PacificSource

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Pete Edlund, Rules Coordinator
Oregon Health Authority
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Portland, OR 97204

Delivered via email: peter.m.edlund@dhsoha.state.or.us

Dear Mr. Edlund:

Thank you for the opportunity to comment on the proposed adoption of OAR 409-070-0000 through 409-070-0085 (rules). We acknowledge that the underlying legislation (2021 House Bill 2362; the Act) left little time for the Oregon Health Authority (Authority) to spend the kind of time necessary to develop such complex rules, though as we noted in the rulemaking advisory committee process temporary rules would have conferred additional time on all parties. It is clear from the progression of the rules that this program is too multifaceted for such a rapid implementation period. We believe that as a result a number of unanswered questions remain, and should be addressed through rulemaking under the Administrative Procedures Act.

For example, the Authority convened a technical advisory group to begin creating guidance to assist parties to comply with the rules. Guidance so far seems to focus on providers, and does not begin to consider the permutations of insurance carrier and coordinated care organization transactions that may fall under the statutory scheme. We would hope that the Authority will re-commit to rulemaking in the future to provide clarity and involve interested members of the general public.

Below, we have grouped comments by rule for your convenience. All comments are based on the redline version of changes to rule text, available here.

-0005, Definitions

- The definition of "health care entity" in the Act separated Medicare Advantage plans from carriers that offer health benefit plans. We do not believe the Act supports section (5) of the rule, which defines "carrier" as "any person that offers Medicare Advantage plans in this state."
- Similarly, the definition of "essential services" in section (14) of the rule infers that both conditions must be present; namely, that essential services are both those on the Prioritized List of Services for the Oregon Health Plan and also those that are essential to achieve health equity. We believe that the text of the Act also requires both elements be present for a service to be considered "essential." In other contexts, the Act uses the term "includes" to denote that any of the elements in a particular definition are covered.

-0010, Covered Transactions

- In paragraph (1)(e)(C) of the rule, we remain unclear what the Authority meant when it included transactions that would "consolidate or combine insurers when establishing health benefit premiums." We would ask for more clarity within the rule text.

- We believe that section (3) should be removed entirely, and the rules themselves should clarify what transactions are covered by the Act. The guidance document risks creating conflicts between the Act and the rules, does not provide the wider public with the notice and opportunity for comment on the changes, and does not provide the certainty to the Authority or to entities contemplating transactions needed to ensure the law is being properly applied.

-0022, Emergency Transactions

- As we noted in our first comment letter, a supervisory event under the Insurance Code or under rules modeled off of the Insurance Code and found in OAR chapter 410, division 141 should be on its face an approved emergency.

  As we noted before, the Department of Consumer and Business Services (DCBS) could assume control of the operations of a carrier well before there is any time to file a request with the Authority. In those situations, since DCBS must make certain findings about the condition of the insurer prior to acting, meeting the statute provides a *per se* case of an emergency. Likewise, OAR 410-141-5365 already allows the Authority to take action against a coordinated care organization in the event of "hazardous operation," which in prudential supervision covers the situations in this rule.

  We ask the agency re-consider language we submitted in our first comment letter:

  > **(8) The Authority will deem a transaction an emergency under this rule if the transaction results from:**
  >
  > **(a) The Department placing an insurer in supervision under ORS 734.043, obtaining an order of rehabilitation under ORS 734.150, or obtaining an order of liquidation under ORS 734.180; or**
  >
  > **(b) The Authority ordering a coordinated care organization to take one or more of the actions described in OAR 410-141-5365.**

- As with our comments on rule -0010, if the Authority wishes to “publish from time to time a list of other categories or types of transactions that shall be exempt from review” as stated in section (6) of the rule, it should do so through the rulemaking process.
- Finally, in subsection (3)(e) of the rule, we ask that the Authority clarify that supervisory information shared with other regulators under ORS 705.137 or protected under applicable provisions contained in ORS chapter 731 should not be disclosed.

-0025, Acquisition of Control

- In subsection (1)(a) of the rule, control of a domestic health insurer entails holding 10% of any class of voting securities. During the rulemaking advisory committee, the Authority noted that this standard was found in the Insurance Code. On further review, the 10% standard in the Insurance Code refers to acquiring the assets of an insurer, not a change in control. *See* ORS 732.518; 732.521.

  However, we understand the difficulty in defining “control.” One potential path may be to set one standard of control for publicly-traded companies, where beneficial ownership may be freely accessed in databases like the EDGAR system of the U.S. Securities and Exchange Commission, and another for closely-held companies, where 51% may more accurately signify control unless found otherwise.

-0035, Material Change Transactions Involving a Domestic Health Insurer

- Under section 2(3) of the Act, DCBS makes the final determinations in material change transactions involving a domestic health insurer. DCBS must also coordinate with the Authority to incorporate the review into the department's final determination. We believe that the authority of DCBS to make the final determination should also extend to when a comprehensive review is appropriate. The Authority and DCBS should agree as equal partners when a comprehensive review process is warranted.

-0042, Optional Application for Determination of Covered Transaction Status

- We would request the agency consider allowing parties to request an opinion without disclosing identities. No amount of adopted rule or guidance can take into account every situation; in other regulatory contexts, attorneys may request a "no-action" letter from an agency. These letters typically introduce a hypothetical fact pattern and request whether such activity could commence without drawing action (i.e., enforcement) from the agency. By asking for the names of the parties under subsection (2)(a) of the rule, the Authority might chill efforts by a party to understand if a transaction not yet even contemplated with another party would be a covered transaction.

-0045, Form and Contents of Notice

- In section (3) of the rule, we ask that the Authority clarify that "electronic" submission of application items should be done through encrypted or secure means.
- As with our comments on rule -0010, we believe that the Analytic Framework described generally in section (9) of the rule would benefit from the public process that is rulemaking, and should be adopted as such.

-0050, Retention of Outside Advisors

- In section (1) of the rule, the text states that the Authority may bypass "any otherwise applicable procurement process" as long as the outside advisor possess the requisite qualifications and expertise to review a proposed transaction. Certainly, the Public Contracting Code allows the Authority to conduct its own procurement, rather than the Department of Administrative Services. *See* ORS 279C.050. But the Code clearly requires the authority to conduct its own procurement "in accordance with" the Public Contracting Code. We request that clause be removed.
- Subsection (1)(b) of the rule requires that "privileged" information in the possession of the Authority may be shared with outside advisors engaged by the authority, and the disclosure would not constitute a waiver of privilege. But the Act does not require parties to turn over "privileged" information; section (13) of the Act states that entities subject to a review may not refuse to provide documents on the grounds that the information is "confidential." We ask that the Authority amend this rule and other similar rules to state it will not require the submission of "privileged" information, and ensure that outside advisory do not share "confidential" information.

-0060, Comprehensive Review

- In section (4) of the rule, community review board members are treated as public officials for conflict of interest purposes. We also believe that community review board members should also be public officials for purposes of the Public Meetings Law. In particular, a quorum of review board members should not meet outside of designated public meeting times to deliberate on a course of action.

- In section (5) of the rule, we would ask that the Authority include provisions to use modern communication tools, like videoconferencing software, in carrying out the public hearings. For example, if a transaction involves a carrier that participates in the individual health insurance market statewide, the statute appears to contemplate that a review board could hold up to 72 hearings (i.e., up to two hearings in each of Oregon's 36 counties). We do not believe that the legislature intended for lengthy road shows in order to assess a transaction, but it could be required without clarification in rule.
- In section (9) of the rule, the Authority will approve a transaction or recommend to DCBS to approve a transaction if "the transaction satisfies (a) below and also satisfies either (b) or (c) below." We request more clarification on how parties will know which criteria the Authority will apply. Will the parties to the transaction be able to choose which subsection to meet? Or will the Authority choose which subsection is met?

-0070, Confidentiality

- In general, this rule essentially requires parties go through the upfront work of meeting the elements of the trade secret test in the Public Records Law, ORS 192.345(2). If a party goes through the work to provide a "confidential" copy of the application to the agency, the copy should on its face be protected under the trade secret exemption under ORS 192.345.

-0080, Compliance with Conditions

- Under section 2(19) of the Act, the Authority analyzes a transaction for compliance with conditions, cost trends and impacts on the cost growth target. This analysis occurs 1, 2, and 5 years out from the time of approval. However, under section (1) of the rule verification of compliance may occur at least 1, 2, and 5 years out, and possibly more frequently. We believe that the rules should align with the statutory responsibility of the Authority to review a transaction on a set interval.

Thank you again for the opportunity to participate and provide comments on the proposed rules. We look forward to reviewing the hearing officer report. For questions or concerns, please contact me at 503.949.3620 or richard.blackwell@pacificsource.com.

Sincerely,

/s/

Richard Blackwell
Director, Oregon Government Relations

cc: Zachary Goldman, Health Care Cost Economist, Oregon Health Authority
Health Care Market Oversight program