HEALTH ACCESS CALIFORNIA

October 10, 2018

Shelley Rouillard
Director, Department of Managed Health Care
980 9th Street, Suite 500
Sacramento, California 95814-2725
Via e-mail to: publiccomments@dmhc.ca.gov

RE: Cigna – Express Scripts Merger

Dear Director Rouillard:

Health Access California, the state health care consumer advocacy coalition working for quality and affordable health care for all Californians, offers the following comments on the proposed acquisition of Express Scripts Holding Company by Cigna Corporation. We request the Department of Managed Health Care (DMHC) to scrutinize carefully this proposed merger and to evaluate whether it is actually good for patients and the public interest. If you do not reject it outright, we urge that you impose the needed and enforceable conditions to prevent negative competitive and consumer impacts.

As a consumer protection agency, the DMHC is tasked with protecting the public interest by ensuring California protects consumers who rely on managed care as well as maintains a robust and competitive commercial health insurance market that delivers quality and affordable care. The stakes—for consumers and the health system as a whole—are high, and different sectors of the health care industry seeking to merge have the burden of showing that consumers will benefit from integration. As the DMHC evaluates this merger, it must keep an eye on the larger picture and evaluate the cumulative effects of this vertical or even diagonal merger on patients and the health system we all rely on.

Cigna HealthCare of California Inc. (Cigna), has a troubling track record in the state's large group commercial market, one that reflects a lack of respect for California law, as well as basic consumer protections. We are deeply concerned about giving more market power to Cigna, given its poor track record. Between 2015 and 2017, Cigna had 14 enforcement actions, which amounted to $285,000 in fines. Additionally, a recent June 2018 DMHC Routine Plan Survey Follow-Up Report found that Cigna still has not corrected 9 out of 15 deficiencies identified in the 2016 Final Report. Some of Cigna's deficiencies include:

- Lack of an adequate Quality Assurance Program that ensures quality of care is reviewed for problems and effective actions taken to improve care;
- Lack of an effective Grievances and Appeals process that assures proper documentation, tracking, and monitoring of enrollee grievances;
- Failure to rectify enrollee grievances regarding quality of care, quality of services, and access issues;
- Failure to resolve medical necessity, benefits and coverage disputes, and grievances by the next business day – a violation of the Knox-Keene Act;
- Failure to inform enrollees' rights to notify the DMHC of expedited grievances;
- Failure to inform providers of the responsible reviewing committee that make clinical decisions (approve or reject care) on behalf of the plan; and
- Inconsistencies and lack of utilization management standards that lead to denial, delay, or changes in authorizations of important health care services and prescription drugs for enrollees.

Since 2016, Cigna has been deficient in its grievances and appeals process for patients. DMHC's most recent 2018 follow-up report for a routine medical survey shows Cigna continues to have major deficiencies in its grievances and appeals and utilization management processes. At a systems level, Cigna has failed to show that it can operate a grievance process that allows it document, track, monitor, and code grievances. Cigna continues to wrongly process grievances specific to billing and claims disputes. We question Cigna's conscious decision not to correct such deficiencies as a deliberate and systematic decision in order to reduce enrollee grievance and appeals submissions.

Consumers are at great risk with more consolidation in the health care market because they feel the most impact first – in higher premiums and more cost-sharing. This acquisition gives us great concerns similar to the CVS-Aetna merger. Consumers cannot tell the difference between their health plans and pharmacy benefit managers (PBMs) because some PBMs are already owned by insurers. Pharmacy benefit managers also keep large profits throughout the prescription drug distribution process. With this in mind, Cigna will assume Express' Scripts profit as "extra" profit on top of Cigna's existing profit. Between 2011-2016, Cigna's profits just on the fully-insured large group market business was already over $134 million.[1] We question if and how Cigna will pass the "extra" profit through in cost-savings to purchasers and consumers. Additionally, Express Scripts is the largest PBM in the nation with 29% of the market[2] and has contacts with multiple plans. We question what the market impact is of this merger on prescription drug costs for health plans, especially for plans that currently contract with Express Scripts. We also question whether Express Scripts would maintain its contract with other plans or will it be exclusive to Cigna.

Consumers will also be impacted by horizontal, vertical, or diagonal "mega-mergers" and consolidations such as Cigna – Express Scripts due to reduced competition and lack of meaningful choices in the market. Given the different types of consolidations we have witnessed among different parts of the health care market, we are concerned that vertical or even diagonal mergers such as this one will ultimately reduce competition not only in the health plan market, but also in the pharmacy business, which will lead to prices going up. According to 2016-2017 data on the fully-insured large group market, prescription drugs make up 14% of the cost of premiums and most insurers premium increases are far above inflation at 2.9%, the average increase in premiums in the large group market in California was 3.5% while Cigna's increase was at 5.8%. This is directly contrary to the company's representations at the hearing that their rate of increase was the lowest in the industry but consistent with Cigna's failure to abide by California-specific requirements or respect the particularities of the California market.

In the fully-insured large group market, Cigna currently covers nearly 355,000 lives, 4% of the market. In the self-insured market, Cigna currently covers 600,000 lives, over 10% of the market.[3] We question whether Cigna will use its new relationship with Express Scripts to destabilize these markets by undermining the competitive position of other plans. The two core elements of the DMHC's mission are to protect consumers and to assure the stability of the market. Experience shows that that consumers do not actually benefit from mergers either through lowered costs and/or better access to care or quality of care. Therefore, we request that the DMHC carefully examine this proposed merger and evaluate whether it is actually good for patients and the public interest, and whether it will yield benefits that will be passed onto enrollees and subscribers.

If the deal is not rejected outright, Cigna HealthCare of California should be required to meet considerable undertakings to ensure that they not only correct ongoing major deficiencies, but also prove how its promises of innovation, efficiency, and value from such a merger would be realized and benefit consumers and purchasers of coverage. The DMHC has found Cigna provides deficient services and the Department must require Cigna to correct such failures and to improve care and services before it acquires Express Scripts. As conditions of this transaction, Cigna should be required to:

- Fund an independent analysis that studies the impacts of such a "diagonal" transaction on the subscribers and enrollees, as well as the stability of the health care system per AB 595 (Chapter 292, 2018);
- Cover medically necessary prescription drugs as explicitly stated in California law, even if Express Scripts permits self-funded insurers to exclude coverage of certain drugs found to be "too costly;"
- Comply with current California law on nondiscrimination provisions of the Affordable Care Act that ensures formularies do not discriminate against a health condition based on a person's health condition or life expectancy, per AB 339 (Chapter 619, 2015) and SB 1021 (Chapter 787, 2018);
- Comply with AB 2499 (Chapter 678, 2018) to assure that profits and overhead of Express Scripts are counted as part of the profit and overhead of Cigna to the extent this condition is consistent with the state's medical loss ratio standards law and regulations;
- Immediately correct deficiencies found in its Routine Follow-up Medical Surveys and maintain compliance with all Knox-Keene requirements over a sustained period of not less than five years;
- Submit plans for achieving value, efficiencies, and savings not only for the health care system as a whole, but for consumers and purchasers. Cigna, with Express Scripts, should

be required to put forth a proposal that delineates how efficiencies and savings will be shared with consumers in the form of lower premiums and cost-sharing, quality improvements, and reductions in health disparities;

- Ensure affordability of coverage for consumers and purchasers by refraining from any rate increases deemed unreasonable by regulators pursuant to the annual rate review processes;
- Allocate and designate a certain percentage of profits earned from the merger to investing in California specific health care organizations and programs dedicated to improving access, quality, outcomes, and equity. Key investments should be made to state's safety-net, the remaining uninsured, rural and other underserved populations, in order to move the state towards a near universal coverage system; and finally
- Include promised benefits as conditions in its contract to assure patients and our overall health care system would benefit from the merger.

We are skeptical that the combination of Cigna and Express Scripts will yield the benefits that the companies' executives claim. Your review of this merger should focus on Cigna's past practices, whether this merger would allow Cigna to leverage its new corporate structure to influence its market influence and our state's insurance markets, and whether the companies would actually commit to the promises made, and whether consumers would actually benefit. On behalf of California's health care consumers, we urge you to scrutinize the Cigna – Express Scripts acquisition and make sure patients are not left with higher prices and unfulfilled promises. We appreciate your highest level of scrutiny and for protecting the interests of consumers in this process.

Sincerely,

Anthony Wright
Executive Director

[1] SB 546 Rate Filing Data, Second Year, 2016-2017 data.
[2] Sood, Shih, Van Nuys, and Goldman, USC Shaeffer. Flow of Money Through the Pharmaceutical Distribution System. June 2017.
[3] SB 546 Rate Filing Data, Second Year, 2016-2017 data.