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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Association of Hospitals and Health Systems (OAHHS) is providing these written comments in response to the following draft guidance documents posted on January 21, 2022, pertaining to the Health Care Market Oversight (HCMO) Program:

- Draft Community Review Board Criteria
- Draft Comprehensive Review Criteria
- Draft Criteria for Using Outside Advisors

As we have stated throughout the rules advisory process for the implementation of HB 2362, sub-regulatory guidance is an inappropriate tool to define key concepts for which the law explicitly requires rulemaking. This includes the criteria for when comprehensive review will be required and the criteria for when a community review board will be appointed (HB 2362, Section 2(8)(c)).

The Authority's current approach denies interested parties the due process of administrative rulemaking, creates an unacceptable risk of arbitrary, inconsistent, and unfair decision-making, and ultimately wastes resources. This is evidenced by the large volume of highly technical sub-regulatory documentation being released with overlapping and incredibly brief turnaround times for public comment. The process is not providing adequate opportunity for engagement with impacted parties to ensure that the HCMO Program is operationalized in a functional manner.

Further, creating more guidance documents does not necessarily create clarity. In what follows, we highlight areas where the draft guidance documents cause confusion either by conflicting with the statute or rules or by introducing additional ambiguity.

Draft Community Review Board Criteria

- Several of the listed reasons to convene a community review board give OHA considerable discretion and are highly unpredictable for the parties to the transaction, including:
 - “...there may be concerns with *any* changes in essential services...” (p. 2, emphasis in original)
 - “The transaction will affect populations that have historically experienced or currently experience inequities.” (p. 2)
 - “OHA lacks necessary data or information about affected populations and would benefit from engaging members of the community.” (p. 3)
- The standard “...there may be concerns with *any* changes in essential services...” (p. 2) appears to set a lower threshold than the “significant reduction” standard described in the draft guidance document reviewed by the Technical Advisory Group. If so, the logical result is that any new contract, new clinical affiliation, or new contracting affiliation that is required to file notice because it meets the “eliminate or significantly reduce essential services” threshold would, by default, also be required to undergo comprehensive review with a community review board. Please clarify whether this is OHA’s intent.
- Questions remain regarding when a transaction has the “potential to impact a large number of residents in this state” (p. 2), including how “market” and “consumers” would be defined and what it means for a resident to be “impacted.”
- OHA’s proposed standard as to a “significant change in market share” does not accurately reflect the U.S. Department of Justice (DOJ) and Federal Trade Commission’s (FTC) *Horizontal Merger Guidelines*. Contrary to OHA’s suggestion, the *Horizontal Merger Guidelines* do not define what constitutes a “significant change in market share,” but set forth general standards for when a change in HHI *may* raise competitive concerns. The *Horizontal Merger Guidelines* set forth a nuanced framework for evaluating proposed mergers, with market concentration being just “one useful indicator of likely competitive effects...used in conjunction with other evidence of competitive effects.” See *Horizontal Merger Guidelines*, p. 18. We are concerned that OHA’s treatment of “high” or “moderate” concentration levels as presumptively in need of a comprehensive review, without reference to or consideration of any of the other factors set forth under the *Horizontal Merger Guidelines*, will lead to many unnecessary reviews and problematic results.¹
- OHA should notify the parties as soon as possible upon determining that a community review board will be appointed.

¹ We have similar concerns about the market concentration analysis set forth in the OHA’s Health Care Market Oversight Analytic Framework.

Draft Comprehensive Review Criteria

- The four “domains” of cost, access, quality, and equity (also included in the Analytic Framework) introduce an extremely broad universe of potential decision-making criteria that are not reflected in the statute or rules and provide virtually no predictability or assurance of consistency for entities subject to review.
- The criteria for comprehensive review in the draft guidance (p. 1) are inconsistent with the criteria at OAR 409-070-0055. For example, OAR 409-070-0055 (2)(b)-(d) set forth standards based on an outcome being “likely” or “unlikely,” whereas several criteria in the draft guidance use the term “may” – which indicates a much lower threshold for comprehensive review than what is required by the rules.
- Several criteria across the four domains, particularly those pertaining to cost and quality, appear nearly impossible to measure prospectively at the time a transaction is reviewed. As we have stated previously, the evaluation of the transaction must reflect a holistic perspective, be based on the foreseeable impacts of the transaction as supported by relevant data and other evidence, and be balanced by consideration of the foreseeable impacts of not completing the transaction.
- Some indicators across the four domains do not necessarily signal potential adverse impacts. For example:
 - An increase in expenditures (p. 1) could reflect an increase in needed services.
 - A reduction in the availability of a specific service (p. 2) may not decrease access overall, depending on the needs of the community or the capacity of other providers.
 - Centralizing services within a larger system (p. 2) does not necessarily mean those services will provide inferior community engagement; in fact, efficiency and responsiveness may improve and the opposite could be true.

Draft Criteria for Using Outside Advisors

- Some criteria for using outside advisors are ambiguous and fail to provide needed predictability, such as needing an independent third party to ensure “credibility” or because “a proposed transaction is unusually complex” (p.1).
- If OHA engages outside advisors because “OHA does not have the resources or capacity to perform aspects of a review process” (p. 1), this additional cost should not fall to the parties. Filing fees are already intended to fund the program at adequate capacity.

We continue to sound the alarm that the Health Care Market Oversight Program is not ready for implementation, and we encourage a delay of the March 1 rollout. The volume and density of the draft guidance documents illustrate the incredible complexity of this Program, and it is critical that we take the necessary time to operationalize it in a manner that will not disrupt important

collaboration across our health system and the delivery of care in our communities. Any other course of action would be irresponsible to Oregonians.

Sincerely,

A handwritten signature in black ink, appearing to read "Andi Easton". The signature is fluid and cursive, with a large initial "A" and "E".

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