January 24, 2021

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

Delivered electronically to: hcmo.info@dhsoha.state.or.us

RE: Comment on final HCMO rules

Dear Directors Allen and Vandehey,

Thank you for your work over these last several months to establish a HCMO program that aligns with the legislative intent of HB2362 – to increase transparency and consideration of health equity, cost, and access when reviewing health care transactions, and to elevate community input.

We applaud OHA's extensive efforts to ensure all viewpoints were heard during this process by adding additional Rules Advisory Committee meetings, forming a Technical Advisory Group, and offering more opportunities for public comment. In particular, we acknowledge the creation of detailed documents that explicitly address industry questions and concerns about which transactions would be subject to review; the addition of a nine-month period in which applications will not automatically be subject to full review at the conclusion of the 30-day review period; the addition of private conferences with agency staff in which applicants can request guidance; and the creation of a detailed analytic framework outlining what criteria will be used to review transactions. All of these changes, and many more, accommodate industry feedback and concerns raised throughout this process.

While the final draft of the rules is strong overall, we remain concerned about several key issues that have the potential to limit the effectiveness of the program. As we expressed late last year, we are particularly concerned about the evolving definition of control and the ability to bypass the established 30-day review through a "rebuttal of presumption of control." We outline these concerns in greater detail below and and offer a few additional points of feedback for your consideration.

Thresholds of Control
We support the proposed thresholds for control in OAR 409-070-0010(1)(b) and believe these changes are necessary to align with Section 1(a) of statute which specifically references partial or complete control. We understand why OHA has chosen to define "complete corporate control" as more than 50 percent. However, it is very possible that "complete corporate control" of an entity could occur anywhere between 26 percent and 49 percent. For example, if there are more than two owners of an entity, one party could exercise control by holding a majority stake without owning more than 50 percent. Under the newest draft of the rules, these transactions would not trigger a review.

To address this issue, we ask that OHA utilize discretion to impose conditions during the initial review process that would trigger additional review if and when a "complete corporate control" threshold was reached for that specific transaction (be it 30 percent or 40 percent, for example). We believe this approach provides a middle ground that allows for predictability and clarity for the industry, but also flexibility to be responsive to the terms of each unique deal.

Rebuttal of Presumption of Control
We are concerned about OAR 409-070-0025(2) as drafted and urge OHA to consider eliminating the option to bypass the review process by submitting a Rebutting Presumption of Control form. As currently structured, these "disclaimer of control" determinations could have the effect of exempting transactions from review even when they involve one entity acquiring substantial portions of another.

Guided by the statute, OHA already has a straightforward 30-day review process during which the agency will make a full determination about whether any change in control may have a negative impact on consumers. We urge the agency not to allow entities to bypass the established, transparent process developed for this purpose given that relatively small changes in ownership structure can have anti-competitive effects or even result in changes in access to essential services.

The statute explicitly calls out partial control situations, reflecting the reality that there can be implications for decision-making even when partial control changes take place. Rebutting that control with a three-question form is neither satisfactory nor in alignment with the sponsoring legislation. To truly determine the absence of control, OHA would need to require additional information from entities seeking to rebut the presumption of control and likely enter a situation that is duplicative of the 30-day process.

We believe OHA should either abandon the rebuttal process entirely or include language tying control not only to percentage ownership but also to influence over considerations outlined in the statute, such as negative impacts on access to affordable healthcare and meeting the criteria outlined in the statute for approval of a comprehensive review (Section 2(9)).

Analytic Framework
While we appreciate that OHA did make a small change to OAR 409-070-0045 (9)(b), we remain concerned that limiting measurements to metrics that can be "meaningfully compared to current and past performance across Oregon and, if available, in other states" could be very challenging

when assessing situations in individual communities. While the current draft analytic framework does not bear out this concern, we believe that guardrails should live in the rules rather than subregulatory documents.

Therefore we suggest the following edit to OAR 409-070-0045 (9)(b):
(b) Use measures of quality and access that can be meaningfully compared to current and past performance across Oregon and, if available, in other states. <u>If data is unavailable to parse at an applicable/necessary level or across time, it will not be assumed that there is no impact. Qualitative information will be consulted as well.</u>

Adding Focus on Essential Services in Definition of Public Good
We believe OAR 409-080-0060 (9)(b) aligns with statute; however, we suggest one minor addition to add greater specificity to (b)(B). We suggest inserting "essential" before "services" to read:
"Increasing access to <u>essential</u> services in medically underserved areas." We believe this change better aligns with statute by emphasizing increasing access to "essential" services when defining public good.

We appreciate the investments OHA has made into building an effective program, as well as the robust process the Authority led around rulemaking. Recent headlines announcing the dissolution of the formal partnership between Providence and Hoag in Southern California affirm and underscore our commitment to the program. For the last several years, these parties have been involved in a protracted legal dispute in which Hoag alleged Providence had abandoned shared population health goals and placed restrictions on reproductive care in defiance of conditions set by the state's Attorney General. This situation illustrates just how complex healthcare mergers and affiliations are to unwind and their potential to limit essential healthcare services – bolstering the importance of comprehensive pre-merger reviews here in Oregon.

We look forward to the launch of the program and for our state to have safeguards in place that recognize and prioritize community voices and needs in healthcare market transactions.

Sincerely,

ACLU
AFSCME
Basic Rights Oregon
Compassion & Choices
Family Forward Oregon
Oregon Health Equity Alliance
Oregon Primary Care Association
Oregon Nurses Association
OSPIRG
Planned Parenthood Advocates of Oregon
Pro-Choice Oregon
SEIU Local 49