Michael Johnson
2818 Hollyridge Drive
Los Angeles, CA 90068
213-447-9589
mikemsj@gmail.com

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David Caldwell
Executive Counsel
Louisiana Department of Insurance

Submitted via upload to LDI website

Re: Blue Cross and Blue Shield of Louisiana's Proposed Plan of Reorganization

Dear Mr. Caldwell:

I am a former public policy director for Blue Shield of California, which like Blue Cross and Blue Shield of Louisiana (BCBSLA) is a nonprofit mutual insurer. While serving in that role I gained significant experience dealing with issues relating to the public benefit obligations of nonprofit health insurers, and since my departure in 2015, have advocated for stricter enforcement of those obligations by regulators.

I write this to comment on the proposal by the directors of BCBSLA to convert the nonprofit health plan into a stock insurance company and then sell it to a for-profit conglomerate, Elevance Health. My comments expand on many of the points made by Jan Moller of the Louisiana Budget Project in his August 4 comment letter. As does Mr. Moller, I believe the Plan of Reorganization (the "Plan") does not meet the requirements for approval under the Louisana Demutualization Law.

I. The Plan Should be Required to Protect the Interests of the Public, as Well as Policyholders.

The Department of Insurance has given notice that in reviewing the Plan it will determine if it protects and serves the best interests of BCBSLA's policyholders.[1] As part of its review, it is critical that the Department determine whether the Plan also protects and serves the best interests of the Louisiana public. This is essential for two related reasons: one, BCBSLA was established to benefit the general public, as well as

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[1] The notice of the public hearing states that the Department will determine if the Plan "(1) properly protects the interests of the policyholders as such and as members; (2) serves the best interests of policyholders and members; and (3) is fair and equitable to policyholders and members as required by La. R.S. 22:236.4(A)."

its own policyholders; and two, a fundamental interest of policyholders as members of BCBSLA is that the corporation's core mission, which includes benefiting the general public, is carried out to its fullest extent.

Unlike a typical mutual insurance company, BCBSLA was not established solely for the benefit of policyholders, but rather for a broader social welfare purpose. As stated in its articles of incorporation, the purpose of the corporation is–and always has been–to "promote the welfare of the members of the Corporation *and* the general public." [emphasis added] In describing its mission on its website and in boilerplate language in press releases BCBSLA makes no reference to policyholders and instead states its mission as simply "to improve the health and lives of Louisianans."

BCBSLA, itself, recognizes that by virtue of the social welfare mission it was established to serve, its Plan of Reorganization must protect the interests of the general public. It proposes to do that by establishing a foundation that would benefit the general public by transferring to it 95% of the proceeds from the sale of BCBSLA.[2] BCBSLA states in the Plan that it shall provide such funds to the foundation "in furtherance of the purposes delineated in the Current Articles to work to improve the health and lives of the citizens of the State of Louisiana…and in exchange for the right to become a stock insurance company under the Louisiana Demutualization Law with the approval of the Commissioner."[3]

Under the Demutualization Law, the interests of policyholders consist of their interests as "policyholders as such *and* as members" of the corporation [emphasis added]. As members of BCBSLA, policyholders have a clear interest in the fulfillment of the corporation's core mission, which as repeatedly affirmed by BCBSLA is to "improve the health and lives of Louisianans." Accordingly, the Plan must by law provide for the delivery of this public benefit at least as fully as could be expected if BCBSLA were to remain nonprofit.

II. In its Current Form, the Plan Does Not Meet the Requirements for Approval.

The Plan falls short of the requirements for approval in the following respects, which are summarized below and discussed in more detail in the section that follows:

1. **No assurance of genuine benefit to the public.** Although the Plan would transfer over $3 billion to an entity BCBSLA describes as a foundation, it provides no assurance that those funds would truly and

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[2] According to Exhibit E of the Plan, the transaction is valued at $3.5 billion, of which 5% would be distributed to policyholders. As described in other portions of the Plan, the remainder, minus certain transaction expenses, would be transferred to the foundation.
[3] Plan of Reorganization, p.5.

effectively be used to carry out BCBSLA's mission to improve the health and lives of Louisianans.

2. **Director and management conflicts of interests.** The BCBSLA directors and top executives who are engineering the insurer's conversion and sale are all poised to receive substantial financial rewards if the reorganization and sale are completed. These conflicts of interest, especially since they remain mostly undisclosed, call into question whether the Plan BCBSLA's leadership has proposed and the sale price it has negotiated protect and serve the best interests of the public and policyholders.
3. **Risk of higher prices.** For obvious reasons, converting BCBSLA from a nonprofit into a for-profit risks driving up the prices that policyholders and prospective policyholders would have to pay for health insurance. This risk is magnified by the huge share of the private insurance market possessed by BCBSLA. The Plan submitted by BCBSLA deals with this risk not by proposing measures to mitigate it, but simply by dismissing it.

A. No Assurance of Benefit to the Public

As previously noted, the Plan proposes to protect policyholders' interest in furthering BCBSLA's core mission by providing that 95% of the proceeds from the sale of BCBSLA would be transferred to an entity that the Plan calls "the Foundation." However, despite the major role assigned to the Foundation in the reorganization, the Plan offers virtually no details about how the Foundation would operate. The Foundation has already been incorporated, and so basic governing documents for the entity–articles of incorporation and bylaws–must have been created. Yet BCBSLA has not included them in its filing.

It is unclear whether the lack of details provided about the Foundation is a function of BCBSLA's unwillingness to disclose its plans or is a reflection of the vague state of those plans. In January, when asked by a reporter for more information about the Foundation than the two-sentence description contained in a press release announcing the planned sale of BCBSLA[4], a company spokesperson said: "'Details of the foundation won't be finalized and announced until after the transaction closes."[5]

The absence of basic information in the Plan about how the Foundation would operate and be governed raises doubt about whether it would actually serve its stated

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[4] BCBSLA Press Release, "Elevance to Acquire Blue Cross and Blue Shield of Louisiana," January 23, 2023.

[5] "Blue Cross sale would create multibillion dollar foundation that would dwarf BRAF," Greater Baton Rouge Business Report, January 24, 2023.

purpose of improving the health and lives of Louisianans. And what little information *is* revealed suggests that doubt is well warranted. These revelations include the following:

- The directors of the Foundation would consist exclusively of four current BCBSLA board members, all of them white men and none with any apparent experience directing or managing a public benefit foundation, let alone one with a multi-billion-dollar endowment. Consequently, the Foundation would be led by a board that doesn't begin to reflect the diversity of the Louisiana public and lacks relevant experience.
- BCBSLA has incorporated the Foundation, not in Louisiana, but instead in Delaware.[6] Given that the Foundation is to benefit Louisianans exclusively, this seems an odd choice. Yet BCBSLA provides no explanation in the Plan for why it has done this. One clear effect, however, would be to weaken the Foundation's accountability to Louisianans.
- The Foundation will not be a real foundation. Despite the term BCBSLA uses in the Plan to describe the entity, BCBSLA has not established it as an organization recognized under federal tax law as a foundation, which is an organization meeting the requirements of Section 501(c)3 of the Internal Revenue Code.[7] BCBSLA has instead established it as a 501(c)4 tax-exempt organization, which allows the directors far greater leeway in what they can do with the organization's funds and gets them out from under the prohibition imposed by Section 501(c)3 on self-dealing transactions by directors. As a result, the directors of the "Foundation" could, for example, legally choose to spend some or all of the billions of dollars transferred to the entity on political campaigns, helping to elect their favored candidates to office. And even if the entity's original articles of incorporation or bylaws prohibited such activity, the directors could always amend them to allow it.

BCBSLA is absolutely correct that its Plan must include the establishment of a foundation in order to ensure that its assets continue to serve BCBSLA's public benefit mission of improving the health and lives of Louisianans. But what BCBSLA's directors are actually proposing to do is to transfer billions of dollars of BCBSLA's assets to the control of four of their own with little restriction on how that money can be spent. It is hard to imagine how this could be determined to protect and serve the best interests of members of either the public or BCBSLA, both of whom have a stake in the faithful execution of BCBSLA's mission of improving the health and lives of Louisianans.

B. Director and Management Conflicts of Interests

[6] See Agreement and Plan of Acquisition, p.1. The Agreement is attached to the Plan of Reorganization.
[7] IRS website page on Private Foundations.

A problem commonly affecting nonprofit-to-for-profit conversions of health insurers in the past has been that a nonprofit's leaders would often be positioned to gain financially from the conversion and that would sometimes lead to situations where it appeared that the leaders were acting for their own benefit at the expense of the public and policyholders. Such was the case, in fact, in an attempted conversion involving Elevance Health.

Under that 2001 proposed transaction CareFirst, the nonprofit Blue Cross and Blue Shield plan serving Maryland, Virginia, and D.C., would have converted into a for-profit company and then been acquired by WellPoint, as Elevance was then named. The deal was ultimately rejected by Maryland regulators, and in a report on their review the regulators "alleged that executive enrichment ($120 million in bonuses) was the principal motivation for conversion," according to an article in the journal Health Affairs.[8] Indeed, WellPoint's CEO testified to the regulators that rewarding CareFirst's executives had effectively been a requirement of gaining their assent to his company's acquisition of the insurer: "No bonus, no deal."[9]

With respect to the present transaction, arrangements appear to have been made for BCBSLA's CEO, Steven Udvarhelyi, and other top executives to be employed by Elevance following the acquisition, according to news reports[10] and a post on BCBSLA's website[11]. Such arrangements undoubtedly include agreements or promises regarding the amount of compensation to be paid to them. However, those amounts are not disclosed in the filings, so it is unknown whether Dr. Udvarhelyi or any other members of the executive leadership are set to receive significant pay increases or other financial benefits if the acquisition closes. The withholding of that information makes it difficult to trust that in negotiating and proposing the conversion and acquisition they have acted in the best interests of the public and policyholders rather than themselves.

Such trust becomes even more difficult to muster when the post-acquisition compensation that BCBSLA's directors have arranged for themselves to receive is considered. In a document filed by Elevance in connection with the proposed acquisition (and which Elevance sought to keep hidden from public view), an agreement is described whereby Elevance has promised to establish an "Advisory Board" and has

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[8] "For-Profit Non-Conversion And Regulatory Firestorm At CareFirst BlueCross BlueShield," Health Affairs, July/August 2004.
[9] Ibid.
[10] "Blue Cross sale would not result in layoffs, CEO says," Greater Baton Rouge Business Report, March 16, 2023.
[11] BCBSLA website page re acquisition.

committed to appoint each BCBSLA director (other than those who will serve on the "Foundation" board) to the board and pay that person at least $105,000 a year for a minimum of ten years.[12]

If Elevance deems it valuable to employ former BCBSLA directors in some capacity to advise it going forward nothing would prevent it from making such an arrangement after the acquisition is completed. The only imaginable purpose served in making the arrangement part of the acquisition agreement (and thus part of the Plan for Reorganization) is to provide an assurance of post-acquisition compensation for BCBSLA's directors, whose support Elevance needs in order to complete the acquisition. The existence of this arrangement calls into question whether BCBSLA's directors can be trusted to put the interests of BCBSLA's intended beneficiaries ahead of their own, and that inherently casts doubt that the Plan, including the acquisition agreement they negotiated with Elevance, protects and best serves the interests of the public and policyholders.

C. Risk of Higher Prices

BCBSLA claims in the Plan that its benefit to policyholders and anyone else who might obtain coverage from BCBSLA is that making the insurer a subsidiary of Elevance would enable BCBSLA to provide a variety of new services, such as "24-hour digital support" and a suite of "whole health solutions."[13] While policyholders might find some value in these new services, having access to affordably priced insurance is clearly a higher priority. Yet the planned conversion of BCBSLA into a for-profit insurer poses a significant threat to health insurance affordability and that threat is left completely unaddressed by the Plan.

The Plan entails taking a nonprofit health insurer, whose mission is to benefit policyholders and the broader public, and turning it into the subsidiary of a for-profit conglomerate whose mission is to make money for investors. On its face, such a move would seem quite likely to result in higher prices, especially in a health insurance market as concentrated as Louisiana's, in which BCBSLA has a 98% share of the market for individual coverage,[14] 85% share of the market for small group insurance,[15] and 69% share of the market for large group insurance.[16]

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[12] Exhibit 10: Form of Advisory Board Letter, Form A Statement re Application by Elevance Health for Approval of Acquisition of BCBSLA.
[13] Plan of Reorganization, p. 2.
[14] KFF, Market Share and Enrollment.
[15] KFF, Market Share and Enrollment.
[16] KFF, Market Share and Enrollment

BCBSLA has previously stated to its policyholders that “as a member-owned, not-for-profit company, it’s not important that we MAKE money. Breaking even, or nearly so, is mostly fine with us.”[17] [emphasis in the original] Unquestionably, this approach to profitability, and thus pricing, is not the same as that of a for-profit company.

The idea that a nonprofit-to-for-profit conversion would result in higher prices is not just theoretical. In a study published in 2019 by the American Economics Journal, Harvard Business School Professor Leemore Dafny examined the price effects of 11 conversions of previously nonprofit Blue Cross and Blue Shield insurers.[18] She found that such conversions resulted in average price increases of 13 percent in markets where the BCBS plan’s pre-conversion market share was greater than 20 percent. As Professor Dafny concludes in the article, “The results suggest for-profit insurers are likelier than not-for-profit insurers to exercise market power when they possess it.” Given that BCBSLA’s market share far exceeds 20%, the risk that Louisianans would face significantly higher prices for health insurance as a result of BCBSLA’s conversion into a for-profit insurer is very real.

Yet BCBSLA ignores the risk in its filing, stating simply that “[t]he Board believes that the Proposed Reorganization will not, in any way, adversely impact policy premiums…”[19] BCBSLA provides no analysis indicating the risk does not exist nor does it propose any measures to mitigate the risk. Since a small increase in prices would make healthcare less accessible, hurting policyholders and other prospective BCBSLA customers, the Plan clearly fails to protect and serve the best interests of policyholders and the public by failing to include any mitigation measures.

III. Only with Modifications Can the Plan Meet the Requirements for Approval.

For the reasons detailed above the Plan clearly fails to protect and serve the best interests of either policyholders or the public and therefore must be rejected in its current form. However, it may be possible to render the Plan acceptable for approval by requiring certain amendments and disclosures and by commissioning independent analysis of a couple of key questions. Specifically, I would urge you to consider the following:

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[17] The statement is contained in an article that was oringally posted on BCBSLA’s “Straight Talk” website section but has since been removed. It remains posted on the LinkedIn page page of the BCBSLA executive who authored the article.
[18] "For-Profit Non-Conversion and Regulatory Firestorm at CareFirst BlueCross and BlueShield," Health Affairs, July/August 2004..
[19] Plan of Reorganization, p. 2.

- **Regarding the Foundation:** Require that BCBSLA appoint a board to the entity referred to as the Foundation, Accelerate Louisiana Initiative, Inc., that includes a diverse cross-section of Louisianans and consists of a minority of directors who are former BCBSLA directors. BCBSLA should also be required to establish the entity as a tax-exempt 501(c)3 organization, the designation for foundations and public charities and the only way to ensure that the funds transferred to it could not be spent on political activity. In addition, absent a suitable explanation of how it benefits Louisianans to have the entity incorporated in Delaware, BCBSLA should be required to reincorporate it in Louisiana.
- **Regarding leadership's conflicts of Interest:** Require that all amounts and forms of compensation that Elevance has represented it would pay to CEO Udvarhely and other senior BCBSLA executives for service post-acquisition be publicly disclosed. In addition, the Department should require the removal of provisions in the Acquisition Agreement guaranteeing post-acquisition compensation for BCBSLA's directors. The Department should also, if it has not already done so, commission an independent valuation analysis of BCBSLA in order to ensure that BCBSLA's directors have negotiated an acquisition price that reflects the true market value of BCBSLA and is fair to policyholders and the public.
- **Regarding the risk of higher prices:** Commission an independent analysis, if not already done so, to determine the risk that the conversion and acquisition would result in higher prices, and absent a showing that such risk does not exist, require mitigation measures to minimize the risk to a point where it is clearly outweighed by the benefits of the Plan to the public and policyholders.

Both current policyholders and the broader Louisiana public have a big stake in the Department's careful of this enormously consequential proprosal. I hope that some of the information I've provided is helpful to you as you consider it.

Sincerely,

Michael Johnson

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