, shall be attributable to services offered under the Blue marks (the "two-thirds rule"). The two-thirds rule limits the ability of each Blue to generate revenue from non-Blue branded business, and thereby limits the ability of each Blue to develop non-Blue brands that could and would compete with other Blues.

The consequences of a Blue's failure to abide by these restrictions are catastrophic. The Association may terminate that Blue's license to use the Blue marks and collect a "re-establishment fee" that will be used to establish a new Blue in its place. According to Anthem's most recent Form 10-K, this fee was \$98.33 per enrollee, and if Anthem's license were terminated, the Association would assess a re-establishment fee of \$2.8 billion.<sup>3</sup>

While the Department should request detailed information about how Anthem calculates its Blue and non-Blue business, a back-of-the-envelope calculation suggests that when Anthem acquires Cigna, it will not be in compliance with the two-thirds rule. In its 2014 Form 10-K, Anthem reported that it had 25,623,000 members, excluding its Medicare and Medicaid business.<sup>4</sup> Cigna reported in its 2014 Form 10-K that it had approximately 14,022,000 members, excluding its Medicare and Medicaid business. If Anthem and Cigna are combined, then, only 64.6% of its members (excluding Medicare and Medicaid) will be enrolled in Blue plans. This noncompliance will effectively preclude Anthem from expanding its non-Blue business, including its Cigna-branded business, or perhaps even require Anthem to pull Cigna out of certain markets. Outside of its service areas, Anthem cannot solve the problem by converting Cigna plans to Blue plans, because it is not allowed to do any business under the Blue marks outside its service areas. And, the limit on Anthem's non-Blue business reduces Anthem's incentive to invest in or attempt to grow that business.

Because Anthem cannot expand its non-Blue business, an evaluation of the effects of its merger with Cigna must include not only those geographic markets in which Cigna competes with Anthem, but also those geographic markets where Cigna competes (or would compete) with any insurer.<sup>5</sup> In each of those markets, the Association's restrictions mean that Cigna can no longer

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<sup>3</sup> Anthem 2014 Form 10-K at 33.

<sup>4</sup> Anthem reported having 37,499,000 members, of whom 1,404,000 were participants in Medicare and 5,193,000 were participants in Medicaid. Another 5,279,000 individuals were listed as being "BlueCard" members, but Anthem explained that these are actually enrollees in other Blue plans who are treated in Anthem's service area. Anthem 2014 Form 10-K at 50-52. Cigna reported that it had 14,456,000 members, 3% of whom were participants in government programs including Medicare and Medicaid. Cigna 2014 Form 10-K at 7, 36.

<sup>5</sup> For this reason, the Department should aggregate market shares of Cigna and Blues plans in each market. Cf. *Standard Oil Co. v. United States*, 337 U.S. 293, 294 (1949) (noting that a 6.7 percent market share was still "substantial" when considering aggregate market shares of other suppliers within the industry also using exclusive contracting deals); see also *United States v. Visa U.S.A. Inc.*, 344 F.3d 229, 240 (2d Cir. 2003) (finding that



compete for new business in any market unless it decreases its business by an offsetting amount in another market. The net effect is that Cigna's effectiveness as a competitor in markets outside of Anthem's service area will be impaired.

The market for PPO plans in Huntsville, Alabama is a good example of the effect of the proposed merger in a state outside Anthem's service areas. According to the American Medical Association, the market for PPO plans in the Huntsville market is highly concentrated. Blue Cross and Blue Shield of Alabama controls 93% of the market, and the HHI is 8639.<sup>6</sup> Recently, Cigna had some initial success in expanding its presence in that market. It not only negotiated a network contract with the Huntsville Hospital System, the largest hospital system in the northern part of the State, but it also won a contract to administer the health benefit plan for the hospital's employees. If Cigna is purchased by Anthem, however, it cannot continue to introduce competition into this market, and may have to scale back its presence, so that Anthem does not violate its license agreements. Huntsville is not unique in this regard; any market in which Cigna competes, or would compete, is subject to the same dynamic. It would be a mistake to focus solely on Anthem's service areas when evaluating the competitive impact of the proposed merger.

Moreover, when analyzing past health insurance mergers, the Department has recognized the role of the Blues in insurance markets throughout the country. While different from the two-thirds issue, in UnitedHealth's acquisition of PacifiCare, the Department required United to terminate its agreement with Blue Shield of California.<sup>7</sup> United did not directly compete within California, but United "rented" provider networks through Blue Shield of California's CareTrust Network to service its national employer contracts.<sup>8</sup> Pursuant to this agreement, United had access to reimbursement information and network development of the Blue Shield plan. Prior to the transaction, PacifiCare was a leading competitor to Blue Shield of California.<sup>9</sup> Thus, the alliance between United and Blue Shield of California created incentives for a merged United/PacifiCare to coordinate with Blue Shield and substantially lessen competition throughout California.<sup>10</sup> Therefore, in the past, the Department has rightfully recognized that health insurance mergers cannot be reviewed in isolation.

Apart from its effect on local markets, the proposed merger will likely cause a substantial reduction in competition for national accounts: plans for large employers whose employees are spread throughout the country.<sup>11</sup> Anthem participates in this market, enrolling 7,155,000

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aggregate market power of both Visa and MasterCard, 47 and 26 percent respectively, allowed the parties to "effectively preclude[e]" other competitors within the credit card markets).

<sup>6</sup> American Medical Association, *Competition in Health Insurance: A comprehensive study of U.S. markets* (2014 Update) at 26.

<sup>7</sup> See Press Release, Dep't of Justice, *Justice Department Requires Divestitures in UnitedHealth Group's Acquisition of PacifiCare Health Systems* (Dec. 20, 2005), available at <http://goo.gl/jq0XqZ>.

<sup>8</sup> Complaint, *United States v. UnitedHealth Inc.*, 1:05-cv-02436 (D.D.C. Dec. 20, 2005).

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

<sup>10</sup> *Id.*

<sup>11</sup> In a food service distribution case, the FTC recently contended that product markets can be for "national" customers. The District Court of Columbia agreed with the national-customers product market by noting the unique nature of companies that serve national markets, including the companies' nationwide capabilities and their direct



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members through these plans, which it generally offers to employers primarily headquartered in an Anthem service area.<sup>12</sup> Cigna also participates in this market, enrolling approximately 3,759,000 members through these plans.<sup>13</sup> For employers headquartered in Anthem's service areas, the proposed merger will eliminate one of Anthem's main competitors, leading to substantially increased concentration.<sup>14</sup> The effects will be felt wherever those employers' employees reside, even if they do not live in Anthem's service areas. Employers headquartered outside Anthem's service areas, where Cigna but not Anthem competes for business, will feel the effects as well because Cigna cannot substantially grow its national accounts without violating the two-thirds rule, and thus may choose not to make competitive bids when it would otherwise have done so. And there will be little opportunity for new entrants, as providing nationwide coverage to large employers is unrealistic for all but a few carriers, who have comprehensive provider networks.<sup>15</sup> Just as it would be a mistake to focus on markets solely within Anthem's service areas, it would be a mistake to ignore national accounts, which cover a substantial portion of all privately insured individuals in the United States.

As you consider the proposed merger between these two of the largest five health insurers in the country, we are prepared to meet with you and present additional information showing that the current rules of the Blue system make the merger one that would greatly reduce competition.

Sincerely,

/s/

Joe R. Whatley, Jr.  
Edith M. Kallas  
Henry C. Quillen

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bidding against other companies attempting to service national customers. Memorandum Opinion, *FTC v. Sysco Corp.*, No. 1:15-cv-00256, 2015 WL 3958568 (D.D.C. June 23, 2015).

<sup>12</sup> Anthem 2014 Form 10-K at 50, 52.

<sup>13</sup> Cigna 2014 Form 10-K at 7, 36. Cigna reported that 26% of its 14,456,000 members are covered by national accounts.

<sup>14</sup> The increase in concentration in the market for national accounts will be even greater if Aetna merges with Humana.

<sup>15</sup> Cigna and Anthem both define "national" accounts as those involving employers with more than 5,000 employees. Cigna 2014 Form 10-K at 7, Anthem 2014 Form 10-K at 50. The Department should evaluate not only this market, but the market for large employers with fewer than 5,000 employees. To do so, the Department should request detailed information regarding Anthem and Cigna's large accounts, including the number and location of the employees covered under these accounts.