



January 21, 2022

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Directors Allen and Vandehey,

PeaceHealth appreciates the opportunity to provide feedback regarding the draft rules dated on or about December 21, 2021 (the Draft Rules), implementing House Bill 2362 and the Healthcare Market Oversight Program (HCMO) for purposes of the public hearing scheduled for January 19, 2022. We also thank OHA and the HCMO team for the significant efforts to distill an array of feedback and evaluate a variety of very complex issues.

PeaceHealth's primary interest lies in development of a HCMO program that does not unnecessarily hinder collaboration and innovation in Oregon – collaboration and innovation that advances the shared goals around improving quality, access, affordability, health equity, and other critical considerations. To that end, we think it is important that the Draft Rules and HCMO review criteria offer a process that is objective and predictable. As PeaceHealth and other Rule Advisory Committee (RAC) members have expressed during the RAC meetings, the Technical Advisory Group (TAG) meetings, and previous correspondence, we still have significant concerns that the Draft Rules will increase healthcare costs and deter organizations from exploring opportunities that improve care for patients in Oregon. The below outlines recommendations for revisions to the Draft Rules. These are only some of the concerns that PeaceHealth and others have emphasized during the RAC meetings and in other correspondence.

1. Covered Transactions (-0010).

The phrase “comprehensive management services” in Section (2)(d) remains ambiguous. As drafted, “comprehensive management services,” means providing “all or substantially all the personnel, or manages all or substantially all the operations, of a health care entity.” It is not clear how a health care entity is expected to measure “personnel” or “operations” for purposes of applying this test. For example, the Draft Rules do not provide direction on whether operations should be weighted in assessing whether certain services are “substantial” or what percentage or type of services would trigger that “substantial” threshold. This ambiguity risks deterring organizations from exploring collaborations intended to improve the patient experience and reducing the overall cost of care. We ask that the “comprehensive management services” category be removed or limited to only those that will eliminate or significantly reduce essential services.

2. Acquisition of Control; Presumptions and Disclaimers (-0025).

The definition of “control” is too broad. In particular, the rebuttable presumption that control exists when one entity has voting control over 25% or more of any class of voting securities is out of step with governance structures for the types of closely held organizations that will make up most of the parties subject to House Bill 2362. For context, small ownership percentages such as 25% are sometimes an appropriate regulatory threshold for publicly traded companies with a large and diffuse number of owners. By contrast, nearly all of the transactions subject to House Bill 2362 will be closely held organizations. Any ownership percentage less than even 40% of a closely held organization’s voting securities is often merely a minority and passive position. We ask that the Draft Rules define control as at least 51% of decision-making authority.

In addition, the irrebuttable presumption of control based more than 50% of voting control currently set forth in the Draft Rules does not reflect the complex facts and circumstances that are often associated with evaluating control. We ask that the presumption be rebuttable.

3. Retention of Outside Advisors (-0050).

We also ask that OHA set clear criteria for when outside experts will be needed under Section 0050, as well as a cap on total fees, so that parties are able to reasonably assess whether the regulatory costs outweigh the merits of proceeding with the transaction. Ambiguity over fees and other regulatory uncertainty is another unnecessary barrier to parties evaluating whether to invest time and resources in collaborations involving Oregon healthcare entities.

4. Preliminary Review (-0055).

We thank OHA for revising Section (5) to provide that for filings before December 31, 2022 a notice will be deemed approved unless within the 30-day preliminary review period OHA makes a determination that a comprehensive review is appropriate. That 30-day automatic approval approach is in line with other successful regulatory review programs, including Federal Trade Commission reviews pursuant to the Hart-Scott-Rodino Act. We request that the automatic approval approach be extended beyond December 31, 2022.

5. Sub-regulatory Process.

OHA is relying heavily a sub-regulatory process to develop important components of the HCMO program. That approach disregards important due process and other protections that are afforded by administrative rulemaking.

Thank you for your consideration of the above comments and the comments of other RAC members. The HCMO program raises multiple complex issues that merit a careful balancing of how best to advance the program's important objectives while not unintentionally or unduly deterring healthcare entities from pursuing collaborations and other arrangements that improve quality, access, affordability, health equity for Oregonians. We hope that the above feedback is useful in striking that appropriate balance.

Respectfully,

/s/

Tom Karnes
Assistant General Counsel