Senate Committee on Health and Welfare

and

Senate Committee on Insurance

Oversight Report

on the

Proposed Acquisition of Blue Cross Blue Shield of Louisiana

Submitted to the Louisiana Department of Insurance

Commissioner Tim Temple

February 8, 2024

Senate
State of Louisiana

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Commissioner Tim Temple
Louisiana Department of Insurance
1702 N. Third Street
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Re: Legislative Hearing to Discuss the Proposed Acquisition of Blue Cross and Blue Shield of Louisiana – Summary of Findings

Commissioner Temple,

On Monday, February 5, 2024, the Senate Committee on Health and Welfare and the Senate Committee on Insurance ("Committee") convened to hold a joint legislative oversight hearing on the proposed reorganization and sale of Blue Cross Blue Shield of Louisiana ("Blue Cross") to Elevance Health. The sale of a locally owned and operated insurance company with a well-respected reputation and a value of $3.4 billion to a multi-state insurance company worth more than $115 billion represents one of the most profound business transactions that will ever occur in this state. It will have direct and lasting effects on the lives of our people for years to come.

For nearly eight hours, the committee conducted an in-depth examination of the proposal and engaged in a robust dialogue with several witnesses. At the conclusion of the hearing, we find ourselves left with more questions and concerns than we had at the outset.

While our ability to intervene in this matter may be limited at this time, the laws that we have enacted in the Louisiana Insurance Code vest within the commissioner the authority to determine whether this reorganization and sale properly protects, serves the best interests of, and is fair and equitable to policyholders and members.

This correspondence serves as a summary of findings based on concerning information amassed in the weeks leading up to and throughout the hearing that should be of importance to the regulatory body charged with overseeing this process. While not intended to be exhaustive, noted below are several problematic issues and occurrences brought to our attention during the course of the committee hearing. For ease of reading, this correspondence sets forth three main areas of concern captioned "regulatory process," "Elevance Health," and the "Accelerate Louisiana Initiative."

Testifying as witnesses before the committee were David Caldwell representing the Louisiana Department of Insurance; Dr. Steven Udvarhelyi, Darrell Langlois, and Korey Harvey representing Blue Cross; Morgan Kendrick representing Elevance Health; Dr. Christy Valentine Theard representing Healthy Blue Louisiana (Elevance); and Tim Barfield, Blue Cross Board member, representing The Accelerate Louisiana Initiative (Foundation/Trust).

REGULATORY PROCESS

The regulatory and voting process involved in the proposed reorganization and $2.7 billion sale of Blue Cross generated much discussion throughout the hearing. Special attention was given to the procedural timeline and sequence of events that could occur within the next thirty days and the integrity of the voting process, especially vote steering and lack of unbiased information provided to voters. Throughout the hearing, the committee made several concerning findings regarding timelines and voting:

Timeline

1. **Scheduled timeline.** While the proposed reorganization/sale has been in the public view for more than a year in one form or fashion, the current timeline for public hearing, voting, and final determination appear to be compressed. There are several steps in this process that current timelines suggest could all be resolved within thirty days. It was admitted during the testimony that there is an urgency by the parties involved to get this resolved prior to the start of the 2024 Legislative Session, which is set to convene on March 11, 2024. There was also concern expressed that having the public hearing the day after Mardi Gras could prevent some interested members of the public from participating.
2. **Prematurely collecting votes.** Votes are already being solicited and collected prior to the public hearing. It appears that the voting policyholders do not have the benefit of all sides and positions prior to casting their votes.

Voting Confusion

3. **Widespread public confusion on who gets to vote on the reorganization/sale.** While nearly 1.9 million Louisiana residents have Blue Cross cards in their wallets, pay Blue Cross premiums, and are Blue Cross policyholders, only 95,000 of them are "eligible policyholders" who have a vote in this matter. This very small percentage of policyholders are the only ones with an opportunity to vote on a transaction that will affect almost half of the population of Louisiana, nearly every healthcare provider in the state, and several thousand Blue Cross employees. In addition, the committee discussed the more than 200,000 government employees, retirees, and their dependents who are covered by Blue Cross through the Office of Group Benefits who have no vote in this matter.

Vote Steering

4. **No unbiased information being provided to voters.** All information being shared with the voting policyholders is coming directly from Blue Cross and is all <u>in support</u> of the proposed reorganization/sale. No independent assessments of the proposal has been shared with the voting policyholders and efforts by those who oppose the proposal were thwarted under the auspices of a HIPAA violation.
5. **Ballot influence techniques.** An actual ballot shared with the committee shows the option "For" in bigger bold font as opposed to the option to vote "against." The ballot lacks any real explanation of what the individual is voting on and lacks clarity on how and when a policyholder can change their vote.
6. **$3000 offer for a vote.** On printed material shared with the committee, Blue Cross touts as the first of seven benefits of casting a "For" vote, a "Cash payment to Eligible Members of approximately $3,000 per Eligible Policy."
7. **Telephone proxy votes.** Blue cross is allowing telephone proxy voting but could not assure the committee on how the vote was being verified or recorded.

8. **Same call to promote the plan and solicit a vote.** The committee received testimony that in the same call to confirm receipt of voting materials and promote "A Better Blue for You," the soliciting caller will also ask if the voting policyholder would like to cast their vote during the same conversation.
9. **Misleading Blue Cross fact sheet influencing voters.** The committee was shown a document titled "Facts about the Proposed Blue Cross and Blue Shield of Louisiana Acquisition by Elevance Health." This document identified "myths" and countered with "truths" according to Blue Cross. Some of the "myths" included concerns about losing access to doctors and hospitals, premium increases, and the loss of jobs. The fact sheet states as truths that these things will not happen. During testimony, it was stated several times throughout the day that neither Blue Cross nor Elevance intended for any of these things to happen, but they could not guarantee them. The document also included a "myth" that policyholders are not getting any portion of the sale proceeds. While it is a "truth" that policyholders are getting *a portion* of the sale, the full "truth" is that it is limited to a very few policyholders and they are only getting 9% of the sale proceeds.

Voting Integrity

10. **Blue Cross board vote influence raises ethics concerns.** Several concerns were brought during the hearing about the fiduciary responsibilities of the Blue Cross board to protect the policyholders. The board members have a vested financial interest in the reorganization/sale taking place so their urging yes votes could have ethics consequences.

ELEVANCE HEALTH

A very thorough analysis of Elevance Health was conducted throughout the hearing and many questions arose regarding their integrity and business practices. The committee discussed whether this information was available to the Louisiana Department of Insurance and was pleased that Mr. Caldwell stayed present for the duration of the entire hearing to listen to all of the testimony and discussion. It should be noted that the witnesses representing Blue Cross, Elevance, and the Accelerate Louisiana Initiative did not stay to hear public testimony. In the course of analyzing Elevance Health the committee made several concerning findings regarding their fines, penalties, litigation, claims denial, and employee retention:

Fines/Penalties/Lawsuits

11. **Incomplete data on administrative actions and fines.** The committee was provided with a Louisiana Department of Insurance document titled "Administrative Actions and Fines Above $250,000.00 for the past 5 years." This document is apparently a component of the resources being considered in the evaluation process and it is a public document. The administrative fines listed on this document total just over $27 million. However, the committee quickly identified several problems with the document that could render this number grossly under calculated. First, Anthem, the predecessor of Elevance, has a long history of incurring fines and penalties so it seems arbitrary to limit this data to just five years. In addition, it also seems arbitrary to limit the data to just fines over $250,000. It is possible that Anthem/Elevance incurred any conceivable number of fines under $250,000.
12. **Unreported or confirmed fines.** Information regarding significant fines were shared with the committee by constituents and obtained through cursory research that were not reflected on the department's document. For instance, $16 million owed to HHS Office of Civil Rights for a record HIPAA data breach violation was not included. One constituent shared with the committee that

the more accurate total of fines in other states since 2000 equals nearly $1 billion for a staggering 476 penalties.

13. **Significant civil litigation.** Through information provided by constituents and cursory research, the committee was made aware of the fact that Elevance has been involved in significant litigation. None of this was reflected on the department's document, but warrants attention and further discussion. For example, there appears to have been a $23.6 million settlement for a breach of fiduciary duty on 401(K) management, $594 million class action antitrust settlement regarding BCBS, settlement in a lawsuit brought by Valley Health over $11.4 million in past due claims, and settlement in a lawsuit brought by Bon Secours over $93 million in unpaid claims.
14. **Significant federal litigation.** Elevance is currently involved in significant federal litigation as a defendant in a US federal civil fraud action in the US District Court for the Southern District of New York. In this case, they are accused of submitting false diagnosis code claims to Medicare to generate tens of millions of dollars in fraudulent revenue. This concerned the committee greatly as it goes directly to the integrity of this company.

Claims Denial

15. **High rate of claims denial.** Several constituents who are members of reputable health provider trade associations contacted their counterparts in other states to discuss their experience with Elevance. The committee learned that the experience has not been good and that Elevance has a higher than usual rate of claims denials. In fact, the committee learned that the Georgia Office of Inspector General found that their rate of claim denial was 33.7%, more than twice as high as the rates of the other managed care organizations that they reviewed.
16. **Impact on state employees, retirees, and dependents.** Based on the information the committee received regarding claims denials and other challenges of working with Elevance, there was discussion about the current Office of Group Benefits contract with Blue Cross and whether Elevance was assuming that contract as a successor or if there would be an opportunity to renegotiate.

Workforce reductions

17. **The impact to the 2,500 Blue Cross employees.** During the hearing, multiple assurances were given that Elevance would retain the 2,500 Blue Cross employees. However, their own 2023 3rd Quarter earnings report indicates that they use staff reduction, relocation, and office closure to improve financial standing.

CMS Star Rating Decline

18. **Elevance has a declining star rating.** The Centers for Medicare & Medicaid Services (CMS) uses a five-star quality rating system to measure the experiences Medicare beneficiaries have with their health plan and health care system. Health plans are rated on a scale of 1 to 5 stars, with 5 being the best. Blue cross currently has a 4.5 star rating. Elevance has experienced a decline from 4.5 stars to 3.5 stars due to poor performance in metrics including member access to appointments and care.

ACCELERATE LOUISIANA INITIATIVE

The Accelerate Louisiana Initiative, referred to throughout the hearing as the foundation or trust, proved to be one of the more controversial components of the reorganization/sale proposal discussion by the committee. It is included as a condition of the sale and sees $3 billion from the sale redirected from the

policyholders to the control of a nonprofit organization presently controlled by four men who are current Blue Cross board members. Aside from funding it, Blue Cross and the foundation/trust took great measure to distance themselves from each other. In fact, it was stated during the testimony that the Blue Cross Foundation would continue to operate and function in its same capacity after the sale as it does today. This new foundation/trust is something completely different. Throughout the hearing, the committee engaged in an extremely detailed discussion relative to the proposed redirecting of funds, legal formation, mission and purpose, and management of the foundation/trust, all of which yielded even more questions that warrant continued scrutiny by the legislature and any other regulatory body with authority and jurisdiction of charitable orgainizations/trusts:

Redirecting Funds to the Foundation/Trust

19. **$3 billion from the sale is being redirected from the policyholders to the foundation/trust.** Understanding how the $3 billion is generated was the initial point of discussion, especially since the sale price is $2.7 billion. According to the Rector & Associates analysis commissioned by the department, the current value of Blue Cross is $3.4 billion. Blue Cross is proposing to make a $667 million contribution to the foundation/trust before the sale. After the sale, from the proceeds received from Elevance, Blue Cross will contribute an additional $2.4 billion to the foundation/trust, which will result in a trust worth more than $3.1 billion.
20. **The policyholders are being asked to vote on the reorganization, but not whether they want to donate 91% of the value of their investment.** Extensive discussions were had regarding why the money wasn't just being returned to the policyholders either outright or in the form of a person specific health savings account or by development of a trust that benefits the total 1.9 million Blue Cross policyholders to cover medical expenses such as deductibles, co-pays, or denied services.

Legal Formation of the Foundation/Trust

21. **Much uncertainty on the legal formation of the foundation/trust.** Throughout the hearing there was extensive fluidity in the entity being a 501(c)(3) without a trust, 501(c)(4) without a trust, or 501(c)(4) with a trust. The committee was told by the witness during the hearing that the addition of the special charitable trust to hold the funds came at the direction of the Governor and his staff. The committee had extensive questions regarding the legal parameters of each of these United States Internal Revenue Code designations, especially as it relates to political activity and expenditure of funds.
22. **New legal designation the legislature "must" give them.** One of the more surprising components in "The Foundation & The Trust" provisions of the "Member Information Statement" that generated a lot of discussion was regarding proposed legislation. The committee reviewed the language which purports to impose a requirement on the legislature to enact a new law exactly as the foundation/trust wants it to read. It states in part that the legislation "must provide for delegation of authority," certain "limitations on liabilities," and "must also permit the trust instrument to be amended by the trustees without court involvement." It goes on to say that the proposed legislation "must not (i) change the purpose of the Trust, (ii) require amounts be paid to specific recipients or causes or (iii) change the board of trustees of the Trust." It concludes by stating "Finally, no amendments to the Proposed Legislation that are enacted that materially alter the terms above would be allowable." Extensive discussion ensued relative to the purported inability to comply with the current laws regarding nonprofits or trusts in Louisiana. The committee had several questions regarding the need for a new type of trust that would operate outside of the scope of current laws governing non-profits and trusts while having nonprofit rights and protections.

23. **No defined beneficiary of the trust.** There was much discussion regarding the use of a trust and how a trust is typically established for an identified beneficiary or class of beneficiaries. In this case, the beneficiary of the trust is the "people of Louisiana." In discussing how the trust is being redirected from the policyholders, the committee noted that the trust beneficiaries are not the Blue Cross policyholders, but the broadly identified "people of Louisiana."

Mission and Purpose of the Foundation/Trust

24. **Mission of the foundation/trust is extremely broad.** The foundation/trust's mission is to "improve the health and lives of the people of the State of Louisiana," which the committee noted is admirable but is very broad and could lend itself to a litany of funded and supported causes.
25. **Purpose of the foundation/trust is extremely generic.** The foundation/trust's four focus areas were described by the witness as "bold and transformative." The committee noted that the focus areas are all things that several other state agencies, institutions, charities, and foundations are already committed to working on. Three of the four focus areas include moving "Louisianans from dependence to independence," "improving health outcomes," and "healthcare workforce development." The fourth focus area is "optimizing government performance" to "supercharge agency performance and program optimization," which appeared to the committee to potentially be providing for government consulting contracts.
26. **"Relatively small" portion of resources.** The foundation/trust generated extensive discussion regarding the intent to "allocate a relatively small portion of its resources to innovation, research and development, and pilot programs designed to improve the health, health outcomes, and social determinants of health in Louisiana." The committee had several questions regarding what is considered a "small portion" of $3.1 billion and why these particular initiatives were being relegated to a "small portion."
27. **No one but Pennington.** The foundation/trust favors only Pennington by stating in their plan "other than Pennington Biomedical Research Center, educational institutions and institutions of higher education shall not be eligible to receive these resources." This generated a thorough debate as each member of the committee could name an institution in their district that could contribute to advancing the stated purpose of the foundation/trust, especially workforce development. The committee was told by the witness during the hearing that the exclusion of all entities other than Pennington came at the direction of the Governor and his staff.

Management of the Foundation/Trust

28. **Blue Cross board placement and compensation.** According to the Rector & Associates analysis commissioned by the department, the current Blue Cross board members will either move to the BCBSLA Advisory Board where they will be compensated "at least" $105,000 annually for "at least" ten years. Separate from the BCBSLA Advisory Board will be the board of the foundation/trust, which currently has only four members who are Blue Cross board members and is expected to increase to nine to eleven members with one member appointed by the Governor. The witness testified that they had provided the Governor with the list of candidates they were pursuing for the remaining board seats but could not share it with the committee. The board salaries are still being assessed by a consultant, but the chief executive office is expected to have a salary of around $500,000 to $700,000. The committee had extensive questions about compensation and selection of board members.
29. **Good "intentions" and "hopes."** Throughout the hearing the witnesses on behalf of all parties involved, but particularly the foundation/trust, used phrases like "we intend" or "we do not intent" or "hopefully." This gave the committee significant concerns since the legislature operates in terms of what you can and cannot do, not what you intend to do. From lobbying to political

influence to salaries to rate cuts and premium increases, the committee was very concerned with the use of non-concrete parameters and rules of engagement.

30. **Change is always possible and inevitable.** The foundation/trust witness stated to the committee several times that the governing documents established by the foundation/trust, including the Articles of Incorporation and Bylaws, could not be changed. This was intended to give the committee comfort, but several lawyers on the committee and lawyers who observed the entire day's hearing and testified in opposition said that there is nothing absolute and with a proper vote and legal compliance anything can be changed. The trust itself may be irrevocable, but all of the terms and conditions may be revisited.

Upon conclusion of the witness testimony, several members of the public either submitted a card in opposition to the proposed reorganization/sale or offered testimony before the committee. Those members of the public include Mariah Bowen with the Louisiana State Medical Society, Tut Kinney, John Bradford, Bryan Gautreaux, Kevin Landreneau, Chris Alexander, Brian Albrecht, Coleman Brown, and Bridgette Gilbert. All of the members of the public present opposed the proposed reorganization/sale and concurred with many questions and concerns expressed by the committee throughout the hearing. All of the written materials submitted by the public are included with this correspondence.

This was not an exercise taken lightly by the members of the Senate Committee on Health and Welfare and the Senate Committee on Insurance. Extensive research was conducted by the members in anticipation of the meeting to be prepared for an informed and thorough discussion. All of the materials reviewed by the committee before and during the hearing are included with this correspondence. In addition, the committee hearing in its entirety can be viewed at Hearing Part 1 and Hearing Part 2.

We take seriously our responsibility to provide oversight on matters of such importance that nearly every family in this state will be impacted in some form or fashion by this proposal. We will continue to have hearings on this matter regardless of what transpires within the next thirty days because whether the proposal advances or not, clearly Blue Cross believes it needs additional resources to continue to serve the people of Louisiana.

The responsibility for approval is ultimately within your control. As stated by your executive counsel during the hearing, your staff is doing research to prepare for the public hearing and decision-making that soon follows. We understand that you may approve the proposal, reject the proposal, or apply your own conditions for approval. We request that you consider the information contained in this correspondence as there are significant questions and concerns that have not been properly addressed regarding the integrity of the voting process, the quality of Elevance, and the positioning of the Accelerate Louisiana Initiative as an integral part of the entire proposal.

Sincerely,

Senator Patrick McMath
Health and Welfare, Chairman

Senator Kirk Talbot
Insurance, Chairman

Blue Cross Blue Shield of Louisiana
Reorganization and Acquisition Timeline

Reorganization/Demutualization

February 14 - 15:

Department of Insurance Public Hearings on the Reorganization/Demutualization of BCBSLA

February 21:

BCBSLA Policyholder Meeting to vote on the Plan of Reorganization/Demutualization

- 2/3 of voting members must approve the conversion of BCBSLA from a mutual insurance company to a stock insurance company

Between February 21 and 29:

Commissioner makes determination regarding the reorganization in accordance with R.S. 22:72

- "A. No domestic insurer may convert from a stock to a mutual, or from a mutual to a stock insurer, or from any type insurer to any other type insurer, except as provided in R.S. 22:71 unless a plan of conversion is submitted to and approved by the commissioner of insurance.
  B. The commissioner of insurance shall not approve any such conversion unless in his opinion after a full investigation the best interests of the policyholders of any such insurer will be served."

Acquisition

February 29:

Department of Insurance Public Hearing on the BCBSLA Acquisition

- The proposed public hearing on the acquisition will not be held if the Commissioner and/or the Policyholders do not approve the Plan of Reorganization/Demutualization of BCBSLA.

Within 30 days after the public hearing:

The commissioner shall make a determination regarding the acquisition in accordance with R.S. 22:691.4.

*Prepared by Senate Health & Welfare Staff based on information available on the Department of Insurance's public website: https://ldi.la.gov/public-hearing-and-rulemaking-notices