
In the Matter of
the Application by Cigna Corporation and
Halfmoon Parent, Inc. for Approval to Acquire
Control of Medco Containment Insurance
Company of New York

DECISION AND ORDER

BACKGROUND

On April 26, 2018, the New York State Department of Financial Services (the “Department”) received an application by Cigna Corporation (“Cigna”), a Delaware corporation, and Halfmoon Parent, Inc. (“Halfmoon”), a wholly owned Delaware corporation (together with Cigna, the “Applicants”), for approval from the New York State Superintendent of Financial Services (the “Superintendent”), pursuant to New York Insurance Law (“Insurance Law”) § 1506, to acquire control of Medco Containment Insurance Company of New York (the “Domestic Insurer”), a New York domestic stock accident and health insurance company and an indirect subsidiary of Express Scripts Holding Company (“Express Scripts”), a Delaware corporation (the “Proposed Acquisition of Control”).

On April 19, 2018, Cigna also submitted a request for an exemption from Insurance Law § 1506 regarding Cigna’s subsidiary, Cigna Life Insurance Company of New York, a New York domestic stock life insurance company (the “Exemption Request”), which would experience a technical change in one of its holding companies as a result of an internal restructuring should the merger contemplated in the Agreement and Plan of Merger executed between Cigna and Express Scripts, dated March 8, 2018 (the “Cigna/Express Scripts Merger”), be concluded.

Cigna and Express Scripts entered into Amendment No. 1 to the Agreement and Plan of Merger on June 27, 2018 to reflect the addition of certain directors to the Applicants’ Board of Directors post-closing and it was received by the Department on July 16, 2018 (these documents together with the April 26, 2018 application as supplemented, the “Application”).

On November 21, 2018, the Department noticed a public hearing on the Proposed Acquisition of Control, pursuant to Financial Services Law §§ 304-a, 305 and 306, and Insurance Law § 1506 (the “Hearing”). The Department has received only one request to testify, and one written comment letter. The Department has carefully and thoroughly examined the entire record of information before the Department, including the representations made by the Applicants and other relevant parties, and the requirements of the Insurance Law and Financial Services Law. In addition, the Department has raised with the Applicants certain concerns about the Cigna/Express Scripts Merger, and the Department has obtained substantial commitments from the Applicants to address those concerns.

As described in detail below, as a result of this review and given the specifics of the Application before the Department, the Superintendent has determined that (i) the Hearing scheduled for January 10, 2019 will not be necessary and (ii) the interests of the People of the State of New York are best served by approving the Proposed Acquisition of Control with the commitments that the Department has obtained from the Applicants, which are conditions to this approval as attached to this Decision and Order (the “Commitments”), along with the Department’s ongoing regulatory oversight.

APPLICABLE LEGAL STANDARDS

The Application was filed pursuant to Insurance Law § 1506 and 11 NYCRR § 80-1.6 of Insurance Regulation 52. Insurance Law § 1506(a) provides:

No person, other than an authorized insurer, shall acquire control of any domestic insurer, whether by purchase of its securities or otherwise, unless:

- (1) it gives twenty days’ written notice to the insurer, or such shorter period of notice as the superintendent permits, of its intention to acquire control, provided that the notice shall include an agreement by the person seeking to acquire control that the person will provide the annual report specified in section one thousand five hundred three of this article for so long as control exists; and
- (2) it receives the superintendent’s prior approval.

Because the Applicants are not “authorized insurers” within the meaning of Insurance Law § 107(a)(10), the Applicants cannot acquire control of the Domestic Insurer without the Superintendent’s prior approval.

Insurance Law § 1506(b) directs that “the [S]uperintendent shall disapprove [an] acquisition [of control] if [s]he determines, after notice and an opportunity to be heard, that such action is reasonably necessary to protect the interests of the people of this state.” Section 1506(b) further guides the Superintendent’s inquiry into whether to disapprove of an acquisition by providing an exclusive list of factors to be considered. Those factors are:

- (1) the financial condition of the acquiring person and the insurer;
- (2) the trustworthiness of the acquiring person or any of its officers or directors;
- (3) a plan for the proper and effective conduct of the insurer’s operations;
- (4) the source of the funds or assets for the acquisition;
- (5) the fairness of any exchange of shares, assets, cash or other consideration for the shares or assets to be received;
- (6) whether the effect of the acquisition may be substantially to lessen competition in any line of commerce in insurance or to tend to create a monopoly therein; and
- (7) whether the acquisition is likely to be hazardous or prejudicial to the insurer’s policyholders or shareholders.

Insurance Regulation 52 (11 NYCRR Part 80) lists information that an applicant must furnish to the Superintendent when applying for approval of an acquisition of control. The required

information includes the identity and background of the applicant; financial statements for the applicant; a description of the nature, source, and amount of consideration to be used in effectuating the acquisition; and a description of the applicant's objectives in acquiring control. See 11 NYCRR § 80-1.6.

Financial Services Law § 301(c) provides that the Superintendent has "the power to protect users of financial products and services," including health insurance. Financial Services Law § 201(b) further directs that the Superintendent "shall take such actions as the [S]uperintendent believes necessary to":

- (1) foster the growth of the financial industry in New York and spur state economic development through judicious regulation and vigilant supervision;
- (2) ensure the continued solvency, safety, soundness and prudent conduct of the providers of financial products and services;
- (3) ensure fair, timely and equitable fulfillment of the financial obligations of such providers;
- (4) protect users of financial products and services from financially impaired or insolvent providers of such services;
- (5) encourage high standards of honesty, transparency, fair business practices and public responsibility;
- (6) eliminate financial fraud, other criminal abuse and unethical conduct in the industry; and
- (7) educate and protect users of financial products and services and ensure that users are provided with timely and understandable information to make responsible decisions about financial products and services.

ANALYSIS

The Scale of the Merger

Under the Cigna/Express Scripts Merger, Cigna will pay approximately \$58 billion (\$27.5 billion in cash -- which includes \$24.5 billion in new debt comprised of approximately \$20 billion in senior notes, \$1.5 billion in Commercial Paper, \$3 billion per Term Loan Credit Agreement, and \$3 billion cash on hand -- and the remaining \$30.5 billion in new equity to be issued to Express Scripts' shareholders) to acquire Express Scripts, and will also assume \$13 billion of Express Scripts' debt, with the total value of the overall Merger being approximately \$71 billion.

In 2017, Cigna reported total revenues of \$41.6 billion. In the first six months of 2018, Cigna reported total revenues of \$22.9 billion. Cigna owns six insurers that are licensed to conduct insurance business in New York. In 2017, Cigna companies wrote approximately \$1.4 billion in direct premiums in New York. In the first half of 2018, Cigna companies have reported approximately \$765.7 million in New York direct premiums.

In 2017, Express Scripts reported total revenues of \$100.1 billion. In the first six months of 2018, Express Scripts reported total revenues of \$50.4 billion. In 2017, the Domestic Insurer wrote approximately \$115.8 million in direct premiums in New York.

Consideration of the Insurance Law § 1506(b) Factors

In considering this transaction and in obtaining the attached Commitments, the Department has considered each of the factors enumerated in New York's Insurance Law.

Financial Condition

The Cigna/Express Scripts Merger involves over \$24 billion in new debt, exclusive of the \$13 billion of Express Scripts' debt that the Applicants would be assuming to finance this transaction. Cigna has represented to the Department that it will use Cigna's revenues from other business operations to pay down the debt.

The Department seeks to ensure that New Yorkers will not pay to finance this acquisition, in insurance premiums or otherwise. Accordingly, in the Commitments, Cigna and Express Scripts have agreed to certain requirements to ensure that New Yorkers' insurance premiums are not used to pay the acquisition price of this transaction, that the company uses income from other operations to reduce its debt in a relatively short period of time, and that the company observes certain dividend restrictions and risk-based capital requirements subject to the Superintendent's approval.

Trustworthiness

A review of the biographical affidavits of the officers and directors of the Applicants that were submitted with the Application did not reveal any issues regarding the backgrounds of such individuals that would indicate untrustworthiness. The biographical affidavits have been forwarded to the Department's Albany office for further investigation. The Department has been furnished with a commitment that the Applicants will promptly replace any present and/or future principal officer or director of the Applicants or the Domestic Insurer that the Department has deemed to be untrustworthy upon conclusion of its investigation. Under the Insurance Law, the Department can always seek removal of an officer or director if its investigation reveals untrustworthiness.

Plan of Operations

The Applicants assert that the Cigna/Express Scripts Merger will result in operational synergies and that the combined companies will achieve substantial cost savings for the benefit of consumers. Accordingly, the Commitments include requirements of post-transaction reporting to the Department with respect to the claimed reduced costs, commitments assuring that benefits fairly reach all New York communities, and public service commitments, including financial commitments for health insurance education and enrollment and health care transformation measures.

The Department is also concerned with the relationship that would result among Cigna, on the one hand, and one of the largest pharmacy benefit managers ("PBM") in the country, Express Scripts, on the other hand. Express Scripts currently has access to drug claims data, patient electronic medical records, and other member information from insurers that use its PBM services

and that presently compete with Cigna and its affiliates. The Applicants commit to strong safeguards to protect and prevent the inappropriate sharing of consumers' data. Accordingly, the Commitments include substantial commitments to comply fully with the Department's cybersecurity regulation, as well as the commitment to an independent assessment, with periodic reports to the Department regarding such assessment, and an audit of the companies' firewall policies and protections.

Source of Funds

As discussed above, the Department has required Cigna and Express Scripts to provide enforceable Commitments, set forth in the attached, that New Yorkers will not pay to finance this acquisition, in insurance premiums, drug prices or otherwise.

Fairness of Consideration

According to the Application, the nature and amount of the consideration for the Cigna/Express Scripts Merger were determined by arm's length negotiations among the parties. The Department's review has not raised any concerns with the consideration to be paid from the perspective of the fairness of the purchase price for the stock of Express Scripts.

Effect on Competition

The Cigna/Express Scripts Merger raises the question of the cost of pharmaceuticals. Cigna is a large insurance group and Express Scripts owns a large PBM. Pharmaceutical costs represent the single largest driver of insurance premium increases today. The top three PBMs control 70% of the business in this highly opaque industry. Express Scripts is one of the three PBMs with this dominant market power, and the Cigna/Express Scripts Merger would further concentrate its market power by removing Cigna, which currently owns and operates its own PBM, as a competitor in the PBM market. Moreover, Express Scripts, as a PBM, would have the power to offer Cigna companies larger rebates or reduced fees than offered to other insurers. This would give Cigna an artificial competitive advantage that would draw policyholders away from other insurers and create an even larger market share for the enterprise. As a result, small and regionally-based carriers, without an affiliated PBM, may be disadvantaged, thereby harming markets and consumers.

Moreover, PBMs repeatedly are criticized for their lack of transparency and oversight. Without commitments to address these concerns, Express Scripts, within the Cigna holding company, could create the risk of increased costs of pharmaceuticals and insurance premiums paid by New York consumers.

Accordingly, the attached Commitments include substantial measures related to Cigna's commitment to New York policyholders, agreements that Cigna will not receive preferential pricing from Express Scripts, commitments to independent pharmacies, required reporting to the Department regarding pharmaceutical rebates, and commitments to PBM transparency. Express Scripts has also committed to not opposing the Department's proposed legislation to license and regulate PBMs.

Potential Hazard or Prejudice to Policyholders

Without a proper and effective plan to ensure that promised cost savings for policyholders are actually realized, the merger could be prejudicial to policyholders. Without greater transparency and oversight, PBMs' pricing models could result in higher medical-claims-related costs, potentially increasing premiums. Moreover, cyber-attacks are a growing threat and institutions must commit to strong data security protections.

Accordingly, to address these concerns, the Department has required Cigna and Express Scripts to commit to implementing their stated objectives across New York State, in a manner that serves New York's communities fairly and equitably, including those communities most in need of affordable health care services, as well as the uninsured. As set forth above, the attached Commitments also include reporting obligations, measures to address competition and cost concerns, data privacy protections and public service commitments.

Weighing of Insurance Law § 1506(b) Factors

The Department has evaluated the transaction based upon the nature of the Application that is before the Department, and the concerns set forth above. The Department has determined that obtaining commitments from Cigna and Express Scripts to address these concerns serves the People of the State of New York. Accordingly, as conditions to approval, and as set forth in the discussion above, the Department has required Cigna and Express Scripts to make significant commitments to the Department that address each of the Insurance Law factors. Those Commitments, signed by both Cigna and Express Scripts, are conditions to the Department's approval and are attached and fully incorporated into this Decision and Order.

The Department notes that it has a range of regulatory tools to ensure the realization of the promises that have been made by the parties in seeking the Department's approval and to ensure the continued protection of New York consumers. The promises made to the Department throughout the application process, as well as in the Commitments incorporated and attached to this Decision and Order, are subject to review and enforcement by the Department to ensure compliance and otherwise to protect the public. Furthermore, while the Department will have full powers to examine both Cigna and Express Scripts entities under New York's holding company statutes, the Department's proposed legislation to license PBMs is a necessary additional step. Accordingly, in the Commitments, Cigna and Express Scripts have committed that they will take no action to oppose such legislation.

ORDER

WHEREAS, the Department has reviewed the complete record before the Department, which includes the Application; representations made by Cigna and Express Scripts in the course of the Department's extensive review of the Application; and the opinions of the expert staff of the Department;

WHEREAS, upon that record, the relevant provisions of the Insurance Law and Financial Services Law, the parameters of the specific application before the Department, the attached Commitments made by Cigna and Express Scripts, and the Department's regulatory and enforcement powers over future matters regarding Cigna and Express Scripts, the Superintendent has found that disapproval of the Proposed Acquisition of Control is not necessary to protect the interests of the People of this State; and

WHEREAS, based on the representations made in the Exemption Request, and in reliance on the truthfulness of such representations, the Superintendent has found that the Exemption Request should be approved;

NOW, THEREFORE, I, Maria T. Vullo, Superintendent of Financial Services of the State of New York, having found that disapproval is not necessary to protect the interests of the People of New York, based upon the Application and documents furnished in connection therewith and in reliance upon the commitments and representations made to the Department, and the Department's regulatory authority under the New York Insurance Law with respect to all controlled persons within a holding company of all insurers, domestic or foreign, licensed in New York, and the Department's authority under the Financial Services Law, do hereby **APPROVE** the Exemption Request and the Proposed Acquisition of Control, subject to the attached Commitments.

Dated: December 13, 2018

SO ORDERED:



Maria T. Vullo
Superintendent of Financial Services

Cigna-Express Scripts: Conditions for DFS Approval

Cigna Corporation, Halfmoon Parent, Inc. (together, the "Applicants"), Express Scripts Holding Company (together with the Applicants, "Cigna/Express Scripts") and their applicable subsidiaries agree to the following commitments:

Financial Condition

1. **No New York Funds for Acquisition.** Upon consummation of the Proposed Acquisition of Control, Cigna/Express Scripts shall: (a) *Assets*: not dispose of or otherwise use assets of Medco Containment Insurance Company of New York (the "Domestic Insurer") or Cigna Life Insurance Company of New York ("CLICNY" and, together with the Domestic Insurer, the "NY Domestic Insurers") or any other insurance subsidiaries of Cigna/Express Scripts that are licensed to transact comprehensive health insurance business in New York (collectively, the "Foreign NY Insurers") for the purpose of repaying any debt incurred to finance the Proposed Acquisition of Control, use no part of the assets of the NY Domestic Insurers or the Foreign NY Insurers to pay, reimburse, or otherwise fund both the cash financing portion of the Proposed Acquisition of Control and the substantial debt related to the financing of the Proposed Acquisition of Control except, with respect to this clause (a), as approved or otherwise permitted by the relevant agency with regulatory authority; (b) *Costs*: not pass onto the NY Domestic Insurers, the Foreign NY Insurers or New York insureds any acquisition costs or other consideration, including without limitation executive compensation paid to or accrued for the benefit of any executive officers of Cigna/Express Scripts in connection with, or triggered by, the Proposed Acquisition of Control; (c) *Rates*: not seek premium rate increases applicable to New York insureds that are intended to be used, or are used, to pay for the cost of the Proposed Acquisition of Control. Cigna/Express Scripts represent and warrant that premiums and cost-sharing obligations payable (including copayments and deductibles) by New York insureds for products offered by the NY Domestic Insurers and the Foreign NY Insurers shall not increase as a result of costs incurred in financing, analyzing and/or consummating the Proposed Acquisition of Control ("Acquisition Costs"). (Such Acquisition Costs include, but are not limited to, attorneys' and investment bankers' fees, travel expenses, due diligence expenses, and expenses related to current or future acquisitions by Cigna/Express Scripts.); (d) *No Dividends*: cause the NY Domestic Insurers to refrain from declaring and/or paying any dividends (ordinary or extraordinary), without the express prior approval of the Superintendent for a period of three years from the consummation of the Proposed Acquisition of Control.
2. **Prompt De-Lever.** The Applicants have represented in the Application that the combined entity will de-lever to a debt-to-capital ratio below 40% within 18 to 24 months following the Proposed Acquisition of Control. Upon the consummation of the Proposed Acquisition of Control, Cigna/Express Scripts will provide to the Department semi-annual reports on the status of the plans to de-lever with regards to the debt financing obligations. Such semi-annual reports shall be submitted to the Department as a separate document and shall include the current leverage ratio.

3. **Maintain RBC.** Cigna/Express Scripts shall cause the NY Domestic Insurers, to maintain a minimum Authorized Control Level Risk Based Capital (RBC) level of 300% at all times. Beginning five years following the consummation of the Proposed Acquisition of Control, Cigna/Express Scripts may ask the Department to revise the 300% requirement, and if so requested, the Department will consider the request in good faith.

Plan of Operation

4. **Document Synergies.** The Applicants have represented in the Application that certain synergies will be achieved as a result of the Proposed Acquisition of Control. As such, Cigna/Express Scripts shall provide to the Department annual reports for three years documenting details of the progress toward achieving such estimated synergies annually (total cost savings reflected in terms of premium reductions, out of pocket cost savings and/or other savings accruing to customers and consumers), both (a) on a nationwide basis and (b) specific to the New York business of the NY Domestic Insurers and the Foreign NY Insurers.

Commitment to New York Insureds

5. **Maintain Products, Services Area, Networks.** Cigna/Express Scripts agree that, for a period of three years from consummation of the Proposed Acquisition of Control, (a) the NY Domestic Insurers shall, continue to offer their current Medicare Part D prescription drug plans and comprehensive health products, if any, and the Foreign NY Insurers shall maintain substantially the same offering of comprehensive health products, if any, in each case, throughout their current service area in New York, except to the extent that changes to such products or service areas are otherwise approved by the Department or required by the Centers for Medicare and Medicaid Services, and (b) the NY Domestic Insurers and the Foreign NY Insurers shall use reasonable efforts to maintain their current networks of providers, including pharmacies, without material changes, except to the extent such changes are otherwise approved by the Department or required by the Centers for Medicare and Medicaid Services. Nothing herein shall preclude the NY Domestic Insurers or the Foreign NY Insurers from offering new products with different networks.
6. **New York Business.** Cigna/Express Scripts are committed to seeking opportunities to write new business in New York. During the two year-period from the consummation of the Proposed Acquisition of Control, Cigna/Express Scripts will evaluate in good faith opportunities to offer, through an existing or new insurer domiciled in New York, one or more new products and will report to the Department annually regarding such efforts.
7. **No Material Change to Business.**
 - (a) Upon the consummation of the Proposed Acquisition of Control, Cigna/Express Scripts shall refrain from the following actions: (i) liquidating the NY Domestic Insurers; (ii) selling any material portion of the assets of the NY Domestic Insurers; (iii) merging the NY Domestic Insurers with any other person or persons; or (iv) making any other material change with regard to business, corporate structure,

management or general plan of operations of the NY Domestic Insurers, all without the express prior approval of the Superintendent.

- (b) Except to the extent authorized or required by a regulatory authority with applicable jurisdiction, upon the consummation of the Proposed Acquisition of Control, Cigna/Express Scripts shall refrain from the following actions: (i) liquidating the Foreign NY Insurers; (ii) selling any material portion of the assets of the Foreign NY Insurers; or (iii) merging the Foreign NY Insurers with any other person or persons.

Commitment to New York's Improved Health Outcomes

- 8. **Care Improvements.** Cigna/Express Scripts shall roll out throughout New York State, and in scale that is reflective of New York State's market share of Cigna/Express Scripts' business, the enhanced care model as presented as part of the Application – such as improvements in total cost of care, Net Promoter Score, cost trend and closures in gaps of care such as diabetes care, cardiology care and opioid abuse. Cigna/Express Scripts shall also provide to the Department an annual report for a period of three years from consummation of the Proposed Acquisition of Control, detailing quality metrics applied and measured by Cigna/Express Scripts along with additional details indicating improved health outcomes.
- 9. **Public Service.** Cigna/Express Scripts agree to pay \$20 Million over three years to New York State, subject to a plan approved by the Superintendent of Financial Services and the Director of the Division of the Budget. Such plan shall include, but not be limited to: (i) funds paid to organizations to support health insurance education and enrollment activities; and (ii) funds to strengthen New York health care transformation activities, which may include payments to the New York State Health Care Transformation Fund.

Data Privacy

- 10. **Firewalls and Data Use.**

Effective upon the consummation of the Proposed Acquisition of Control, Cigna/Express Scripts shall adopt a firewall policy creating appropriate functional separation between Cigna employees involved in sales and account management, pricing and underwriting, and proposals and marketing for Cigna's Health Plan and competitively sensitive information belonging to Express Scripts' health plan clients ("Confidential Information"). No later than 45 days following the consummation of the Proposed Acquisition of Control, Cigna/Express Scripts shall retain an independent consultant selected by Cigna's Chief Compliance Officer and reasonably acceptable to the Department to perform an assessment of such firewall policy. Cigna/Express Scripts shall provide the Department with periodic reports regarding such assessment as well as a copy of such consultant's final report together with Cigna/Express Scripts' plans to address any recommendations and, within 90 days of receipt, a progress report as to implementation. In addition, Cigna/Express Scripts shall submit to the Department a copy of the firewall training taken by Cigna and Express Scripts employees regarding the firewall policy.

No later than one year following the consummation of the Proposed Acquisition of Control or such later date as approved by the Department, Cigna/Express Scripts shall submit to the Department a copy of an audit conducted by an independent big four accounting firm to assess that Cigna employees have not accessed the Confidential Information in violation of the firewall policy submitted to the Department pursuant to this condition.

11. **Adherence to New York Cybersecurity Regulation.** The NY Domestic Insurers, the Foreign NY Insurers, Express Scripts, Inc., Medco Health Solutions Inc. and Cigna Pharmacy Management shall adhere to New York's cyber-security regulations (23 NYCRR Part 500) and have submitted and will submit the required annual certificates of compliance to the Department.

Competition

12. **No Preferential Pricing.** Express Scripts and its subsidiaries agree to provide pricing for pharmacy benefit management services to the NY Domestic Insurers or Foreign NY Insurers without regard to the fact that the health insurer is Cigna-affiliated.
13. **Independent Pharmacies.** Cigna/Express Scripts strongly support the role of independent pharmacies in the healthcare system. The NY Domestic Insurers and the Foreign NY Insurers will strive to maintain a participating provider network that includes both chain and non-chain pharmacies for insured products in New York. For a period of three years from consummation of the Proposed Acquisition of Control, the NY Domestic Insurers and the Foreign NY Insurers shall annually report to the Department the percentage of non-chain New York pharmacies in their New York pharmacy networks.

Pharmaceutical Costs

14. **Pharmacy Rebates to Policyholders.** Cigna/Express Scripts shall provide to the Department an annual report describing all pharmacy rebates received by or credited to the NY Domestic Insurers, as well as those pharmacy rebates received or credited to the Foreign NY Insurers in connection with New York business insured or administered by such affiliates. The report shall include at a minimum, by line of business, the volume of rebates returned to employers or insureds, the volume of rebates credited at the point of sale, and the volume of rebates retained by the insurer.
15. **PBM Legislation.** Cigna/Express Scripts agree to take no action to oppose legislation the same as or substantially similar to Part J of FY 2018 New York State Executive Budget Health and Mental Hygiene Article VII Legislation. Cigna/Express Scripts commit to serving as a resource to the Department and providing constructive input and expertise to the Department with respect thereto.

Nothing herein shall preclude Cigna/Express Scripts from asserting that reports provided pursuant to the commitments contained herein are exempt from disclosure pursuant to the provisions of the Public Officers Law.

Cigna Corporation

Date _____

Earl Palmer

Date _____

By: Eric Palmer, President Halfmoon Parent, Inc

By:


Date _____

Cigna Corporation
By: _____

Date

Halfmoon Parent, Inc.
By: _____

Date


Express Scripts Holding Company
By: Timothy Westworth
President and Chief Executive
Officer

Date 12/12/18