

January 4, 2022

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

Re: Draft rules for HB 2362, Health Care Market Oversight

Directors Allen and Vandehey,

Thank you for the opportunity to participate in the rulemaking process for HB 2362. I appreciate the collaboration and some of the changes made to earlier drafts in response to input. However, Salem Health still has concerns that are not addressed in the most recent version of the rules.

Administrative rules should be fair and able to be objectively enforced. This is foundational for public trust in the program and for organizations to effectively and efficiently plan. Transactions subject to review should be predictable with a fair amount of certainty. As crafted, the rules do not yet meet this reasonable standard.

The Authority has deferred the work of crafting definitions for key terminology within the rules and has announced plans to issue sub-regulatory guidance. Sub-regulatory guidance has no associated public engagement process, requires no filing with the Secretary of State and no notice to legislators. Changes to such guidance could be made with no warning or involvement of regulated entities. This adds to the uncertainty and opacity associated with these rules.

We are also concerned about the level of fees proposed by the Authority. We understand that the Legislature chose to make this an Other Funds program. However, the fees as proposed, together with a blank checkbook for retention of outside experts, may drive up the cost of innovative partnerships that have the potential to accomplish the equity and cost containment goals set forth by the Legislature and the OHPB.

Over time, these fees and the oversight process as outlined in these rules will add to the cost of health care in Oregon, discourage innovation, and impede progress toward achieving greater equity in the provision of health care that is supported by statute and the Oregon Health Policy Board.

-0005

(14) (b) “services that are essential to achieve health equity” are not defined within these rules. These terms should be clearly defined to enable fair application of the law and a clear understanding of what is required by the program.

-0010

(1), (3) The term “significantly reduce” is used twice in this section of rule, but is not defined. Section 1(10)(c) of the Act requires the Authority to define “significantly reduce” in the text of rule, not as sub-regulatory guidance. We suggest that the Authority work with the RAC to craft a definition of this term for inclusion in the rules.

(3)(c) In determining whether there are significant impacts, the Authority promises to consider a reduction in the number of providers serving individuals who are uninsured, or providers serving individuals who are underinsured.” This language is not part of the statute and we request that it be removed.

(4) It appears that the Authority is assigning sub-regulatory guidance documents the same power as administrative rule. This language is not part of the statute. We request that it be removed.

-0015

The revenue triggers listed in this section are part of statute. However, we advise the Authority that they are so low as to include a wide range of transactions that do not rise to the level of a merger or acquisition of the size and scope discussed during deliberations on this bill. These low revenue triggers without appropriate exemptions combined with the Agency’s extremely high fees are likely to increase the cost of health care for consumers rather than reduce it.

-0025

(1)(b) & (c) The definitions of control listed in these sections of rule are artificially low and not reflective of the actual health care marketplace. The definition of control should be set at 51 percent.

-0045

(5)(a)(B) It is unreasonable for the Authority to require complete and final executed copies of transaction documents to be submitted within 15 days after the commencement of the comprehensive review period. This is not a requirement of the statute and the Authority can proceed with comprehensive review based on information contained within a term sheet. We suggest the following language, “Fifteen days before the projected end of the comprehensive review period, if the transaction was not approved following preliminary review. If the parties are unable to furnish complete and final executed copies of all the definitive agreements within that fifteen day period,

then the running of the period for review of the notice shall be tolled upon such notification and shall not resume until the parties have furnished such executed copies.”

(8) The Authority allows itself more than one standard for statements of revenue and revenue projections in this section of rule. This represents a lack of predictable, clear, and objective standards that should be the goal of these rules.

The Authority promises that its Analytic Framework will have standards that are clear, fair, predictable, and consistent – but the Analytic Framework is not contained within rule and does not exist as this date. Statements made by the Authority in rule should be objective and quantifiable.

-0050

(2) The Authority requires reimbursement for “all reasonable and actual costs incurred by the authority in connection with its review of the material change transaction.” The Authority should limit their expenditures of this type to a fixed amount.

(4) I appreciate that the Authority has agreed to notify applicants before any costs are incurred when a transaction requires their use of outside advisors. If the Authority will commit to limiting their expenditures as I suggest above, then such notification would not be necessary.

-0055

(2)(d) What is the objective standard for “substantially altering the delivery of health care in Oregon?” In order for regulated entities to comply, the Authority must limit itself to objective and quantifiable rules that can be equitably enforced. A definition of this phrase is needed in rule.

(4) In the event that the Authority fails to complete preliminary review within 30 calendar days, then the transaction should be considered approved without conditions.

-0060

(2)(b) What is the quantifiable standard for “impacting a large number of residents in this state?”

(2)(c) The rules lack clarity regarding a “significant change in the market share of an entity involved in the transaction.” We suggest that the Authority consider a standard based on a 50% increase in the number of lives served.

(9)(a)(A) What is the standard for “material anticompetitive effects in the region?” While there are examples given, it is not clear what the Authority would consider to be “material.”

(10) Because tribes are only mentioned in this section of rule, it is not clear what circumstances would trigger a tribal consultation. The Authority threatens disapproval of a transaction if the parties do not agree to an extension of time necessary to accomplish a tribal consultation. Thus, the Authority has the obligation to clearly state when and why a tribal consultation would be needed

within the context of rule. To do otherwise disregards tribal sovereignty and the tribes' important role as partners in the delivery of equitable health care in Oregon.

-0075

(5) Rule text in this section is not clear.

(9) It appears that the Authority is reserving the right to selectively enforce an order resulting from a contested case hearing. This is not part of the statute and we request that this section of rule be removed.

Thank you for your consideration of these comments. I appreciate the complexity of this work and the potential for unintended consequences that negatively affect patient care. Please don't hesitate to reach out with questions or clarifications.

Sincerely,

A handwritten signature in black ink, appearing to read "James Parr", with a long horizontal stroke extending to the right.

James Parr

Executive Vice President of Operations & Chief Executive Officer