Oregon Association of Hospitals and Health Systems

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Patrick Allen, Director
Jeremy Vandehey, Health Policy & Analytics Division Director
Oregon Health Authority
500 Summer Street NE, E-20
Salem, OR 97301

Delivered electronically to:

hcmo.info@dhsoha.state.or.us
patrick.allen@dhsoha.state.or.us
jeremy.vandehey@dhsoha.state.or.us

Directors Allen and Vandehey,

On behalf of Oregon's 62 hospitals and the communities they serve, the Oregon Association of Hospitals and Health Systems (OAHHS) is providing these written comments regarding the draft rules dated October 18, 2021, implementing House Bill 2362. OAHHS participated in the Rules Advisory Committee (RAC) meeting on October 25, 2021.

As we have indicated previously, HB 2362 and its implementing regulations will have far-reaching impacts across the healthcare delivery system. This rulemaking presents a critical opportunity to ensure that the new Health Care Market Oversight Program accomplishes the intent of the legislature. We ask that the new Program:

- Operate with fair, objective, consistent, and predictable processes;
- Be efficient and avoid introducing expenses that ultimately increase the cost of health care; and
- Encourage innovation in care delivery without delay.

OAHHS and its member representatives serving on the RAC emphasized these themes throughout the October 25 meeting.

Our most significant concern is that the rules will encourage healthcare providers (hospitals and all others) to simply "go it alone," avoiding all development of new care settings, new ways of delivering care, and new concepts in savings and waste reduction. The breadth of the rules moves away from the legislative concerns of access, equity, and cost reduction and into the micromanagement of healthcare delivery. If implemented, these rules will discourage the very activities that OHA policy seeks to encourage.

Furthermore, the Program lacks predictability and transparency. Contrary to the Authority's stated goal to create "[a] process that is transparent . . ." (OAR 409-070-0000 (3)(c)), we pointed to several examples wherein the draft rule lacks the objective and predictable standards that would enable such a process.

Reviews add cost to the system, discourage or prevent innovation, and may delay patients' ability to access care in this state. We remain concerned that the rules as drafted will yield a high volume of contracts and other arrangements that OHA will have to review, including those involving day-to-day operational matters outside the scope of the legislature's intent and the statutory language.

In what follows, we highlight our recommendations for specific revisions to rules.

1. Definitions (-0005)

- We question why the rule is silent on what it means to "eliminate or significantly reduce" essential services. Similarly, the rule does not define when a service is "essential to achieve health equity." These terms clearly limit the scope of the Program. Yet, by not defining the terms, OHA misses an opportunity to make the process more predictable and fair, and to allow entities and the public to anticipate whether a review will be necessary.

- We recommend the following definition: "eliminate or significantly reduce essential services" means that access to a service within the service areas of the entities, taken as a whole and among all service providers in the service areas, would be reduced, as a direct result of the material change transaction, by more than 50% and the remaining service providers will not have the capacity to increase service provision sufficient to meet the current need for the essential service within the service areas.

- The definition of "control" (-0005(7)) is too broad. It may make sense for publicly traded entities, but it is not reasonable outside of that context, and it is not an appropriate fit for healthcare in Oregon. As several RAC members noted, the 10% threshold is not indicative of control for the vast majority of health care entities in Oregon. True control will often not arise until an entity holds at least 51% of decision-making authority and, depending on the organization, even that threshold may be too low. Additionally, the broad definition of control acts as a dragnet, pulling in all sorts of routine transactions that do not affect access, care, equity, or cost.

- The definition of "control affiliate" (-0005(8)) should be removed. This concept is beyond the scope of the legislation, which is limited to "health care entity."

- The definition of "significant portion" (-0005(20)) should be removed, as should its use in -0010(2)(h), because it is beyond the scope of the legislation.

2. Covered Transactions (-0010)

- Again, the concept of a "control affiliate" should be removed throughout the rule as it is beyond the scope of the legislation.

- Section (1)(e) regarding new contracts/affiliations should read "will" (not "may") eliminate or significantly reduce essential services. HB 2362 uses the word "will" at Section 1 (10)(c).

- The scope of "corporate affiliation" (-0010(2)) extends beyond the scope of the legislation. Remove Section 2(a) and 2(e)-(h) as beyond the scope of the legislation and exceedingly broad in its application.

- Additionally, (4)(a)-(d) are very broad. As several RAC members indicated, the rule as written could envelop various day-to-day operational contracts, such as those for environmental services, securing care in underserved areas, provisioning an electronic medical record in a medical group or smaller hospital, hosting a continuing education event for providers from multiple organizations, and more. The Authority risks being overwhelmed and delaying critical collaboration and innovation across the health care system if these activities are subject to review. We cannot emphasize the breadth of these enough.

- In Section (4) regarding clinical affiliations and contracting affiliations, the rule must state explicitly that these are only covered if they "eliminate or significantly reduce" essential services. The rule should be consistent with HB 2362 Section 1(10)(c).

3. Materiality Standard (-0015)

- Several RAC members indicated that it is not feasible to require statements of revenue and revenue projections to be prepared in accordance with generally accepted accounting principles by a duly qualified and credentialed accounting expert (-0015(2)). The low materiality threshold in the rule will result in smaller clinics being included and being unable to meet this standard. This requirement exceeds the filing requirements under the Hart-Scott-Rodino Act.

- The rule should specify that the revenue thresholds apply at the time notice is filed and the requirements for review will not change if there are changes to these projections later in the transaction.

4. Excluded Transactions (-0020)

- Remove Section (1)(d)(C) as this qualifier was not included in the legislation.

- Remove Section (3) and the corresponding reference in Section (1)(c). The legislation did not contemplate a separate review process for this exclusion.

- Clarify that "provider" in -0020(2)(a)(B) can be a legal entity and not simply a human licensee. We believe this is the intent but wish to confirm. The clarification should confirm that basic payor contracts between a payor and a hospital are not covered. The purpose of the "medical services contract" exclusion is that downstream provider contracts are excluded as normal business operations.

5. Emergency and Exempt Transactions (-0022)

- Emergency situations contemplated by the rule require expedient action. We propose that entities request the exemption verbally and that OHA provide a decision within 48 hours, followed by a written confirmation within 5 business days.

- Emergency exemption requests must remain confidential. A public comment period is not appropriate because disclosure of a solvency issue or immediate care situation could undermine patient and community confidence and threaten the viability of the health care entity to survive. If public disclosure is necessary, it should be made following the close of the transaction.

- If the Authority denies the emergency exemption, an immediate appeal must be available.

- The emergency and exempt transactions rules drew widespread concern from RAC members. The rules do not reflect the reality of these types of situations. The rules suggest time would not be of the essence. The rules do not specify a timeline for OHA's response and allow for a potential public comment period (Section (4)). Further, the detailed application process described in Section (3) is not supported by the legislation.

6. Notice Filing (-0030), Charitable Transactions (-0040), and Form and Contents of Notice (-0045)

- RAC members noted several operational challenges with these sections of the rule. For instance, it is not clear whether notice is required to be filed for excluded or exempt transactions. Notice should not be required.

- We are concerned that the sheer volume of transactions subject to the notice and review requirements could render the Authority unable to review transactions that should be subject to the 30-day review within the 30 days. The 30-day timeframe was established by the legislature and should be followed.

- The form for filing the notice is excessively lengthy and burdensome and reaches beyond the scope of the legislature's intent. As the RAC members suggested, we encourage the Authority to consider adopting a simplified form like the one used in Washington.

- The requirement that entities submit complete and final executed copies of all definitive agreements (-0045 (4)) is not feasible, as noted by several RAC members who have experience with these transactions. Negotiating final agreements ahead of filing notice could lead to long delays and wasted resources, particularly if the review process identifies required changes to the terms. The Hart-Scott-Rodino Act and similar law and regulation in Washington both permit filing without definitive agreements. Instead, the parties should file descriptions of the key deal or contract terms relevant to clear, objective review criteria articulated by OHA.

7. General Comments

- A recurring theme throughout the RAC meeting was the need for dialogue with OHA prior to and throughout the filing and review process. This includes an expeditious path

for definitive assurance of what activities do not require review. Suggestions included having an "advice line" or a verbal confirmation process. This is particularly critical for emergency exemptions but would be beneficial for other situations as well.

- Under this proposed Program, the parties must pay costs that the Authority incurs that are outside of the parties' control and not subject to oversight by the parties. As the draft rule states, "The Authority may retain at the expense of the parties to a material change transaction any actuaries, accountants, consultants, legal counsel and other advisors not otherwise a part of the Authority's staff as the Authority may reasonably need to assist the Authority in reviewing the proposed material change transaction." Such costs could be significant. The parties will not know the extent of the costs until they are asked to pay, and there is no mechanism to challenge the appropriateness of the costs. In addition, the Authority may condition any approval of a material change transaction on the parties paying these costs. We would like to be clear that this Program creates a situation where hospitals cannot control the costs that they will be forced to pay.

We look forward to seeing the next draft of the rules and continuing the discussion at the next RAC meeting on November 4, 2021. In addition to hearing RAC members' feedback at the next meeting, we hope the Authority will engage further in dialogue and collaborative problem solving to ensure the rules are operationally feasible and accomplish the legislature's goals. As we have suggested previously, at least one additional RAC meeting may be needed to achieve the appropriate level of discourse on these issues.

Sincerely,

Andi Easton
Vice president of government affairs
Oregon Association of Hospitals and Health Systems