June 7, 2018

Secretary Alex Azar
US Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, DC 20201
StateInnovationWaivers@cms.hhs.gov

RE: ABC for Health, Inc.'s comment on Wisconsin's Section 1332 State Innovation Waiver Request Regarding a State Reinsurance Program

Dear Sec. Azar–

Thank you for the opportunity to provide comment on Wisconsin's Section 1332 Waiver Request. Advocacy and Benefits Counseling for Health, Inc. (ABC for Health) helps low-income, health disparity populations obtain access to both health care and coverage in Wisconsin. ABC for Health's mission is to provide consumers and providers with information, advocacy tools, legal services, and expert support they need to secure health care coverage and services. We translate individual client case experiences into local strategies as well as system level reforms through our statewide HealthWatch Wisconsin subsidiary, which serves as a catalyst in the development of local HealthWatch Coalitions to promote community efforts and community voices directed at health care coverage and access concerns for children and families.

The Affordable Care Act envisioned reinsurance as a way to stabilize the individual insurance market as individuals with preexisting conditions entered the market for the first time without discrimination. Reinsurance stabilized markets for insurance companies carrying higher risk, or with underpriced monthly premiums, in a temporary, three-year program. Reinsurance provided a glide path for insurance companies to evaluate price plans and remain competitive in the expanded individual policy market. That program, however, only succeeded in compensating insurers for about half the claims expenses of high-cost enrollees. The original ACA legislation grossly underestimated the amount of funding necessary to keep up with high-cost claims in the Marketplace's second year, and subsequent challenges by Republican opponents, including Wisconsin's Governor Walker, limited the federal government's ability to pay out fund contributions.

With the draft waiver, Governor Scott Walker changes course and pivots toward the ACA and the reinsurance concept. The plan, approved by the legislature, includes a request for federal and state funding for a state operated reinsurance program that would partially reimburse individual health insurance plans for claims paid on behalf of their highest cost enrollees.

In substance, the plan mirrors programs enacted in other states, including Minnesota, Alaska, and Oregon. Wisconsin's proposal asks the US Treasury and US Department of Health and Human Services (HHS) to waive section 1312(c)1 under Sec. 1332 of the ACA for 5 years (starting in 2019) to implement the "WI Healthcare Stability Plan" (WIHSP). The Office of the Commissioner of Insurance (OCI) will administer this state-based reinsurance program upon federal approval. OCI is responsible for WIHSP operations, including setting the attachment point, reinsurance cap, and

coinsurance amounts. Wisconsin seeks approximately $170 million in federal pass through dollars for Wisconsin's reinsurance program. The state would contribute the balance.

The waiver language blames the existing premium increases in Wisconsin's individual insurance market almost exclusively on the "failing" of the ACA, looking backward with rose-colored glasses on the pre-ACA market in Wisconsin, citing a time when there was "more competition" in the marketplace. Yet, upon scrutiny, the past also lacked Medical Loss Ratios, essential health benefits, individual mandate, or other consumer-level protections. In reality, the small group market was collapsing under the weight of its own inefficiencies.

Marketplaces in Wisconsin evolved after ACA implementation, more specifically, after the implementation of HealthCare.gov in 2013. Market forces cause inefficient insurers, selling ineffective products, unable to meet the stricter Medical Loss Ratio requirements to close. [1] Strong political opposition from state and federal policymakers barraged markets, as did continued high-stakes constitutional or other ACA legal challenges, some of which Wisconsin spearheaded. State and federal regulators extended ability of certain health plans to remain exempt from the ACA's insurance reforms. In addition, states lacked sufficient funding for consumer outreach and assistance or like Wisconsin, rejected already awarded consumer assistance funding and sent it back to Washington,[2] harming consumers, the operation of OCI, and ultimately enrollment and stability in the markets. For these and other reasons, enrollment growth slowed and premiums increased.

While ABC generally recognizes reinsurance programs as a useful tool, especially in risky insurance markets, Wisconsin's proposed waiver request generates three major concerns: 1) lack of sufficient consumer protections; 2) troubling funding mechanisms; and 3) insufficient impact in the context of recent state and federal policy.

Consumer Protection

Wisconsin should take proactive steps to support enhanced consumer protections in the private insurance market, and promote increased growth of risk pools and plan enrollment. Wisconsin could expand public-private partnership coverage options like BadgerCare Plus, that promote large-scale

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[1] At the time, companies like American Republic Insurance and World Insurance Company were at 68% and 65% Medical Loss Ratios, respectively. Commissioner Nickel went so far as to request a waiver of the medical loss ratio requirements of the ACA, in an obvious effort to help support these failing small group market plans. OCI claimed Wisconsin's insurance market could not operate with requirements that limits health insurer profits, salaries, marketing, and other overhead costs to 20% of the amount spent by consumers in the individual market. OCI rejected the idea of streamlined administration of insurance plans and a more competitive marketplace, instead preferring to have consumers cover the cost.

[2] On February 10, 2011, then new Commissioner of Insurance, Ted Nickel terminated Wisconsin's federally funded consumer assistance program. The majority of the $637,114 grant to Wisconsin went to the Office of the Insurance Commissioner. The purpose of the program, supported by a U.S. Department of Health and Human Services Consumer Assistance Grant, was to "educate consumers about their health coverage options, empower consumers, and ensure access to accurate information." See also, "New state insurance commissioner terminates $637K federal health care grant," Feb. 10, 2011, WI State Journal, *available at*: http://host.madison.com/wsj/news/local/health_med_fit/article_dd894d62-3572-11e0-a002-001cc4c002e0.html

pooling, spread risk, create financial leverage, and promote consumer protection and health plan accountability.

Most fundamentally, Wisconsin's draft waiver (the language in Act 138) provides no guarantee that any reinsurance payment made to Wisconsin insurers will translate into reduced premiums for consumers.

OCI estimates the waiver's impact to include premium decreases of approximately 10% for 2019. Lowering premiums is an important goal, but consumers should bear some of the fruit of that reduction. As such, the waiver must also require insurance companies to pass on the savings to the consumer as a condition of receiving WIHSP payments. Otherwise, WIHSP risks simply subsidizing insurance companies who could otherwise "justify" accepting reinsurance payments while subsequently increasing premiums or out of pocket costs to high cost consumers, or both.

OCI's role will be an important one, when paired with OCI's duty to administer a fully transparent rate review process in Wisconsin. We would expect OCI to administer a strict rate review process for those insurers receiving reinsurance payments. The language in Act 138 stops short of any such guarantee. Ch. 601.83(1)(e) requires eligible health carriers to "calculate the rates the eligible health carrier would have charged for a benefit year if the healthcare stability plan had not been established and submit the calculated rates as part of its rate filing submitted to the commissioner," for *consideration*, and nothing more. To efficiently review requests for rate increases, OCI determines the reasonableness of requests that fall into a certain "review path." Establishing a review path specific to reinsurance providers would be appropriate, and creating a heightened threshold of responsibility, expected.

For stability, reinsurance alone is not enough. Wisconsin's program effects will depend on its impact on the cost of coverage, the ability of lower premiums to attract a healthier mix of enrollees, and an overall expanded enrollment in the market to help achieve economies of scale in non-claim costs. As reported in the draft waiver request, WIHSP will help a negligible amount of people gain health insurance. OCI estimates only a 0.8% increase in enrollment after reinsurance in the short term.

Over the short and long term, Wisconsin must expand and maintain the marketplace's enrollment to include healthier and younger consumers. Moreover, Wisconsin should embrace educational campaigns and consumer outreach and assistance efforts, and even reinforce mechanisms like auto-enrollment of enrollees that do not proactively select a plan. Instead, Wisconsin is doing the opposite,[3] making the impact of reinsurance negligible in the broader context.

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[3] "Update: Wisconsin Gov. Signs Health Reinsurance Bill; State Joins 'Obamacare' Suit," Insurance Journal, Feb. 28, 2018, *available at*: https://www.insurancejournal.com/news/midwest/2018/02/28/481836.htm, saying "Walker signed the reinsurance bill less than 24 hours after Schimel joined with 19 other states in filing a federal lawsuit in Texas. The lawsuit, which Schimel led along with Texas Attorney General Ken Paxton, argues that the individual mandate is unconstitutional and that the entire law should be blocked."

Even if it is as effective as OCI predicts, at best, WIHSP will lower premiums for only a relatively small group of people, and in only small amounts. (The waiver predicts a 10% premium reduction for 2019, yet the impact over time reduces to 6.5% over the next decade). Other market instabilities will offset any reduction in premiums, discussed more below. Wisconsin had approx. 225,000 enrollees in the 2018 marketplace, the vast majority, 80% of whom are eligible to receive federal subsidies.[4] Approximately 30,000 are unsubsidized consumers, and the target of this reinsurance program.

The program benefits higher income consumers. Unsubsidized Marketplace customers with incomes above 400% FPL are the primary beneficiaries of the reinsurance proposal. Those people range from middle class incomes up to higher self-employed incomes. We recognize that premium support for this population is needed; however, funding $200 million a year – over $30 million in state money – for reinsurance to bring down premiums for this sliver of the insurance market seems wasteful and inefficient. Funding the reinsurance program with Medicaid leftovers is an upward redistribution of income, regressive and wrong. We address this more, below.

Funding Concerns

Wisconsin asks the federal government to pay up to 85% of the reinsurance program, with the State paying "a sum sufficient" to cover the rest of the program. Total funding is not allowed to exceed $200 million dollars. ABC has three concerns about how WIHSP is funded: 1) the $200 million limit may not be enough to adequately fund a robust reinsurance program; 2) the state may be left to pay more than anticipated; and 3) the state's funding mechanism may incentivize reducing Medical Assistance coverage to the most vulnerable.

The state seeks federal support of an 85% pass through rate of the $200 million deemed necessary to fund the reinsurance program. State reinsurance programs (1332 waivers generally) are required to be budget-neutral to the federal government. Passing through Advance Premium Tax Credit (APTC) expenditures for reinsurance payments is how the state generates their approx. $170 million federal savings. As such, Wisconsin's funding request could very well fall short of required funding to support an effective reinsurance program. We need look no further than Minnesota. After devoting $300 million in 2017, the Minnesota Legislature spent an additional $542 million to set up a reinsurance pool for the next two years.[5] Should the sum not be sufficient, Act 138 allows OCI to ask Wisconsin's Joint Finance Committee to increase the amount, most likely to come out of state dollars.[6]

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[4] https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/Marketplace-Products/2018_Open_Enrollment.html

[5] Available at: https://www.usnews.com/news/best-states/minnesota/articles/2017-09-19/apnewsbreak-reinsurance-approval-costly-for-minnesota

[6] In addition, Act 138 allows OCI simply, without a legislative process or following formal administrative rulemaking procedures, to make up its own rules. Under 601.83(3g), the Commissioner of Insurance can promulgate "any rules necessary to implement the healthcare stability plan" as "emergency rules under s. 227.24," but "the commissioner is not required to provide evidence that promulgating a rule under this paragraph as an emergency rule is necessary…" This is an extraordinary and perhaps impermissible grant of *legislative* power to the Commissioner of Insurance. OCI can promulgate emergency rules without the usual finding of emergency required under current law, and extend the reach of the Commissioner, without the legislature, to create policy. In such an

Furthermore, the state takes on even greater financial risks, thanks to the drafting of a "sum sufficient appropriation." Wisconsin's waiver "grants" the state the needed "flexibility" to fund the $200 million program if the federal pass through funds differ from the anticipated amount. Recognizing that there is no guarantee the federal government's payment will cover the program's costs or that the federal government would not fully fund its "share," the waiver directs the state to fund the balance. Such a scenario is entirely possible, as federal pass through funding originates from savings in APTC. Large increase in premiums anticipated in 2019 and beyond (discussed more below) would surely mean a larger need for APTC in the Wisconsin market and therefore fewer dollars available to be redirected to reinsurance.

Curiously, Governor Walker rejected federal Medicaid Expansion funds for fear that the state would be left "holding the bag" for the full cost of expansion, should the feds "renege" on their funding share. Here, the statue *directs* the state to "pay the bill," should the feds not pay its share.

Similarly, Act 138 expressly prohibits the state from accepting federal Medicaid Expansion money without legislative approval. Despite the fact that if Wisconsin were to fully expand Medicaid, more than 80,000 adults between 100 and 138% FPL would be covered in BadgerCare Plus. That change would yield a net savings for state taxpayers of about $190 million per year,[7] freeing up more than enough GPR to fund the state's reinsurance share – or even the entire cost of reinsurance – and dozens of other state projects and priorities.

Chapter 16.5285(3)(a) of the statue as written in Act 138 authorizes the Secretary of Health Services to transfer savings from the Medical Assistance program to the GPR. Wisconsin's funding provisions may create a perverse incentive to reduce Medical Assistance program spending in order to pay for WIHSP. As Wisconsin develops an annual Medicaid budget, it can generate larger and larger Medicaid lapse funds at the end of the fiscal year that can become a "goodie bag" fund for the administration to dole out to special interests. Wisconsin can engineer a Medicaid surplus by adding administrative hoops and hurdles in the eligibility path of people seeking or using Medicaid.[8]

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instance, OCI could also draft exemptions for the insurance industry instead of waiting for the legislature to create new Wisconsin law. The waiver's broad delegation of emergency rulemaking authority to OCI may be illegal, and at the very least will further erode consumer protections. Also troubling, Act 138 *requires* OCI to submit a recommendation report, not an assessment, a recommendation to the Governor on requesting additional waivers. In these recommendations, OCI "shall consider and include" impacts of creating a high-risk pool or an invisible high-risk pool; funding of consumer health savings accounts; expanding consumer plan choices, including catastrophic plans or coverage and new low-cost plan options; and implementing any other approach…" [601.85(4)]. Curious how it is in the best interest of consumers that OCI should be statutorily-required to recommend a high-risk pool to the Governor.

[7] The Wisconsin Approach to Medicaid Expansion, Dec. 2017, Kids Forward, available at: http://kidsforward.net/assets/Medicaid-Approach.pdf

[8] Elements of Wisconsin's still pending Sec. 1115 Demonstration waiver, including drug testing requirements, work requirements, premium requirements, etc. are anticipated to create a drop in BadgerCare Plus enrollment (as witnessed from other states such as Indiana. Similarly, Wisconsin need look no further than its own FoodShare program where work requirements caused 86,000 to be cut from the program.

In Wisconsin, nearly 1.2 million people rely on BadgerCare and Medicaid programs to provide essential, affordable, and effective health care services. Moreover, the impact of these programs reaches thousands more--our friends, neighbors, grandparents, colleagues, and health care providers large and small in every county of Wisconsin. The large pool of BadgerCare and Medicaid recipients provides cost effective coverage that lowers the number of uninsured and keeps people out of expensive, inefficient, and often uncompensated emergency room care. Most people realize that uncompensated care costs do not disappear but rather show up in the form of increased health care costs. Health care providers redistribute unpaid medical bills to small business, people with insurance, and other hospital patients. Lowering premiums is important, but Wisconsin should take care to ensure that marginal benefits for 30,000 higher-income Wisconsinites do not come at the expense of our most vulnerable.

In order to comply with Sec. 1332 guardrails, Wisconsin's waiver promises "comprehensive coverage," and says that the "scope of benefits provided by other types of coverage such as Medicaid, CHIP, and grandfathered plans will not be impacted." Nevertheless, this is a promise Act 138 alone cannot make, and therefore delivers false confidence to Wisconsinites. The state has already taken other steps to reduce services for a large portion of Wisconsin's BadgerCare Plus population.[9]

Overall Impact

In fact, Wisconsin's entire waiver request needs to be examined in the broader context of the current health care coverage landscape. A new report[10] paints a grim picture for premiums in the individual insurance market over the next three years. The report predicts a 15% average premium increase stemming from the repeal of the Affordable Care Act's personal responsibility tax penalty in 2019 (in the Tax Reconciliation Act signed into law December 22, 2017). In combination with Trump Administration proposed rules to increase the availability of association health plans and short-term health plans, the authors predict overall price increases ranging between 12% and 23% in 2019 and rising to triple that amount in 2021. The highest increases are expected for states that did not pursue federal Medicaid expansion. Wisconsin joins ranks with Texas as states at "catastrophic risk" of 90% premium increases over a three-year period. Neighboring Medicaid Expansion states, such as Illinois, Indiana, and Iowa, will fare somewhat better with premium rates topping out at a 50% increase over the next three years. However, these changes also mean 5 million people losing coverage by 2027, and insurers dropping out of the marketplace.

The nonpartisan Urban Institute[11] corroborates that prediction in a separate study evaluating the impact of the GOP Tax bill and federal move to allow short term insurance plans. The combined

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[9] *Infra* note 8.

[10] "Individual Markets Nationally Face High Premium Increases in Coming Years…" Covered California, March 2018, *available at*: http://hbex.coveredca.com/data-research/library/CoveredCA_High_Premium_Increases_3-8-18.pdf

[11] "The Potential Impact of Short-Term Limited-Duration Policies on insurance Coverage, Premiums and Federal Spending," Urban Institute, March 2018, *available at*: https://www.urban.org/research/publication/updated-potential-impact-short-term-limited-duration-policies-insurance-coverage-premiums-and-federal-spending

effect of eliminating the individual-mandate penalties and expanding short-term limited-duration policies would increase 2019 ACA-compliant nongroup insurance premiums 18.3% on average, and 20% in Wisconsin.[12]

Finally, in a May 29 Bulletin, Wisconsin's OCI reauthorized transitional health plans through December 2019, another decision likely to increase premiums in the Marketplace.[13]

Any reduction in premiums Wisconsin hopes to achieve with the reinsurance program will likely be offset by, and most likely obliterated by, other political decisions that dramatically increase premiums and destabilize the private insurance market, further diminishing the impact of reinsurance, and certainly prohibiting federal pass through dollars from entering the state. We call WIHSP, "much ado about nothing."

Conclusion

Under the right circumstances, reinsurance is an effective tool to help stabilize risk and jittery insurance marketplaces. The Wisconsin approach could be drastically improved to better serve the insurance consumers of our state. Unfortunately, too many myopic, political decisions impede effective, impactful implementation of a reinsurance program in our state.

Sincerely,
ABC for Health, Inc.

Bobby Peterson
Executive Director/Public Interest Attorney
32 N. Bassett St.
Madison, WI 53703
bobbyp@safetyweb.org

[12] *Id.* at 16, Table 4 "Percent change in ACA-Compliant Premiums because of Expanded Short-Term Limited-Duration Policies and Loss of Individual Mandate, 2019." Five states prohibit short-term limited duration policies in state law and therefore fare better in the estimated premium increases. Wisconsin has no such regulation.
[13] CMS Extension of Transitional Health Plans Could Ding ACA Market, Modern Healthcare, April 26, 2018, *available at*: http://www.modernhealthcare.com/article/20180426/NEWS/180429925