

November 4, 2021

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RE: Rules Advisory Committee for the Health Care Market Oversight Program

Dear Director Allen,

Thank you for the opportunity to participate in the Rules Advisory Committee for the Health Care Market Oversight Program. First, we would like to commend the Oregon Health Authority for releasing an initial set of draft rules that are comprehensive, robustly structured, and reflective of the legislative intent of HB 2362 (2021) to advance health equity, protect access to essential health services, and rein in the growth of health care costs.

The Health Care Market Oversight Program is an essential complement to Oregon's Sustainable Health Care Cost Growth Target and a critical tool to advance the agency's goal of achieving health equity. While we do have some suggested edits and clarifications, in general, the draft rules are appropriate and necessary given the role this new program will play in maintaining Oregonians' access to quality, affordable, equitable health care services. We look forward to continued work on the Rules Advisory Committee and partnership with OHA to ensure these rules fulfill the legislation's promise. The rules must meet the clear legislative intent to ensure that access to essential health services, as defined in statute and in the current draft rules, is not eliminated or significantly reduced as the result of a health care transaction, affiliation, or merger. Safeguarding against the loss of or change in access to essential health services is a key provision of the statute and in service of the legislation's other explicit goal of advancing health equity.

The initial meeting on October 25 was a good start to finalizing the draft rules. In addition to our contributions during the meeting, this letter provides more detailed suggestions regarding the draft rules. We have structured our feedback by rule section and subsection, providing both general feedback and line edits where applicable.

Please do not hesitate to reach out if you should require further clarification on any of the points outlined below.



## FEEDBACK ON 10.18.21 DRAFT RULES FOR HEALTH CARE MARKET OVERSIGHT PROGRAM

### OAR 409-070-0005: Definitions

- **(7) Control:** We are strongly supportive of the definition as currently drafted. We believe that entities holding less than a majority ownership stake can still have substantial influence over a company's decisions. OHA's proposal reflects the spirit of the law, which seeks to review transactions that transfer power and control. Even a relatively small ownership percentage transfer can be significant. Moreover, the statute explicitly calls out partial or complete control, and does not explicitly include the word "majority." We believe OHA has drafted this definition appropriately.
- **(8) Control affiliate:** We are strongly supportive of the drafted definition. It impressively addresses the statute's call to recognize relationships between organizations (whether direct or indirect) and acknowledges the reality of complex and varied corporate arrangements.
- **(13) Essential Services:** We are supportive of the definition of essential services as presented. In addition, this definition is provided in the statute, so the rules cannot deviate from it (see Section 1(2)).
  - **(13)(b)** There was some criticism during the first RAC meeting that (13)(b) is too vague. While we are not opposed to adding specificity, we think there is value to communities and the industry in keeping the language as is. The current language allows maximum flexibility to meet the needs of unique communities and recognize individual attributes that any one transaction may possess.

### OAR 409-070-0010: Covered Transactions

**(1)(e)** We support the draft language using the word "may" in this section. We have seen transactions occur in communities where the parties vaguely referenced non-specific reductions in services and refused to disclose to the community what was under consideration and why. New arrangements that may reduce essential services should be subject to review as a material change transaction so that there is full transparency and the Authority can assess if any conditions are necessary to protect patient and community interests.

- **(2)(e)** Shared services or business operations services would only be a qualifying transaction "if, as a result thereof, the legal entity would directly or indirectly control the health care entity or any control affiliate, or would be under common control with the health care entity or control affiliate." We understand this to mean that entities could share services as much as desired as long as it was not accompanied with a change in control. If that understanding is correct, we are supportive of the draft language.
- **(2)(f) and (2)(g)** We support the draft as is, considering that both of these provisions are required by statute per Section 1(1)(b).
- **(4)** We appreciate the holistic approach that the draft rule reflects and are also sympathetic to concerns raised in the first meeting of the RAC by industry representatives. We do want to underscore that this section only applies to new clinical affiliations and new contracting affiliations. Also, it is critical to note that the statute clearly excludes "Contracts under which one health care entity, for and on behalf of a second health care entity, provides patient care and services or provides administrative services relating to, supporting or facilitating the provision of patient care and services, if the second health care entity: (i) Maintains responsibility, oversight and control over the patient care and services; and (ii) Bills and receives reimbursement for the patient care and services." (Statute: Section 1(6)(b)(D))

### OAR 409-070-0022: Emergency and Exempt Transactions

- **(1)** We believe it is important that the emergency exemption not be used for solvency issues alone; the failure to complete the transaction must also have a negative impact on consumers. Therefore, the "or" must be changed to an "and." This change is needed to conform with Section (2)(8)(a) of the statute.
  - *The Authority, for good cause shown, may exempt an otherwise covered transaction from review if the Authority finds that there is an emergency situation which threatens immediate*

*care services and the transaction is urgently needed to protect the interest of consumers and to preserve the solvency of an entity other than a domestic health insurer.*

- **(4)** We understand that emergency situations may develop and appreciate the flexibility written into the draft rules. While a pre-closure public notification and/or comment period is not required, it leaves the Authority or Department flexibility to determine if it is necessary given the unique situation. We see value in that. In response to concerns expressed in the first RAC meeting, we do think it is possible to add that the notification is done in a timely manner so as to not unduly delay the transaction. We do not have the expectation that every emergency transaction will be publicly disclosed prior to completion. However, we do expect a public notification of all emergency transactions in a timely manner, even if post-facto.
- **(5)** We believe it is important to have transparency about how often transactions are qualifying for different exemption clauses. We respectfully suggest two changes here. First, that “publish” be replaced with the more accurate word “clarify.” Second, that “and disclose the frequency with which transactions are exempted under such categories” be added to the end of the sentence.
  - *The Authority may ~~publish~~ clarify from time to time a list of ~~other~~ categories or types of transactions that shall be exempt from review under these rules and disclose the frequency with which transactions are exempted under such categories.*
- **ADD (6)** We believe that if there is the unfortunate situation of entities creating the conditions for an emergency or purposefully delaying until urgent to avoid review, the pattern should be noted and there be consequences. Therefore we suggest the following addition:
  - *Repeat, excessive use of the emergency exemption by related entities will result in stricter application of the standard.*

#### **OAR 409-070-0025: Disclaimers of Affiliation**

**(1)** We support this definition as written, including the reference to 10 percent.

#### **OAR 409-070-0060: Comprehensive Review of a Notice of a Material Change Transaction**

- **(8)(a)** We believe that “commitment” is ill-defined and more reflective of intentions on paper than actual work. We suggest deleting reference to commitment and instead add that assessing if a transaction will reduce health disparities can be informed by a) the purpose and plan of the transaction itself and b) entities’ track records.
- **(8)(e)** Competition is not effectively measured on a statewide basis, so we want to be clear that it could be measured on a more appropriate scale (where applicable).
  - *The transaction or the completion of the transaction would substantially diminish competition in this state or a region of the state.*
- **Proposed Addition:**

Overall, we believe that while section (8) is a quality draft, it is not entirely reflective of the statute. The statute requires that transactions will benefit the public good to move forward. This is outlined in Section 2(9)(a) of the legislation. We propose the following edits to reflect this:

*(8) The Authority shall approve, or approve with conditions as provided in OAR 409-070-0065, a material change transaction, or, in the case of a material change transaction involving a domestic health insurer, recommend to the Department that the transaction be approved if the conditions under [NEW SECTION] are met and, unless the Authority makes any one or more of the following findings and conclusions:*

(NEW SECTION #) In order to approve a transaction after a comprehensive review the Authority must conclude that either:

(a) the transaction will, on balance, benefit the public good and impacted communities by:

(A) Reducing the growth in patient costs in accordance with the health care cost growth targets established under ORS 442.386 or maintain a rate of cost growth that exceeds the target that the entity demonstrates is the best interest of the public;

(B) Increasing access to services in medically underserved areas; or

(C) Rectifying historical and contemporary factors contributing to a lack of health equities or access to services; or

(b) The transaction is likely to improve health outcomes for residents of the state and there is no substantial likelihood of anticompetitive effects from the transaction that outweigh the benefits of the transaction in increasing or maintaining services to underserved population.