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June 22, 2018

Joint Interim Task Force on Fair Pricing of Prescription Drugs
900 Court Street NE
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RE: Public Comment from T1DF President Julia Boss
Joint Interim Task Force On Fair Pricing of Prescription Drugs, June 21, 2018

Dear Members:

To solve Oregon's drug pricing crisis, patients need 100% point-of-sale rebate pass-through within insurance plans.[1] In any reasonable definition of fair pricing, patients pay only the commercial payer's net cost for prescription drugs. For analog insulins, that net cost is about 1/4 of the unrebated price that many Oregonians now pay. Oregonians need net pricing now.

The Oregon Prescription Drug Program (OPDP) was expanded specifically to give uninsured and underinsured Oregonians access to the same low net prices commercial payers obtain. Effective February 1, 2007, the Northwest Prescription Drug Consortium, the partnership between OPDP and the similar purchasing pool in Washington State, awarded the management of NPDC/OPDP to Moda Health "to make drug purchasing through the program even more transparent."[2] Instead, 11 years later, The Oregon Health Authority's June 11, 2018, letter to this Task Force finally publicly acknowledges that OPDP has failed to fulfill its legislated mandate and has misled Oregonians.[3]

As an OPDP discount card holder, I now pay an unrebated price of $270 for every vial of analog insulin I buy for my daughter, who has type 1 diabetes. Senator Linthicum, as an Oregon state senator, does not have to pay that price, because Oregon's employer plan PEBB does obtain the benefit of the

[1] Patients are facing a cost-sharing and benefit design crisis, not only a drug pricing crisis per se. For specialty and rebatable brand drugs, net prices paid by commercial insurers and public payers have steadily decreased; list prices, presented to patients/customers by these same payers as a cost, have skyrocketed as payers demand increasingly larger rebates from drug manufacturers.

[2] "Governor Announces Expansion of the Oregon Prescription Drug Program," Oregon Gov. Theodore Kulongoski, Press Release, December 6, 2006.

[3] Unsigned letter from the Oregon Health Authority to the Task Force, June 11, 2018. See: https://olis.leg.state.or.us/liz/2017I1/Downloads/CommitteeMeetingDocument/149286.

large manufacturer rebates OPDP negotiates on analog insulins.[4] OHA's letter makes it clear that OPDP has breached its statutory duty toward individual Oregonians. It provides no reference to any public audit report nor to any administrative rule that would support either of its primary assertions, (1) that OPDP "does not" negotiate or collect rebates related to OPDP discount card holders' purchases of heavily rebated prescription drugs, and (2) that OPDP "can not" do so.[5]

Contrary to representations made to this Task Force by the Oregon Health Authority and thus by this Task Force's co-chair, Dana Hargunani (OHA's Chief Medical Officer):

[4] Legislators are eligible for PEBB coverage, with 95% to 99% reimbursement of health care premiums. See https://www.oregonlegislature.gov/chief-clerk/Documents/NewMemberGuidebook2017.pdf "Insulin & diabetic supplies" are free to individuals in 2018 PEBB plans–"$0 or 0%, deductible waved." See: https://www.oregon.gov/OHA/PEBB/Documents/Medical%20Plans%202018.pdf. OEBB also offers plans with zero out-of-pocket payment for insulin. The OHA's June 11 letter lists both PEBB and OEBB as plans that rely on OPDP for pharmacy benefits.

[5] OHA alleges that Moda Health rebate contracts with manufacturers exclude OPDP's discount card program members. To date, however, OHA has not provided any evidence supporting this claim.

- OPDP and the Northwest Drug Pricing Consortium negotiate manufacturers' rebates on behalf of all OPDP members.[6] 300,000 "lives" in the OPDP discount card program are part of those negotiations.[7]

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[6] The OPDP administrator's responsibilities include: "[n]egotiate price discounts **and rebates** on prescription drugs with prescription drug manufacturers" ORS 414.312(3)(a)(Emphasis added); "[a]dopt and implement a preferred drug list for the program" ORS 414.312(3)(e); and "[d]evelop a system for allocating and distributing the operational costs of the program and **any rebates obtained** to participants of the program." ORS 414.312(3)(f)(Emphasis added). OHA interpreted this requirement under Rule 431-121-2000(17) to mean that drug prices offered to OPDP members, individuals and groups, must be net of all applicable manufacturers discounts and rebates. Accordingly, Moda's 5th Restated Contract (OHA #133419) appointed Moda as the Discount Card's agent "for the purpose of negotiating and arranging, either directly or indirectly, pharmaceutical manufacturer Rebates and other incentives in connection with prescription drugs dispensed to Members under the Participating Program Agreement." (Attachment 1, Section 15(E) on p. 22.) Under Moda's contract, "rebates" means "retrospective payments or discounts, including promotional or volume-related refunds, incentives or other credits however characterized, pre-arranged with pharmaceutical companies on certain Prescription Drugs, which are paid to or on behalf of Contractor, and are directly attributable to the utilization of certain drugs by Members… 'Rebate' includes all rebates, discounts, payments or benefits (however characterized) generated by Participating Program's Prescription Drug Claims, or derived from any other payment or benefit for the dispensing of Prescription Drugs or classes or brands of drugs within Participating Program or arising out of any relationships Contractor has with pharmaceutical companies." (Attachment 6, p.131) Participating programs include the Discount Card Program (Attachment 6, p. 128). Every two weeks, Moda Health invoices each participating program "based on the Contractor's **actual net cost** of the specific Covered Drug." (Attachment 5, Contract Costs and Financial Guarantees, Section 4(G) p. 110 – emphasis added.) Rebate Program Management is addressed in Section 2 of Moda Health's Statement of Work (Attachment 3). The Contract also provides for an audit of the rebate program for each participating program, including the audit of all manufacturer rebate contracts. (Attachment 1, Section 13(D)(iv) on p. 20.) If performing any or all of these statutory, regulatory and contractual requirements is the only way to achieve the program's stated purpose, i.e. to "[m]ake prescription drugs available at the lowest possible cost to participants in the program as a means to promote health," (ORS 414.312(2)(b)), then OHA and Moda Health must explain why OPDP's TPA Moda Health has failed to perform those tasks. With manufacturer rebates on analog insulins now reported at 70% of list price and greater, an unrebated per-vial price of $270 is manifestly not "lowest possible cost."

[7] The Competitive Marketplace Assessment ("2016 Market Check") performed by The Burchfield Group for Northwest Prescription Drug Consortium / Moda Health assessed the performance of OPDP/WPDP based on its overall adjusted lives (discount card and groups). As of June 2017, discount card lives were 'normalized' based on utilization (14 discount card lives assumed to equal 1 non-discount card life), for an adjusted lives total of 462,811.

- OPDP's prices, net of manufacturer rebates, must be made available to all OPDP participants, without discrimination against individuals as compared to plans and programs. Oregon statutes do not give any discretion to OHA to create a separate "pharmacy discount" program where individuals are not entitled to rebated "lowest possible cost," nor to redistribute individuals' rebates to plans or to OHA general funds.

- OPDP does or should maintain a preferred drug list. OPDP implementing regulation specifies use of a PDL developed by OHA's Office of Health Policy and Research (OHPR); OPDP is to convey the benefits of the PDL and manufacturer rebates to its individual members as "lowest possible cost."[8]

The Oregon Health Authority's June 11 letter to this Task Force documents only the ongoing breach of Oregon's OPDP statutes by OHA and by OPDP administrator Moda Health. To solve the drug price and access crisis in Oregon the current administration must:

- First, compel OPDP to finally fulfill its legislated mandate, to offer underinsured and uninsured Oregonians access to the same low net prices obtained by commercial insurers and health plans.

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[8] OPDP's existing drug pricing tool, "Look Up Prescription Drug Costs" (https://www.oregon.gov/oha/HPA/CSI-OPDP/Pages/Drug-Costs.aspx clearly indicates "formulary" (e.g. Humalog) and "non-formulary" brands (e.g. Novolog). Adoption of a PDL by OPDP is one of the stated powers of OPDP's administrator. ORS 414.312(3)(e). On preferred drug list in OPDP, see, e.g., OHA Rules 431-121-2000(11), 431-121-2000(13), 431-121-2005(1)(e), 431-121-2030(2) ("The OPDP shall develop a PDL that participating programs may choose to adopt for beneficiaries of their prescription drug benefit program. The PDL shall include the most effective prescription drugs at the lowest possible prices, **taking into account negotiated price discounts and rebates** available to the OPDP") and 431-121-2030(4)("OPDP shall make the PDL available to individuals enrolled in the OPDP."). Moda's 5th Restated Contract (OHA #133419) also stipulates that "at the request of the relevant Co-Administrator, Contractor shall administer a PDL for the [Discount Card Program]." (Attachment 3, Scope of Work, Section 3(10) p. 71) "Preferred Drug List (PDL) management" is a stated purpose of Moda's contract. (Purpose, p. 3). Moda's contract contemplates the adoption of a single State-specific PDL. Management of the PDL is addressed under Attachment 3, Section. 2(3), Administrative Services. In Oregon, House Bill 2009 (2009) authorized the establishment of a statewide PDL (codified under ORS 414.351 to 414.414). "The Pharmacy and Therapeutics Committee will advise the Oregon Health Authority on which prescription drugs should be included on any preferred drug list or formulary established by the Health Authority." (https://www.oregon.gov/oha/HSD/OHP/Pages/PT-Committee.aspx) Trevor Douglass, as ODPP Director and Pharmacy Purchasing Manager, is one of the OHA staff who provides support to the P&T committee as required under ORS 414.354(5). See, e.g., http://www.orpdl.org/durm/meetings/meetingdocs/2018_05_24/finals/2018_05_24_PnT_Complete.pdf

- Second, address Moda Health's breaches. Moda Health's OPDP administrator contract should be re-procured to an independent transparent purchasing organization or PBM such as Navitus Health Solutions.

- Finally, audit OPDP's Prescription Drug Purchasing Fund[9] and all OPDP-related drug rebate transactions. The Northwest Drug Pricing Consortium and its two state programs, OPDP and the Washington equivalent, are subject to audit, including rebate performance audits. Existing audits by the Burchfield Group and Milliman, and any related reports or assessments by OHA or OPDP, must be made public. One issue that any audit of OPDP/OHA must clarify is the origin of a $15-million-plus budget line item—identified as "drug rebates"—appearing in OHA's biennium budgets as general funds.

In addition to shedding light on OHA's and Moda Health's statutory and regulatory breaches in relation to the management of OPDP's discount card program and the OPDP purchasing fund, such audits are an abundant source of information for the few members of this Task Force who do not already understand where the money goes when an Oregonian pays $270 or more for a vial of insulin.

On the other hand, OHA's letter makes it clear that some Task Force members, including representatives from OHA and Moda Health, know what manufacturer rebate contracts are, know that 100% rebate pass-through to health plans is now the norm, and know that payers are failing to pass through rebates to individuals in many public and private health plans and programs. Payers/health plans in Oregon (both in and out of OPDP) receive full rebate pass-through on heavily discounted brand drugs and biologics like insulin, but continue to base some patients' cost-sharing and the actuarial assessment of premium rate increases on unrebated list price.[10] A Task Force dedicated to"fair pricing" of prescription drugs cannot turn a blind eye on this rebate capture scheme—including rebate capture by Task Force members Moda Health and the Oregon Health Authority (OPDP).

OPDP point-of-sale rebate pass-through to individual Oregonian discount card holders can happen tomorrow. It is entirely in Oregon's control. The Type 1 Diabetes Defense Foundation is deeply troubled that OPDP discount card program is not on this Task Force's agenda. We are equally troubled by coordinated attempts by Task Force members OHA, OSPIRG, Moda Health, and Prime Therapeutics/

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[9] Creation of the Prescription Drug Purchasing Fund is required by statute (see ORS 414.318), yet the implementing regulations make no mention of such a fund. No readily available OHA document mentions even the mere existence of a Prescription Drug Purchasing Fund. OHA must disclose whether such a fund actually exists and, if so, audit and make public the results of such audit.

[10] The National Association of Insurance Commissioners facilitates this scheme via data modeling.

BCBS to remove insurance benefit design from the discussion, and by suggestions from the same parties that the interests of patients should be deemed outside the scope of this Task Force.[11]

We remind the Task Force that HB 4005's sponsors and primary supporters (several of whom are cited in this letter) rushed that legislation through on an emergency basis because they claimed deep concern for the immediate threat to patients' lives and health, particularly patients who depend on heavily rebated analog insulins. Those patients are the ultimate stakeholders here. This Task Force must thus confront the reality of rebate capture by actors including OPDP and Moda Health, or it will fail to advance the cause of fair pricing where Oregonians most desperately need relief.

Regards,

Julia Boss
President

About T1DF. The Type 1 Diabetes Defense Foundation is a nonpartisan Oregon-based nonprofit 501(c)(3) dedicated to advancing equal rights and opportunities for all people with type 1 and other forms of insulin-dependent diabetes. We focus on the significant social impact of living with a condition that requires patients to make constant dosing decisions with a drug that, without careful management and constant monitoring, can kill them. T1DF strives to improve the regulatory, legal and social ecosystem essential to development and adoption of new technologies and therapies, with an explicit commitment to inclusive policies that will deliver for all Americans with diabetes, insured and uninsured, equal access to standard-of-care pharmaceuticals and equipment. T1DF accepts no funding from the pharmaceutical, pharmacy benefit management, or insurance industries.

[11] We likewise note with dismay the revolving door among HB 4005's public and private supporters: OSPIRG's Jesse O'Brien announced at the start of the June 21, 2018, Task Force meeting that he will soon leave OSPIRG to join the staff of Oregon's insurance commissioner (and Task Force co-chair) Andrew Stolfi. This now-vacant position should be filled by an **independent** patient advocate with demonstrated knowledge in drug pricing and commitment to insured, under-insured and uninsured Oregonians' best interests.