



U.S. DEPARTMENT OF JUSTICE
Antitrust Division

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August 23, 2023

Louisiana Department of Insurance
P.O. Box 94214
Baton Rouge, LA 70802

Re: Conversion of Louisiana Health Service & Indemnity Company d/b/a Blue Cross and Blue Shield of Louisiana from a mutual insurance company to a stock insurance company pursuant to La. R.S. 22:236.4(C).

Dear Mr. David Caldwell:

At the request of the Louisiana Department of Justice ("LADOJ"), dated August 11, 2023,¹ the Antitrust Division of the U.S. Department of Justice ("Division") respectfully submits this statement to encourage the Louisiana Department of Insurance ("LDI") to consider competitive effects of Elevance Health's f/k/a Anthem Health proposed acquisition of Louisiana Health Service & Indemnity Company d/b/a Blue Cross and Blue Shield of Louisiana ("BCBSLA") in its October 5–6, 2023, public hearings.

I. Background and the LADOJ's request

In January, Elevance Health f/k/a Anthem Health and BCBSLA announced that Elevance Health plans to acquire BCBSLA.² The LADOJ subsequently opened an investigation into this acquisition. Given that the investigation is ongoing, the LADOJ requested that the Division consult on the matter.³ The LADOJ also invited the Division

¹ Letter from Jeff Landry, Louisiana Attorney General, Louisiana Dep't of Just., to Jonathan Kanter, U.S. Dep't of Just., Antitrust Div., Competition Pol'y & Advoc. Sect. (Aug. 11, 2023).

² Blue Cross & Blue Shield of Louisiana, [*Elevance Health to Acquire Blue Cross and Blue Shield of Louisiana*](#) (Jan. 23, 2023).

³ Note, the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act") mandates parties to report certain mergers and acquisitions to the Division and the Federal Trade Commission (collectively, "Agencies") and must wait before closing the transaction so that the Agencies may investigate any potential competitive impact of the merger or acquisition. Conclusion of the HSR process and inaction by the Agencies do not reflect formal approval of the transaction and no such inferences should be drawn. *See* 15

to submit a public comment for the LDI's consideration in the October 5–6, 2023, public hearings on the transaction⁴ and emphasize the importance of competition.

II. The importance of healthcare competition, and the Division's interest and experience in the healthcare industry.

Competition is a core organizing principle of America's economy.⁵ The Division works to promote competition through its own enforcement efforts and through competition advocacy before federal and state authorities (*e.g.*, comments on legislation, discussions with regulators, court filings, and regulatory proceedings).

Healthcare competition has long been a priority for the Division due its significant impact on the public. The Division has accrued deep expertise in healthcare from its own enforcement and by engaging in competition advocacy with federal and state authorities across the entire healthcare sector.⁶ We have investigated and litigated antitrust cases across the country involving mergers and unlawful business practices by healthcare insurers, hospitals, pharmaceutical companies, physicians, and other providers of healthcare goods and services.⁷ The Division has, over the years, through its publication of research, reports, and public events, provided guidance to the community on competition. Our antitrust enforcement and advocacy work enables us to recognize competitive forces that impact cost, price, quality, and innovation in the healthcare sector.

U.S.C. § 18a (i)(1) ("Any action taken by . . . the Assistant Attorney General or any failure of . . . the Assistant Attorney General to take any action under this section shall not bar any proceeding or any action with respect to such acquisition at any time under any other section of this Act or any other provision of law"); *see also* *California v. American Stores Co.*, 495 U.S. 271, 296 (1990); *Steves & Sons, Inc. v. JELD-WEN, Inc.*, 988 F.3d 690, 716–19 (4th Cir. 2021).

⁴ Press Release, Louisiana Dep't of Ins., [Louisiana Department of Insurance to Hold Public Hearing BCBSLA Conversion Plan](#) (June 30, 2023).

⁵ *See, e.g.*, *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, (2015) ("Federal antitrust law is a central safeguard for the Nation's free market structures."); *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951) ("The heart of our national economic policy has long been faith in the value of competition."); *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (noting that the antitrust laws reflect "a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.").

⁶ *See generally*, [Healthcare](#), U.S. DEP'T OF JUST., ANTITRUST DIV., (Aug. 14, 2023) (providing an overview and links to the Division's many healthcare-related activities in enforcement, advocacy, and written publications).

⁷ *E.g.*, *United States v. Anthem, Inc.*, 855 F.3d 345 (D.C. Cir. 2017); *United States v. Aetna, Inc.*, 240 F. Supp. 3d 1 (D.D.C. 2017); *VDA Plea Agreement, United States v. Hee*, No. 2:21-cr-00098 (D. Nev. Oct. 27, 2022), ECF No. 106; Press Release, U.S. Dep't of Just., Antitrust Div., [Pharmaceutical Company Admits to Price Fixing in Violation of Antitrust Law, Resolves Related False Claims Act Violations](#) (May 31, 2019).

III. Competitive effects of mergers and acquisitions in the healthcare industry

Given the importance of competition, the Division encourages the LDI to consider the importance of competitive and vibrant free markets when evaluating BCBSLA's plan of conversion. Specifically, we encourage the LDI to consider the following factors:

- 1. When evaluating a merger or an acquisition, the LDI should consider the risk of the transaction resulting in a reduction in competition.*

An assessment of a merger or acquisition should start out by evaluating how competition in a relevant market occurs in the present and the likelihood of the transaction to lessen that competition. Today, that competition likely occurs on several fronts. Insurers may compete for individuals and employers who need to purchase health insurance. They may compete to contract with healthcare providers and facilities on favorable terms. And they may compete to participate in state-administered programs such as Medicaid. Importantly, the Division encourages the LDI to assess the proposed acquisition of BCBSLA for its potential long-term competitive effects in the healthcare sector. Transactions may limit rivals' access to markets or raise barriers to entry for new or expanding health insurers.⁸ In such cases, the LDI is encouraged to consider the transaction's impact on price to the consumer, the quality of healthcare services, access to care, reduction of costs, and innovation. Moreover, the Division encourages the LDI to evaluate whether the incentives of the acquiring firm to be accountable to patients, physicians, and BCBSLA's plan members will be altered because of the transaction, thereby causing harm to both existing and future health care competition.

- 2. Antitrust scrutiny is not limited to horizontal transactions.*

The Division encourages the LDI to consider whether the transaction may substantially lessen competition by giving a firm control over access to a product, service, or customers that its rivals use to compete. Where access to products, services, or customers are important for rivals to compete, competition concerns may arise even in markets that do not reflect traditional vertical supply and distributor relationships, such as in connected ecosystems. The healthcare industry is one example of a connected ecosystem. Insurance companies put together networks that connect patients to providers, but providers also set up their own system of relationships through referrals and contracting for privileges at certain facilities. Similarly, many health insurance companies rely on pharmacy benefit managers to help assemble formularies, pharmacy networks, and mail-order and specialty pharmaceutical delivery. In mergers involving connected ecosystems, the Division assesses whether the merger changes ownership or alters incentives in the merged firm, which may result in higher barriers to entry or switching costs, or foreclosing or raising rivals' costs. In other words, the Division analyzes the risk that the merged firm would have the ability and incentive to make it

⁸ Ford Motor Co. v. United States, 405 U.S. 562, 571 (1972).

harder for rivals to compete, thereby harming competition.⁹ Any of these would present a competitive harm of the merger, even if the merging firms were not previously in a horizontal or vertical relationship.

The Division also encourages the LDI to consider whether Elevance Health or BCBSLA already maintains a dominant position¹⁰ in the health insurance markets. If either merging party has a dominant position in the market, such position could be used to (1) entrench their dominant position in the health insurance market using various mechanisms to prevent rivals from competing in the market rather than through improvements from efficiency¹¹ or (2) extend that dominant position into another market. A merger that entrenches or extends a firm's dominant position may violate Section 1 or Section 2 of the Sherman Act. *See, e.g., United States v. Grinnell Corp.*, 384 U.S. 563 (1966) (acquisitions among the types of conduct that may violate the Sherman Act).

3. *Antitrust scrutiny should cover any relevant market where the merger or acquisition may impact competition.*

The Division encourages the LDI to consider how Elevance Health's proposed acquisition of BCBSLA may affect not only insurance markets but also the labor markets for healthcare workers. Some transactions between competitors have the potential to impact industry participants in both upstream and downstream markets. With respect to the healthcare insurance industry, a merger or acquisition may affect not only the costs and quality of services, or of patients' experience, but also the wages and working conditions to which physicians, nurses, and other healthcare professionals are subject. Furthermore, markets for healthcare services may differ from labor markets because each has a distinct geographic scope. Therefore, the Division encourages the LDI to consider the impact of the transaction not only on the harm to competition affecting patients, but also that affecting healthcare workers.

⁹ *E.g., in United States v. UnitedHealth Grp. Inc.*, the Division sued to block the merger of UnitedHealth Group's acquisition of Change Healthcare, Inc. Although the merging parties were in different levels of the healthcare insurance supply chain, the Division argued that the proposed transaction would substantially lessen competition because post-acquisition, the merged entity would be able to gain access to a vast amount of its rival health insurers' competitively sensitive information and to use its rivals' information to gain an unfair advantage and harm competition in health insurance markets. Plaintiffs' Pretrial Brief, *United States v. UnitedHealth Grp. Inc.*, No. 1:22-cv-00481-CJN, (D.D.C. 2022), ECF No. 101.

¹⁰ To identify whether one of the merging firms already has a dominant position, the Division looks to whether (i) there is direct evidence that one or both merging firms has the power to raise price, reduce quality, or otherwise impose or obtain terms that they could not obtain but for that dominance, or (ii) one of the merging firms possesses at least 30 percent market share.

¹¹ These mechanisms include, but are not limited to, increasing barriers to entry, increasing switching costs, interfering with the use of competitive alternatives, depriving rivals' scale economics or network effects, or eliminating a nascent competitive threat.

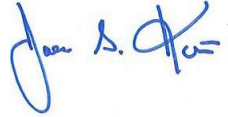
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IV. Conclusion

The Division recognizes that competition is only one of the many policy objectives LDI must consider in its evaluation of the Elevance Health-BCBSLA transaction. The Division encourages the LDI to carefully consider the competitive impacts of this transaction when evaluating the BCBSLA's current plan of conversion in the upcoming hearing and in future hearings.

Sincerely,

A handwritten signature in blue ink, appearing to read "Jon S. Kanter", with a stylized flourish at the end.

Jonathan S. Kanter