October 28, 2021

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

Delivered electronically to:

hcmo.info@dhsoha.state.or.us
patrick.allen@dhsoha.state.or.us
jeremy.vandehey@dhsoha.state.or.us

Directors Allen and Vandehey,

PeaceHealth is providing these written comments regarding the draft rules dated October 18, 2021, implementing House Bill 2362. PeaceHealth participated in the Rules Advisory Committee (RAC) meeting on October 25, 2021.

As PeaceHealth and other RAC members expressed during the October 25 RAC meeting, PeaceHealth has significant concerns that the October 18 draft rules will add significant and unnecessary delays and expenses to healthcare organizations exploring opportunities to improve patient care, support care equity, develop care efficiencies, and reduce the overall costs of care. All of which are consequences that run counter to the legislature's intent for House Bill 2362 and the Oregon Health Authority's (OHA) overall policy goals. Specifically, the October 18 draft rules would (a) require OHA review of transactions pertaining on day-to-day operational matters with no direct relation to patient care and (b) even for arrangements that do reasonably qualify as a "material change transactions," create unnecessary administrative burdens and costs so as to discourage the kind of innovative collaborations that ultimately benefit Oregonians.

The below outlines recommendations for revisions to the October 18 draft rules. These are only some of the concerns that PeaceHealth and other RAC members emphasized during the October 25 RAC meeting.

1. **Definition of Control (-005(7))**.

The definition of "control" is much too broad. In particular, the rebuttable presumption that control exists when one entity has voting control over 10% or more of any class of voting securities is dramatically out of step with governance structures for the types of closely held organizations that will make up most of the parties subject to House Bill 2362. 10% is sometimes an appropriate regulatory threshold for publicly traded companies with a large and diffuse number of owners. By contrast, a 10% ownership stake in a closely held organization is often just a minority and passive position. Setting control at 10% will require OHA review of many transactions that do not have any implications for

access, care, equity, or cost. The next draft of the OHA rules should define control as at least 51% of decision-making authority, although in some arrangements involving super-majority approval rights even that 51% threshold is too high.

2. **Covered Transactions (-0010(4))**.

The definition for "new contracting affiliations" is much too expansive and is well outside the legislature's intent for House Bill 2362. As examples, the draft rule would require OHA review for the kind of electronic health record access arrangements, co-branded service lines, revenue cycle services, and other ordinary course functions that are critical to successful healthcare administration but have little direct influence on access, care, equity, or cost. To the contrary, imposing the additional time, expense, and overall administrative burden for those types of relationships will more likely increase the cost of care and make the care delivery system less innovative overall. The next draft of the OHA rules should limit "new contracting affiliations" only to those transaction that result in actual material changes directly addressing access, care, equity, or cost.

3. **Contents of Notice (-0045(4))**.

The October 18 draft rules require that the parties wait to submit the OHA notice until they have executed "definitive agreements." That is an extreme standard and unnecessarily out of step with analogues practices for Hart-Scott-Rodino, Washington State Healthcare Transactions, and other notice filing constructs. It is highly unreasonable to ask parties to incur time, expense, and other institutional capital to negotiate definitive agreements only to have that work vulnerable to regulatory approval. Other notice regimes allow parties to submit filings during any period in the process once sufficient detail is available to respond to the notice prompts.

As a reference to approaches in other jurisdictions, it goes without saying that if the parties certify a particular fact in the regulatory notice and that fact later changes in a material way prior to executing a definitive agreement, the parties would then need to submit a new or supplemental regulatory notice. Some parties may choose to submit the regulatory notice once definitive agreements have been executed, but that should not be the standard in every instance. The approach currently in the October 18 draft rules is unnecessary and only leads to greater expense and uncertainty. The next draft of the OHA rules should remove the requirement that the parties submit definitive agreements in their OHA notices.

4. **Retention of Outside Advisors (-0050)**.

The October 18 draft rules provide that the parties must pay the costs that OHA incurs for the transaction review. The parties have no visibility to those expenses or have any ability to challenges their appropriateness. Although fee requests are sometimes included as part of civil investigative demand settlements in other jurisdictions for transactions that have been flagged for heighted scrutiny, in this instance OHA is pushing a cost burden on the parties for ordinary course transaction reviews. The next draft of the OHA rules should remove the requirement that the parties reimburse OHA for outside advisor expenses.

5. **Presumption of 180-Day Review (-0055(3))**.

The October 18 draft rules provide that if the OHA fails to complete its preliminary review within 30 days, then the transaction is automatically subject to the comprehensive review. This approach creates a presumption that every transaction is inherently suspect so as to merit a comprehensive review. It also creates significant and unnecessary timing uncertainty. Other notice processes regimes, including Hart-Scott-Rodino, provide that a transaction is automatically approved if the agency does not respond within the initial review period. That structure has been successful for other jurisdictions while still giving the parties important timing predictability. The next draft of the OHA rules should provide that a transaction is automatically approved if OHA does not respond within the 30 days preliminary review period.

We look forward to OHA publishing the next draft of the rules and a continued discussion into how best to capture the legislature's intent for House Bill 2362 and improving access, care, equity, and cost for Oregonians.

Respectfully,

/s/

Tom Karnes
Assistant General Counsel