

MEMORANDUM

FOR: Members of the Community Review Board and Interested Persons

FROM: Larry Kirsch

SUBJECT: Community-Based Assessment of the OHSU-LEGACY Transaction

DATE: February 14, 2025

I. Overview

This comment is being dropped just days after the initial meeting of the Community Review Board (Board or CRB) on February 10. My understanding is that the HCMO Public Comment feature should be used to address the CRB Program and its members.

I wish to thank all of you for your service on the OHSU-Legacy Community Review Board. As you know, the CRB has a unique role to play in the HCMO Review Process. By law, the Board is to serve as the independent representative of the community and the public interest in the critical review of M&A deals submitted for OHA approval. Its functions are to evaluate competitive risks, potential hazards including financial instability, and statutory review factors such as cost, access, and quality, and to make recommendations to the OHA for the approval, disapproval, and/or modification of proposed material transactions.

This comment offers an alert regarding several ways in which the CRB could be blocked from contributing most effectively to the evaluation of the OHSU-Legacy transaction. The thrust of the comment is to focus on the CRB's charge-- namely, to identify and evaluate substantive public risks, costs, and offsetting benefits of this transaction-- and to explore whether and how the Board's mission might be undermined by the design and conduct of the OHA/HCMO Program, itself.

The timing of this comment is intentional. If the CRB is to succeed in its statutory mission, the Board will be working against very rigorous deadlines. It will have to work swiftly to clarify its analytic scope, define major priorities, identify information requirements, and specify anticipated work products. This will call for the Board to hammer out agreements among its members in consultation with the OHA/HCMO Program staff. No doubt, the process will engender strong differences in opinion that will have to be resolved.

This is admittedly a demanding agenda. But so too is the OHSU-Legacy transaction. Realistically, members of the CRB will need to begin their research in advance of the next scheduled meeting on February 18 and well ahead of the Public Hearing it voted to convene in its initial meeting.

II. A Comment About Transparency and the Feasibility of Independent Review of the OHSU-Legacy Transaction by the Community Review Board

The essential features of the transaction and corresponding documentation now on file with HCMO are contained in:

- A 61 page Notice of the Transaction-- a document that serves as an outline of the proposal and a summary of its rationale from the perspective of the Parties. Also, as a framework for identifying corresponding documents including data displays.
- 26 questions propounded by OHA/HCMO to the Parties during the Preliminary Review Stage.
- The answers submitted by the Parties during the Preliminary Review Stage along with an itemized log of redactions.
- An extensive compilation of Supplemental Materials furnished by the Parties during the Preliminary Stage and organized by Bates Number. These documents ostensibly contain additional responsive information (e.g. audited financial statements).
- A miscellaneous compilation of Additional Supplemental Materials furnished by the Parties on January 22, 2025 in response to a further Request for Information.
- Public Comments filed by individuals and organizations.
- A memorandum from OHSU President Stadum for OHA/HCMO (January 2025) under the title "OHSU + Legacy Health: An Urgent Case for Integration in Response to Public Comments".

Transparency

A prominent objective of the HCMO review process, as defined by regulation (OAR 409-070-0000) and restated explicitly in OHA's written criteria for convening a CRB, is to "implement a process that is transparent, robust and informed by the public, including the local community, through meaningful engagement."

<https://www.oregon.gov/oha/HPA/HP/HCMOPageDocs/HCMO-Community-Review-Board-Criteria.pdf>

To achieve its mission and perform its statutory functions, I submit that the CRB must have access to:

- the details of the transaction, its logic, and likely impact on communities including financial statements and estimates, delineation of service areas, governance arrangements, quality assurance and accessibility. This is the type of information that ostensibly characterizes the submissions bulleted above. Without this information, the CRB will be blinded to the potential

hazards of the transaction, possible offsetting benefits, and the likely net impact going forward.

- The Board will be unable to advise the OHA/HCMO program on the question of approval, disapproval, and modifications. It will also be unable to demonstrate that it has made a thorough, meaningful, and first-hand review of the transaction in the public interest. These are among the most fundamental undertakings of the CRB; they are dependent on factual analyses and cannot be satisfied via “impressionistic” observations or exclusively through moderated discussions among CRB members. Nor can they be based on unverified conclusions or assurances (as in “the Parties assured OHA that x, y, z would happen” or that OHA/HCMO staff assured the CRB that there was no reason to spend time on assertions already in the record).
- If the CRB comes up short, it will galvanize public criticism of the social protection mechanism and the value of the OHA/HCMO program, itself.

Redactions

Of the 26 questions addressed to the Parties in the initial review phase, half came back fully or substantially redacted. Questions pertaining to organizational goals and governance arrangements as well as services, and service areas were redacted most frequently; financial issues were a close second, and legal issues were less often redacted.

A considerable fraction of the answers to the Additional Supplemental data requests filed with the Parties through January 6, 2025 were also redacted in whole or part. Unfortunately, the redaction log placed in the record [https://www.oregon.gov/oha/HPA/HP/HCMOPageDocs/Redaction-Log---Response-to-Request-for-Supplemental-Information-\(1.16.2025\).pdf](https://www.oregon.gov/oha/HPA/HP/HCMOPageDocs/Redaction-Log---Response-to-Request-for-Supplemental-Information-(1.16.2025).pdf) makes it impossible to pair the questions with the redacted responses or even to provide a qualitative breakdown. OHA/HCMO should promptly address this shortcoming.

Public Records and Redactions

In the context of the HCMO review process, it is essential to understand that the determination of what data and information are immune to the requirements of the Oregon public records law (for reasons of privacy, trade secret or other claims) is assigned, conditionally, to the Parties themselves. Thus, each document marked “redacted” is based on a particularized claim of confidentiality made by the Parties. Under existing ground rules, each redacted record in the file is also inaccessible to the CRB.¹ Thus, unless the OHA/HCMO (in collaboration with the DoJ and possibly

¹ One mechanism that was suggested to OHA/HCMO and the DoJ on multiple occasions—and apparently rejected-- was to appoint members of the CRB as “consultants” to OHA for the limited purpose of the Comprehensive Review Process, subject to individual non-disclosure agreements. There is no reason why accountants, attorneys, economists and other consultants should be in a position to

the Parties) finds a way to provide CRB access those records, the raw material necessary for an independent, in-depth review of the transaction will be unavailable.²

As a practical matter, neither the OHA/HCMO nor the DoJ has been willing to take a forceful position on the public records-transparency issue—even understanding the link between transparency and CRB public oversight. There has simply been no demonstrated enthusiasm for making transparency a sufficient priority even though the absence of real transparency functions as a barrier to public protection, citizen engagement, and the crucial oversight role of the CRB.³

With the appointment of this CRB and the high visibility and perceived significance of the OHSU-Legacy merger, I would argue that it is up to the CRB to advocate for effective transparency guidelines. If for no other reason than to preserve its institutional integrity and functional ability as public overseer of healthcare merger and acquisition activity, the ball is now in the CRB’s court.

III. The Proposed Consolidation, Net Impact on Competition, Cost, and Risk Distribution

This portion of the comment will allude to a highly selective set of issues slated for CRB analysis and will draw a connection to the informational pre-requisites discussed in section II, above.

Consolidation and Competition:

The overriding objective of the HCMO Program is to assess the likely impact of consolidations on competition in relevant market areas and to balance negative competitive effects (if any) against offsetting benefits . In the case of competitive

review the documents they need to make findings and recommendations to OHA/HCMO while community consultants are denied the very same tools required for their job.

² OHA/HCMO are entitled to challenge the conditional redactions on legal grounds and also as a matter of overriding public interest. The Department of Justice shares a critical interest in the administration of the public records statutes and has direct statutory authority to participate in the HCMO review process if it wishes to do so.

³ At the conclusion of the Preliminary Review stage, OHA/HCMO was asked via public record request whether it had challenged any of the conditional redactions proposed by the Parties and/or whether it had obtained a reversal. HCMO replied that it had not challenged or overcome any of the redactions but that it intended to pursue this issue in the comprehensive phase. More recently, the same question was restated in relation to the first phase and a comparable inquiry was made about the comprehensive phase. In the last week, HCMO replied that they were still working on the issue and that if and when they concluded discussions with the Parties, they would post public access documents on their website. In effect, the CRB might never obtain working documents or might possibly tap into some documentation at the very last moment, depriving it of the time needed to do its analysis and make knowledgeable recommendations.

The DoJ was also the recipient of a detailed memorandum on this subject and was asked on five separate occasions for a meeting to discuss the actions it was taking to define trade secret and confidentiality claims. It rejected each one of these requests although assurances were given that there was no intent to discuss individual cases—only process concerns.

impact, this calls for defining the products (services) that are to be compared before and after a merger or acquisition;⁴ defining geographic market areas (primary service areas); and identifying relevant competitor entities (e.g. hospitals). For ease of reference, the three components will be referred to as Market Definition.

Without getting too deep into technical details, suffice to say all three elements of Market Definition are controversial and have a critical bearing on the calculation of market share and the analysis of competition as per the applicable Antitrust Guidelines adopted by the HCMO Program.

- Product Definition: Since OHSU and Legacy offer certain services which are largely interchangeable and subject to competitive pressure as well as others which are unique and therefore pose no comparable competitive concerns, it is good practice to determine a product definition which is best suited to competition analysis. The Parties have proposed a definition which is quite broad and which CRB—with access to service data-- might decide to narrow. For example, the CRB could decide to exclude quaternary services—uniquely produced by OHSU—from the competitive analysis. This could have a material impact on the calculation of market share.
- Geographic Definition: OHSU defines its primary service area broadly to accommodate referrals for highly specialized, quaternary services that are not offered elsewhere and thus are not subject to competition. A more restricted geographic definition could have a material impact on the calculation of market share and the analysis of competitive conditions. Service-area data (now redacted) could have important implications for this analysis.
- Competitor Definition: The Parties have defined competitor entities inconsistently. A major issue here is the inclusion of Kaiser Hospitals as competitors even though Kaiser, as a closed-panel entity, does not admit non-Kaiser patients to its facilities and is thus not a traditional competitor. HCMO did not question the inclusion of Kaiser in its Preliminary Review. It is not clear why.

In terms of offsetting benefits, OHSU has made extensive claims to the effect that the proposed transaction will provide the public with wide-ranging advantages ranging from improved access and quality to a better foundation for medical education.⁵ The CRB will have to make a critical assessment of these claims based on the information made available in the filing.

⁴ See, Public Comment from Larry Kirsch and John McAnulty, MD posted by HCMO on January 27, 2025 for an extensive discussion of the definition of product markets.

⁵ The Comment made by OHSU (<https://www.oregon.gov/oha/HPA/HP/HCMOPageDocs/039-OHSU-HCMO-Public-Comment.pdf>) offers a tightly constructed summary.

Cost:

The likely impact of the transaction on costs ultimately borne by individuals and payors through health insurance premiums and as taxpayers through contributions to state budget expenditures represents another priority issue.

Where the Transaction Notice filed by the Parties contains highly material ambiguities about the cost of the transaction, the CRB is called upon to make an independent determination of the likelihood that individuals, payors, and taxpayers will ultimately be burdened by those costs.

A good example relates to the cost impact of the transaction associated with employee retirement benefits. If the acquisition of Legacy potentially creates a significant additional cost to the PERS system (through the integration of Legacy and OHSU retirement systems), the CRB should factor that into its ultimate determination of the cost impact. That means determining a best estimate of the incremental cost of the retirement benefits to PERS and making a judgement regarding the likelihood of such a cost increase.

The CRB should take notice of the following statement found in the Transaction Notice submitted by the Parties:⁶

OHSU will evaluate the feasibility and appropriateness of moving to integrated system-wide employment policies over time, including a single compensation system and employee benefits like health insurance and retirement across all integrated public university health system entities, subject to applicable legal requirements and the terms of collective bargaining agreements. For example, *the OHSU Board may consider adding opportunities for employee participation in State of Oregon Public Employee Retirement System benefits.* (page 31, emphasis added).

A second highly controversial cost-related issue concerns the potential impact of the proposed consolidation on premiums charged by commercial insurers. The Transaction Notice filed by the Parties states as follows:

OHSU does not anticipate that this transaction will materially increase the cost growth rate (reimbursements per adjusted admissions) for the state... OHSU expects that costs for the integrated public university health system will increase by roughly 4.6% on average, which is one percent above Oregon's current health care cost growth target. Even without this transaction, OHSU and Legacy would separately pursue reimbursement increases equivalent to the average cost increase (4.6%) projected for the combination.

In support of these assertions, the Transaction Notice refers to HCMO Notice Question 7 – Exhibit 5 for draft and preliminary financial projections for the combination. Presumably, this Exhibit captures the relevant data and underlying

⁶ Both OHA/HCMO and OHSU have been queried on this matter (by this commenter) but neither one has offered a reply.

assumptions for the claim that the proposed transaction can be expected to exceed statewide cost trends by no more than 35%.⁷ Regrettably, Q.7-Exh. 5 is redacted-in-full so that the CRB (and the public) has no way of testing the assumptions, data, and cost-trending analyses. If the CRB expects to make an independent finding on the cost issue, it will be imperative to unmask the relevant exhibits.⁸

Risk Distribution

If the proposed consolidation results in the merged entity gaining additional market power, the public will predictably lose out. Virtually all payors will be obliged to offer the OHSU-Legacy option to their accounts even though the consolidated entity will be positioned to extract higher reimbursements by virtue of enhanced bargaining power.

Although the Parties have put forward a claim about stabilizing costs by capping the differential between their costs and the statewide guidelines, they have not seen fit to proffer an enforceable commitment for the first year and subsequent years.⁹ Assuming that good faith adherence to a claim of this sort tends to dissipate over time, without a long-term enforceable commitment, the cost-risk to the public is bound to compound as well. This is grossly inequitable since the public has no meaningful recourse or protection against unanticipated future year cost increases. Clearly the Parties (and payors) have a more effective way to limit public exposure through the reimbursement system.¹⁰ Those least able to prevent harm should not be put at greatest risk of endangerment.

One policy option would be to condition approval of the consolidation proposal upon an enforceable long-term agreement on the margin between OHSU-Legacy costs and the statewide cost guideline. In 2018, the Massachusetts Attorney General investigated a proposed merger between the Beth Israel Hospital and the Lahey Hospital. The net result of the AG's investigation was an approval predicated on a

⁷ See, memorandum from OHSU President Steve Stadum and others at page 8) for the argument that a 4.6% cost increase is consistent with a statewide target rate of 3.4%.
(<https://www.oregon.gov/oha/HPA/HP/HCMOPageDocs/039-OHSU-HCMO-Public-Comment.pdf>)

⁸ The Parties have the burden of convincing OHA/HCMO that the incremental impact of the consolidation on the premium costs borne by Oregon consumers and payors will fall in line with statewide cost guidelines. Given the extensive academic research results bearing on this issue, the Parties will face significant challenges on this score especially if the consolidation index (the so-called HHI Index) demonstrates that the transaction is likely to impeded competition. Once again, CRB must have access to the most complete information produced by the Parties on this topic.

⁹ OHA/HCMO Preliminary Review Report (at page 20)
<https://www.oregon.gov/oha/HPA/HP/HCMOPageDocs/039-Preliminary-Report.pdf>

¹⁰ The Oregon statute does not give HCMO authority to rescind or otherwise enforce cost-limiting claims made by the Parties absent formal arrangements to do so.

long-term (7 year) enforceable agreement on costs in relation to a statewide cost index.¹¹

IV. **Additional Thoughts**

The failure of transparency (discussed in relation to the redacted public record and its impact on the CRB) makes it impossible for the Board to fulfill its multipart statutory mission. Merely patting the HCMO Program on its back for posting documents on its website is not nearly enough to bring about real openness and public engagement. The CRB should address this systemic deficit head-on with OHA/HCMO and the DoJ.

A good example of how this plays out in the review process can be found in the analysis of consolidation and cost. All of the basic documents relating to assumptions, data, and forecasts have been redacted and are unavailable to the CRB. There is no possible way for the CRB to analyze and offer a meaningful, independent recommendation to OHA/HCMO without full access and the ability to raise further questions. The impact of the shifting cost of retirement benefits provides a case-in-point. The Parties have not made any enforceable commitments to cost stability and thus the risk of spiraling costs falls squarely payors and the public.

One of the major arguments articulated in the Parties' narrative is that Legacy has unused excess capacity (beds, OR's) and that OHSU has excess demand for those resources. Thus, a merger could manage this resource mismatch.

I have seen no comparable attempt to present alternatives to consolidation that could achieve desired results. For instance, various lease and operating agreements that would provide OHSU access to additional capacity in return for the financial compensation needed by Legacy. The CRB could take the opportunity to encourage creative solutions that did not include the likely undesirable features of a full merger agreement.

Thank you for your attention and willingness to take on this complex assignment.

:Larry Kirsch

Portland

¹¹ <https://www.naag.org/wp-content/uploads/2020/10/733.civil.11.29.18MASettlementBethIsrael-Lahey.pdf>

