CABIA California
BUSINESS & INDUSTRIAL ALLIANCE

MEMORANDUM

DATE: March 10, 2021

RE: Julie Su, Nominee for Deputy Secretary for the Department of Labor

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Executive summary

Julie Su, the current Secretary for the Labor and Workforce Development Agency ("LWDA") in California, is President Biden's nominee to be the next Deputy Secretary for the Department of Labor. As California's Labor Chief, Su oversees the Employment Development Department ("EDD") which manages unemployment insurance claims for the state.

While Su had success as a civil rights attorney early in her career, she presided over severe operational failures at the EDD--*some of which directly resulted from her poor decision-making.* As California Assemblywoman Cottie Petrie-Norris (D-Laguna Beach) put it: "...[Su] has not done a good job at running the Employment Development Department and, as a result, has wasted billions of dollars and, more importantly, caused heartache for millions of Californians."

Early Failures Led to Later Disasters

- Shortly after Su was appointed to lead the LWDA, a state auditor urged EDD to address its mailing system after millions of Social Security Numbers were included in a mailing sent to wrong addresses. The auditor recommended prioritizing three main mailings used by EDD to contact unemployment insurance claimants. Under Su, the EDD did not prioritize addressing the auditor's recommendation.
- By the time the pandemic hit, EDD had not implemented the recommended changes. Hundreds of thousands of pieces of mail including full SSNs were sent to incorrect addresses or to fraudsters. One individual received more than 60 separate EDD mailing that included full SSNs of individuals who did not live in the home.

Unprepared for the Surge in Claims

- EDD was not prepared for the surge in unemployment insurance claims. Many Californians waited months to receive their claims. EDD, which had ignored advice to automate an identification verification process, needed to hand-check each claim that included mismatched identification information. Su later admitted that EDD was "woefully unprepared" to manage the crisis.

- To speed up the processing, Su ordered that EDD eliminate additional key safeguards that verified the eligibility of claimants.
- EDD also abandoned its process of halting payments until mismatched identification information is confirmed. EDD allowed payments to be dispersed without confirming identities, something of which LWDA claimed Su was unaware.

The $11 Billion Consequence of Su's Failures

- Fraudsters exploited EDD's failing system and limited safeguards. More than $11 billion in fraudulent payments were disbursed, including $1 billion to inmates, several of whom are on death row. The state auditor noted that much of this money is untraceable and will not be recouped by the state.
- Bank of America was the first to flag the fraud, not EDD. The bank consulted EDD about freezing the accounts to halt fraudulent payments. EDD agreed and ordered the accounts to freeze, but failed to notify the public. Many law-abiding claimants had their accounts frozen and were unable to access their benefit.
- After public outrage, EDD reversed the decision and unfroze all accounts, including those flagged for fraud.

As Deputy Labor Secretary, Su would oversee thirty department subdivisions. Based on her leadership in California and her supervision over EDD, Su has not demonstrated the ability to properly manage that responsibility.

1. Background Before Su's Public Sector Career.

Su, the daughter of Chinese immigrants, grew up in Wisconsin. (Exhibit A.)[1] She received her undergraduate degree from Stanford University in 1991 and her law degree from Harvard Law School in 1994. (Exhibit B.)[2] She speaks Mandarin and Spanish. (*Id*.)

After graduation from law school, Su practiced as a civil rights attorney in California. She began her career with a Skadden Fellowship working for the Asian Pacific American Legal Center ("APALC"), which describes its mission as to "advocate for civil rights, provide legal services and education, and build coalitions to positively influence

[1] Murphy, Katy; Mueller, Eleanor. "California labor secretary in serious contention for Biden Cabinet", available at https://www.politico.com/states/california/story/2020/12/10/california-labor-secretary-in-serious-contention-for-biden-cabinet-1345100. Politico PRO. Last viewed February 24, 2021.

[2] Labor & Workforce Development Agency. "Julie A. Su Biography", available at https://www.labor.ca.gov/about/secretary/. Last viewed February 24, 2021.

and impact Asian Americans, Native Hawaiians, and Pacific Islanders and to create a more equitable and harmonious society."[3] (Exhibits A, B.)

She achieved notoriety in 1995 when she and her team at the APALC represented seventy-two Thai garment workers who had been forced to work up to 16 hours per day in a compound near Los Angeles. The workers endured this treatment until they were rescued during a raid in 1995. (Exhibit A.) Su's team sued the sweatshop operators, along with the manufacturers and retailers that ordered from the sweatshop. (*Id.*) The lawsuit resulted in more than $4 million in restitution for the garment workers. (*Id.*) Su was credited with negotiating the workers' release from detention by the Immigration and Naturalization Service on bond, locating housing and jobs for the workers, and earning them legal immigrant status. (Exhibit C.)[4] The *Los Angeles Times* ran a profile of Su in 1995 in light of the successful litigation in which the author referred to Su as a "freedom fighter." (Exhibit C.)

Su later was elevated to Litigation Director of APALC. (Exhibit D.)[5] She co-founded Sweatshop Watch, a California-based organization committing to eliminating illegal practices and inhumane conditions that occur in sweatshops. (*Id.*) The MacArthur Foundation awarded her a "Genius" grant in 2001. (Exhibits A, D.)

2. Su's Appointment As Labor Commissioner.

In 2011, then-Governor Jerry Brown appointed Su as California's Labor Commissioner. As Labor Commissioner, Su was responsible for enforcing California's labor laws on behalf of the state. The Labor Commissioner reports to the Chief Deputy Director of the Department of Industrial Relations and is responsible for overseeing five sub-agencies – Bureau of Field Enforcement ("BOFE"), Wage Claims Adjudication ("WCA"), Retaliation Complaint Investigation Unit, Public Works Unit, and Licensing and Registration. (Exhibit E.)[6] The Labor Commissioner operates nineteen offices across the state. (Exhibit F.)

In May of 2013, Su released a report taking credit for the following accomplishments, among others:

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[3] The Skadden Fellowship Foundation, a grant from the law firm of Skadden, Arps, Slate, Meagher & Flom, provides two-year Fellowships to young lawyers to pursue the practice of public interest law on a full-time basis.

[4] Warrick, Pamela. "The Freedom Fighter: Lawyer Julie Su Finds Inspiration in the Thai Garment Workers She's Assisting", Sep. 4, 1995, available at https://www.latimes.com/archives/la-xpm-1995-09-04-ls-42199-story.html. Los Angeles Times. Last viewed February 24, 2021.

[5] MacArthur Foundation, Julie Su Biography, available at https://www.macfound.org/fellows/class-of-2001/julie-su. Last viewed February 24, 2021.

[6] Department of Industrial Relations Organizational Chart, available at https://www.dir.ca.gov/org_chart/org_chart.pdf. Last viewed February 24, 2021.

- Reducing the length of time from filing to hearing by the WCA of individual wage claims by more than two months;

- Highest total amount of hearing awards by the WCA in the past five years;

- Highest total amount awarded in garment claims by the WCA in the past five years;

- Highest amount on record of minimum wages assessed by the BOFE;

- Highest amount on record of overtime wages assessed by the BOFE;

- Highest amount of total wages assessed in nearly a decade by the BOFE;

- Highest total amount of civil penalties assessed in a decade by the BOFE;

- Highest combined amount of wages and civil penalties assessed since 2002 by the Public Works Unit; and

- Reduction in average number of days to complete investigations by the RCI. (Exhibit G.)

Su launched the first "Wage Theft Is A Crime" campaign to educate low-wage workers and their employers in California in 2014. (Exhibits B, H[7].)

Su received a number of accolades based on her achievements as an attorney, including being named one of the *Daily Journals* "Top 75 Women Litigators" in California, *California Lawyer's* "Super Lawyers" and becoming the first Labor Commissioner to be named one of the *Daily Journal's* "Top 75 Labor and Employment Lawyers." (Exhibit B.)

3. Su's Appointment As Secretary for the Labor and Workforce Development Agency.

In January 2019, Governor Gavin Newsom appointed Su as Secretary for the Labor and Workforce Development Agency ("LWDA"). (Exhibit I.)[8] The LWDA was created in 2002 and is the first California cabinet-level agency to coordinate workforce programs.

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[7] "Wage Theft Is A Crime," available at https://wagetheftisacrime.com/Campaign-Materials.html. Last visited February 24, 2021.

[8] "Governor Newsom Appoints Natural Resources and Labor Secretaries, Senior Advisors, and Communications Staff," available at https://www.gov.ca.gov/2019/01/11/governor-newsom-appoints-natural-resources-and-labor-secretaries-senior-advisors-and-communications-staff/. Last viewed February 24, 2021.

(Exhibit J.)[9] The LWDA oversees seven departments, boards, and panels – the Agricultural Labor Relations Board, the Department of Industrial Relations Board, Employment Development Department ("EDD"), Employment Training Panel, Public Employment Relations Board, and Workforce Development Board. (*Id*.) As of 2020, LWDA had almost 12,000 employees and a budget of just over $1 billion. (Exhibit K.)[10]

Background Information Regarding EDD.

As stated above, in her position as LWDA Secretary, Su was responsible for overseeing EDD. EDD administers California's unemployment insurance ("UI") program, which provides partial wage replacement benefits to eligible Californians who have become unemployed through no fault of their own. EDD also administers the State's Disability Insurance ("SDI") program, which provides partial wage replacement benefits to eligible California who are unable to work due to disability or pregnancy.

During the COVID-19 pandemic, EDD has been heavily criticized for two significant scandals – (1) rampant fraudulent recovery of UI benefits, resulting in billions of dollars lost by the State due to EDD's ineffective protection against fraud; and (2) significant delays in the payments of UI claims due to the EDD's lack of advance planning. These two issues are addressed below.

4. EDD's Failure To Prevent Fraud, Which Cost The State of California Billions of Dollars.

(a) Background Information Regarding General EDD Security Measures.

California residents who seek UI benefits ("claimants") must meet certain requirements. They must be unemployed through no fault of their own and they must also be able and available to work. Claimants need to provide identifying information, including their Social Security numbers, previous employers, and estimated earnings. This information is used to verify the individual's identity. The two main types of EDD fraud are benefit fraud and impostor fraud. Benefit fraud occurs when an individual misreports their earnings or employment history. An example of this type of fraud would be failing to notify EDD that an individual had returned to work and was no longer eligible for UI benefits. According to the California State Auditor, this type of fraud is easily detected by EDD's fraud detection because the benefits go to the individual filing the fraudulent claim. (Exhibit L. at p. 5)[11] Imposter fraud is when an individual files under a stolen identity.

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[9] "About the Labor and Workforce Development Agency, available at https://www.labor.ca.gov/about/. Last viewed February 24, 2021.

[10] 2019-20 State Budget, available at http://www.ebudget.ca.gov/budget/publication/#/e/2019-20/BudgetDetail. Last viewed, February 24, 2021.

[11] Report 2020-628.2, California State Auditor (January 2021), available at https://www.auditor.ca.gov/pdfs/reports/2020-628.2.pdf. Last viewed February 25, 2021.

According to the California State Auditor, the EDD uses the following system to detect imposter fraud:

> "One of the key ways that EDD attempts to prevent impostor fraud is by verifying the identities of prospective claimants as a condition to providing benefits, as federal law requires. Historically, this process has included basic automated verifications to ensure that the information that claimants submit to EDD, such as SSNs and driver's license numbers, match the information retained by the U.S. Social Security Administration and California Department of Motor Vehicles. If these verifications detect discrepancies, EDD activates a manual identity verification process to confirm whether the claimant is the true owner of the identity. When it activates the manual identity verification process, EDD's system suspends or stops payments to the affected claim while EDD attempts to verify the claimant's identity. EDD will pay eligible claimants whose identities it confirms for the weeks their payments were paused. This process does not block the claimants' access to UI benefit payments that EDD has already issued." (Exhibit L at p. 6.)

(b) March 2019 Audit of EDD Calls For Improved Security Measures.

In March 2019, two months after Su's appointment, the California State Auditor presented Governor Newsom and legislative leaders with an audit report regarding EDD's privacy protection practices when mailing documents to its customers. (Exhibit M at p. 1.) The Auditor determined that EDD likely sent more than 17 million pieces of mail containing full SSNs to more than a million people in fiscal year 2017–18. (*Id.*) According to the Audit, EDD "removed SSNs in January 2019 from a document that it mails about 4 million times per year," but did not "have a short-term plan for removing SSNs from the other high-volume documents [the Auditor] reviewed, which [EDD] mailed at least 13 million times per year." (Exhibit M at p. 15.) Based on this determination, the Auditor concluded that EDD's inclusion of full SSNs on mail "continues to put disability and unemployment claimants at risk of identity theft." (Exhibit M at p. 9.)

Consequently, the Auditor urged EDD to take near-term measures to better protect UI and SDI claimants. The Auditor acknowledged that EDD, at that time, intended to incorporate a unique identifier that would replace its need for printing full SSNs as part of its benefit systems modernization project, but that process would take at least five and a half years to complete. The Auditor stated that EDD could not wait that long to address the security threats.

To that end, the Auditor identified several interim solutions EDD could implement to replace full SSNs on each of the types of documents EDD receives. The interim actions the Auditor suggested included:

- Replacing full SSNs with a modified unique identifier on the EDD's high-volume documents;

- Providing claimants the option to receive documents online instead of by paper mail;

- Truncating full SSNs and enhancing system search functionality to include other key information, such as partial addresses and the last four digits of SSNs; and

- Replacing full SSNs with another unique identifier. (Exhibit M at p. 19.)

The Auditor estimated that these changes would take anywhere from twenty-six months to fifty-one months and cost a total of $36.8 million if EDD implemented all of the proposals.[12] (*Id*.) The Auditor recommended that EDD implement by December 2021, "one or more of the proposed solutions or another viable solution to discontinue its use of full SSNs as unique identifiers on all documents it mails to claimants." (Exhibit M at p. 23.) Further, the Auditor recommended prioritizing three specific documents with the highest mail volumes, which cumulatively accounted for nearly 10 million of the 13 million high-volume mailings that included SSNs, and implementing those changes by March 2020. (Exhibit M at pp. 23, 31.)

(c) EDD's Stated Fraud Deterrence Commitments In 2019 and Beyond.

On June 30, 2019, EDD issued a report to the California legislature regarding its fraud deterrence and detection activities. (Exhibit N.) Among other things, EDD reported that it was considering adopting data-sharing interfaces with government agencies, such as incarceration data, or a more department-wide use of Social Security Administration's decedent data, to "cross-match" and protect against fraud. (*Id*. at p. 44.) This was not the first time EDD raised the possibility of implementing such safeguards. In June 2018, EDD advised the legislature that it was considering the same course of action. (Exhibit L at p. 28.) As of 2016, thirty-five other states had already implemented such cross-matching procedures.[13] (*Id*.)

(d) Expanded UI Benefits During COVID-19.

According to the auditor's report, the expansion of UI benefits during the coronavirus pandemic presented another challenge for EDD:

> "[I]n late March 2020, in light of the COVID-19 pandemic, the federal government enacted the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"),

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[12] EDD expressed concern with only one of the proposed solutions – the proposal to truncate SSNs on certain documents that EDD mails to claimants, as well as enhancing search functionality in some of its systems. (Exhibit M at p. 20.) Specifically, the UI section chief stated that EDD would not be able to guarantee it could match each piece of undelivered mail with a specific claim using this solution and that processing claims using truncated SSNs would take longer because staff would need to use additional search functions.

[13] In its June 2020 annual report to the legislature, EDD once again stated that it was considering implementing the same cross-match program against incarceration data. (Exhibit O at p. 46.)

> which expanded UI benefits and relaxed some requirements for receiving those benefits. For instance, the CARES Act extended pandemic unemployment assistance (“PUA”) to certain individuals who were not eligible for regular unemployment benefits, such as individuals who had been self-employed and therefore would not have a third-party employer to report their wages or validate unemployment. Further, the CARES Act added $600 per week to the amount of benefits claimants could otherwise receive under state law between March and July 2020. The DOL also specified that states were required to backdate PUA claims to the first week in which claimants became eligible for benefits, which was as early as February 2020 – meaning that a larger amount of money was available to claimants because they could receive benefits from many previous weeks before the date that they filed their claims. These factors further contributed to the heightened risk of fraud because impostors had opportunities to earn more benefits without providing verifiable information about their work histories.” (Exhibit L at p. 7.)

Shortly after the passage of the CARES Act, the DOL warned states on two separate occasions that the DOL did not change its expectations related to fraud prevention. In April 2020, the DOL provided states with instructions for implementing and operating the PUA program. DOL reminded states that they were “still mandated to take reasonable and customary precautions to detect fraud, including random audits to verify claims.” (Exhibit L at p. 9.)

The DOL issued another letter in May maintaining the need for states to ensure the integrity of their UI programs. DOL recommended that the states perform ongoing reviews to detect improper payments throughout the UI program, including payments resulting from the CARES Act. (*Id*.)

Also in May 2020, the DOL’s Office of the Inspector General warned EDD that California could see at least $1.2 billion in potential fraud because of the 2.9 million new claims that EDD had received in March and April 2020. (*Id*.) Despite repeated warnings from the U.S. DOL, the EDD under Su’s leadership failed to maintain safeguards that opened the door to exploitation by criminals.

(e) EDD’s Failure To Implement Security Safeguards Before And During COVID-19.

According to the auditor’s report, EDD failed to secure its safeguards prior to the pandemic under Su’s leadership. The state continued to struggle to respond to the surge in claims:

> “After the start of the pandemic and the imposition of the statewide stay-at-home order, California’s unemployment rate surged from 4.3 percent in February 2020 to 16.2 percent by April 2020, according to EDD’s labor market information. This surge in unemployment created a dramatic increase in the number of UI claims individuals submitted: EDD received nearly 2.4 million UI claims in April 2020, about 13 times as many as it received in April 2019.” (Exhibit L at p. 7.)

Between early March 2020 and mid-October 2020, EDD's claims dashboard indicated that it received almost 6 million online applications for UI benefits – a historically high number of claims, directly related to the COVID-19 pandemic. (Exhibit P at p. 2.) During this same period, EDD sent out at least 38 million mailings containing SSNs associated with these UI claims – almost three times more than the State Auditor reported in total in March 2019 – because Su and the leadership at EDD failed to implement the Auditor's March 2019 recommendations. (*Id.*)

According to the audit, "EDD did not make any substantive changes to its fraud detection practices until late July 2020 – four months after the pandemic-related shutdowns led to a surge in UI claims. That July 2020 change automated EDD's process for stopping payments on claims that EDD believed were suspicious, a process that EDD's staff previously performed manually." (Exhibit L. at p. 9.)

As explained above, the State Auditor recommended in March 2019 that EDD prioritizing removing SSNs from three of its forms that EDD most frequently mailed, which together accounted for "nearly 10 million of the 13 million problematic mailings." (Exhibit M at pp. 23, 31.) However, Su failed to prioritize this effort and EDD did not remove SSNs from any of those three forms. (Exhibit P at p. 3.) As of a November 2020 Report submitted by the California State Auditor, EDD had updated only two of the 10 forms the Auditor reviewed, neither of which were among the three forms the Auditor recommended EDD prioritize and, combined, accounted for fewer than 1.3 million—or 10 percent—of the 13 million mailings the Auditor identified in the March 2019 audit. (*Id.*) According to the Auditor, "[H]ad EDD modified the three highest-volume documents as we recommended, it would have avoided sending full SSNs on nearly 34 million—or close to 90 percent—of the 38 million mailings it sent from March 2020 through mid-October 2020." (*Id.*)

When asked by the Auditor why EDD had not implemented the Auditor's recommendations, EDD's application services division chief explained that EDD chose to replace SSNs on two "simpler" SDI forms. The division chief stated that while EDD had "started work" on removing SSNs from the high-volume UI mailings identified by the Auditor, EDD had not planned to complete the Auditor's recommended changes to those forms until at least May 2021 – over one year past the Auditor's suggested completion date. (*Id.*)

The State Auditor noted the harm caused by EDD's delay in implementing the recommended security measures. Specifically, the Auditor stated EDD's "failure to change its business practices in a timely manner has unnecessarily put claimants at risk of identity theft." Because Su and the top officials at EDD did not follow the Auditor's guidance, mail with SSNs was stolen, mail with SSNs was accidentally sent or delivered to incorrect addresses, and fraudulent claims resulted in multiple mailings with SSNs being sent to incorrect addresses listed by fraudsters. (Exhibit P at pp. 3-4.)

The Auditor noted that during the eight-month period between March and November 2020, there were several reports of individuals receiving mail from EDD that was not addressed to them. (Exhibit P at p. 3.) The Auditor shared one example of an individual who received more than 65 pieces of mail from EDD after moving into a new home. The mailings were addressed to at least 15 people. (*Id*.) The November 2020 Audit report included three photographs of multiple boxes stacked from floor to ceiling comprised of mail that was returned to EDD because it was undeliverable, including mail that individuals received erroneously and returned to EDD. (Exhibit P at p. 5.) The Auditor stated that such mailings "may be linked to attempts to fraudulently collect unemployment benefits." (Exhibit P. at p. 3.)

The Auditor inspected a "small amount" of the returned mail documented in the three photographs and found "multiple examples of mailings containing full SSNs." (*Id*.) In one case, an individual wrote on the envelope, "this person does not live at this address" and the envelope contained two of three highest-volume forms the Auditor recommended EDD change, both of which displayed an individual's full SSN. (*Id*.)

Su's failure to address the problems identified by the Auditor shortly after she took office resulted in millions of SSNs and other personal identifiers being exposed to the public in a way that could have lasting consequences for the claimants who had identities stolen after EDD failed to make the basic changes as recommended by the Auditor.

(f) EDD's Failure To Prevent Or Curtail Fraud During The Pandemic.

According to EDD data, a total of $111 billion was paid during the pandemic, from March 2020 through December 2020, including roughly $10.4 billion in claims that it flagged as potentially fraudulent. (Exhibit L at p. 9.) The California State Auditor opined that the $10.4 billion "is likely not the full amount of improperly paid benefits." (Exhibit L at p. 17.)

According to the California State Auditor, EDD's failure to automate its process for stopping payment on suspicious UI claims until July 2020 "likely allowed fraudulent claimants to collect benefits through the first four months of the pandemic." (Exhibit L at p. 10.) In support of this conclusion, the Auditor noted that it reviewed reports from two days each of April, May, and June 2020. The Auditor found that these reports had "identified more than 1,000 claims as suspicious or potentially fraudulent on each of these days." (*Id*.) The Auditor also noted that "EDD asserted that two staff members were responsible for reviewing these reports each day and stopping payment by initiating the identity verification process for all current claims that this report identified as suspicious." However, as determined by the Auditor, EDD's reliance on this manual allowed claimants to collect UI benefits before staff could stop the payments. (*Id*.)

The Auditor also concluded that the EDD, under Su's watch, failed to follow through on addresses that had been flagged as likely locations for fraudulent activity:

> "[EDD] delayed responding to instances in which an unusually high number of claims under different names were filed from a single address, 'despite having substantial evidence that fraudsters were using this approach to defraud the UI program during the pandemic.' According to EDD, multiple claims from the same address, such as a vacant building or house, can be a sign that fraudsters are

> trying to intercept or gather the mail associated with this address. However, EDD did not identify suspicious addresses associated with these claims until September 2020.
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> Further, although EDD performed two separate analyses of the suspicious address issue, it took action on only a portion of the cases it identified. One of its assessments identified 26,000 suspect addresses that were associated with a total of more than 555,000 claims. However, EDD stated that it did not stop payment on all of these claims because it considered this list informational. Rather, it performed another assessment to determine addresses that may have been associated with fraudulent claims, which identified only 10,000 suspicious addresses associated with 250,000 claims. Most of these 10,000 addresses also appeared on the larger informational list of 26,000 addresses. EDD asserted that it stopped payment on this set of 250,000 claims and required these claimants to verify their identities. The most egregious example from this analysis was a case of more than 1,700 claims going to a single address." (Exhibit L at pp. 10-12.)

The Auditor selected three addresses among the 26,000 associated with a total exceeding 555,000 claims, none of which had been blocked for payment. The Auditor discovered that "more than 80 UI claims were filed at one of these unblocked addresses." Because EDD was unable to verify the identities for more than 70 of those claims, the Auditor determined that it was "likely that impostors used the address to file fraudulent claims."

> "EDD's fraud detection tools failed to detect 12 of the more than 80 claims as suspicious, allowing those 12 claims to remain active. As of mid-December 2020, EDD has paid more than $300,000 in UI benefits related to these 12 active claims. One of the other two unblocked addresses that [the Auditor] reviewed, which had more than 20 claims associated with it, raised similar concerns." (Exhibit L at p. 12.)

As recently as January 2021, the Auditor stated that under Su's leadership, "EDD continues to pay claims despite having evidence that they are very likely fraudulent." (Exhibit L at p. 12.)

In detailing another failure that occurred under Su's leadership, the Auditor also noted that EDD "compounded the effect of its slow and inadequate reaction to potential fraud" by instructing staff to automatically backdate new UI claims to the date a claimant represented that he/she became unemployed. (Exhibit L at p. 13.) EDD implemented this practice based on guidance the DOL provided instructing states to backdate pandemic-related claims to the week in which claimants first became unemployed. The Auditor noted that since early September 2020, EDD has required claimants to submit a separate request to obtain backdated payment in response to suspected fraud in the PUA program.[14] (*Id.*)

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[14] Since EDD took that action, claims for PUA have fallen considerably. Although the Auditor could not establish a direct link between EDD's actions and the drop in PUA

The Auditor concluded that, “Under normal circumstances, some of EDD’s benefit fraud detection efforts might have allowed it to detect impostor fraud.” But under Su’s watch, EDD became overwhelmed by the number of UI claims and failed to follow through on flagged identities. (Exhibit L. at p. 13.)

> “Benefit fraud can occur when people continue to receive benefits by failing to report that they have returned to work. To detect such fraud, EDD performs daily reviews using California employer data and weekly reviews using nationwide employer data. Because these reviews use SSNs to identify overlap between EDD’s benefit data and employer databases, the reviews would detect when impostors filed claims using the identities of people who were earning wages. When an overlap is detected, EDD generates and mails documents to the employers of the claimants whom the system detected as both continuing to work and receiving UI benefits, asking for further information about the claimant. EDD staff must then review the returned documents to assess whether fraud has occurred and take appropriate action. (Exhibit L at p. 13.)
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> However, during the pandemic, the amount of work generated by these matches ‘overwhelmed’ the unit responsible for performing these reviews – the Benefit Overpayment Section within the UI Integrity and Accounting Division. Between March and November 2020, this process generated more than 840,000 matches, illustrating that hundreds of thousands of claimants were either collecting UI benefits while working or had had their identities stolen and impostors were using those identities to collect benefits. These 840,000 reviews generated during the pandemic were quadrupled from the number generated for this section to complete in 2019. [...] [B]ecause of the significant increase in the number of reviews generated, as of the end of November 2020, the section responsible for performing them had completed only 113,000 of the 840,000 reviews generated during the pandemic. This process is entirely paper-based and, as of the end of November 2020, the section was still processing documents received in August 2020. Staff do not stop payment on these claims until they process these documents, meaning that EDD has likely continued to pay on these potentially fraudulent claims, despite having identified them through this process. As a result of these workload challenges, EDD has been unable to effectively leverage this practice of relying on existing cross-match reviews to quickly detect fraud. (Exhibit L at p. 14.)
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> [...]
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> As of late December 2020, EDD had more than 2.2 million claims submitted during the pandemic for which it could not confirm the identity of the claimant – 24 percent of the 9.5 million claims filed from the time the CARES Act became law in March. EDD issued at least one benefit payment on about 597,000 of those claims before identifying them as potentially fraudulent. [...] More than

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claims, it is possible that by ceasing its practice of automatic backdating, EDD has deterred fraudulent claims from occurring. (Exhibit L at p. 13.)

> 534,000 of the claims were paid UI benefits in excess of EDD's traditional dollar threshold for pursuing a criminal investigation of an impostor. (Exhibit L at pp. 14-15.)"

EDD's Investigation Division advised the Auditor that as of December 10, 2020, it had "opened more than 250 criminal cases related to potentially fraudulent claims filed during the pandemic and estimated an initial loss totaling greater than $30 million on these cases." However, the Auditor opined that "considering that EDD's data show many more potentially fraudulent claims and the difficulty of identifying the perpetrators of the impostor fraud in 2020, it seems highly unlikely that EDD will be able to investigate more than a small fraction of these fraudulent claims, let alone recover a significant portion of the lost funds." (Exhibit L at p. 15.)

(g) The Auditor Noted EDD's Culpability Regarding Fraud.

Early in the pandemic, EDD changed one critical fraud prevention mechanism. The Auditor concluded that decision resulted in EDD paying more than $1 billion of the $10.4 billion in benefits to suspicious claimants. (Exhibit L at p. 17.)

As the auditor noted, EDD typically halts payments when claims are flagged, but that did not happen after EDD eliminated that policy. EDD did this because of, in the words of the Auditor, "the mistaken belief that other safeguards would stop payments on these claims." However, as explained by the Auditor "because the EDD leadership who made these decisions did not adequately understand how the stop payments worked, EDD waived the barriers to payment for almost 77,000 claims and paid more than $1 billion on claims that it has determined are potentially fraudulent." (*Id.*)

EDD stated that it removed the safeguard to streamline its processes and remove barriers to payment in light of the "overwhelming volume" of UI claims. (*Id.*) The Auditor noted that the decision had "significant consequences" because the remaining safeguards were not always sufficient. (*Id.*) EDD continued this problematic practice for four months before reinstituting it. (*Id.*)

The Auditor stated that, "EDD could have avoided this misstep through more careful planning and preparation." (Exhibit L at p. 19.)

(h) EDD's Response To Accusations That It Approached Fraud In 2020 Slowly And Reactively.

When asked by the Auditor for its perspective on its slow response to addressing fraud in 2020, the EDD under Su's leadership denied that its fraud detection had failed completely, despite paying out as least as many fraudulent claims as it prevented:

> "EDD asserted that its fraud tools effectively identified and stopped potentially fraudulent claims throughout the pandemic and that it enhanced its existing processes and tools as needed. However, an estimate of the total UI benefit payments EDD prevented through these fraud prevention tools demonstrates that EDD paid almost as much to suspicious claims as it prevented. Using the

number of claims associated with individuals with unconfirmed identities to which EDD had not issued payment and an estimated benefit amount based on DOL data for 2020, [the Auditor] estimated that EDD stopped about $12.8 billion in payment to potentially fraudulent claims. Although any amount of fraudulent payment that EDD stops is a benefit to the UI program, a thorough analysis of the effectiveness of EDD's fraud prevention efforts needs to compare the amount of fraud prevented to the amount paid to potentially fraudulent accounts.[...] The total amount EDD paid to fraudulent claims is likely to continue growing as it completes upcoming work, further showing that EDD's fraud prevention methods have not been adequate to stop it from paying on fraudulent claims during the pandemic." (Exhibit L at p. 15.)

(i) Issues With Identity Theft.

The failures of Su and the other leaders at EDD will continue to be a resource drain for California for years to come. The Auditor noted that EDD's problematic efforts to prevent fraud will likely result in a "significant workload in the future to support the individuals whose identities were stolen by imposters who filed fraudulent claims during the pandemic." (Exhibit L. at p. 19.)

> "Between March 2020 and early January 2021, more than 2.2 million claimants did not satisfactorily answer EDD's request that they provide identity documentation. According to EDD, fraudsters are often not able to provide documents to confirm identities; therefore, EDD considers claims that are disqualified due to nonresponse as evidence that it has effectively deterred fraud. (Exhibit L at p. 20.) Although not every one of these 2.2 million claims made it far enough in the process to be paid, EDD's data indicate that it paid benefits totaling about $10.4 billion on almost 597,000 of these claims, which suggests that these individuals may have obtained benefits fraudulently. However, these are only the cases EDD has identified; the actual number of claims filed with other people's personal information may be higher because people who have not yet learned that they were victims of identity theft have not yet reported it to EDD. Further, [the Auditor does] not believe that EDD's fraud detection tools have yet detected every fraudulent claim filed during the pandemic." (Exhibit L at pp. 19-20.)

Under Su's leadership, EDD also failed to respond and provide assistance to the Californians who attempted to report that their identities had been stolen. The Auditor noted:

> "EDD's main process for addressing complaints of identity theft has been overwhelmed during the pandemic. If individuals discover that their identity has been used to file a fraudulent claim with EDD, they can notify EDD through its online fraud reporting portal or through its telephone hotline. EDD's data show that by July 1, 2020, EDD was receiving hundreds of these reports each day, growing to consistently receiving more than 1,000 a day in September 2020 and peaking at more than 1,800 reports on a single day that month. By comparison,

EDD only received 6,000 UI fraud reports in all of calendar year 2019. EDD has dedicated only a single staff position to receive and assess these reports, and that position became vacant in July 2020. As a result, from April through October 2020, EDD responded to less than 2 percent of the UI fraud reports it received through its online portal. Further, it had yet to address more than 77,000 fraud reports as of November 2020. Many of these reports likely involve victims of identity theft who will need EDD's help to resolve their situations." (Exhibit L at p. 20.)

In recent weeks, the victims of fraud have been receiving tax forms – specifically, a 1099-G tax form – from EDD reflecting payments from EDD in 2020 that the victims of fraud never received.[15] (Exhibit Y.) Consequently, the victims of fraud may be compelled to pay taxes on payments they never received. One victim stated that she received a Form 1099 reflecting over $14,000 in benefits, when she never actually received any benefits. (*Id.*) Some individuals who elected to have federal taxes withheld from their payments have already paid taxes on some benefits that were never received by them. (*Id.*)

EDD provides no direct support, advice, or guidance for victimized claimants who have questions regarding the tax implications regarding benefits they never received. EDD has a video about the Form 1099-G, but the video does not address what a claimant should do in the event of fraud. EDD offers a printable guide that merely directs victims of fraud to contact EDD. (*Id.*) However, as explained below, EDD's call centers are understaffed and inadequate according to the California State Auditor.

(j) EDD's Directive To Freeze 344,000 Bank of America Debit Cards And The Directive's Adverse Impact On Legitimate Claimants.

In September 2020, EDD directed Bank of America – the State's vendor for distributing UI benefit payments – to freeze 344,000 debit cards (accounts) because of concerns about UI fraud. (Exhibit L at p. 23.) EDD did so in response to Bank of America identifying 309,000 of its UI accounts to be fraudulent. EDD reviewed the accounts, agreed with Bank of America's assessment, and confirmed that Bank of America should freeze 271,000 of those accounts. EDD identified another set of 73,000 Bank of America accounts as potentially fraudulent and consequently directed Bank of America to freeze those too. (*Id.*)

The Auditor opined that, "several elements of EDD's role in these events are troubling." First, it was Bank of America – not EDD – that identified the fraud concern and initiated the freeze. Second, according to the Auditor, EDD "mishandled the aftermath of this

[15] Choi, Kenny. "Victims Of EDD Bank Of America Debit Card Fraud Could Be Taxed On Benefits They Never Received," available at https://sanfrancisco.cbslocal.com/2021/03/02/victims-of-edd-bank-of-america-debit-card-fraud-may-be-hit-with-taxes-on-benefits-never-received/. KPIX CBS SF Bay Area. Last viewed, March 2, 2021.

incident." EDD froze all accounts without a plan for assisting qualified claimants. Then, EDD unfroze all accounts, including those deemed fraudulent.

> "EDD has not acknowledged its responsibility for this action, and it did not have a plan or take action to ensure that it could unfreeze those accounts belonging to legitimate claimants." (Exhibit L at p. 23.)
>
> [...]
>
> "Following public outcry in early October 2020 from legitimate claimants who could not access their benefits, EDD requested that Bank of America unfreeze all 344,000 accounts it had originally directed the bank to freeze –including the 73,000 claims it had independently identified as potentially fraudulent. In effect, EDD's response was to permit potentially fraudulent activity to continue to ensure that legitimate claimants received their benefits. However, it had no analysis supporting its decision to make such a swift change to its previous direction. In the end, Bank of America disregarded EDD's request to unfreeze the accounts. In a subsequent letter to the Legislature, Bank of America cited its obligation to prevent fraud under federal law as its reason for freezing accounts without EDD's approval." (Exhibit L at pp. 23-24.)

As summarized by the Auditor, "This series of events reveals flaws in EDD's response to fraud: it erred in its initial analysis and request that Bank of America freeze the 344,000 accounts, and it reacted poorly once it realized that accounts of legitimate claimants had been frozen." (Exhibit L. at p. 24.)

Beyond that, the Auditor stated the failures at EDD that took place under Su's leadership destroyed the public faith in the agency:

> "EDD's lack of transparency throughout this exchange damages the public's trust in its statements. When it became apparent that legitimate claimants had been included in the listing of frozen accounts – leading to media reports of people being unable to pay their bills or feed their families – EDD was slow to provide information. In fact, we found no public statements that acknowledged that EDD had directed the freezing of the 344,000 accounts. About a week after EDD directed Bank of America to freeze those accounts, the director of EDD testified to the Legislature that EDD and Bank of America were coordinating "additional review" of more than 350,000 suspicious claims. As the text box shows, when one assemblymember asked the director who froze the accounts, the director did not describe EDD's responsibility and identified Bank of America as the responsible party. A letter from 59 members of the Legislature in November 2020 to the chief executive officer of Bank of America shows that the Legislature believed that EDD had far less of a role in freezing accounts than it actually did. The letter indicates that EDD informed the Legislature that frozen accounts were solely the result of Bank of America's efforts. Although it is true that Bank of America froze some accounts without direction from EDD, the department played

> a significant role in directing that 344,000 accounts be frozen." (Exhibit L at p. 25.)

The Auditor further noted:

> "Subsequent coordination between EDD and Bank of America about potentially fraudulent accounts has also been problematic. [...] In early November 2020 Bank of America sent EDD a list of more than 104,000 accounts that it identified as suspicious and requested guidance from EDD about what to do with the accounts. EDD delayed providing direction to Bank of America until one month later, risking that some fraudulent claimants would continue to collect benefits while EDD performed its analysis on those accounts. Further, when it did respond, EDD informed Bank of America that it had already stopped payment to more than 99,000 of the accounts, but failed to provide explicit instructions to Bank of America as to whether it should freeze those accounts. Therefore, EDD did not direct the bank to protect the money that it had already deposited into those accounts. Moreover, EDD neglected to mention what it had determined, if anything, about the remaining 5,000 accounts that Bank of America originally provided for review. EDD explained to the Auditor that it was still verifying the identities of the majority of these claimants as of December 10, 2020." (Exhibit L at p. 25.)

The Auditor noted that "more problematic have been difficulties that EDD and Bank of America have had in agreeing how to unfreeze accounts that belong to legitimate claimants." This was complicated by the fact that EDD "did not know which accounts were frozen or needed to be unfrozen" and because "EDD acknowledged it has no centralized process for tracking and monitoring those frozen accounts, making it unclear how many accounts in total were frozen." (Exhibit L at p. 26.)

> "[EDD] does not have a systematic way to ensure that it reviews all frozen accounts to determine whether the accounts should be unfrozen and returned to legitimate claimants. Without such a process, any attempt that EDD makes to address the problem of legitimate claimants with frozen accounts may be incomplete and potentially flawed. Further, Bank of America has required EDD to individually verify the identities of the claimants associated with the 344,000 frozen accounts that EDD identified before it will unfreeze the accounts. An external consultant determined that 72,000 of the 344,000 frozen accounts were at low risk of being fraudulent claimants; however, EDD will need to manually verify these claims as legitimate before Bank of America will unfreeze those accounts. As of December 10, 2020, EDD had verified the identities of only about 7,500 affected claimants. Although EDD may find that it disqualifies some of these claimants – potentially from both the low-risk group of 72,000 accounts and the remaining population of the original 344,000 frozen accounts – for failing to respond to its requests for identity documentation, there will likely be a significant number still to be addressed." (Exhibit L at p. 26.)

The disarray and lack of leadership at EDD under Su's watch left thousands of valid claimants unable to access their payments while fraudsters were allowed to continue to spend. Su's failure to provide leadership led to extended delays in which this fraud was allowed to continue while law-abiding Californians suffered.

(k) EDD Paid Hundreds of Millions of Dollars To Fraudulent, Incarcerated Claimants.

Law enforcement officials in California concluded that hundreds of millions dollars in fraudulent payments were provided by EDD to incarcerated individuals during the pandemic, as the Auditor noted.

> "In late November 2020, nine county district attorneys signed a letter announcing that the DOL identified roughly 35,000 unemployment claims filed from March 2020 through August 2020 using data that matched individuals incarcerated in state prisons against UI information. According to November 2020 correspondence from the deputy secretary of communications at the [LWDA], 21,000 of these claims received payments that totaled $400 million. EDD later estimated that between January 2020 and November 2020, it paid about $810 million in benefits to roughly 45,000 claimants with information that matched incarcerated individuals, based on both state prison data and a December 2020 analysis by a private vendor that used data from state and local correctional facilities across the country. EDD noted that most of the problematic claims were for PUA. (Exhibit L at p. 27.)"

Among the beneficiaries of these fraudulent payments, included Cary Stayner, a serial killer who murdered four women near Yosemite National Park in 1999; Wayne Ford, another serial killer, who confessed to at least four murders in 1997 and 1998 in Northern California; Scott Peterson, convicted murderer who killed his pregnant wife, Laci; and Isauro Aguirre, a man convicted of torturing and murdering his girlfriend's 8-year-old son, Gabriel Fernandez. (Exhibit Q.)[16]

According to the Auditor, "CARES Act relaxed some requirements for receiving the UI benefits during the pandemic [...] such as extending the benefits to individuals who had been self-employed and therefore would not have had a third-party employer to report their wages. [...] EDD was unprepared to guard against inmate fraud in this program because it lacked a system to cross-match all incoming claims against incarceration data." (Exhibit L at p. 27.)

The Auditor noted again that thirty-five other states cross-matched unemployment claims with state prison data, which EDD had stated it was considering implementing in 2018, but was not executed under Su. (Exhibit L at pp. 28-29.) EDD concluded that

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[16] Hubler, Shawn. "Unemployment Scam Using Inmates' Names Costs California Hundreds of Millions," available at https://www.nytimes.com/2020/11/24/us/california-unemployment-fraud-inmates.html?smid=em-share. New York Times. Last viewed, February 26, 2021.

"given the prevalence and usefulness of the incarceration data cross-match, it is troubling that EDD failed to implement this fraud prevention tool previously." (Exhibit L at p. 29.)

(I) California State Auditor Concludes "EDD's Approach to Fraud Prevention Is Disjointed and Ineffective."

The Auditor's criticism of EDD's failure to provide adequate safeguards against UI form was succinct and direct. The Auditor stated, "Given the importance of fraud prevention, we expected that EDD would have a cohesive and centrally managed fraud prevention effort, that it would track potential fraudulent activity from detection to resolution, and that it would ensure coordination between the fraud prevention and detection initiatives it uses. Because these practices are lacking, EDD's UI program is at a higher risk for fraud." (Exhibit L at p. 33.)

The Auditor opined that EDD has "convoluted its fraud prevention and detection approach by spreading key efforts among its different units." (Exhibit L at p. 35.) As an example, the Auditor observed:

> "[A] key mechanism EDD's units use to communicate about potentially fraudulent claims is dedicated email accounts that are managed by multiple staff. Referral and tracking of potential fraud by email increases the risk that EDD will mishandle a fraud report. For example, the Criminal Intelligence Unit's hotline operator monitors and receives reports of fraud from the public. If the hotline operator finds that an allegation has merit, the operator forwards the report to a dedicated email address for the UI Integrity and Legislation Unit. The UI Integrity and Legislation Unit reviews the claim associated with the fraud report and then passes the fraud report to the UI Identity Verification and Technical Support Section for further work. We attempted to follow two fraud reports that the hotline operator emailed to the UI Integrity and Legislation Unit in April and July 2020 to determine what action the unit took. In neither case could the UI Integrity and Legislation Unit locate the original emailed referral from the hotline operator, and the unit could only demonstrate that it had reviewed one of the two fraud reports. These examples demonstrate the gaps in the way EDD manages reports of potential fraud." (Exhibit L at p. 34.)

The Auditor cited another example:

> "EDD has not coordinated its identity verification efforts, leading to duplicated effort with no discernible benefit. Since its implementation in October 2020, EDD has touted ID.me – an identity verification program [...] as one of its primary methods for preventing identity thieves from filing false claims. However, EDD confirmed that it continues to implement fraud detection tools that require claimants to verify their identities even after successfully completing ID.me verification, essentially requiring claimants to verify their identities twice. During a single day in November 2020, for instance, one of its other fraud detection tools flagged 352 claims for identity verification. . . .

When [the Auditor] asked EDD why it continued to require secondary identity verification even after implementing ID.me, staff asserted that ID.me may have verified an individual's identity, but that individual may have exhibited indicators of fraud that ID.me was not designed to detect. However, as of mid-November 2020, EDD stated that it had not performed any analyses to determine whether this secondary verification step detects fraud that ID.me missed. Further, this secondary verification tool initially requires claimants to provide identity information similar to what they used for ID.me before EDD then further evaluates their eligibility. As such, EDD's secondary tool may delay payments to legitimate claimants by requiring them to verify their identities twice.

"During [the Auditor's] review, EDD asserted that it was taking steps to improve coordination between the different units that take action to prevent and detect fraud. In mid-November 2020, EDD hired a new deputy director to oversee its Policy, Accountability, and Compliance Branch. This deputy director has been tasked with establishing a fraud working group across the department. However, as of December 30, 2020, this group had not yet held its initial meeting or fully formed a charter to define its purpose. Because best practices for fraud prevention and detection suggest that government agencies should have a dedicated unit to identify fraud risk and determine the activities that the agency will engage in to mitigate that risk, [the Auditor has] concerns that EDD's approach does not seem headed in this direction. The U.S. Government Accountability Office ("GAO") recommends that fraud prevention units have sufficient authority, be the central repository for knowledge about the agency's fraud prevention activities, and be the central coordinator of those activities. EDD's new working group may be an improvement to its current approach to preventing fraud, but it would be an even greater improvement for EDD to centralize fraud prevention into a single unit with proper authority to adopt and manage a fraud prevention strategy." (Exhibit L at pp. 34-36.)

Su waited until the fraud problem exploded during a pandemic before she took steps to organize a fraud prevention unit, despite a historical pattern of fraud at EDD and recommendations from the Auditor.

(m) California State Auditor Concludes: "EDD Has Not Determined the Effectiveness of its Fraud Prevention and Detection Methods."

The Auditor noted:

"[California] law requires EDD's director to periodically review its policies and practices to identify, in part, those that provide little or no value in preventing fraud or abuse in the UI program. However, EDD could not demonstrate that it had performed any such reviews since it reported the results of its first review to the Legislature in 2015. Although EDD annually reports on its fraud detection and deterrence efforts to the Legislature, it has not determined how reliably its tools and methods actually detect fraud. [...] EDD's lack of a single unit with the authority to oversee its fraud prevention and detection activities may be one of the reasons that no one at EDD has measured or assessed these tools' effectiveness." (Exhibit L at p. 37.)

(n) EDD's Response To The Auditor Regarding The Fraud Issues.

In response to the January 2021 Audit Report, Rita Saenz, the Director of EDD, acknowledged that California was "unprepared for the impact the COVID-19 pandemic had on both unemployment claims and fraud." (Exhibit L at p. 43.) Saenz stated that "the Trump Administration provided insufficient support to states to address the aggressive attacks by domestic and international crime syndicates." (*Id*.)

Saenz, however, did not acknowledge that California neglected to implement a cross-match program against incarceration data, which EDD had been considering since 2018. (Exhibit L at p. 28.) As explained above, the EDD under Su also did not follow the Auditor's prior recommendation to prioritize revising three specific documents with the highest mail volumes, which cumulatively accounted for nearly 10 million of the 13 million high-volume mailings that included SSNs, and implement those changes by March 2020. (Exhibit M at pp. 23, 31.)

5. EDD's Ineffective Management During The Pandemic Leading To Significant Delays In Claimants Receiving UI Benefits.

(a) Changes In The UI Program At The Outset Of The Pandemic.

As explained above, the CARES Act expanded UI benefits available to American workers during the pandemic. One of those changes included expanding UI coverage to self-employed workers and business owners.

Beyond that, when Governor Newsom's stay-at-home order went into effect in March 2020, EDD waived the requirement that claimants must seek work in order to maintain eligibility of benefits.

(b) California Received An Unprecedented Volume Of Claims in 2020.

The combination of the significant rise in unemployment and the expansion of UI benefits created a massive surge in UI claims after California's statewide stay-at-home order went into effect on March 19, 2020. California's statewide unemployment rate rose from 4.3 percent to 16.2 percent between February 2020 and April 2020. UI claims skyrocketed during that same time period and they remained above historic averages through October. The Auditor noted:

> "Individuals filed about 13 times as many claims in April 2020 as in April 2019. Ultimately, from March through November 2020, EDD reports that it processed more than 17 million regular UI and pandemic unemployment assistance claims – eight times as many claims as were filed for the entirety of 2019 – and, as explained above, it paid more than $111 billion in unemployment insurance benefits." (Exhibit R at p. 7.)

As stated by the Auditor, such a surge was "unprecedented in California's recent history." (Exhibit R at p. 7.)[17]

(c) The Surge In Claims Caused Significant Delays in the Delivery and Receipt of Benefits.

Because EDD was unprepared for the pandemic, Californians were forced to wait months to receive UI benefits:

> "Along with the surge in claims came delays in the receipt of benefit payments, as EDD was overwhelmed by the extraordinary number of claims. When a claimant has waited more than 21 days after submitting an application for either processing of payment or disqualification, EDD considers that claim as part of its backlog. This metric is similar to a measurement used by the DOL that measures the timeliness of the first payment of UI benefits according to 14-day and 21-day time frames, depending on the specific requirements of a state's UI program. According to data from the DOL, for regular UI claims filed from April through September 2020, EDD provided 80 percent of claims with a first payment within 21 days – leaving more than 800,000 claimants in the regular UI program waiting longer than the 21 days to receive their first payment. In contrast, for claims filed in 2019, EDD provided 88 percent of claims a first payment within the designated window." (Exhibit R at pp. 7-8.)
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> "In July 2020, [Governor Newsom] directed the secretary of California's Government Operations Agency and a former Chief Deputy of the White House Office Science and Technology Policy to lead a strike team to recommend reforms at EDD related to its UI clams processes. The strike team received assistance from staff from both the California Department of Technology and the Office of Digital Innovation. The strike team's report, issued in September 2020, made 100 recommendations to improve EDD's claim processing and to reduce the number of claims in its backlog, which EDD was reporting had reached about 1.6 million at that time." (Exhibit R at p. 9.)

The legislature also requested an emergency audit, which the State Auditor proceeded to do. (Exhibit R at p. 9.)

(d) EDD's Backlog Dashboard Misrepresent the Number of Claims With Delayed Payments.

Under Su, the EDD did not accurately disclose the number of Californians waiting to receive their benefits. The Auditor explained:

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[17] Report 2020-128/628.1 by the Auditor of the State of California. "EDD's Poor Planning and Ineffective Management Left It Unprepared to Assist Californians Unemployed by COVID-19 Shutdowns," available at http://www.auditor.ca.gov/pdfs/reports/2020-128and628.1.pdf . Last accessed February 26, 2021.

"At the end of September 2020, EDD began reporting the numbers of backlogged initial and continued claims on dashboards on its website, using an approach recommended by the strike team. EDD represented this backlog as the number of claimants awaiting payment because EDD had yet to act on their claim. As of December 15, 2020, EDD reported that a total of about 685,700 initial and continued claims were remaining in its backlog. However, the State Auditor determined that contrary to EDD's characterization of the backlog, this number did not represent the actual number of claims needing action so that claimants can receive payments. Instead, the count in the backlog also included claims needing actions unrelated to issuing payments. This disconnect may cause confusion for the public and policymakers and also creates a false picture of the work EDD has done and needs to do. We asked EDD to modify its calculation to isolate the number of claims in the backlog that were waiting on payment due to incomplete work on EDD's part. That modified calculation showed that of the 685,700 claims EDD reported, fewer than 20,000 had incomplete work that EDD needed to perform so that the claim could be paid." (Exhibit R at p. 11.)

(e) The Auditor Concluded That EDD's Inefficient Processes Were Unable to Handle the Claim Surge, Resulting in Late Payments.

The EDD failed to respond to approximately half of the claims made, leaving millions waiting on payments. (Exhibit R at p. 15.) The Auditor noted:

"According to data EDD reports to the [DOL], its rate of first-payment timeliness declined significantly from April to September 2020 compared to the same months in 2019. In a regular year unaffected by the pandemic, the [DOL] measures California's first-payment timeliness by assessing the percentage of claims paid within 14 days of the end of the first week a claimant is eligible for benefits. For claims submitted in April through September 2019, EDD reported that it paid about 75 percent within that 14-day period. In contrast, for the same period in 2020, EDD reported that it made only 61 percent of payments within 14 days. Although these delayed payments occurred in part because of the unprecedented number of claims EDD received, its inefficient claims processing also played a significant role. State law requires EDD to periodically review policies and practices in the UI program and identify those that result in delayed eligibility determinations or benefits payments, those that increase its workload, and those that provide little or no value in identifying fraud or abuse. However, instead of continually improving its policies and practices, EDD allowed inefficient manual processes to remain. In the three months preceding the claim surge, EDD's automatic initial claim processing rate was at about 30 percent. Since the claim surge began, these inefficient processes have delayed benefits for claimants who require them for essential needs, such as food or shelter. (Exhibit R at pp. 14-15.)

Most notably, nearly half of the claims EDD processed in the first six months of the claim surge required additional intervention to complete filing after claimants submitted them online. In total, about 4.7 million of the 9.9 million claims EDD processed during this period – about 48 percent – were not filed automatically in UI Online, EDD's online UI application service. Many of the remaining claims required staff involvement to verify claimant identities or resolve issues related to employment information [...]. For example, when a claimant submits an application with a first or last name that does not precisely match the existing name in EDD's benefits system, staff need to manually review the claim to resolve the mismatch. EDD's workload reports indicate that activities like manual identity verification require significant time for its staff to complete, when compared to other manual work performed by EDD staff for UI claims. (Exhibit R at p. 15.)

> EDD also struggled to efficiently process work related to continued claims during the claim surge. As of September 2020, continued claims represented the majority of those claims for which EDD had pending work to perform that it had not resolved within 21 days. After the approval of their initial claims, claimants must certify every two weeks that they continue to meet eligibility requirements. [...] EDD's processing of these continued claims has frequently required significant staff attention. For example, sometimes claimants submit eligibility certifications that contain employment or wage information that does not match the information on their original filings. EDD staff must investigate these unmatched certifications, and EDD does not pay such claims until it resolves the issues in question. (Exhibit R at p. 15.)

> According to the strike team's report from September 2020, EDD's failure to promptly process both initial and continued claims was in part the result of its staffing decisions. Most notably, the strike team reported that EDD assigned its most experienced claims processers to help train newly hired claim-processing staff. This responsibility left these experienced individuals too little time to focus on actually resolving claims. The strike team developed a staffing and workload projection tool (workload tool) that isolated 16 critical areas of work for EDD to focus on to eliminate its work backlog by January 2021. The strike team noted that this tool would help address the most time-intensive areas of work that required additional staff to increase productivity." (Exhibit R at p. 16.)

(f) Su Reacted to the Surge in UI Claims by Suspending Some Eligibility Requirements, Thereby Putting Nearly 1.7 Million Californians At Risk of Needing to Repay Benefits.

In response to the surge of UI claims in March 2020, EDD stopped most of its work determining whether claimants were eligible for UI benefits. While this course of action curbed the size of the clams backlog and resulted in more timely payments, it compromised the integrity of the program. The Auditor noted:

> "Specifically, on March 20, 2020, [Su] directed EDD to temporarily pay all claims without determining whether claimants met key eligibility criteria: being able to, and available for, work. [Su] made this directive after receiving a recommendation from EDD to do so. This directive remained in effect at the

> beginning of December 2020. However, Su's directive required EDD to maintain its identity verification practices as well as to continue to allow employers to contest unemployment claims. In response, EDD stopped making some of the specific eligibility determinations [Su] had identified, but it also suspended its review of many additional eligibility issues that it would usually examine. These issues included, for example, determining whether a claimant who reported voluntarily quitting a job or refusing suitable work had good cause to do so. Effectively, EDD stopped making most required eligibility determinations. According to EDD's general counsel, [Su and other officials at the LWDA] did not learn of this additional action on EDD's part until several months later." (Exhibit R. at p. 27.)

As explained above, EDD had significant difficulties paying claims on time during the surge notwithstanding its decisions to suspend certain eligibility requirements. Maintaining those standards would necessarily have added to the claims backlog and slowed claimants' access to critical UI benefits. The Auditor added:

> "However, the [DOL] determined that this decision likely compromised the integrity of California's UI program. In September 2020, the [DOL] learned about EDD's decision to suspend many eligibility determinations. On December 4, 2020, the [DOL] notified EDD that it believed those actions conflicted with a core tenet of the UI program, namely not paying benefits to ineligible claimants. It noted that without conducting eligibility determinations, EDD could not be certain that individuals are eligible for benefits and instructed EDD to immediately resume all eligibility determinations. It also directed EDD to begin examining all the suspended determinations that had accumulated. As of December 3, 2020, EDD's claims processing system had flagged about 12.7 million potential eligibility issues on claims since March 2020, affecting up to 2.4 million claimants." (Exhibit R at pp. 27-28.)

> "Although EDD's actions likely allowed it to pay benefits faster, EDD now faces an impending workload for which it has no clear plan to address and that could have significant consequences for claimants. Resuming all eligibility determinations will slow how quickly EDD can process claims and pay benefits. Processing the 12.7 million suspended determination issues on prior claims will also present significant challenges. EDD estimates it takes 30 minutes on average to resolve a determination. Even if it only had to resolve half of the suspended determination issues, it would still take EDD over 3 million hours to do so." (Exhibit R at p. 28.)

As explained by the California State Auditor:

> "When it conducts these eligibility determinations, EDD will likely find that some of these claimants were in fact not eligible for the benefits they received. For example, EDD told the Auditor that in 2019, it disqualified about 164,000 claims because it found during its eligibility review that the claimants had voluntarily quit or been dismissed because of misconduct. Although some ineligible claimants

are actively attempting to defraud the UI program, others may be genuinely confused about the eligibility requirements. These claimants now face the possibility that they may have to repay some or all of the benefits they received in good faith—and many will have already spent these benefits." (Exhibit R at p. 28.)

Compounding the challenge is the fact that on April 23, 2020, Su directed EDD to suspend the requirement that UI claimants certify every week that they remain eligible for benefits which EDD must then confirm by verifying information the claimants report to allow them to continue receiving payments. (Exhibit R at p. 30.) Following Su's direction, EDD automatically paid claimants without demanding that they submit certifications for their claims. EDD paid nearly 1.7 million claimants more than $5.5 billion in benefits over this period. (Exhibit R at p. 30.)

As was the case with the suspension of specific eligibility requirements, the decision to suspend the certification process resulted in more timely payment to claimants, but compromised the integrity of the UI program.

> "During July and August 2020, EDD notified the nearly 1.7 million affected claimants that they would need to retroactively submit all certifications by November 21, 2020, for the weeks they received benefits. To avoid placing an additional burden on its unemployment benefits information system that typically receives the online certifications, EDD contracted with a vendor to implement a new system for accepting these retroactive certifications. As of November 23, 2020, about 67 percent of these claimants – or 1.1 million – had submitted retroactive certifications, representing the equivalent of almost 4 million weeks of benefits that EDD will need to process. As it continues to collect retroactive certifications, EDD will need to validate that claimants were eligible for payments and that they were paid the appropriate amount of benefits. For those claimants who do not submit their retroactive certifications, EDD must investigate the claims and potentially initiate the process to recoup the overpaid amounts.
>
> These retroactive certifications add to EDD's already sizeable volume of work." (Exhibit R at pp. 30-31.)

Su's directive to eliminate safeguards in the identification verification process directly resulted in an increase in fraud. Su also failed to properly supervise EDD, which abandoned additional safeguards without making LWDA aware of the changes.

(g) EDD's Inadequate Call Centers.

Claimants can request assistance in many ways, including a website, email, online chat, and call center. As of January 2020, the call center had roughly 1,270 EDD field office agents across California. (Exhibit R at p. 37.) Under Su, the agency failed to improve its call center before the pandemic hit, as the Auditor noted:

> "Even before the claim surge, EDD struggled to meet a critical benchmark for its call center's performance. Specifically, in 2014, EDD made a commitment to the

> Legislature to answer 50,000 claimant calls per week as a result of receiving increased funding to hire staff. EDD refers to this commitment when it makes staffing decisions and it pointed us to other documents related to that commitment as a way to measure the success of its call center. However, from January to mid-March 2020, EDD answered only about 42,000 calls per week on average. Although it answered at least 50,000 calls in four of the 11 weeks in the period, it failed to meet this benchmark in the other seven weeks, and it was often significantly below 50,000. Worse yet, the calls EDD answered represented less than 25 percent of the 184,000 calls requesting to speak to an agent it received on average each week. In fact, EDD's phone system blocked 17 percent of call attempts because of its technical capacity limitations." (Exhibit R at p. 37.)

The claim surge compounded upon EDD's failure to answer calls. At one point, the call center struggled to provide assistance to any callers.

> "The number of callers trying to reach the call center spiked drastically from 120,000 per week in the middle of March 2020 to more than 1.7 million in a single week by the end of April 2020, while the number of calls EDD answered only increased slightly. During this period, individuals attempting to reach EDD's call center were almost universally unsuccessful in speaking to an agent – hundreds of thousands of callers were unable to speak with an agent each week, and EDD answered an average of only 0.5 percent of total calls per week. In fact, based on the number of unique callers and total calls at the end of April 2020, the average unique caller attempted to reach EDD at least 10 times. This suggests that if EDD had been able to more immediately answer questions from a greater number of unique callers, the total number of calls would have likely fallen." (Exhibit R at p. 38.)

> "On April 15, 2020, [Governor Newsom] signed an executive order requiring EDD's oversight agency to expand call center hours and ensure sufficient staffing levels to process claims. Following this order, EDD quickly implemented a preliminary, minimal version of a new phone system—known as a virtual contact center (VCC)—in late April 2020. The VCC allowed agents who were working remotely because of stay-at-home orders to answer claimant calls, but it lacked some functionality that EDD's previous phone system featured. Additionally, EDD expanded call center hours and began adding thousands of agents to answer

calls and perform other tasks related to claim processing." [18] (Exhibit R at pp. 38-39.)

The California State Auditor observed:

> "EDD has not implemented several best practices that would enable it to improve the performance of its call centers. Improving its ability to successfully respond to callers is of critical importance, as providing customer service to claimants is one of EDD's key responsibilities. [The Auditor] reviewed numerous reports and articles related to managing both commercial and government call centers to identify best practices for improving customer service that EDD should adopt. EDD either has not adopted these practices or lost the features that enable them when it implemented its new VCC phone system in April 2020. Consequently, EDD is not operating as effectively as it could be nor always resolving callers' questions." (Exhibit R at p. 44.)

(h) The State Auditor Concludes That EDD Failed To Adopt A Comprehensive Plan For How It would Respond to an Economic Downturn, in which the UI Program is in Higher Demand.

The California State Auditor concluded EDD should have been prepared for an increase in claims that could have been triggered at any time by a recession. But under Su, those preparations did not occur:

> "When the claim surge began in March 2020, EDD was far from prepared. [...] The rise in claims was unprecedented in its size and speed, and the Auditor recognized that it is not realistic to expect that EDD would have flawlessly responded to such a challenge. Nonetheless, the key factors that limited how effectively EDD responded to the claim surge resulting from the pandemic – inefficient processes; a lack of readily available, qualified staff; and poor management of its call center – are the same factors that would degrade its ability to respond to a more regular occurrence like an economic recession. According to the National Bureau of Economic Research—an entity that tracks

[18] As explained by the Auditor:

> "These two actions resulted in a gradual increase in the number of full-time equivalent agents answering calls, from fewer than 100 at the start of April 2020 to about 1,000 by the end of August 2020.5 This increase in staff may have had some positive effect, as total calls decreased significantly during the month of August. However, the number of unemployed Californians and claims filed during August 2020 also dropped, which likely also contributed to the decrease in total calls. Although EDD agents answered about 161,000 total calls during the first week of August, these answered calls still represented only 16 percent of the roughly 1 million unique callers who contacted EDD during that week, highlighting the fact that the vast majority of callers faced continued difficulty in speaking with agents." (Exhibit R at p. 40.)

recessions—the United States has entered a recession approximately every five and a half years on average since January 1950. As the department that oversees California's UI program, EDD should be well aware that recessions regularly occur and that its operations may be stressed when handling the resulting increased workload. Consequently, we expected that EDD would have a plan for scaling up its UI program in response to a recession so that it could provide timely assistance to Californians. However, EDD had no such plan ready. [...] Its failure to prepare left it poorly positioned to respond to the claim surge." (Exhibit R at p. 49.)

"Although EDD has recognized that having a plan for an economic downturn is important, it only very recently took steps to create such a plan. EDD indicated that its UI branch began planning for a recession in 2019—almost a full 10 years after the end of the Great Recession of 2008 and 2009. When we asked EDD to explain its delay, it noted that it has implemented numerous improvements to its business processes since the Great Recession, such as training agents to both file claims and confirm that claimants are eligible for benefits instead of only one or the other. Although we acknowledged these efforts, we noted they are not the same as adopting a comprehensive recession plan." (Exhibit R at p. 49.)

[...]

"EDD's delay in developing such a plan cost it valuable preparation time. EDD published an initial draft of a plan in January 2020 that articulates its overall vision for recession preparedness. But when the economic effects of the COVID-19 pandemic began, EDD was only in the beginning stages of developing specific policies, tools, and metrics that its staff would use during a recession to respond to the increased workload. EDD has since suspended its recession planning in order to respond to the claim surge." (Exhibit R at p. 51.)

Under Su, months were wasted that could have been used to correct the course of EDD so that it would not have been so unprepared to address the surge of claims triggered by the pandemic.

6. Su's Accountability For EDD Issues During the Pandemic.

In a Facebook Live chat in April 2020, Su responded to inquiries in which the participants conveyed frustration regarding the delays in the deliveries of UI payments, "I acknowledge that problem. I own it. I want you to hear from me directly that that is not acceptable and we are going to fix it." (Exhibit S.)[19]

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[19] McGreevey, Patrick, "California Labor Secretary Julie Su Picked for Federal post Amid Crisis at EDD," available at https://www.latimes.com/california/story/2021-02-10/california-unemployment-benefit-problems-julie-su-federal-appointment-edd. Los Angeles Times. Last viewed, February 26, 2021.

She also acknowledged that the EDD was not prepared for the rapid increase in demand for unemployment assistance triggered by the pandemic. ”It should be no surprise that EDD was overwhelmed just like the rest of the nation’s unemployment agencies,” Su told reporters on Jan. 25. (Exhibit S.)

Su also conceded that EDD’s technology was subpar. She stated, “I know this sounds crazy because we are in California, we are the tech center of the world, but our system is built on multiple antiquated systems, and because of that it is inflexible – it is very difficult to change,” Su said during another Facebook Live session last spring. (Exhibit S.)

Su told legislators that she planned to follow through with the changes recommended by the governor’s strike team.

“EDD was woefully unprepared for the unparalleled demands created by COVID-19,” Su said in a statement to *The Times* in December. But, she added: “Many of the issues were not caused by COVID-19.” (Exhibit S.)

Some Democrats in California have criticized Su’s performance regarding her oversight of EDD. For example, Assemblywoman Cottie Petrie-Norris (D-Laguna Beach), chairwoman of the Assembly Accountability and Administrative Review Committee said Su “has done a tremendous job on many different initiatives, but she has not done a good job at running the Employment Development Department and, as a result, has wasted billions of dollars and, more importantly, caused heartache for millions of Californians.” (Exhibit S.)

7. Challenges Pending With The DOL.

The DOL employs over 15,300 full-time employees and has a budget of $11.1 billion.[20] (Exhibit T.)[21] As Deputy Secretary of the DOL, Su would have responsibility for overseeing thirty subdivisions within the DOL. (Exhibit U.)[22]

Among the challenges facing the DOL at this time is responding to widespread UI fraud across the country – the same challenge plaguing EDD in California. The DOL’s Inspector General recently stated that the DOL “needs to take immediate action and increase its efforts to ensure” state agencies “implement effective controls to mitigate fraud.” (Exhibit V.)[23] The Inspector General’s analysis identified $5.4 billion in potentially

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[20] As explained above, as of 2020, LWDA had almost 12,000 employees and a budget of just over $1 billion. (Exhibit K.)

[21] FY 2021 Department of Labor Budget In Brief, available at https://www.dol.gov/sites/dolgov/files/general/budget/2021/FY2021BIB.pdf. Last viewed, February 27, 2021.

[22] Department of Labor Organizational Chart, available at https://www.dol.gov/general/aboutdol/orgchart. Last viewed, February 27, 2021.

[23] Penn, Ben, “Jobless Aid Fraud Warrants Greater Federal Action Watchdog Says,” available at https://www.bloomberglaw.com/product/blaw/bloomberglawnews/bloomberg-law-news/

fraudulent jobless benefits that were paid out across the country between March and October of 2020 (Exhibit W) – which is less than half of the $10.4 billion in claims payments that EDD provided during the same period that EDD determined could be fraudulent. (Exhibit L at p. 9; Exhibit W.) Some estimate that the total amount of fraudulent payments in California could be as high as $31 billion.[24] (Exhibit X.)

BNA%2000000177-d4d0-dcae-aff7-d6da81e00001?bwid=00000177-d4d0-dcae-aff7-d6da81e00001. Bloomberg Law. (Last viewed, February 27, 2021.)

[24] Hepler, Lauren, "California's Unemployment Crisis, Explained," available at https://calmatters.org/explainers/california-edd-unemployment-crisis-explained/. CalMatters. Last viewed, February 27, 2021.