STATE OF VERMONT
DEPARTMENT OF FINANCIAL REGULATION

In The Matter of:	)	
	)	
Application by the Proposed Vermont	)	
Health CO-OP for a Certificate of	)	**Docket No. 12-041-1**
Public Good and Certificate of	)	
Authority to Commence Business as a	)	
Domestic Mutual Insurance Company	)	

CONSUMER HEALTH COALITION OF VERMONT, INC.
d/b/a VERMONT HEALTH CO-OP'S MOTION TO REOPEN AND RECONSIDER
LICENSING DECISION AND ORDER OF MAY 22, 2013

NOW COMES Petitioner, Consumer Health Coalition of Vermont, Inc. d/b/a Vermont Health CO-OP, by and through its attorneys, Dinse, Knapp & McAndrew, P.C., and hereby requests that the Department of Financial Regulation reopen the above-captioned matter to hear new evidence and reconsider its denial of the CO-OP's application for a Certificate of Public Good and Certificate of Authority. In support of this Motion, the CO-OP submits the following Memorandum of Law and Exhibits.

MEMORANDUM OF LAW

I. INTRODUCTION

On May 22, 2013, the Department of Financial Regulation (the "Department") issued a decision (the "Decision") denying the Vermont Health CO-OP's (the "CO-OP") application for a Certificate of Public Good pursuant to 8 V.S.A. § 3305 and a Certificate of Authority pursuant to 8 V.S.A. § 3309. The Department based its denials primarily on identified concerns as to the CO-OP's risk of insolvency and corporate governance. Some of the Department's concerns

Dinse,
Knapp & McAndrew, P.C.
209 Battery Street
P.O. Box 988
Burlington, VT
05402-0988
(802) 864-5751

stemmed from incomplete information in the record, which the CO-OP now seeks to correct by submitting additional evidence. All issues identified in the Decision have now been addressed and all concerns rectified. The CO-OP accordingly requests that the Department reopen the application to afford the CO-OP an opportunity to demonstrate the corrective actions it has taken in response to the Decision and to provide the most accurate rate information and enrollment projections available so that the Department may render its decision on a full and accurate record.

As the first applicant to seek a license to operate as a domestic health insurer in Vermont since 1961,[1] and as the product of a recent and innovative federal initiative, the CO-OP's application for licensure as a domestic mutual health insurer is unquestionably a unique and challenging event. Consequently, both the CO-OP and the Department are navigating unfamiliar territory in the application and licensure process and the CO-OP believes that the public good will be best served by the Department and the CO-OP working collaboratively to reach the most appropriate outcome.

II. THE DEPARTMENT POSSESSES AUTHORITY TO REOPEN AND RECONSIDER ITS DECISION

Administrative agencies in Vermont have inherent authority to reopen evidence after rendering a decision. *See In re Hunter*, 167 Vt. 219, 223-24 (1997) ("[A]dministrative agency has discretion whether to reopen evidence") (citing *In re Twenty-Four Vermont Util.*, 159 Vt. 339, 356 (1992)); *In re New England Tel. & Tel. Co.*, 116 Vt. 480, 515 (1951) (reversing an agency's denial of motion to reopen evidence as an abuse of discretion); *In re Maple Tree Place*, 156 Vt. 494, 502 (1991) ("[M]unicipal zoning boards have the authority to reopen proceedings

Dinse,
Knapp & McAndrew, P.C.
209 Battery Street
P.O. Box 988
Burlington, VT
05402-0988
(802) 864-5751

[1] At the March 1, 2013 hearing, the Commissioner explained that a public hearing had not been held in connection with a domestic insurance company in over 50 years, as the state "ha[s] not had a formation of a new company in Vermont since 1961." *See* Hr'g Tr. at 6-7.

and reconsider a decision where new evidence is submitted."); *In re Tariff Filing of Green Mountain Power*, 138 Vt. 213, 216 (1980) (stating that "decision upon [a motion to stay and a motion to reopen] is normally, in the first instance, within the Board's discretion, the total failure to exercise such discretion amounts to an abuse of discretion") (citations omitted). This rule reflects the widely held principle in administrative law that an agency may reconsider its decisions even in the absence of express statutory authorization. *See Dun & Bradstreet Corp. v. U.S. Postal Serv.*, 946 F.2d 189, 193 (2d Cir. 1991) ("It is widely accepted that an agency may, on its own initiative, reconsider its interim or even its final decisions, regardless of whether the applicable statute and agency regulations expressly provide for such review."); *Macktal v. Chao*, 286 F.3d 822, 825-26 (5th Cir. 2002) ("[I]t is generally accepted that in the absence of a specific statutory limitation, an administrative agency has the inherent authority to reconsider its decisions."); *see also Belville Mining Co. v. United States,* 999 F.2d 989, 997 (6th Cir. 1993); *Gun South, Inc. v. Brady,* 877 F.2d 858, 862 (11th Cir. 1989); *Iowa Power & Light Co. v. United States,* 712 F.2d 1292, 1297 (8th Cir. 1983); *Trujillo v. General Electric Co.,* 621 F.2d 1084, 1086 (10th Cir. 1980); *Albertson v. FCC,* 182 F.2d 397, 399 (D.C. Cir. 1950).

The Department should exercise its discretion to reopen and reconsider the Decision to afford the CO-OP an opportunity to respond to the concerns expressed therein. Reconsideration of agency decisions implicates two competing interests: "the desirability of finality, on the one hand, and the public interest in reaching what, ultimately, appears to be the right result on the other." *Civil Aeronautics Bd. v. Delta Air Lines, Inc.*, 367 U.S. 316, 321 (1961). Here, the interest in reaching the correct result, to promote the public good, is substantially greater than any interest in finality.

Dinse,
Knapp & McAndrew, P.C.
209 Battery Street
P.O. Box 988
Burlington, VT
05402-0988
(802) 864-5751

The CO-OP's application to become a mutual health insurer is a matter of considerable public importance and it is therefore of paramount importance that the Department base its decision on the most complete and accurate information available. The CO-OP does not seek to rehash old issues or advance previously rejected arguments—instead, as detailed below, the purpose of this motion is to supplement the record and to demonstrate the actions that the CO-OP has taken to address and correct the deficiencies identified in the Decision.

Moreover, reopening and reconsidering the Decision poses a negligible risk to the interest in finality. As a licensing decision, this is not a situation where the Decision implicated the rights of multiple parties, thereby engendering reliance on that decision by other interested parties. Instead, the CO-OP is the only party whose rights have been affected by the Decision and reopening and reconsidering the matter will not disrupt any other party's reliance interests. While not a formal "party" to these proceedings, the public would also be well-served by reconsideration since it would ensure that regulatory decisions are made based on a complete and accurate record and in a manner that promotes harmony between state and federal objectives. Maintaining such harmony will be particularly important as Vermont moves forward with its implementation of health care and health insurance reform.

Furthermore, reopening evidence will not result in protracted administrative proceedings. As the Department knows, the CO-OP has a limited window in which it must receive a license in order to operate as a mutual health insurer, as it must be licensed and selling health insurance policies by January 1, 2014 when the Exchange becomes operational.[2]

Dinse,
Knapp & McAndrew, P.C.
209 Battery Street
P.O. Box 988
Burlington, VT
05402-0988
(802) 864-5751

[2] Although the CO-OP understands that it has missed the timelines outlined in the Requests for Proposals ("RFP") process, if the CO-OP obtains a health insurance license and then its rates and forms are approved by the Department and Green Mountain Care Board, the CO-OP may be deemed a qualified health plan able to participate on the Exchange by the Centers for Medicare and Medicaid Services as outlined in 45 C.F.R. § 156.520(e). The CO-OP program's regulations include this provision, in part, to allow a CO-OP to participate on state exchanges in those states where the process to review and approve qualified health plans conflicts with a CO-OP's licensing or regulatory compliance process.

Finally, the CO-OP's request has been made in a timely manner; indeed the CO-OP has worked diligently since the Decision was issued to remedy the problems identified therein.

Accordingly, the Department should exercise its authority to reopen and reconsider the CO-OP's application.

THE CO-OP'S RESPONSE TO THE DECISION

The concerns identified by the Department in the Decision can be grouped into three broad categories: (1) risk of insolvency due to non-competitive rates, inadequate enrollment and debt load;[3] (2) corporate governance; and (3) the prospect of a shift to Green Mountain Care.

III. RISK OF INSOLVENCY, RATES AND ENROLLMENT

The Department identified risk of insolvency as its primary concern in denying the CO-OP's request for a Certificate of Public Good. The three factors creating this risk were the CO-OP's: (1) initial rate submission, which was, on average, fifteen percent (15%) higher than the other two carriers in the market; (2) enrollment projections, which the Department determined were unsustainable given the higher rates; and (3) debt obligations. Each of these factors is addressed below.

a. Rates

The Department's concern regarding the CO-OP's rates and the resulting impact on enrollment was based on preliminary rates for the small group and individual market that had necessarily been assembled early in the application process and which were unavoidably based on incomplete information. Accordingly, the CO-OP asks that the Department consider its revised rate projections resulting from its most recent actuarial analysis, which are competitive

Dinse,
Knapp & McAndrew, P.C.
209 Battery Street
P.O. Box 988
Burlington, VT
05402-0988
(802) 864-5751

[3] These factors, although considered separately in the Decision, are consolidated for purposes of this motion. Because rate and enrollment projections are inextricably intertwined with the issue of solvency, the concerns identified in Sections III.b.i and III.c.i. of the Decision are addressed together in Section III of this Memorandum.

with the two other insurers that are expected to offer products on the Exchange. *See* Exhibit A.[4]

It bears emphasizing, however, that as a start-up health insurer organized and created under the Affordable Care Act ("ACA"), the CO-OP finds itself in the complex position of developing projected rates without the benefit of past experience. This challenge is a characteristic of all new market entrants, including all CO-OPs created under the ACA. The very nature of the CO-OP program, which requires that it have no affiliation or connection with an existing health insurer to ensure the entry of truly new choices for consumers, and which places restrictions on its method of financing and organizational framework to ensure nonprofit status designed to bring defined benefits to consumers not offered by conventional nonprofit insurance companies, necessarily results in initial rate-setting challenges for CO-OPs. Fortunately, the process becomes more accurate for CO-OPs as more market information becomes available. The inevitable result for new market entrants like CO-OPs is that calculating and composing projected rates must be an ongoing and dynamic process, requiring close attention to changes in both internal operations and in the market at large.

The CO-OP engaged Milliman, a widely recognized and respected firm of actuaries with experience developing health insurance rates both nationally and in Vermont, to help with the rate development process. The CO-OP, in its early stages of development and without having yet established an internal underwriting staff, understandably relied heavily on Milliman's analysis. As state and federal governments move to implement the new health care system, important regulations and guidance have been published and modified, sometimes at a rapid and

---

[4] The CO-OP is also submitting revised pro forma financial projections. *See* Exhibit B. These financial projections are required with licensing applications of new companies and are used as one of the primary sources for determining solvency. Although the Department relied primarily on the CO-OP's proposed rates to evaluate solvency, the revised pro forma financial projections are provided to assist the Department in its solvency analysis. Additionally, for purposes of this motion the use of the term competitive when referring to CO-OP rates means that are in parity with other carriers. This is in contrast to the way the term is used in the Actuarial Memorandum which uses the term "competitive" to indicate where rates are lower than other carriers.

Dinse,
Knapp & McAndrew, P.C.
209 Battery Street
P.O. Box 988
Burlington, VT
05402-0988
(802) 864-5751

even frenetic pace. In some instances, information was simply, and unfortunately, missed by the CO-OP's actuaries prior to the March 25, 2013 rate submission (the "Initial Submission"). In other instances, the CO-OP continued to develop in ways that now impact the rates it would offer if licensed.

Given this context, neither the CO-OP nor its actuaries considered its Initial Submission to be "final." Instead, the CO-OP continued to evaluate and refine its rate projections after the Initial Submission.[5] In fact, the CO-OP's actuarial analysis was ongoing at the time the Department issued its Decision. Accordingly, the CO-OP's Initial Submission, which was the single most important factor in the Department's decision to deny the CO-OP a license, does not reflect the rates currently projected by the CO-OP, nor do those projections reflect the rates that would be approved pursuant to the Green Mountain Care Board's ("GMCB") rate review process before policies are sold in January of 2014.

The current actuarial analysis yields rates that are significantly lower than initially projected and comparable to those proposed by the CO-OP's competitors. The four factors which led to a reduction in the CO-OP's rate projections were: (1) a modification in the conversion factors used to adjust the average per member per month cost to the single person rate; (2) adjustments to medical cost trend factors based on the Vermont-specific limitation on hospital cost increases implemented by the GMCB; (3) a reduction in the CO-OP's expected administrative expenses; and (4) a reduction in the CO-OP's contributions to surplus. Each of these factors is addressed below and discussed in greater detail in the Actuarial Memorandum. *See* Exhibit A.

Dinse,
Knapp & McAndrew, P.C.
209 Battery Street
P.O. Box 988
Burlington, VT
05402-0988
(802) 864-5751

[5] The CO-OP had been advised by the Commissioner that filing rates with the Department prior to receiving an insurance license would constitute unauthorized practice of insurance. For this reason, the CO-OP submitted rates in a paper form to the Department of Vermont Health Access as required by the RFP to select plans qualified to offer products over the Exchange.

i. Changes to Conversion Factors

The largest reduction in the CO-OP's rates resulted from correcting the conversion factors used in the Initial Submission. Milliman should have, but did not, use all of the Vermont-specific data available to develop the base conversion factor. Instead, Milliman relied on nationwide data to develop a base factor of 1.198 and then converted the base to the four tier levels required by Vermont. However, determining an accurate conversion factor required that all state-specific information be assessed, which was not done before the Initial Submission.

After the Initial Submission, it became evident to Milliman that they had not accounted for the population of children in Vermont that would remain on Dr. Dynasaur, which provides coverage for over 60% of children under the age of 18 in families with household incomes of up to 300% of the federal poverty level. Removing that population from their analysis reduced the base conversion factor to 1.1239. The remaining three tiers were developed using this base factor, which resulted in an overall rate reduction of 5.7%. *See* Exhibit A at 23.

ii. Adjustments to Overall Trend Factor from 7.9% to 4.5%.

The second largest adjustment to the rates resulted from a reduction in the medical cost trend factor, which lowered the overall trend factor.[6] The Initial Submission used an overall trend factor of 7.9%. Milliman derived the overall trend from its database of utilization and average charge trends across the nation and in Vermont, and advised the CO-OP that the 7.9% trend was conservative.

On March 7, 2013, just prior to the March 25, 2013 submission deadline, the GMCB announced that it intended to cap hospital cost growth at 3.75% in 2014 and beyond. The now-public rate filings of other carriers seeking to be on Exchange indicate that they relied heavily on

Dinse,
Knapp & McAndrew, P.C.
209 Battery Street
P.O. Box 988
Burlington, VT
05402-0988
(802) 864-5751

[6] The overall trend factor is comprised of the medical cost trend factor and the prescription drug trend factor. The CO-OP did not make adjustments to the prescription drug trend factor after the Initial Rate Submission.

this cap in setting lower medical cost trends.[7] Milliman did not consider the GMCB directive when developing the CO-OP's medical cost trend factor used in the Initial Submission.

After accounting for the GMCB's cap on hospital costs, Milliman determined that reducing the medical cost trend to 4.0% was supportable and presented minimal risk to the CO-OP's ability to remain solvent. *See* Exhibit A at 12. The CO-OP's new medical cost trend factor is comparable to that of the other carriers who will operate on the Exchange. Given the Department's recommendations to the GMCB of the reasonableness of other carrier's rates, the CO-OP and Milliman believe that setting a medical cost trend factor of 4.0% would be supported in a rate review process by the Department's actuaries.[8]

Additionally, after our Initial Submission, the CO-OP finalized the draft of their provider contracts and will be reimbursing providers a percentage of Medicare fees which has a much slower growth rate than reimbursements based on discounts off charges. The reduction in the medical cost trend and factoring in provider contract terms resulted in a reduction in the overall trend from 7.9% to 4.5%. Overall, these changes resulted in a 3.1% rate reduction. *See* Exhibit A at 12.

iii. Adjustments to Administrative Expenses

After the initial submission, the CO-OP made important changes that reduced its administrative expenses, resulting in an overall reduction to its rates. The most significant reductions in the CO-OP's administrative expenses resulted from: (1) securing a favorable rate for reinsurance; and (2) reducing its payment to Fleischer Jacobs.

---

[7] Blue Cross Blue Shield of Vermont set their medical cost trend at 3.75% and MVP set their medical cost trend at 5.2% based on the GMCB cost containment directive. *See* Exhibit C at 5; Exhibit D at 5.

[8] In the Department's memorandum to the Green Mountain Care Board regarding BlueCross BlueShield's rate filing, the Department stated that their actuaries, Oliver Wyman, had approved the carriers overall rates but noted that the 3.75% medical trend factor was aggressive. *See* Exhibit C at 9. Similarly, in the Department's memorandum to the GMCB regarding MVP's Exchange rate filing, the Commissioner recommended that the GMCB modify MVP's proposed medical cost trend from 5.2% to 4.8%. *See* Exhibit D at 12.

Dinse,
Knapp & McAndrew, P.C.
209 Battery Street
P.O. Box 988
Burlington, VT
05402-0988
(802) 864-5751

At the time of the Initial Submission, the CO-OP had not yet secured reinsurance but was reviewing quotes from two companies. Milliman relied on those quotes in calculating the CO-OP's administrative expenses. After the Initial Submission, the CO-OP secured reinsurance at a more favorable rate than initially quoted which resulted in an administrative expense reduction and a corresponding reduction in rates. This information was not available to the CO-OP or to Milliman at the time of the Initial Submission.

Further, the CO-OP's fixed expenses were significantly impacted by its restructured contract with Fleischer Jacobs.[9] Changes to the Fleischer Jacobs arrangement resulted in an overall savings of $850,000, generated by removing the $20 per month per member fee from the individual and small group payment terms for education and outreach and replacing it with a fixed fee arrangement. The CO-OP also incorrectly factored an Employee Assistance Program ("EAP") into its Initial Submission. In sum, these adjustments to the CO-OP's administrative expenses resulted in a 2.3% reduction in its rates. *See* Exhibit A at 20-23.

iv. Reduction in Contribution to Surplus Charge.

The CO-OP made the decision, subsequent to the Initial Submission and in consultation with Milliman, that it could safely reduce the contribution to surplus charge from 2% to 1% of premium. After the Initial Submission, the CO-OP and Milliman more closely examined final rules issued immediately prior to March 25, 2013, related to the federal premium stabilization programs regarding parameters of risk adjustments, transitional reinsurance, and temporary risk corridors and determined that these programs would safely allow the CO-OP to initially make a smaller contribution to surplus.[10] After further consideration of protections added by the

Dinse,
Knapp & McAndrew, P.C.
209 Battery Street
P.O. Box 988
Burlington, VT
05402-0988
(802) 864-5751

[9] These contracts are discussed in greater detail, *infra*, in Section IV.

[10] Centers for Medicare and Medicaid Services, Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2014, 78 Fed. Reg. 15410 (March 11, 2013).

federally mandated risk corridors and required carrier participation, the CO-OP's potential eligibility for additional transitional reinsurance credits, and the CO-OP's purchase of additional reinsurance after the Initial Submission, Milliman and the CO-OP calculated that adverse scenarios provided in the financial projections showed that, even if claims experience was initially 15% higher than anticipated, the CO-OP would still be able to maintain a risk-based capital ("RBC") ratio over 300%.[11] This change resulted in an overall rate reduction of 1%. *See* Exhibit A at 21.

b. Enrollment

The Department's concerns surrounding the CO-OP's projected enrollment, expressed in connection with its analysis under both 8 V.S.A. § 3305 and § 3309, are closely tied to the CO-OP's Initial Submission. The Department found that because the CO-OP's proposed rates were significantly higher than those of its competitors, enrollment was likely to suffer, thereby creating a risk of insolvency.

After accounting for the CO-OP's revised rate projections in progress at the time of the Decision, reassessing small group and individual projections based on the revised agreements with Fleischer Jacobs and factoring CO-OP expected enrollment numbers in the large group market, which were not included in the Initial Submission, the CO-OP expects to enroll 16,025 lives, 11,097 of which will be in the small group and individual market and the remaining 4,928 in the large group market. *See* Exhibit A at 7-9.

As noted in the Decision, competitive rates are the most important factor in determining whether the CO-OP will reach enrollment sufficient to make the CO-OP a competitive and

Dinse,
Knapp & McAndrew, P.C.
209 Battery Street
P.O. Box 988
Burlington, VT
05402-0988
(802) 864-5751

[11] Vermont law dictates that a company is considered at a "Company Control Level" requiring corrective action when the insurer's RBC is at 200%. *See* 8 V.S.A. § 8301(12)(a). CMS requires CO-OPs to maintain a 500% RBC but allows for adjustments in unanticipated situations, such as claims experience that is unusually high. *See* Exhibit E.

successful supplier of health insurance in Vermont. Decision at 31. Typically, when the number of expected enrollees is reduced, administrative costs must be spread over a smaller group of people, which may tend to increase rates. This would have resulted in a 1.7% increase in the overall rate for the small group and individual market. However, when the CO-OP initially calculated its transitional reinsurance credits under federal rules, it did not include sole-proprietors as potential enrollees in individual products for purposes of qualifying for reinsurance credits because under state law they are considered small groups. *See* 33 V.S.A. § 1811(a)(3)(A-B) (including "self-employed persons" as part of the "small employer" group). After the Initial Submission, Milliman and the CO-OP made assumptions that sole-proprietors would have incentives to enroll as individuals given the subsidy eligibility and merged rating pool. Given the new individual enrollment assumptions and the CO-OP's ability to qualify for transitional reinsurance for individual insureds, Milliman determined that the protections under the federal rules offset potential losses resulting from the smaller enrollment number and results in a reduction of 0.3% to the overall rates.

In the small group and individual market, the enrollment projections were calculated by adjusting the CO-OP's ability to penetrate the market, the competitiveness of CO-OP rates, and assumptions about populations that will enroll as individuals or as small groups. A more detailed justification of the small group and individual enrollment projections is discussed in the Actuarial Memorandum. *See* Exhibit A at 7-9. Additionally, the enrollment numbers now include large group enrollment projections. Although the large group rates have yet to be developed, the CO-OP expects to have rates that will be competitive in the Vermont

Dinse,
Knapp & McAndrew, P.C.
209 Battery Street
P.O. Box 988
Burlington, VT
05402-0988
(802) 864-5751

Marketplace.[12]

In the large group, the enrollment numbers were calculated accounting for the following factors: (1) CO-OP's expectation that its rates will be competitive in the large group market, (2) the CO-OP's ability to leverage broker relationships and connections to the business community through Fleischer Jacobs and connections with the Vermont cooperative community, and (3) strong relationships with the provider community, which accounts for a significant portion of large employers in Vermont. Although the CO-OP has yet to develop its large group products, the enrollment projections in the large group market are modest for a new entrant, representing only 2% of the Vermont large group market. *See* Exhibit A at 9.

In addition to offering competitive rates, the CO-OP also possesses a unique structure, innovative features and other qualitative characteristics which will make it an especially attractive option for Vermonters given our history of community self-governance. Although the Department considered some of those factors in evaluating the CO-OP's enrollment projections, there are additional factors not considered in the Decision which will attract consumers to the CO-OP.[13]

---

[12] For purposes of this motion, the term "competitive" when referring to rates means on par with other carriers in the marketplace. This distinction is made here because the actuarial memorandum uses the term "competitive" to refer to rates that are lower than other carriers.

[13] The Decision cites an article for the proposition that "individuals receiving health insurance through their employer often choose to remain with existing health insurance plan options, even when offered a lower rate elsewhere." *See* Decision at 29 (citing Su Liu & Deborah Chollet, *Price and Income Elasticity of the Demand for Health Insurance and Health Care Services: A Critical Review of Literature*, p. 20 (2006)). That article, however, actually shows a significant percentage of such individuals *do* switch insurance plans based on cost. Moreover, that research describes a scenario involving employer-based insurance, where choices are typically quite limited, which is much different than the circumstances that will exist on the Exchange, where businesses and individuals will choose between comparable plans offered by different insurers on the basis of price, customer service and other qualitative features. In fact, studies of consumer behavior on the Massachusetts Health Connector (a health insurance exchange that operates in a manner similar to Vermont's Exchange) indicate that consumers who buy insurance on an exchange are sensitive to price as well as other qualitative factors and exhibit limited loyalty to particular plans or insurers. *See* D. Chan & J. Gruber, *How Sensitive Are Low Income Families to Price Differentials Across Health Plan Choices*, AMERICAN ECONOMIC REVIEW: PAPERS AND PROCEEDINGS 100: 292-96 (May 2010).

Dinse,
Knapp & McAndrew, P.C.
209 Battery Street
P.O. Box 988
Burlington, VT
05402-0988
(802) 864-5751

First, the CO-OP's model will integrate treatment for mental health and substance abuse in its medical management program. Long treated separately in the insurance industry, by integrating these services, the CO-OP would be the only insurer in the state that does not utilize a managed behavioral health organization to coordinate mental health treatment. Furthermore, the CO-OP has designed an evidence-based model that encourages, rather than restricts, access to mental health care. These innovations include: (1) rapid access to mental health care assessments and treatment; (2) removing barriers such as prior approval for mental health treatment and artificial caps on number of visits; and (3) treatment decisions actually guided by the clinician and patient rather than artificial limits imposed by an insurer. We believe this model will not only improve mental health care, but will also result in better coordinated and more cost-efficient care. *See* Exhibit F.

Second, the CO-OP will allow for treatment options not commonly included in the plans of other insurers, allowing future-members to more freely and conveniently interact with their health care providers. To further improve coordination of care, the CO-OP intends to reimburse specialists for telephone consults to primary care practitioners. Paid telephone consults (between specialists and primary care physicians) have been shown to improve access and reduce unnecessary emergency room visits, hospitalizations, and hospital transfers, thereby reducing costs.[14] Additionally, CO-OP case managers would play an active role in helping CO-OP members to coordinate and access the care they need. The CO-OP would also place specific emphasis on wellness and preventative care, including face-to-face wellness coaching in an effort to avoid more serious and costly interventions.[15]

Dinse,
Knapp & McAndrew, P.C.
209 Battery Street
P.O. Box 988
Burlington, VT
05402-0988
(802) 864-5751

[14] Steven E. Wegner, *et. al.* PEDIATRICS, OFFICIAL JOURNAL OF THE ACADEMY OF PEDIATRICS, *Estimated Savings from Paid Telephone Consultations Between Subspecialists and Primary Care Physicians* (December 1, 2008), available at: http://pediatrics.aappublications.org/content/122/6/e1136.full.pdf.

Third, as required by the federal program, all profits generated by the CO-OP will be returned and redistributed to its members. In the short term, profits returned to CO-OP members will be subordinate to the CO-OP's loan obligations and the need to build adequate reserves. Accordingly, this profit redistribution will not threaten the CO-OP's financial viability, consistent with the requirements of the CO-OP program that give priority to maintaining solvency. However, over the long term, this consumer-oriented feature combined with its consumer governance model, will differentiate the CO-OP from its competitors, which, in conjunction with providing comparable—and, in some cases, superior—services at competitive rates, will make the CO-OP the most attractive option for many consumers.

Finally, although as noted in the Decision, the CO-OP's goal of developing a risk-sharing relationship with its providers has not yet come to fruition, the CO-OP continues to support non-fee-for-service reimbursement methods, and, if licensed, will continue to pursue more "global" forms of reimbursement.[16] It is important to note that this change in the provider network from that proposed in the CO-OP program application is fully consistent with CO-OP program rules and the terms of the loan agreement, and does not in any way put the CO-OP out of compliance with the CO-OP program.

The CO-OP's revised, competitive rates, coupled with its innovative coverage plan and member-owned structure, firmly support its revised enrollment projections and make the CO-OP an attractive option for consumers. These factors combine to support the reasonableness of the CO-OP's revised enrollment projections and demonstrate a high probability the CO-OP will

Dinse,
Knapp & McAndrew, P.C.
209 Battery Street
P.O. Box 988
Burlington, VT
05402-0988
(802) 864-5751

[15] For greater detail regarding the innovative features of the CO-OP's coverage, see "Vermont Health CO-OP's Innovations in Health Delivery That Will Improve Vermonters' Quality of Life and Reduce Health Care Spending." Exhibit F.

[16] The CO-OP also notes that Vermont Managed Care's decision not to proceed with a network risk arrangement for 2014 was not due to any concerns as to the CO-OP, but instead was based on the uncertainties inherent in the start-up of the Exchange itself. *See* Exhibit G.

attain adequate enrollment to ensure sustained financial stability.

c. Debt Load

The Department also identified the CO-OP's debt load as an aggravating factor in assessing the CO-OP's risk of insolvency. The Department determined that the CO-OP's debt obligations to the federal government, along with its plan to defer a portion of its administrative costs over its first several years in operation, increase its risk of insolvency. Decision at 14-15.

Using the revised and more accurate rate and enrollment numbers, the CO-OP's financial projections support its ability to begin to service its debt obligations as payments become due. Although the CO-OP's debt obligations are significant, the loans were approved by the federal government (which alone bears the financial risk in the event of a default) and its financial analyst, Deloitte, and are an integral component of the CO-OP program under the ACA.[17]

Moreover, since the Initial Submission, the CO-OP changed its strategy to defer a portion of its first year administrative costs. *See* Decision at 15. Instead, the CO-OP will spread its projected total administrative expenses for its first five years of operation equally over the five year period. The CO-OP and Milliman believe this method of cost-averaging is a more reasonable approach because costs will be spread over a larger member pool as enrollment increases year over year and the average cost impact will be consistent over the five year period. This will assist the CO-OP as it becomes more efficient and achieves economies of scale over time. In sum, because the CO-OP's administrative costs will be lower in the future, deferment of its current administrative burden is simply a prudent decision to spread the larger up-front

Dinse,
Knapp & McAndrew, P.C.
209 Battery Street
P.O. Box 988
Burlington, VT
05402-0988
(802) 864-5751

[17] The federal government created and funded this program with knowledge that, as with any entrepreneurial enterprise, the creation of health care CO-OPs poses some level of financial risk. Moreover, in issuing the start-up and solvency loans, CMS was aware that, as with any investment, the financier would bear some risk of loss. This is a risk, however, the federal government has chosen to undertake and it has agreed to bear the risk of financial loss, thereby insulating CO-OP members or policyholders from any financial consequences in the unlikely event of default. In short, even in the worst case scenario, neither CO-OP policyholders, CO-OP providers nor citizens of Vermont will face adverse financial consequences.

administrative costs over time consistent with standard industry practice of drawing on reserves to meet short-term needs unrelated to claims and does not pose any significant financial risk.

It must also be emphasized that the CO-OP's debt load is integral to the structure of the CO-OP program based on Congress' decision to capitalize CO-OPs through long-term, low-interest loans. Many of the Department's concerns are coincident to the financial structure of all health insurers financed by the CO-OP program. It should be noted that the loan is structured in the form of a surplus note, a form of debt generally permitted to meet solvency requirements.[18] Although the CO-OP's debt load is higher than that of the other two insurers who are expected to sell plans on Vermont's Exchange, the CO-OP's start-up and solvency loans are integral components of the CO-OP program and are instrumental in achieving Congress' goal of facilitating new entrants to highly concentrated health insurance markets by supplying sufficient capital to overcome high capital barriers to entry. *See* Establishment of Consumer Operated and Oriented Plan (CO-OP) Program, 76 Fed. Reg. 77392 (December 13, 2011) ("One major barrier to continued development of [health insurance cooperatives] in the health insurance market has been the difficulty of obtaining adequate capitalization for start-up costs and State insurance reserve requirements. The CO-OP program is designed to help overcome this barrier to new issuer formation by providing loans specifically for these critical activities."). Significantly, despite sharing similar financial characteristics with the Vermont CO-OP, twenty of the twenty-four federally-approved CO-OPs have received licenses in other states.[19] Vermont is the only state to have denied the CO-OP a license.

[18] The Decision notes that the CO-OP's competitors maintain larger reserves than the CO-OP, totaling over $100 million. To the extent the Department suggests that $100 million in capital surplus is or should be the standard for operating in Vermont, the Department is effectively blocking any and all new entrants to the Vermont market, as neither the CO-OP nor any other start-up company could satisfy such a standard. 8 V.S.A. § 3309 (requiring that mutual insurer "possesses and thereafter maintains unimpaired basic surplus of not less than $2,000,000.00 and, when first so authorized, shall possess free surplus of not less than $3,000,000.00").

[19] This information is based upon the National Alliance of State Health CO-OPs newsletter issued June 28, 2013.

Dinse,
Knapp & McAndrew, P.C.
209 Battery Street
P.O. Box 988
Burlington, VT
05402-0988
(802) 864-5751

The Department agreed to treat the solvency loan proceeds as capital for purposes of evaluating the CO-OP's reserves and acknowledged that the loans satisfied the capital requirements established in 8 V.S.A. § 3309. Decision at 32. Indeed, the Department certified to CMS in Appendix 10 of the Loan Agreement that it would accept the loans as the basis for solvency. *See* Exhibit 34, Docket No. 12-041-I. Yet, the Department indicated that the nature of the loan itself weighs against a Certificate of Public Good and a license. *See* Decision at 14-15. Although the Decision states that the fact of the loan was not determinative in the licensure denial, *see* Decision at 11, the Decision makes clear that the loan itself poses a substantial barrier to licensure. *See* Decision at 14.

This approach is fundamentally at odds with the expectations created by the Department's certification provided to CMS prior to the issuance of the loan. The certification led CMS and the CO-OP organizers to conclude that the CO-OP loans would be evaluated on a level playing field with other types of solvency capitalization. It is reasonable to assume that had CMS been informed that the loan would actually prejudice licensure, it would not have awarded the loan, and the CO-OP organizers and their supporters in the Vermont community would not have then devoted their time, resources, and careers to establishing the CO-OP. Indeed, the Department's certification at Appendix 10 was a condition precedent to the closing of the loan.

The Department's acceptance of the CO-OP's solvency loan as adequate to satisfy the reserve requirements of § 3309, while simultaneously denying licensure, in part, based upon the CO-OP's reliance on the loan, establishes a standard that is impossible for any CO-OP to meet. Moreover, in an effort to alleviate any lingering concerns, the CO-OP has offered to commit additional capital to its reserves, over and above the statutory requirements, and remains willing

Dinse,
Knapp & McAndrew, P.C.
209 Battery Street
P.O. Box 988
Burlington, VT
05402-0988
(802) 864-5751

to increase its reserves to a level that the Department believes is necessary.[20]

The Department's responsibility to ensure solvency is undisputed. Accordingly, it is important to understand that the CO-OP program's statutory provisions and rules, as well as the loan agreement itself, fully defer to the state's authority to determine the timing of repayment of the loans to ensure solvency. No repayment of principle or interest can occur without the Department's express authorization. Furthermore, under the CO-OP program rules and the loan agreement, such a delay in repayment at the instigation of the Department does not constitute a violation of the loan agreement. Therefore, the Department could delay repayment to enhance CO-OP reserves without jeopardizing the CO-OP's compliance with CO-OP program requirements or the loan agreement. *See* 45 C.F.R. § 156.520(a-b).

In sum, the Department's concerns regarding the CO-OP's debt load do not accurately reflect the risk to consumers or providers in Vermont; rather, they arise from a blurring of the compatibility between the Department's interest in solvency and the structure and purposes of the CO-OP program under the ACA.[21]

IV. CORPORATE GOVERNANCE

The Department also raised concerns regarding the CO-OP's corporate governance. Specifically, the Department perceived the following concerns: (1) lack of adequate experience and involvement by members of the Board, as well as issues related to the Board Chair's compensation and influence; (2) insufficient experience among management; and (3) a conflict between the CO-OP's then-existing Agency and Marketing Agreement with Fleischer Jacobs & Associates ("Fleischer Jacobs") and the amended version of 8 V.S.A. § 4085 set to take effect on

Dinse,
Knapp & McAndrew, P.C.
209 Battery Street
P.O. Box 988
Burlington, VT
05402-0988
(802) 864-5751

[20] The Department has discretion to set stricter surplus requirements. *See* 8 V.S.A. § 3309 ("The commissioner may prescribe additional surplus based upon the type, volume, and nature of insurance business transacted.").
[21] As discussed in Section V *infra*, if the Department were to employ non-statutorily mandated criteria (in this case, debt load) to frustrate implementation of the CO-OP program in Vermont, serious preemption concerns would result.

January 1, 2014. As detailed below, the CO-OP has taken corrective action to remediate these concerns.

a. Board of Directors

The Department expressed concerns that the CO-OP's Board had not been sufficiently active and involved in governing the CO-OP. After receiving notice of the Department's concerns, the CO-OP has taken decisive and effective action to address those concerns and strengthen the Board's involvement to ensure effective oversight of CO-OP affairs.

First, in order to guarantee that the Board enhances its role in actively overseeing the CO-OP's management and operations, the Board has formally adopted a traditional board oversight model. In contrast with its previous "policy governance" model, the newly adopted model requires that Board members be actively engaged in the CO-OP's affairs. The Board has taken tangible steps toward implementing this model by amending its Bylaws to include a number of Committees, with the goal of developing targeted Board oversight. This revised approach represents a fundamental shift in the Board's role from one focused on setting general goals, to one that closely monitors its managers and officers, offers significant input on all phases of the CO-OP's operations and ensures management accountability. Since October 2012, the Board has met on a near-monthly basis and is committed to continuing its monthly meetings until the CO-OP converts to its Operation Board elected by the policyholders. Moreover, since the Decision was entered, the Board has held four meetings in the span of one month.

Second, the Board amended its Bylaws to expand the Formation Board from a maximum of nine to fifteen seats. In addition to strengthening oversight, this expansion allows the Board to enlist additional Directors with specialized backgrounds, enhancing the Board's depth of knowledge and experience and enabling the Board to more effectively develop strategies to

Dinse,
Knapp & McAndrew, P.C.
209 Battery Street
P.O. Box 988
Burlington, VT
05402-0988
(802) 864-5751

ensure success in Vermont's health insurance market. The CO-OP is currently engaged in targeted recruiting, seeking individuals with expertise and experience in insurance, finance, cooperative business models and health care to fill the newly created vacancies.

The CO-OP's recruiting efforts have been met with significant success. The following five individuals have recently joined the Board of Directors: (1) M. Jerome Diamond, a former Vermont Attorney General; (2) David Kibbe, a current Divisional Vice President of Universal Health Services, a hospital management company located in Pennsylvania; (3) Leonard Crouse, who has more than 30 years of experience as an insurance regulator in Vermont and Massachusetts; (4) Chuck Butler, a former executive at Blue Cross Blue Shield Vermont and Blue Cross Blue Shield Montana, and co-founder of Caring Foundation of Montana, an organization to help pay for medical care of uninsured Montana children; and (5) Steve Post, the President and CEO of Vermont State Employees Credit Union, a cooperative enterprise. More complete biographical information for each new Director is attached as Exhibit H.[22] Each new Director has substantial experience in the highest levels of their respective fields of insurance, finance, law or government regulation, and their collective expertise significantly enhances the CO-OP's leadership. The CO-OP expects that the Board will be thoroughly engaged and intimately involved in the development of the CO-OP going forward, and will continue to be populated with individuals with requisite expertise to meaningfully guide the CO-OP's development.

Finally, the Decision identified several concerns surrounding the former Chair of the Board Mitchell Fleischer, including issues of excessive compensation,[23] an outsized influence on

Dinse,
Knapp & McAndrew, P.C.
209 Battery Street
P.O. Box 988
Burlington, VT
05402-0988
(802) 864-5751

[22] Leonard Crouse has been unable to provide his curriculum vitae at the time of this filing. A summary description of his experience is attached hereto as part of Exhibit H.

existing Board members and a conflict of interest regarding the CO-OP's relationship with Fleischer Jacobs. Decision at 19-20. Accordingly, Mr. Fleischer stepped down as Chair and resigned from the Board of Directors on June 13, 2013. Mr. Fleischer no longer has any involvement in managing or directing the CO-OP and will receive no additional compensation from the organization. Mr. Fleischer's successor will be compensated at the same rate as other Board members, receiving $250 per meeting.

b. Fleischer Jacobs Contract

In its Decision, the Department noted that the CO-OP's then-existing contract ("the Former Contract") with Fleischer Jacobs conflicted with the amended version of 8 V.S.A. § 4085. The Department also noted that the Former Contract gave rise to a conflict of interest for Mr. Fleischer, who was, at the time, the Chair of the Board and a principal of Fleischer Jacobs. Decision at 19. The CO-OP has taken decisive action to eliminate both concerns by: (1) voiding the Former Contract and entering into two new contracts that fully comply with § 4085; and (2) accepting the resignation of Mr. Fleischer.

i. Compliance With Amended 8 V.S.A. § 4085

The amended version of 8 V.S.A. § 4085, which takes effect on January, 1, 2014,[24] will prohibit an insurer from paying any "commission, fee, or other compensation, directly or indirectly, to a licensed or unlicensed agent, broker, or other individual in connection with the

[23] It bears noting that Mr. Fleischer's compensation reflected his substantial investment of time and effort in developing and guiding the CO-OP in its early stages and was limited to one year as the CO-OP sought approval first from CMS, and then from the state. Mr. Fleischer spent many hours getting the CO-OP through CMS review and loan approval and into the state licensing process. As such, Mr. Fleischer's involvement in the company's efforts was far greater than that of most, if not all, other comparable insurance company board members, and his compensation reflected that workload.

[24] Fairness requires that it be noted that, contrary to statements in the Decision, the contract was not "illegal," given that 8 V.S.A. § 4085(d)(1) is not yet in effect and will not be until January 1, 2014. On March 11, 2013, the CO-OP clearly advised the Department of its intention to alter the arrangement to comply with § 4085(d)(1) and that it would not allow the arrangement to remain in place after § 4085(d)(1) took effect. The CO-OP was not aware that the Department expected a new agreement to be in place before issuing a license. *See* Exhibit I.

Dinse,
Knapp & McAndrew, P.C.
209 Battery Street
P.O. Box 988
Burlington, VT
05402-0988
(802) 864-5751

sale of a health insurance plan" sold on the Exchange. *See* 8 V.S.A. § 4085(d)(1). Compensation under the Former Contract was divided into two phases—the pre-launch phase, which covered the period leading up to the opening of the Exchange, and the post-launch phase, which covered the period after the Exchange becomes operational. In the pre-launch phase, Fleischer Jacobs was guaranteed a flat monthly fee, with the potential for an additional $500,000, paid in monthly installments. The post-launch phase, which was set to begin when the CO-OP became operational on January 1, 2014, called for Fleischer Jacobs to receive payment on a per member per month basis. The post-launch phase compensation arrangement, as noted in the Decision, was inconsistent with the proscription against commission based payment in the amended version of § 4085(d)(1).

In response to the Department's concerns, the Former Contract has been voided and the CO-OP's relationship with Fleischer Jacobs has been restructured into two contracts, one governing the education, outreach and, ultimately, marketing services Fleischer Jacobs will provide in the small group and individual market (the "Small Group and Individual Contract") and one governing the broker and marketing services Fleischer Jacobs will provide in the large group market (the "Large Group Contract").

Under the Small Group and Individual Contract, the CO-OP, consistent with 8 V.S.A. § 4085(d)(1), pays Fleischer Jacobs a fixed monthly fee for the duration of the contract that slightly increases once Fleischer Jacobs is authorized to perform marketing services on behalf of the CO-OP. Under the CO-OP's loan documents, it is prohibited from paying for marketing services with loan funds. The CO-OP, therefore, expects to begin paying the amount associated with the marketing services from revenue toward the end of the first quarter of 2014. The Small Group and Individual Contract is structured to pay additional consideration (also in the form of a

Dinse,
Knapp & McAndrew, P.C.
209 Battery Street
P.O. Box 988
Burlington, VT
05402-0988
(802) 864-5751

fixed fee) for the marketing services at that time. No other elements in the agreement change the fixed fee amount for the duration of the agreement and Fleischer Jacobs is also strictly prohibited from reimbursing any brokers or subcontractors in a manner that would violate 8 V.S.A. § 4085. Additionally, the contract was modified to reduce its duration from five to two years, include a sixty (60) day "termination without cause" provision, and include clear compliance language that holds Fleischer Jacobs and its subcontractors to the same regulatory standards that apply to the CO-OP itself with respect to education, outreach and marketing services.

The new Small Group and Individual Contract thus changes the payment structure between the CO-OP and Fleischer Jacobs, as well as downstream payment relationships between Fleischer Jacobs and other brokers, to prevent the payment of an incentive that is related to the sale of a CO-OP product or based on the amount of business Fleischer Jacobs or their contractors bring to the CO-OP. *See* Exhibit J.

The Large Group Contract was also modified. The new contract provides that Fleischer Jacobs will provide broker services with respect to the CO-OP's large group plans not sold on the Exchange on a commission basis.[25] However, the contract was further modified to reduce its duration from five to two years, eliminate the exclusivity provision, include a "termination without cause provision" upon sixty days notice, include stronger regulatory compliance and oversight language, and reduce the commission payment. Under the Large Group Contract, Fleischer Jacobs will not receive any commission until the CO-OP has collected premiums so services will not be paid from loan funds. These changes afford the CO-OP greater flexibility to renegotiate or change vendors should it be desirable to do so. *See* Exhibit K. Both the Small Group and Individual Contract and the Large Group Contract were renegotiated through separate

Dinse,
Knapp & McAndrew, P.C.
209 Battery Street
P.O. Box 988
Burlington, VT
05402-0988
(802) 864-5751

[25] The commission arrangement is permissible with respect to the sale of large group policies. *See* 8 V.S.A. § 4085a(d).

outside local counsel and are the result of an arms-length negotiation process.

The new Board of Directors met on June 18, 2013 and June 25, 2013 and discussed the relationship between the CO-OP and Fleischer Jacobs at length. The Board carefully considered that relationship, including whether the services should be taken out to bid and the appropriate terms of any arrangement. After extensive deliberation, the Board agreed that moving forward with these contracts is in the best interest of the CO-OP.

ii. Mr. Fleischer's Conflict Of Interest

Mr. Fleischer's resignation from the Board of Directors eliminates any continuing concern of a conflict of interest with respect to the CO-OP's relationship with Fleischer Jacobs. The new arrangement with Fleischer Jacobs was negotiated and entered into after his departure. Mr. Fleischer took no part in the Board's deliberations concerning the new contracts with Fleischer Jacobs and no conflict of interest exists among the current Board with respect to the restructured agency and marketing agreements.[26]

c. Management Qualifications

The Decision stated that "[c]ertain key officers lack the insurance experience and business qualifications commensurate with similar positions in similar entities, including a lack of specific experience operating a health insurance company." Decision at 23. The absence of specific experience running an insurance company notwithstanding, the Department did not fully appreciate the wealth and breadth of experience among the CO-OP's management team as a whole. Aside from the CEO and COO, both of which themselves bring valuable experience as a former health insurance regulator and business executive respectively, every other officer has

Dinse,
Knapp & McAndrew, P.C.
209 Battery Street
P.O. Box 988
Burlington, VT
05402-0988
(802) 864-5751

[26] It should be noted that CMS thoroughly reviewed the Former Contract and found it acceptable. All Board members knew of the relationship between Mr. Fleischer and Fleischer Jacobs, Mr. Fleischer did not take part in the vote to approve the Former Contract, and both sides were represented by separate legal counsel. Nonetheless, given the fact that the Former Contract has been voided and Mr. Fleischer no longer holds any position at the CO-OP, the Department's concern as to the Former Contract has been fully addressed by the new Board.

significant experience in the insurance industry. Indeed, the presence of CEOs who were former insurance regulators among CO-OPs has widely been regarded as an asset rather than a limitation in the licensure of CO-OPs across the country.

Nonetheless, the CO-OP has now elevated Clifford Frank to the executive position of Chief Administrative Officer. Mr. Frank has more than three-decades of experience in the health insurance and health care industries, including over 12 years as the acting Chief Executive Officer of Vermont Managed Care. Mr. Frank's resume is attached hereto as Exhibit L. Mr. Frank has been involved with the CO-OP since its founders began the application process in late 2011, initially as a consultant and then as the Director of Product Development. Mr. Frank's increased involvement will place him in charge of managing core CO-OP projects and integration between business units, which will provide the basis for the CO-OP's operations. These include network development through provider contracting, credentialing oversight, provider education and outreach. These changes add significant strengths to the CO-OP's management structure, ensuring the CO-OP's success in the Vermont market.[27] As the CO-OP continues to grow, it will seek individuals with particularized experience in these fields and, specifically, in the health care and insurance industries.

V. LEGAL AND MARKET LANDSCAPE

In its Decision, the Department discussed the highly concentrated nature of Vermont's insurance market as a factor in challenging the future solvency of the CO-OP. Decision at 26. Respectfully, this factor weighs against any new entrant becoming licensed and amounts to a regulator ceding the market to a dominant issuer, a result not called for in 8 V.S.A. § 3305 or § 3309. Such a result is completely contrary to the ACA's goal to create more competition,

Dinse,
Knapp & McAndrew, P.C.
209 Battery Street
P.O. Box 988
Burlington, VT
05402-0988
(802) 864-5751

[27] Pending the filing of the instant motion, the CO-OP has continued to work toward becoming operational and is on schedule to do so when the Exchange goes live. *See* Exhibit M.

particularly in concentrated markets. *See supra* discussion at 10-11. And, once again, the concentrated nature of Vermont's insurance market was well known to the Department before the loan was awarded. If this was considered as a factor barring licensure, it should have been communicated clearly to CMS and CO-OP organizers prior to the loan award.

The Department also noted that the State's intent to implement Green Mountain Care in 2017 weighs against issuing the CO-OP a Certificate of Public Good, though the Department acknowledged that this factor "carries minimal weight." Decision at 26. The Department concluded that "[a]ny attempt by a start-up company to enter a highly concentrated industry that will cease to exist as early as three years after entry may not serve the public interest." *Id.* The Department specifically identified certain aggravating factors in the case of the CO-OP, specifically that the CO-OP is projected to lose money over its first several years in operation, a situation that no longer exists with the revised market assumptions and enrollment forecasts, and that its federal start-up loans become due in 2017. *Id.*

First, the possibility of conversion to Green Mountain Care in 2017 was a factor known to the Department when it provided Appendix 10 to CMS. *See* Exhibit 34, Docket No. 12-041-I. To the extent that this possibility was viewed as a barrier to licensure in 2013, it was incumbent on the Department to so inform both CMS and the CO-OP organizers prior to the loan award. Again, it appears unlikely that CMS would have awarded the loan if they had known that the Department viewed Vermont's plan to convert to a single-payer system as an impediment to new market entrants in 2013.

In the CO-OP's discussions with CMS prior to loan award, CMS was fully aware of the Green Mountain Care plans and their implications. After all, on the basis of Vermont's representations, CMS must approve the waiver to implement it and must approve the transfer of

Dinse,
Knapp & McAndrew, P.C.
209 Battery Street
P.O. Box 988
Burlington, VT
05402-0988
(802) 864-5751

all of the Federal funds used to pay for the care of Medicare beneficiaries and the subsidies for the Vermont Exchange to the stewardship of Green Mountain Care. CMS agreed to the CO-OP loan agreement with full knowledge of the possibility that Vermont may transition to a single-payer system and the financial risks that such a transition posed, believing that the people of Vermont would benefit from consumer-oriented competition until such time as that transition occurs.

In this context, the Department makes a conclusive determination that the CO-OP would be precluded from becoming a fiscal intermediary in Green Mountain Care because such a change in mission would be inconsistent with the CO-OP program. Decision at 25 n.10. However, only CMS can determine whether CO-OP operations are consistent with CO-OP program rules. Additionally, because of CMS' long history of using fiscal intermediaries in Medicare, there is no evidence—one way or the other—that CMS did not consider such a change in operations as possible or regard the use of a consumer-based fiscal intermediary as beneficial. At a minimum, the people of Vermont would benefit from a more robust, competitive bidding process as to any award of a contract to administer Green Mountain Care.

Although future transition to publicly-financed health care is possible, this uncertain occurrence does not diminish the fact that increased competition and consumer choice in Vermont's existing health insurance market will be beneficial. The fact that the CO-OP (along with all of its competitors) may potentially be eliminated as issuers due to future changes in the law is not determinative of whether the CO-OP would provide a benefit to the current health insurance system. Notably, the Green Mountain Care legislation does not suggest—much less dictate—that prior to 2017, new entries into the Vermont health insurance market should face stricter solvency, capital or other licensing requirements. *See An Act Related to a Universal and*

Dinse,
Knapp & McAndrew, P.C.
209 Battery Street
P.O. Box 988
Burlington, VT
05402-0988
(802) 864-5751

Unified Health System, Act 48 (2011) (no discussion of enhanced solvency or licensing requirements for new health insurers, and no amendments to applicable licensing standards in 8 V.S.A. § 3305 or § 3309); *see also Agency of Nat. Resources v. Riendau*, 157 Vt. 615, 620 (Vt. 1991) ("There is a presumption against implied repeal of one statute by another.").

Second, even assuming that the CO-OP were to begin operations only to become displaced as a result of the transition to Green Mountain Care in 2017, or later, there is no risk, financial or otherwise, to either consumers or the public. Although this potential change could trigger an event of default on its loan agreement with CMS, CO-OP members and other Vermonters would suffer no adverse effects. As the Department acknowledges, "[e]ven in the event of default on the [CMS] loan agreement, solvency loan funds will be available to pay claims and maintain required reserves." Decision at 32. In other words, in the event of default, the CO-OP and federal government, rather than the State of Vermont or its citizens, will shoulder the financial loss.[28]

Finally, the Department's consideration of Vermont's potential shift to Green Mountain Care in denying the CO-OP a license, though accorded only "minimal weight," raises potential preemption concerns. The ACA provides that "[n]othing in this title shall be construed to preempt any State law that does not prevent the application of the provisions of this title." 42 U.S.C. § 18041(d). Therefore, although the CO-OP is required to satisfy Vermont's licensing requirements, *see* 42 U.S.C. §§ 18042(c)(5), 18044(b)(1-13), the Department's injection of a criterion that serves as an impediment to the operation of the federally-mandated CO-OP program on the Vermont Exchange would frustrate an essential element of the ACA and

Dinse,
Knapp & McAndrew, P.C.
209 Battery Street
P.O. Box 988
Burlington, VT
05402-0988
(802) 864-5751

[28] This is true whether the CO-OP were to default due to the transition to Green Mountain Care or due to insolvency. Vermonters and CO-OP members are free from financial risk, which is instead shouldered by the federal government. Indeed, this is one of the fundamental components of the CO-OP program designed to promote new entrants in the health insurance industry.

constitute "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the ACA. *See Geier v. American Honda Motor Co.*, 529 U.S. 861, 873 (2000). By relying on general policy goals as to future changes to Vermont's health care system to deny the CO-OP's license, the Department has adopted a criterion that would weigh against any CO-OP from becoming licensed in the state. At a minimum, such an approach is in conflict with the goals of the federal government in creating the CO-OP program and threatens to undermine one of the central aspects of the ACA.

VI. CONCLUSION

In response to the Department's Decision, the CO-OP has moved rapidly and decisively to remedy each and every identified deficiency. Evidence of these changes, along with updated actuarial analysis which firmly supports the CO-OP's solvency and financial stability, should be considered in order for the Department to base this important decision on the best available evidence. The CO-OP is confident that it has satisfied the criteria for obtaining a Certificate of Public Good and Certificate of Authority under 8 V.S.A. § 3305 and § 3309, and therefore requests that the Department reopen this matter and reconsider its decision, and issue the requested Certificates.

Dated at Burlington, Vermont this 3rd day of July, 2013

Respectfully submitted,

DINSE, KNAPP & McANDREW, P.C.

Ritchie E. Berger, Esq.
209 Battery Street, P.O. Box 988
Burlington, VT 05402
(802) 864-5751
rberger@dinse.com

Attorney for Petitioner Vermont Health CO-OP

Dinse,
Knapp & McAndrew, P.C.
209 Battery Street
P.O. Box 988
Burlington, VT
05402-0988
(802) 864-5751