August 24th, 2017

Interim Director Patrick Allen
Oregon Health Authority
2600 Center Street NE
Salem, OR 97301

Dear Interim Director Allen,

The following letter constitutes our concerns about Oregon's application for a 1332 State Innovation Waiver which is currently being sought from the Center for Medicare and Medicaid Services (CMS), a division of the United States Department of Health and Human Services (HHS).

In 2013, the Oregon Legislature created what was to be a temporary reinsurance program while the Oregon Health Exchange (formerly known as Cover Oregon) was ramping up to enroll lives into the Exchange under the Patient Protection and Affordable Care Act (ACA). It was estimated that the reinsurance program would be a temporary measure until such a time that the Exchange was operating at a break-even capacity, some 285,000 lives to be covered. The reinsurance program ended in 2016, leaving a $50 million dollar balance in the program. The Oregon Legislature opted to renew the program, sweeping the $50 million dollar "windfall" back into the program while seeking additional funds to shore up the renewed reinsurance program. As part of that effort, the state was directed through House Bill 2391 to seek this 1332 waiver.

Oregon's waiver draft rightly states the problem our state is having in maintaining a robust insurance market with consumer choices. However, the draft wrongly identifies a reinsurance program as the solution to a volatile insurance market that has left Oregon consumers with dwindling choices both in and out of the Exchange, while simultaneously facing double-digit rate increases. In fact, early in 2017, the Department of Consumer and Business services put forth a document that expressed concerns whether a 1332 waiver was the correct course of action for Oregon and made a recommendation that we NOT pursue a 1332 waiver. We agree with the original recommendation to not pursue a waiver. Indeed, as we see it, the solution to fixing these problems doesn't lie in taxing consumers to subsidize the marketplace with a reinsurance program as a mechanism to decrease rates. We also believe the tax mechanisms proposed by House Bill 2391 are not broad-based enough to even qualify for such a waiver.

The fact is Oregon failed to enroll enough lives into the Exchange to spread the risk pool in such a manner so that the insurance market would stabilize on its own without an additional infusion of state or federal tax dollars. We pinpoint the failure of the Exchange to House Bill 2128 (2013) when the legislature repealed portions of a negotiated compromise in House Bill 4164 (2012), the business plan for the Cover Oregon. In House Bill 4164, Oregon's school districts would have been granted the opportunity to buy insurance for their employees via the Exchange beginning in School Year 2015. Besides an estimated $400 million in annual K-12 budget school savings had House Bill 4164 been implemented, the net result of adding 150,000 lives from school districts, coupled with the existing 135,000 lives currently in the Exchange, would have leveled out risk pool. Subsequently, it would have held down rates for all ratepayers in the Exchange without the need for a costly, taxpayer-funded reinsurance program as proposed by this waiver.

Had we followed through with the policy in House Bill 4164, Oregon would have achieved the 285,000 lives needed to make the Exchange function as originally planned.

We dispute projections of insurance rate decreases estimated by this waiver request will manifest at the levels proposed by the agency. This year, rate requests from the remaining insurers in Oregon ranged upwards to an eye-popping 21%. The state granted rate requests as high a 14% for some carriers, while granting only 2% rate increases for others. These variances have caused some insurers to exit markets, and in rural Oregon, leave ratepayers with only one carrier choice. In subsequent biennia, as these insurers bear the brunt of healthcare costs for some of Oregon's highest risk patients who buy their coverage via the Exchange, without expanding the risk pool itself, we believe it will be impossible to create the kinds of rate savings this waiver purports to potentially yield. The reinsurance program created by the 2013 legislation did little to offset repeated, annual double-digit rate increases or exits from the marketplace. In fact, Moda, because of poor rate planning and the amount of high-risk patients entering the marketplace, required a $50 million dollar loan from Oregon Health Sciences University to stabilize their presence in Oregon.

The projected increase in people buying insurance in the marketplace is not enough to bring the overall risk down. Of concern are the number of people who have bronze and silver plans who are unable to afford associated premiums. Hospitals in Oregon self-report seeing an increase in charity care of people with ACA coverage who cannot afford co-pays associated with these plans. This uptick in charity care occurred with a reinsurance program in place. Given the continued volatility of the insurance marketplace in Oregon, we dispute the cost savings renewing the reinsurance program is purported to save the federal government.

The 1332 waiver request by Oregon to CMS is also predicated on the passage of taxes in House Bill 2391. Currently, there is a referendum effort to repeal the taxes in Sections 3, 5, 9 and 27. Even if voters are not successful in repealing the tax mechanisms in House Bill 2391, we also do not believe that these taxes constitute a broad enough base to even qualify for a 1332 waiver.

The following takes a look at the tax mechanisms the state is looking to use as the basis for its waiver request. These dollars were also warranted as a potential revenue stream for additional Medicaid match dollars from the federal government:

Section 3: This 1.5% tax is on the insurance for Oregon's Public Employee Benefit Board (PEBB). Given healthcare for public workers come from state tax resources, the tax on PEBB plans constitutes a tax on tax dollars. It does not generate net-new revenue for the state from which to constitute a broad-base for a 1332 waiver request or new resources for Medicaid matching.

Section 5: The 1.5% tax on insurance markets will impact about 1.2 million Oregonians who through their own purchasing power or via an employer, will see a rate increase as a result of the tax. Separately, nearly one million Oregonians who receive employer-sponsored benefits via self-insurance will not be subject to this tax. This unfair tax burden being leveraged to generate both a 1332 waiver and potentially Medicaid match dollars, disproportionately impacts just over half of the healthcare-purchasing market while leaving the other half of remaining Oregonians free from taxation. We believe this tax does not meet the requirements for a 1332 waiver.

Section 9: This 1.5% tax on Medicaid Coordinated Care Organizations (CCOs, MCOs) is incredibly problematic. The state currently leverages a Medicaid match from the federal government via hospital and long-term care bed tax assessments. Under Oregon's laws, these dollars are assessed to the hospital or long-term care facility, matched with federal funds, and then redeployed to Medicaid providers. The taxation provision in Section 9 of House Bill 2391 proposes to tax the gross revenues of MCOs for the purpose of attempting a second bite at a Medicaid match. However a legal opinion from Oregon's legislative counsel states that the taxes in Sections 5 and 9 of House Bill 2391 are essentially fungible to Oregon's General Fund. We find the "double dip" element of the MCO tax to be at odds with the intent of the match programs allowed by CMS for Medicaid, and would not be able to be used as consideration for a 1332 waiver. In fact, we believe that this particular provision in House Bill 2391, if found to be in violation of federal Medicaid policy, has the potential to put our entire Medicaid program as it's currently delivered in jeopardy.

Additionally, the state has presented a timeline for a 1332 waiver which does not align with that tax-raising mechanisms in House Bill 2391 to fund the reinsurance program. Should the taxation components in House Bill 2391 stand up to a referendum of Oregon voters, the bill itself has language that without another vote of the legislature, would render the taxes in the Section 3 PEBB tax and the Section 9 MCO tax sunsetted. This would only leave the taxation of insurance premiums in Section 5 moving forward, which would not constitute a broad enough base for a long-term reinsurance plan as presented to CMS in the request by Oregon for the 1332 waiver.

Waiver requirements specially ask states to demonstrate a 10-year budget showing the waiver will not increase the federal deficit and show how the waiver will not decrease coverage or affordability. We do not believe the state can adequately prove to CMS a 10-year budget plan with a broad enough tax base given two of the tax provisions in House Bill 2391 sunset in 2019, and given nearly half of Oregonians who have private-pay health coverage are not subject to the taxes in House Bill 2391.

Additionally, if the legislature chooses in the next biennium to sunset the tax provisions in Sections 3 and 9, the resulting cost increases demonstrated in Oregon's draft budget to fund the growth of the reinsurance program will disproportionately fall to only one category of insured. The net result will likely manifest in decreased coverage as insurers continue to drop out of the marketplace and increased costs to ratepayers when insurance companies pass additional costs to consumers. We believe this does little to stabilize the market and puts Oregon back in the position of having to negotiate with the federal government for increased budget allocations or additional waiver options to keep citizens covered.

This bait-and-switch type tactic should raise red flags for CMS about the long-term sustainability of the reinsurance program proposed by Oregon. Indeed, as the potential for the PEBB and MCO taxes disappear with a sunset, and the cost of the reinsurance program to the state is slated to rise, we have concerns about the state's ability to fund its share of a reinsurance program long term.

Lastly, we have concerns about future "windfalls" and how funds remaining in the reinsurance program are handled. With the close of the reinsurance program that ended in 2016, the state was left with a $50 million dollar balance that had been generated by ratepayers. We believe keeping those funds and redistributing them back to insurance companies, and not to the ratepayers from whom the funds were generated, violated the public's trust in a state-run reinsurance program. The $50 million overdraw from ratepayers, and the subsequent redistribution to insurance companies proposed by this new reinsurance request, we maintain, amounts to a taking from individuals who may no longer be participating in the insurance marketplace.

We believe the federal government should be concerned as we are by a reinsurance program that lends itself to profiteering by insurance companies at the expense of ratepayers. House Bill 2391 was pitched as a bill that "taxes big insurance companies" yet insurance companies themselves are twice-exempted: once as an employer because they self-insure, and secondarily, because Section 8 of House Bill 2391 gives statutory authority for insurance companies to pass the new taxes directly to ratepayers. If the taxation under House Bill 2391 is passed directly to ratepayers, then a reinsurance program in which a positive fund balance is created by that taxation should be restored to those who actually incurred the tax liability. House Bill 2391 has no such provision to protect ratepayers.

Interim Director Allen, we understand the responsibility for management of the health and welfare of millions of lives in Oregon is a weight bigger than one agency director, one governor, or 90 legislators can possibly comprehend. However, we've watched mistake after mistake in how Oregon has implemented the components of the Affordable Care Act. From a failed Cover Oregon web portal that wasted over $300 million dollars, to policy decisions that neutered the participation and financial efficacy of the Exchange, to a Medicaid backlog which has cost the state hundreds of millions in additional healthcare IT software challenges, not to mention hundreds of millions in Medicaid overpayments to Coordinated Care Organizations, our handling of the ACA has been ineffective and has cost Oregon taxpayers and the federal government dearly.

We would ask that you go back and revisit your original recommendation that the state NOT participate in a 1332 waiver request. We have much work to do to bring down insurance rates and healthcare costs for Oregonians, but the solution doesn't lie in more costly gimmicks like a reinsurance program. It would stand to reason that taxing healthcare is not the way to make it more affordable. We're further concerned that recent announcements of layoffs and hiring freezes at hospitals across Oregon due to tax increases in House Bill 2391 and hospital payment capping in Senate Bill 1067 (2017) will contribute to a sharp increase in healthcare costs and a decrease in healthcare access for Oregon citizens that this 1332 waiver request won't address.

We would like during your time as interim director of Oregon's Health Authority for you take the opportunity to provide sound policy recommendations to Governor Brown and the legislature for how to implement what we all originally understood would bring down rates long term – and that's getting more lives into the risk pool to stabilize the market. We must revisit moving public employee lives onto the Exchange as a way to boost participation and bring down the overall risk, which in turn, would help bring down insurance rates for ratepayers and reduce pressure on all taxpayers who contribute to the healthcare benefit costs of public employees. Anything else is just a continuation of failed policy decisions which have ruined the chance of cost savings voters were promised with the passage of the Affordable Care Act.

Next year, many Oregonians will forced to change insurance providers and doctors while simultaneously experiencing double digit rate increases. The state should take care to avoid policies that will continue to increase consumer insurance costs for some, while giving tax carve-outs to nearly half of Oregon's healthcare purchasers. What we're doing in Oregon's insurance market is unsustainable.

We appreciate your consideration of our comments on Oregon's request for a 1332 waiver and would urge the state and CMS to avoid this expensive and wrong choice. We believe Oregon's proposal doesn't fit the requirements for a waiver, and that ultimately, a costly reinsurance program will do more harm than good. It's time to come back to the table to find a better path to bring down long-term healthcare costs, and we're ready to work towards that end.

Sincerely,

Cedric Ross Hayden   Julie Parrish

Rep. Cedric Hayden   Rep. Julie Parrish
Falls Creek   West Linn