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August 24, 2018

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By Email to: dcbs.director@oregon.gov
Jesse.E.OBrien@Oregon.gov

Re: Defects of HB 4005 Rulemaking Advisory Committee's Charter

Mr. Smith,

Both the membership and Charter of the HB 4005 Rulemaking Advisory Committee are defective; these should immediately be corrected to salvage the fairness and legitimacy of this rulemaking process. At a minimum, Courtney Helstein—a lobbyist for Texas-based Laura and John Arnold Foundation's political action committee—should immediately be removed from this Committee and the identity of her client formally disclosed. Jesse O'Brien's own bias in favor of the "Coalition [of private and public payers] in support of HB 4005" that he worked hard to support prior to his employment with DCBS should also be mitigated, either by removing him as officer of this RAC or by introducing procedural safeguards (e.g. in the selection of the RAC's membership).

The purpose of a Rulemaking Advisory Committee (RAC) formed under ORS 183.333 is to allow the interested parties most affected by the rules under consideration to provide substantive recommendations or feedback. The purpose is not to offer a group of insurance industry lobbyists, their coalition allies, and a PAC funded by an out-of-state billionaire a platform to further advance their clients' agenda.

HB 4005 is not a drug price transparency law per se;¹ it is an insurance law that attempts to address, under the guise of drug pricing 'transparency,' a loophole in the current Insurance Code—the absence of a specific assessment standard for health insurance benefit designs that now base some insureds' coinsurance and other payments on the list prices of heavily rebated pharmaceuticals. It is also an attempt, by the insurance lobby represented on the HB 4005 Rulemaking Advisory Committee by AARP/UnitedHealth, Moda Health, Cambia Health, Prime Therapeutics (BlueCross BlueShield), Providence, Kaiser Permanente, the manager of their astroturf coalition—Strategies 360—and insurer-

¹ The legislature could have delegated authority to implement HB 4005 to the Oregon Health Authority—the agency tasked with purchasing pharmaceuticals and managing the State's drug lists. Instead, the Oregon legislature vested jurisdiction over HB 4005's implementation in DCBS, the agency in charge of regulating the health insurance industry under the Oregon Insurance Code. This assignment signals that the true target of HB 4005 is not transparency in the pricing of prescription drugs but health insurance benefit design under the Oregon Insurance Code.



allied organizations (Laura & John Arnold Foundation/Action Now Initiative, Oregon Medical Association, OSPIRG, AFSCME) to use a regulatory process to unduly modify sound actuarial standards on which insurance premium rate assessments should be based. This concerted effort by payers and their allies is against the interest of the insurance-buying public.

DCBS apparently put Jesse O'Brien—a former lobbyist member of the insurer-funded and Strategies 360-managed coalition to pass HB 4005—in charge of drafting the Charter for the Prescription Drug Price Transparency Rulemaking Advisory Committee (“Charter”) and selecting the members of this Rule Advisory Committee (“RAC”). Unsurprisingly, the insurance lobby he actively supported prior to being hired by Oregon Insurance Commissioner Andrew Stolfi now represents a majority of the Committee’s members (56% or 10 out of 18 representatives). The remaining 8 members do not include any representative of patients exposed to insurer-determined prices for rebated brand drugs.

There is no representative on this RAC for patients with chronic medical conditions (e.g. diabetes) who actually buy heavily rebated drugs, under-insured Oregonians exposed to coinsurance payments that Oregon insurers have chosen to base on unrebated list prices, and uninsured Oregonians—the collateral victims of insurers’ ongoing rebate-capture scheme (because the uninsured have little choice but to pay the skyrocketing list prices to which insurers’ rebate-capture scheme contributes) and simultaneously the collateral victims of the Oregon Prescription Drug Program (OPDP)’s failure to pass rebates through to individual discount card holders in the form of “lowest possible [net] price.”

This RAC is thus in breach of (1) the Administrative Procedure Act, (2) DCBS’s Rules of Procedure adopted under ORS 183.341(2), and (3) the purpose and letter of the Insurance Code as codified under under ORS 743.018:²

- (1) The RAC’s membership does not meet the requirements of the Oregon Administrative Procedure Act and regulations. There is no representative on this RAC for users of heavily discounted brand drugs such as insulin. There is no representative for the uninsured or for OPDP discount card holders. There is no representative for underinsured Oregonians on ACA HDHPs, where Oregon insurers are currently electing to base many patient payments on unrebated list prices.
- (2) Courtney Helstein should immediately be removed from this RAC, as her client Action Now Initiative LLC is a Texas-based entity representing the interest of billionaires Laura and John Arnold. Texas billionaires are not interested parties within the meaning of Oregon laws.

² “The Legislative Assembly declares that the Insurance Code is for the protection of the insurance-buying public.” ORS 731.008.



- (3) The Charter's sections addressing Authority and Purpose and Scope should be amended to reflect that HB 4005 is an insurance law subject to the Insurance Code's strict procedural safeguards and substantive bar on misrepresentation, unfairness and discrimination.
- (4) Furthermore, the Charter should acknowledge that resolution of the many conflicts between HB 4005's vague language and the primacy of individual rights under the Oregon Insurance Code requires consideration of broader policy issues including NAIC's and the ACA's approach to rebate accounting in contexts other than financial reporting as allowed under ORS 731.574(5), e.g. MLR calculation, SSAP 84.³

Non-Representative Members; Undue Influence of Pro-Payers Lobby.

The RAC must represent the interests of persons likely to be affected by the rule.⁴ And under the adopted Rules of Procedures, DCBS is required to make a good faith effort to ensure that the committee's members represent the interests of persons likely to be affected by the rules.⁵ This RAC has breached those requirements.

Organizations that represent individuals—uninsured and under-insured Oregonians who will be significantly affected by the rulemaking action—have been excluded. Instead, the RAC has been stacked with members of an insurer-funded coalition. The mere presence of Ms. Helstein on this RAC and the absence of any patient organization would further suggest that DCBS is not acting in good faith.

The individuals most affected by the rules of this committee and by HB 4005 are not the majority of healthy consumers, government employees and union members who have access to OPDP pharmacy benefits with 100% rebate pass-through, beneficiaries of government programs such as Medicaid and employees of large corporations with subsidized health plans—these plans are also the most likely to have 100% pass-through contracts with PBMs. The most affected individuals are individuals with disabilities within the meaning of ORS 174.107 who are either uninsured or under-insured, including people with chronic medical conditions such as diabetes who are currently forced by their insurers to pay full list prices for heavily rebated drugs such as analog insulin.

In order to give effect to the policy goal stated in ORS 731.008,⁶ i.e. **the protection of the insurance-buying public**, DCBS is required to interpret procedural rules in a manner that is most beneficial for

³ These technical issues will be further addressed in OR4AD's response to the RAC's RFI.

⁴ ORS 183.333(1).

⁵ 137-001-0007(2), Public Input Prior to Rulemaking.

⁶ ORS 731.016.



these individuals. DCBS should therefore have appointed at least one representative of a patient organization with substantive knowledge of the pharmaceutical market. Mr. O'Brien should not have filled this Committee with members of the coalition in which he formerly played a prominent role.

Instead, this RAC has been artificially packed with representatives of the insurance lobby: AARP/UnitedHealth, Moda Health, Cambia Health, Prime Therapeutics (BlueCross BlueShield), Providence, Kaiser Permanente, one of the managers of their astroturf coalition—Strategies 360—and allied organizations (Oregon Medical Association, OSPIRG, AFSCME).⁷

The insurer-funded and Strategies 360-managed coalition (see photo on following page) comprises a majority of the Committee members (56% or 10 out of 18 representatives). The remaining 8 members include 5 representatives of the pharmaceutical industry (1 manufacturer, 2 PhRMA representatives, 1 BIO representative and 1 representative of generics manufacturers), 1 representative of independent pharmacies, 1 representative of wholesalers, and 1 representative of nonprofit hospitals.

In the absence of any patient-focused independent representatives, this lobbyist-stacked RAC is basically an invitation for powerful corporate interests to collude—a collusive scheme that is, paradoxically, being facilitated by “Oregon's largest consumer protection and business regulatory agency.”⁸

[continued after next page]

⁷ The Oregon Medical Association represents providers. AARP represents its joint-venture partner UnitedHealth (AARP and UnitedHealthcare together market 11 co-branded Medicare plans in Oregon). See also <https://olis.leg.state.or.us/liz/201711/Downloads/CommitteeMeetingDocument/149724>. OSPIRG, under the leadership of Jesse O'Brien, has become subservient to its “Coalition partners”—as further documented by the letters recently filed by Mr. Griffith. Mr. Griffith's anti-consumer intervention on August 21, 2018, in the Joint Interim Task Force On Fair Pricing of Prescription Drugs, as well as his response to this Committee's July 31 Request for Information, arguing “this rulemaking should not be viewed by any stakeholders as an opportunity to reform insurance rate review in a comprehensive fashion,” are self-serving: OSPIRG's past and present failure to challenge insurer rebate capture in benefit design and its impact on insurance rate review in Oregon seriously compromises OSPIRG's claim to operate as an independent watchdog in relation to the health insurance industry.

⁸ <https://www.oregon.gov/dcbs/news-info/Pages/about-us.aspx>.



Coalition in support of HB 4005 (March 4, 2018)



Pictured above, from left to right

Unidentified; Inga Deckert (Kaiser Permanente); **Courtney Helstein** (front row, in red shirt, Strategies 360 director, government affairs); **Patty Wentz** (back row, Strategies 360 vice president, campaign manager succeeding Andrea Salinas); **Jon Bartholomew** (UnitedHealthcare/AARP); **Dave Hunt** (former Oregon House Speaker, Strategies 360 senior vice president and, at time of photo, registered lobbyist for Laura and John Arnold’s Action Now Initiative); **Kenya Juarez** and **Danielle Alexander** (Strategies 360); **Elise Brown** (AHIP).

Not pictured

Jesse O’Brien (then OSPIRG, now DCBS Senior Policy Analyst and officer of the HB 4005 Rulemaking Advisory Committee), **Rep. Andrea Salinas** (Strategies 360 vice president and initial campaign manager of the “Coalition in support of HB 4005” from January 2017 to September 2017, then appointed representative of District 38 and member of the House Interim Committee On Health Care, sponsor of HB 4005); **Tom Holt** (formerly Cambia lobbyist, succeeded at Cambia by Strategies 360 vice president Vince Porter, now healthcare advisor to the Knute Buehler gubernatorial campaign).



At a minimum, Ms. Helstein should be removed from this RAC, and she should be replaced by a representative of individuals who purchase heavily rebated brand drugs.

Courtney Helstein is the Director of Government Affairs and Campaigns for Strategies 360's Oregon team⁹ and a member of the Capitol Club.¹⁰ In that capacity, she provides lobbying, strategic legislative consulting and coalition-building for Strategies 360's clients.¹¹ Ms. Helstein is a lobbyist registered with the Oregon Government Ethics Commission.¹²

Ms. Helstein purportedly represents on the RAC the “Coalition in support of HB 4005.” Members of the HB 4005 coalition managed by Strategies 360 in 2017 and early 2018 apparently included, among others, OSPIRG (Jesse O’Brien, and now Mark Griffith), AARP/UnitedHealthcare, Cambia, Providence, Moda Health, Kaiser Permanente, the AFSCME, the Oregon Medical Association and possibly the Laura and John Arnold Foundation’s PAC (Action Now Initiative).

The lobbying team of this Coalition is pictured above in a photo taken on March 4, 2018 (the whole team is included, with the exception of Rep. Andrea Salinas—who was then apparently in session, having accepted a legislative appointment and membership in the House Committee on Health Care, it seems concurrently with her Strategies 360 employment—Tom Holt, and Jesse O’Brien):

- Elise Brown — AHIP.
- Inga Deckert — Kaiser Permanente.
- Jon Bartholomew — UnitedHealthcare/AARP, a joint venture marketing 11 co-branded Medicare plans in Oregon.
- Tom Holt — Cambia/BCBS (succeeded by Strategies 360 vice president Vince Porter in October 2017).¹³

This insurance lobby retained the services of the politically-connected Strategies 360 to manage their astroturf operation—the “Coalition in support of HB 4005.” The Strategies 360 team included:

⁹ <https://www.strategies360.com/team/courtney-helstein/>.

¹⁰ <https://www.oregoncapitolclub.org/user/?type=user&search=Courtney%20Helstein>.

¹¹ Description of responsibilities from <https://www.linkedin.com/in/cmhelstein/>. The true identity of the client Ms. Helstein represents on this RAC has yet to be confirmed.

¹² via <https://apps.oregon.gov/OGEC/EFS/Records/GetUserProfile?filerID=1388&reportType=Registrations&filerType=Lobbyist%20Client>.

¹³ In October 2017, Tom Holt was replaced as Cambia’s lobbyist by Vince Porter, former Strategies 360 vice president, shortly after the nomination of Rep. Salinas. Mr. Holt is now reportedly advising Knute Buehler’s gubernatorial campaign.



- Dave Hunt (former Oregon House Speaker, Strategies 360 senior vice president) — account manager and, at the time, a registered lobbyist for the Laura & John Arnold Foundation’s PAC (Action Now Initiative).¹⁴
- Rep. Andrea Salinas, junior member of the House Interim Committee On Health Care and sponsor of HB 4005 (Strategies 360 vice president)— initial project manager.
- Patty Wentz (Strategies 360 vice president) — successor project manager.
- Courtney Helstein (Strategies 360 director, government affairs).
- Kenya Juarez and Danielle Alexander (Strategies 360 staff).

With the exception of AHIP, the principals of the “Coalition in support of HB 4005” (Cambia, Moda, AFSCME, OSPIRG, Kaiser Permanente) are already represented on the RAC. Ms. Helstein’s presence on this RAC would thus be, at best, redundant.

The true identity of the Strategies 360 corporate client that Ms. Helstein represents on this RAC must also be disclosed. Ms. Helstein’s current lobbying clients,¹⁵ as reported to the Oregon Government Ethics Commission, only include Action Now Initiative LLC, ACLU of Oregon and Cascade AIDS Project. Neither her 2017 nor her 2018 registration identifies a “Coalition in support of HB 4005.” The ACLU of Oregon and Cascade AIDS Project had no involvement in the HB 4005 campaign. Either Ms. Helstein failed to register the “Coalition in support of HB 4005” as her client (if such client ever actually existed), and she is thus in breach of Oregon ethics rules, or the “Coalition in support of HB 4005” is in fact a project of Laura and John Arnold’s Action Now Initiative—and should have been thus identified by Jesse O’Brien’s Charter.

Action Now Initiative LLC is a Domestic Limited Liability Company (LLC) incorporated in the State of Texas in January 4, 2018, by Laura and John Arnold; its registration with the Oregon Government Ethics Commission identifies a Texas-based campaign finance attorney as its contact.¹⁶ The Laura and John Arnold Foundation is currently financing several drug pricing-related initiatives in Oregon, including a review of OPDP/NWDPC,¹⁷ a \$2 million grant to OHSU-based Vinay Prasad, M.D., M.P.H.¹⁸

¹⁴ Mr. Hunt was Action Now Initiative’s lobbyist from February to April 2018. Ms. Helstein would formally become Action Now Initiative’s lobbyist on April 25, 2018.

¹⁵ In 2017 (but not in 2018), Ms. Helstein listed Strategies 360 as her employer/client.

¹⁶ <http://gobergroup.com/profile/karen-blackistone-oaks/>.

¹⁷ Presentation to the Washington Healthcare Authority on the NW Prescription Drug Consortium (including OPDP) by Ray Hanley, Director, Prescription Drug Program (March 21, 2018).

¹⁸ <https://blogs.ohsu.edu/cancertranslated/2017/03/22/with-foundation-help-an-ohsu-physician-roots-out-low-value-medical-practices/>.



and a \$1.6 million grant to the Center for Evidence-based Policy at Oregon Health and Science University.¹⁹ Texas billionaires are not interested parties within the meaning of ORS Chapter 183.

LJAF’s contract lobbyist(s) should not be a member of this RAC, while Oregon-based patient organizations and advocates for uninsured and under-insured Oregonians are patently excluded.

Ms. Helstein’s failure to identify the client(s) she actually represents on this RAC could also be a breach of lobbying disclosure requirements and ethics law. Her immediate removal and replacement by a knowledgeable representative of the Oregonians most affected by HB 4005 rulemaking would somewhat mitigate the existing and obvious bias of DCBS in favor of the corporate and political interests she represents.

Incomplete and Inaccurate Statement of Authority.

HB 4005 did not authorize the “Department of Consumer and Business Services ... to take a variety of steps to enhance transparency...”²⁰ and HB 4005 did not delegate any new or expanded rulemaking²¹ power to the Director of the Department of Consumer and Business Service (“DCBS”) or the Insurance Commissioner.

HB 4005 Section 13(d) vests in DCBS jurisdiction over the implementation of HB 4005—an insurance law—and sets deadlines for DCBS to “take all steps necessary... to carry out the provision of sections 1 to 5 of this 2018 Act and the amendments to ORS 743.018 and 750.055 [of the Insurance Code] by section 8 and 19.”

DCBS’s statutory rulemaking authority to carry out the provisions of HB 4005 derives from three sources: a general authority under ORS 705.135(2) and under ORS 731.244 (Insurance Code), and a specific authority under HB 4005 section 2(12) (but only for carrying out the provision of this section). DCBS’s authority to take “all steps necessary” and the scope and nature of these “steps” are matters

¹⁹ The Arnolds’ interest in Oregon has been sustained over many years. Their Oregon experiment seems to have begun in 2009 when they gave \$1.5 million in support of a ballot measure that would have rewritten Oregon’s primary system to reduce the influence of political parties. “Opponents of Measure 90, which include the state’s Democratic and Republican parties, have portrayed Arnold’s donations as part of an effort by well-heeled corporate interests to give an advantage to business-friendly candidates.” https://www.oregonlive.com/politics/index.ssf/2014/10/texas_billionaire_donates_anot.html. The cited article noted that subsequent to LJAF’s massive donation in support of the ballot measure, the ACLU of Oregon changed its position from opposing Measure 90 to neutral. The LJAF perfected their state political influence strategy during campaigns against public pension funds and public schools. See, e.g., <https://protectpensions.org/arnold/>

²⁰ Prescription Drug Price Transparency Rulemaking Advisory Committee C.

²¹ “Rule” means any agency directive, standard, regulation or statement of general applicability that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of any agency. The term includes the amendment or repeal of a prior rule. ORS 183.310(9).



governed by Oregon statutes: this authority is bound by (1) a reasonableness standard²² and (2) the substantive requirements, purpose, anti-discrimination standards and trade practices of the Insurance Code.²³

DCBS's rulemaking authority is concurrently governed by the Administrative Procedure Act, ORS chapter 183.²⁴ The composition, authority and procedures of this Rule Advisory Committee are more specifically governed by ORS 183.333 and ORS 183.335. Finally, rulemaking action in this RAC must comply²⁵ with DCBS's adopted Attorney General's Model Rules of Procedure,²⁶ OAR 137-001-0005 through 137-001-0100, in effect on January 1, 2006. These Rules of Procedure apply to both DCBS's general rulemaking authority under the APA, ORS 183.341, and its specific rulemaking authority under the Insurance Code, ORS 705.135.

These procedural requirements and HB 4005, an insurance law, must be liberally construed, administered and enforced to give effect to the policy stated in ORS 731.008:²⁷ **the protection of the insurance-buying public**—not the profit-maximizing interests of the “Coalition [of public and private payers] in support of HB 4005.”

In the context of a Rulemaking Advisory Committee overwhelmingly dominated by corporate interests adverse to the insurance-buying public, the Charter should have, at a minimum, stipulated this controlling standard.

Misleading and Incomplete Scope.

The Charter does not cite the Section of HB 4005 that defines its scope and instead implies that the scope of the RAC is limited to sections 2, 3 and 5.²⁸

HB 4005 Section 13(d) vests in DCBS jurisdiction over the implementation of HB 4005—an insurance law—and sets deadlines for DCBS to “take all steps necessary... to carry out the provision of sections 1 to 5 of this 2018 Act **and the amendments to ORS 743.018 and 750.055 [of the Insurance Code] by**

²² ORS 731.244 (“the Services may make **reasonable rules** necessary for or as an aid to the effectuation of the Insurance Code”).

²³ ORS 731.244 (“No such rule shall extend, **modify or conflict** with the Insurance Code or the reasonable implications thereof”).

²⁴ ORS 731.244; ORS 705.13(2).

²⁵ ORS 183.341(2).

²⁶ OAR 440-001-0005, Model Rules of Procedure.

²⁷ ORS 731.016.

²⁸ RAC Charter, Purpose of Scope, p. 2.



section 8 and 19.” To do so, this RAC is to consider deleting, modifying or creating rules, i.e. directive, standard, regulation or statement of general applicability that implements, interprets or prescribes law, procedure or practice requirements.²⁹

The first step of this RAC must therefore be to identify existing rules and currently defined terms in HB 4005 and their interplay with the Insurance Code. When a key undefined term is identified—or when a conflict or ambiguity is identified—the RAC must then define the issue and seek feedback on potential solutions. Moreover, contrary to statements included in the Charter, this first step may require taking into consideration broader policy questions, including trade practices, financial accounting and actuarial standards of practice (ASOPs).³⁰

For example, section 8 of HB 4005 use the term ‘expense’ but does not define it. The term ‘expense’ is undefined in the Insurance Code.³¹ In the context of the purchase of pharmaceuticals, ‘expense’ could refer to gross ‘claims expense’ (e.g. Oregon AAAC and dispensing fee paid at the pharmacy point-of-sale), prior to reconciliation with manufacturer rebate offset and other discounts. However, sound actuarial assessment (the purpose of ORS 743.018) requires the use of actual/net costs, not unrebated gross expenses or list prices (defined by HB 4005 as WAC). The use of list prices in the context of rate setting and benefit design would be discriminatory and unfair; it would also result in inflated cost-sharing and inflated premium rates.

There is therefore a conflict between one of the customary meanings of ‘expense’ and the primary purpose of the Insurance Code under ORS 743.018—**the protection of the insurance-buying public.**³² In order to protect the public, the terms of ORS 743.018 must be liberally construed.³³ This RAC must therefore clarify that for the purpose of ORS 743.018, ‘expense’ will be defined to mean ‘net expense,’ i.e. the net cost to plan of the pharmaceuticals after all rebate offset and discounts paid by manufacturers, wholesalers and pharmacies are taken into consideration.

The section of the Charter addressing Scope and Purposes should therefore be completely redrafted in order to:

- (1) Include the complete scope of HB 4005, i.e. section 1 to 5, but also sections 8 and 9;

²⁹ ORS 183.3101(9) Definition of “Rule.”

³⁰ “The workgroup... will refrain from debating... any broader policy questions, which are outside the scope of its charge.” Charter, Purpose and Scope, p. 2.

³¹ See, e.g., ORS 741.300. The definition of Health Insurance is somewhat circular and relies on the undefined term ‘expense’ in ORS 731.162.

³² “The Legislative Assembly declares that the Insurance Code is for the protection of the insurance-buying public.” ORS 731.008.

³³ ORS 731.016.



- (2) Identify the controlling standards imposed by the Insurance Code on the RAC deliberations; and
- (3) Encourage RAC members to take into consideration the broader trade practices, financial accounting and actuarial standards upon which the consumer protection framework of the Insurance Code is predicated.

Unspecified Decision-Making Process; No Procedural Safeguards.

DCBS, the Coalition in support of HB 4005, and the DCBS officer in charge of this RAC, Jesse O'Brien (who worked actively for the Coalition for over a year immediately prior to joining DCBS), don't seem to be acting in good faith—as discussed above.³⁴ Procedural safeguards should therefore protect the interest of the insurance-buying public in the context of an RAC exclusively controlled by powerful corporate interests.

The Charter should clarify that this RAC isn't governed by collaborative or consensus-based rulemaking. Since the purpose of the RAC is to collect differing opinions, the Charter should have put in place a process to fairly capture these opinions. The RAC officer should also guarantee that opponents will be given a fair opportunity to voice their concerns or competing suggestions, and that these suggestions will be fairly represented.

The informal RAC process can easily be abused when a coalition, formally represented by the DCBS officer in control of the RAC, is given an absolute majority. In the absence of any independent patient representative, this RAC is also an invitation for powerful industry actors to collude against patients' interest. Procedural safeguards must be implemented.

A collaborative rulemaking committee could serve as an advisory committee under ORS 183.333(1).³⁵ Considering the stakes, it would seem that the public involvement objectives of ORS 183.333 would in theory best be met through the use of a collaborative rulemaking process.³⁶ DCBS's failure to act in good faith has, however, precluded the use of such a decision-making process. It is also unlikely that the "Coalition [of public and private payers] in support of HB 4005" would accept a compromise since their purpose is patently adverse to the interest of insurance-buying patients.

³⁴ OAR 137-001-0008(1)(b)(C).

³⁵ OAR 137-001-0008(1)(i).

³⁶ OAR 137-001-0008(1)(f).



It seems that DCBS has de facto acknowledged the controversial nature of HB 4005 provisions. The Charter’s reference to “feedback on key rulemaking considerations”³⁷ would suggest that this RAC is merely consultative. The Charter should, in that case, clarify that the RAC is merely consultative and that both proponent and opponent views will thus be recorded and given fair consideration. The Charter does not, however, clarify how DCBS intends to safeguard the rights of the opponents to the “Coalition [of public and private payers] in support of HB4005” and the rights of the excluded public.

Under adopted procedures, DCBS may, in its discretion, conduct an assessment to determine if collaborative rulemaking is appropriate and, if so, under what conditions.³⁸ In the present situation, collaborative rulemaking does not seem advisable. A payer-dominated committee on HB 4005 can only reach a consensus on the proposed rulemaking action by continuing to exclude the views of those persons directly affected.³⁹ Persons, interest groups or entities that will be significantly affected by any rulemaking action on HB 4005 and that have the technical ability to participate effectively in a collaborative rulemaking process can be readily identified;⁴⁰ but DCBS has decided thus far to exclude all such entities representing the Oregonians primarily affected by this rulemaking process.

Even though the Charter specifies that DCBS only expects to receive feedback, the RAC has been organized in a way that encourages powerful corporate interests to reach a consensus against the interest of the insurance-buying public. The RAC’s Charter should therefore acknowledge this tension and put in place procedural safeguards to prevent a feedback-seeking RAC from becoming, in the hands of powerful corporate interests, a collusive rulemaking process working against the interest of the excluded insurance-buying public.

Under ORS 183.333, the RAC is not required to provide joint recommendations (except, if required, on the fiscal impact of the rule). The purpose of this RAC is thus solely to obtain public feedback.⁴¹ At the conclusion of the hearing, the agency is required merely to “fully consider all written and oral submissions.”⁴² To do so, all submissions, including the submissions of opponents, must be recorded and fairly represented/summarized.

The Charter must thus guarantee that the minority voice of members and excluded public stakeholders not affiliated with the “Coalition [of public and private payers] in support of HB 4005”—consumers, patients on high deductible plans, drug manufacturers—is properly recorded. The RAC

³⁷ Charter, p. 2.

³⁸ OAR 137-001-0008(1).

³⁹ OAR 137-001-0008(1)(d).

⁴⁰ OAR 137-001-0008(1)(b)(B) and (E).

⁴¹ OAR 137-001-0008(1)(e).

⁴² OAR 137-001-0050.



must maintain a record of any views and data it receives⁴³ and provide a written summary of statements given during hearings.⁴⁴

Since this RAC isn't controlled by any consensus rule, the presiding officer should not require that all members agree to a single statement, by consensus. Instead, the presiding officer, Mr. O'Brien, should keep a record of all statements of proponents and statements of opponents⁴⁵ and the Charter should provide for a process to correct records if a member or interested party deems that it has not been fairly represented.

Conclusion

This RAC is in breach of (1) the Administrative Procedure Act, (2) DCBS's Rules of Procedure adopted under ORS 183.341(2), and (3) the purpose and letter of the Insurance Code as codified under ORS 743.018.⁴⁶

As stated in the introduction, both the membership and Charter of the HB 4005 Rulemaking Advisory Committee are defective; these should be immediately corrected to salvage the fairness and legitimacy in this rulemaking process. At a minimum, Ms. Helstein—a lobbyist for the Laura and John Arnold Foundation's political action committee—should be immediately removed from this Committee and the identity of her client formally disclosed.

Mr. O'Brien's bias in favor of the "Coalition [of private and public payers] in support of HB 4005" that he worked hard to support prior to his employment with DCBS should also be mitigated, either by removing him as officer of this RAC or by introducing procedural safeguards (e.g. in the selection of the RAC's membership).

At a minimum, DCBS should consider the following actions:

- (1) Courtney Helstein should immediately be removed from this RAC, as her client Action Now Initiative LLC is a Texas-based entity representing the interest of billionaires Laura and John Arnold. Texas billionaires are not interested parties within the meaning of Oregon laws.

⁴³ OAR 137-001-0040(1). ORS 183.335(3)(e).

⁴⁴ OAR 137-001-0040(2).

⁴⁵ OAR 137-001-0030(10).

⁴⁶ "The Legislative Assembly declares that the Insurance Code is for the protection of the insurance-buying public." ORS 731.008.



- (2) Representatives for users of heavily discounted brand drugs such as insulin, for the uninsured, or for OPDP discount card holders and for underinsured Oregonians on ACA HDHPs, where Oregon insurers are currently electing to base many patient payments on unrebated list prices, should be instead appointed to this committee to balance the influence from the payers' lobby(10 representatives) and the pharmaceutical industry lobby (5 representatives).
- (3) The Charter's sections addressing Authority and Purpose and Scope should be amended to reflect that HB 4005 is an insurance law subject to the Insurance Code's strict procedural safeguards and substantive bar on misrepresentation, unfairness and discrimination.
- (4) Furthermore, the Charter should acknowledge that resolution of the many conflicts between HB 4005's vague language and the primacy of individual rights under the Oregon Insurance Code requires consideration of broader policy issues including NAIC's and the ACA's approach to rebate accounting in contexts other than financial reporting as allowed under ORS 731.574(5), e.g. MLR calculation, SSAP 84.⁴⁷

Regards,

Charles Fournier, J.D.

Director

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⁴⁷ These technical issues will be further addressed in OR4AD's response to the RAC's RFI.