

November 2, 2021

TO: Zachary Goldman, OHA
FR: Maribeth Guarino, Oregon State Public Interest Research Group (OSPIRG)
RE: HB 2362 Initial Rules Feedback

Thank you for the opportunity to provide feedback on the rules for HB 2362 (2021) on behalf of OSPIRG and consumer voices. While we believe these rules generally reflect the intent of the statute and appreciate the robust structure given to enact its provisions, we have a few comments for your consideration, broken down by section.

OAR 409-070-0000 Scope and Purpose

We support the rules in this section as drafted, particularly the goals laid out in subsection (3), and believe them to be in the public interest, particularly the aims of reducing cost and ensuring a transparent process with public engagement.

OAR 409-070-0005 Definitions

We support the definitions of “control” and “control affiliate” as drafted in subsections (7) and (8). The statute applies to entities with a relationship based on control, specifically, “any” relationship that “directly or indirectly” reflects “partial or complete” control (see statute, sec. 1(1)(a)). It is important to capture these relationships in the program as it is implemented, as health care entities can be complex and shifts in control can affect the cost of care for Oregonians and the oversight program provides some level of transparency in those changes.

There was some discussion about avoiding a “robust” process for “day-to-day” transactions (e.g. purchase orders) in regards to subsection 15(g). We believe that the statute provides for this exception by excluding affiliations that do “not impact the corporate leadership, governance or control of an entity,” (see statute, sec. 1(b)(c)). If there is a clarification added here, we recommend that it refer to the statute.

OAR 409-070-0010 Covered Transactions

We will reiterate that the statute only applies to corporate affiliations “if, as a result thereof, the legal entity would directly or indirectly control the health care entity or any control affiliate, or would be under common control with the health care entity or control affiliate” (see subsection 2). Combined with our previous comment regarding the definition of “health care entity,” in OAR 409-070-0005(15)(g), our understanding is that shared services, out-sourcing, etc. under subsection (2)(a) would be excluded unless there is a change in control. If that understanding is correct, we are supportive of the draft language.

OAR 409-070-0015 Materiality

We are generally supportive of the draft rules in this section.

OAR 409-070-0020 Excluded Transactions

There was discussion about specifying that payer-provider transactions are excluded transactions. We respectfully object to that idea; so long as there is a change in control under the definitions of the draft rules, we believe the transaction is included in covered transactions.

OAR 409-070-0022 Emergency and Exempt Transactions

There was discussion of changing the “or” to “and” in “if the Authority finds that there is an emergency situation which threatens immediate care services and the transaction is urgently needed to protect the interest of consumers **or** to preserve the solvency of an entity” in subsection (1) in order to conform with statute. We would point out that changing to an “and” would then require preserving the solvency of an entity to be part of the transaction even if the only emergency is a risk to consumers in immediate need of care. We suggest adding clarity to this subsection that indicates an exemption may be made in different types of emergency situations, e.g. the transaction is urgently needed 1) to protect consumers, or 2) preserve solvency and protect consumers.

We would also request clarification in subsection (1) as to the nature of the Authority’s decision to withhold exemptive relief. Our understanding is that an interlocutory decision is **not** final and binding, but the draft rules indicate that it is both.

In regards to subsection (4), we appreciate the need for flexibility to address emergency situations. We suggest that language is added to ensure that in cases where it is not feasible under the emergency circumstances to publish materials and allow for comments prior to the transaction, there is publication timely after the fact. In the same subsection, there was concern about publishing the emergency transaction. Though full disclosure of the application is not necessary, we strongly support some level of transparency, such as the rules as drafted indicate.

We would support adding language to prevent or recognize a pattern of use for the emergency exemption. This provision should not be an excuse to purposefully delay in order to avoid review through this exemption.

OAR 409-070-0030 Notice of Material Change Transaction

As pertains to subsection (3), We believe the fee should be commensurate with the size of the transaction, not the size of the participating organization(s).

The statute calls for a monetary penalty to be placed on entities that fail to file a notice of material change transaction. Does that need to be reflected in the rules?

OAR 409-070-0045 Form & Contents

While we appreciate the draft requirement in subsection (4) to file complete and final executed copies of all the definitive agreements, we are also sensitive to what is practical during the review process. We would be supportive of a system that generally allowed entities to file the most recent version of a contract, agreement, or letter of intent, while requiring notification of any changes to the agreement that are relevant to consideration criteria. If changes are made impacting criteria areas, the Authority must have the right to restart any review processes in order to accurately evaluate the transaction(s).

OAR 409-070-0055 Preliminary Review

Our understanding of the draft rules in subsection (2)(c) is that there is no need for a comprehensive review if the Authority finds that the transaction is likely to have an effect as laid out in the draft rules of OAR 409-070-0060(8). If our understanding is correct, we believe that is the opposite of the statute's intent and would recommend rephrasing. Some suggested language for subsection (2)(c) includes: "The **Authority or Department is unlikely to find the** material change transaction meets the criteria set forth in OAR 409-070-0060(8)."

OAR 409-070-0060 Comprehensive Review

In subsection (1), the draft rules fail to include a provision for a comprehensive review in the case that there is no decision at the end of the 30-day review period as laid out in OAR 409-070-0055(3). We understand not wanting to be repetitive of statute, but suggest adding the following language for clarity in this subsection: "The Authority shall conduct a comprehensive review of a proposed transaction if the Authority determines not to approve the transaction at the conclusion of its preliminary review **or fails to complete a preliminary review within 30 calendar days of the Authority's receipt of a complete notice of material change transaction.**"

Part of the purpose of the statute is to assess the impact of a transaction on the affected community, implying not only a statewide lens but a local one as competition is not effectively measured on a statewide basis. This section of the draft rules makes several mentions of measuring the effect on the state market where the effect on the local market is just as, if not more, important as concerns the review process and overall purpose of the oversight program. We want to be clear that competition should be measured on a more appropriate scale (where applicable). We recommend using language such as that in subsection 8(c) to measure the effect on the market affected by the transaction, particularly in subsections (2)(b), (8)(d)(A) and (B), and (8)(e).

OAR 409-070-0070 Confidentiality

We believe the Authority should retain the ability to dispute inappropriately redacted materials and publish them if in the public interest. This is clearly reflected in the draft forms, but not in the draft rules. Please clarify if the current rules are adequate to enforcing this section. The draft forms state:

After review of the forms and exhibits as submitted, OHA may request that the redacted copy of the forms and exhibits be modified if OHA determines that confidential information claimed to be exempt is in fact not exempt from disclosure.

Interpretation of the Oregon Public Records Law, as determined by OHA upon advice of the Oregon Department of Justice, shall determine if the confidential information claimed to be exempt is in fact exempt from disclosure. OHA may release information notwithstanding its being in fact exempt from disclosure. OHA will not be liable to the applicant or any other person for release of information the applicant claims to be confidential.

OAR 409-070-0080 Continuing Jurisdiction

We are generally supportive of the rules as drafted, but want to ensure that this section grants the Authority the ability to complete the required monitoring of both specific transactions (as called for in statute Section 2(19)) and broadly across the whole industry as called for in statute Section 6. If not, we recommend that the rules make specific reference to those statutory requirements.