STATE OF RHODE ISLAND
OFFICE OF THE HEALTH INSURANCE COMMISSIONER

In Re: Blue Cross Blue Shield of Rhode Island	)	
Rates Filed for 2025 Individual Market Plans	)	OHIC-2024-1

POST-HEARING MEMORANDUM OF THE ATTORNEY GENERAL

The Attorney General files this post hearing submission in furtherance of his distinct role in the health insurance rate review process: to represent, protect and advocate for Rhode Islanders who are and will be consumers of these insurance products.[1] The Attorney General also files this submission in his role as the State's Health Care Advocate: to advocate for quality and affordable health care for "all citizens of Rhode Island."[2] As such, it is not the role of the Attorney General to simply advise whether the actuarial projections provided by an insurer can support requested rate increases; rather, it is incumbent upon the Attorney General to also determine whether such increases are warranted given the health care and economic landscape against which these increases are sought. For the reasons set forth below, we conclude that the requested rate increase for the Direct Pay market should not be approved.

Blue Cross and Blue Shield of Rhode Island ("BCBSRI") also possesses statutory responsibilities to "provide affordable and accessible health insurance to insureds" and "employ pricing strategies that enhance the affordability of health care coverage."[3] R.I. Gen. Laws §§ 27-19.2-3(1) and 27-19.2-10(3). Nevertheless, it has submitted its rate filing for Direct Pay (the "Filing") to Cory King, Health Insurance Commissioner for the State of Rhode Island ("Commissioner"), seeking an overall average weighted premium rate increase of 14.3%, affecting 17,614 Rhode Island members. This request comes on the heels of a series of escalating requests: in five of the past six years, excluding 2020 which was impacted by COVID-19, BCBSRI has requested rate increases between 3.1% - 10.7% for this insured class. *Approved* increases for this product alone have resulted in a 21.6% increase since 2019.[4]

Granting BCBSRI's requested increase would mean a nearly 40% increase in rates in just seven years. This request places an outsized burden on individual market plan consumers, approximately

[1] *See* R.I. Gen. Laws § 27-36-1.
[2] *See* R.I. Gen. Laws § 42-9.1-2(5).
[3] *See* R.I. Gen. Laws §§ 27-19.2-3(1) and 27-19.2-10(3).
[4] See Table 1, attached as Appendix A, summarizing approved rate increases for BCBSRI individual plans.

17,000 Rhode Islanders, to shore up an under-resourced and underfunded health care system that is not delivering the access to care those consumers expect. It should be rejected in full regardless of the actuarial underpinnings of the request because the requested increase, especially given the cumulative increases over the past six years, cannot be the best way to achieve "the goal of quality and affordable health care for all citizens of Rhode Island." *See* R.I. Gen. Laws § 42-9.1-2(5).

The individual health insurance market underwent profound reform with the passage of the Patient Protection and Affordable Care Act and applicable amendments ("ACA") in March 2010. To address "[t]he provision of health care," "a concern of national dimension," Congress could have "installed a federal system" to ensure everyone had access to health coverage, but "Congress chose, instead, to preserve a central role for private insurers and state governments." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 589 (2012) (Ginsburg, J., concurring in part). In providing for insurance market reforms, including the individual mandate, the idea was to prevent "cost shifting by those who would otherwise go without" health insurance to those with health insurance while simultaneously forcing "into the insurance risk pool more healthy individuals, whose premiums on average will be higher than their health care expenses." *NFIB v. Sebelius*, 567 U.S. at 548. These reforms were "plainly designed to expand health insurance coverage," *id.* at 567, and to "manage the risks associated with medical care—its high cost, its unpredictability, and its inevitability." *Id.* at 592 (Ginsburg, J., concurring in part).

In the ten years since the passage of the Affordable Care Act, access to health insurance has certainly increased; however it is not clear that quality and affordability of care followed. Significant problems in seeking and obtaining adequate and affordable medical care remain. In *NFIB v. Sebelius*, Justice Ginsburg presaged that "[w]ithin the next decade, . . . spending on health care will nearly double." 567 U.S. at 590 (Ginsburg, J. concurring in part). This prediction has come true. "Americans spent $2.5 trillion on health care in 2009," *id.* and $4.8 trillion in 2023.[5] Since 2012, as measured by Rhode Island's Health Information Survey, the proportion of Rhode Islanders facing medical bills totaling more than $500 has remained the same from 2012 to 2022, while the average out-of-pocket medical costs has increased by $200 during the same timeframe.[6] Nor has the existence of the

[5] https://www.reuters.com/business/healthcare-pharmaceuticals/us-healthcare-spending-rises-48-trillion-2023-outpacing-gdp-2024-06-12/. Judicially cognizable facts may be administratively noticed. 230-RICR-10-00-2.14.

[6] HealthSourceRI, 2022 Health Insurance Survey, Interactive Tool, "Problems Paying Bills" and "Out-of-Pocket Spending,"
https://app.powerbigov.us/view?r=eyJrIjoiNzk2MzQ3MDUtYWM3ZC00Y2NkLTgyMzAtN2Vk

individual markets led to increased competition. For most years since its inception, HealthSourceRI has only had two carriers offering individual plans, with the exception of plan years 2015 and 2016, when it had three.[7]

In other words, despite the sweeping reforms enacted by the ACA and the improvements in health care access it enabled, the provision of medical care in the United States and Rhode Island remains expensive and hard to access. As of the 2022 Health Information Survey, only 2.9% of Rhode Islanders did not have health insurance.[8] Yet, 11.6% of adult Rhode Islanders reported not having a regular place they can access health care in 2022.[9] Workforce issues are one major cause of the lack of access to care. On several measures of primary physician workforce supply, at least as of 2022, Rhode Island appeared to be doing better than most of the United States.[10] A relatively better position in the context of the United States with regard to access to primary care, however, is not an enviable place to be. Rhode Island is losing primary care physicians and its workforce is aging, and these factors have led providers, insurers, and consumer groups to recognize Rhode Islander's difficulty in accessing the medical care they pay for through expensive health insurance plans.[11] Even with Rhode Island's nation-leading access to insurance coverage, people still face cost and accessibility problems when seeking medical care because of wider systemic issues in the United States health system that the ACA did not fully address, and that the piecemeal rate increases sought here also cannot fix.

As the insurance product that consumers are paying for fails to meet expectations, premiums for that insurance continue to rise substantially. There is a lurking danger in these continued rate-increase requests. Right now, for plans sold in the individual marketplace, enhanced temporary subsidies provided by the American Rescue Plan Act (ARPA) in 2021 and extended by the Inflation Reduction Act (IRA) in 2022, mask the actual pocketbook cost to the consumer. That is, most consumers don't pay the full premiums that are set through this proceeding because they receive subsidies—and in fact, an increase in premiums may result in a lower percentage increase or no

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[7] OHIC, "All Previous Years Health Plan Review Documents," https://ohic.ri.gov/ohic-formandratereview-olddocs.php.

[8] https://healthsourceri.com/rhode-island-achieves-lowest-ever-uninsured-rate-survey-finds/

[9] https://www.commonwealthfund.org/datacenter/adults-usual-source-care

[10] OHIC, Primary Care in Rhode Island: Current Status and Policy Recommendations 17-18 (December 2023), https://ohic.ri.gov/sites/g/files/xkgbur736/files/2023-12/Primary%20Care%20in%20Rhode%20Island%20-%20Current%20Status%20and%20Policy%20Recommendations%20December%202023.pdf.

[11] *Id.* at 19-20.

increase in the amounts consumers actually pay, depending on income. The subsidies were extended in two ways: 1) already eligible consumers received enhanced subsidies; and 2) consumers who formerly did not receive subsidies because they exceeded the income threshold now receive some subsidy. These subsidies are currently set to expire at the end of 2025. Thus, while the rate increases that are proposed this year may not be keenly felt by many individual consumers now, the day may come when consumers will be forced to bear substantially higher costs built up over this period when the true cost increases were not directly born by consumers.

There is another reason OHIC should reject further increases in the premiums individual market plan members must pay. There is currently no mechanism for OHIC to ensure health care costs across the market are fairly and accurately distributed among all participants—whether insured in state regulated, employer-provided, or governmental plans. OHIC is only authorized to review the rates of "insurers licensed to provide health insurance in the state." R.I. Gen. Laws Ann. § 42-14.5-3. This scope excludes self-insured employers offering employees insurance in accordance with the Employee Retirement Income Security Act of 1974 (ERISA), because federal law preempts state jurisdiction over these plans. It also excludes all Rhode Islanders over 65 years of age and Rhode Islanders enrolled in Medicaid plans. In total, this year's rate review proceedings, including this one, affect the premiums paid by about only 15% of Rhode Islanders. The other 85% of Rhode Islanders pay or receive care where the costs of care are not as visible to the public, and the relative contribution of individual Rhode Islanders to their care is not transparently equitable. With this fractured system, even if we were to conclude that investment is necessary and warranted, we cannot ensure that the costs of the system are borne fairly and equitably by all.

To put it bluntly, we have a system that is broken. While rates continue to go up, our health care system stands on the brink of collapse. Insurers get what they need, while consumers, providers, and our healthcare system continue to suffer. We need systemic reform—not tinkering on the margins, and not a 14% rate increase for 17,000 Rhode Islanders. The Attorney General therefore urges OHIC to reject BCBSRI's requested increase as a matter of policy and in the exercise of OHIC's discretion. Regardless of the actuarial justification[12] provided for these rate increases, they must be evaluated in the context of OHIC's overall mission: to protect health care access, affordability, and quality. Here, OHIC has the opportunity to reaffirm its commitment to its mission by considering and evaluating how these rates impact consumers and the Rhode Island heath care ecosystem alike.

[12] The Office of the Attorney General, through its experts, L&E, now additionally submits Exhibit A, which reflects an updated analysis, under separate cover.

JURISDICTION AND STANDARD OF REVIEW

OHIC has jurisdiction over this matter pursuant to R.I. Gen. Laws §§ 27-18.2-1 et seq., 27-19-6, 27-20-6, 42-14-5(d) and 42-14.5-3(d). The hearing was conducted on Tuesday July 2, 2024, in accordance with the Administrative Procedures Act (R.I. Gen. Laws § 42-35-1) and in accordance with R.I. Gen. Laws §§ 27-19-6 and 27-20-6. Commissioner King has jurisdiction to preside over this matter in accordance with R.I. Gen. Laws §§ 27-19-6 and 27-20-6.

BCBSRI bears the burden of proof that its proposed rates are "consistent with the proper conduct of its business and with the interest of the public." *See* R.I. Gen. Laws §§ 27-19-6 and 27-20-6. There is an inherent tension within this standard, insofar as that which is consistent with BCBSRI's interest may not be consistent with the public's interest. *See Hosp. Serv. Corp. of Rhode Island v. West*, 308 A.2d 489, 495 (R.I. 1973) ("If the Legislature intended that proof of consistency with the proper conduct was to be synonymous with proof of consistency with the interest of the public [per R.I. Gen. Laws §§ 27-19-6 and 27-19-20], it would have said so."). BCBSRI is further statutorily required to offer its Direct Pay members "affordable and accessible health insurance" and must further "employ pricing strategies that enhance the affordability of health care coverage." R.I. Gen. Laws§ 27-19.2-3(1).

While BCBSRI has the burden of proof in this matter, the Commissioner shall discharge the duty of his office to protect consumers while simultaneously guarding the solvency of insurers. *See* R.I. Gen. Laws § 42-14.5-2. The ultimate responsibility for determining whether the proposed rates are fair, reasonable, not excessive, not unfairly discriminatory, and consistent with the interest of the public rests exclusively with the Commissioner.

CONCLUSION

As discussed above, current state regulation is not structured in a way capable of achieving the statutory "goal of quality and affordable health care for all citizens of Rhode Island." R.I. Gen. Laws § 42-9.1-2(5). Continuing to approve rate increases for only state-regulated plans has not and will not result in the investments in providers, hospitals, and the people of Rhode Island that can lead to the increased health of our population. Rhode Islanders who purchase BCBSRI individual plans as Direct Pay customers cannot be certain their personal increased investment in health care, by way of their insurance premiums, will result in improved access to health care. Given the context in which these rate increases arise, OHIC should not approve the requests of a singular insurer to dramatically increase costs.

While scrutinizing actuarial analyses for discrepancies and soundness is important, it does not, and cannot, account for the systemic flaws underlying these proceedings. Accordingly, even considering the analysis, ultimately the Attorney General does not believe that rate increases are warranted – for all the reasons set forth above.

The Commissioner should act in the best interest of the consumer when considering rate increases, especially when history has shown that significant increases year after year have not translated into improved access to and quality of care. While inadequate to address the systemic imbalances in our healthcare system, OHIC decision-making remains the only available mechanism to meet the legislative mandate of providing affordable insurance rates. The Attorney General is convinced that a new, holistic approach to paying for and delivering health care is necessary and finding that approach can no longer be delayed. Investment in the health care system is warranted, but it cannot be accomplished through raising premiums on a small fraction of Rhode Islanders. The actuarial analysis provided by OHIC's and the RIAG's experts does not, and cannot, account for the systemic flaws underlying these proceedings. Accordingly, the Attorney General strongly believes that the Commissioner should reject the proposed rate increases -- for all the reasons set forth above.

To the extent the Commissioner disagrees with the Attorney General and believes that an increase in rates in this siloed market is justified, the Commissioner should carefully scrutinize all of the actuarial methodologies and data sources proffered and pick the most reliable methodologies available.

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 2nd day of August 2024, the foregoing document and attachments were delivered via electronic mail to Health Insurance Commissioner Cory King (cory.king@ohic.ri.gov); Raymond A. Marcaccio, Esq., Legal Advisor to Commissioner King (ram@om-rilaw.com); Emily Maranjian, Executive Legal Counsel for OHIC (Emily.Maranjian@ohic.ri.gov); Jamie J. Bachant, Assistant General Counsel for Blue Cross Blue Shield of Rhode Island (Jamie.Bachant@bcbsri.org); Jasmin Amaral, OHIC Docket Clerk, Office of the Health Insurance (Jasmin.Amaral@ohic.ri.gov)