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BY EMAIL

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Jeremy Vandehey, Health Policy & Analytics Division Director
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Re: **Proposed Rule Changes for the Health Care Market Oversight Program**

Dear Directors Allen and Vandehey,

Ropes & Gray LLP ("Ropes & Gray") is a leading global law firm with offices in New York, Boston, Chicago, San Francisco, Washington, D.C., Silicon Valley, Los Angeles, London, Hong Kong, Shanghai, Tokyo and Seoul. We represent interests across a broad spectrum of industries and businesses and—most relevant to Health Care Market Oversight ("HCMO") Program—have market-leading positions in mergers & acquisitions, private equity, health care and life sciences. Given this expertise and based on our experience representing clients who have business in the State of Oregon and have submitted transactions through the HCMO Program to date, Ropes & Gray appreciates the opportunity to provide written comment on the proposed rule changes for the HCMO Program in 2023, as set forth in the Notice of Proposed Rulemaking filed on September 20, 2022 (the "Proposed Rule").

We, first of all, commend the Oregon Health Authority ("OHA") for its willingness to modify the rules to provide greater clarity to the HCMO Program review process. We, secondly, write to raise several, critical outstanding issues regarding the standards contained in the Proposed Rule that, without further clarity, create unnecessary ambiguity and could result in OHA's review of transactions that exceed the intended legislative scope of the HCMO Program. We offer these comments in the spirit of contributing to the creation of commercially reasonable standards that will support HB 2362's aim to promote transparency for the Oregon community and support statewide priorities related to health equity, cost, access and quality, but without stifling interstate commerce or the ability for Oregon to attract investment from outside its borders.

Please find below our specific questions and recommendations in response to the Proposed Rule.

1. Materiality Standards for Out-of-State Transactions (OAR 409-070-0010)

a. Under ORS 415.500((6)(a) and OAR 409-070-0015, a covered transaction involving an out-of-state entity is a "Material Change Transaction" subject to review if it satisfies two prongs: (i) it exceeds relevant revenue thresholds; **and** (ii) it "may result in increases in the price of health care services or limit access to health care services in this state."

i. Assessing whether a transaction "may result in increases in the price of health care services or limit access to health care services in this state" requires a highly complex analysis of pricing, demand, and competition. Under the antitrust laws, federal antitrust regulators and courts typically make such predictions only after gathering significant amounts of data and evidence from merging parties and third parties and then using complex econometric methods to make predictions about competitive impacts. The public does not have the ability to demonstrate that such condition is or is not present in a given transaction (and therefore review is not required).

ii. To that end, we ask that OHA establish the factors by which it will evaluate a transaction to determine whether it "may result in increases in the price of health care services or limit access to health care services in this state." In particular, we ask OHA to further clarity how these criteria will be applied in transactions involving out-of-state entities, which may serve an important benefit to the public.

iii. Further, OHA should consider adding further clarity regarding the rules and process by which parties to an out-of-state transaction may certify to OHA that their proposed transaction would not have such effects, and can thus determine they are not "Material Change Transactions" subject to review by OHA. The statutory trigger for review includes both elements. Presumably, if parties can demonstrate or certify to not increase prices or limit access, then OHA should consider whether review is needed in these circumstances.

2. Definition of "Health Care Entity" (OAR 409-070-0005(16))

a. While we appreciate OHA's efforts in the Proposed Rule to clarify the meaning of "health care entity," we believe that further clarity is needed with respect to the regulatory definition of this term under OAR 409-070-0005(16)(g). Specifically, we noticed a discrepancy between the rule and the statutory language that raises several questions and issues:

i. Proposed Rule Changes: "Health care entity includes . . . [a]ny other person or business entity that is a parent organization of, has **control over, is controlled by, or is under common control with**, an entity that has [as] a primary function the provision of health care items or services." OAR 409-070-0005(16)(g).

1. Note: We separately flag that the word "as" appears to be missing prior to "a primary function."

ii. Statute: "Health care entity includes . . . [a]ny other entity that has as a primary function the provision of health care items or services or that is a parent organization of, or is an entity **closely related to**, an entity that has as a primary function the provision of health care items or services." ORS 415.500(4)(F).

b. Notwithstanding the Proposed Rule departing substantially from the statutory definition, OHA does not explain why it has elected to make this change. Accordingly, we request that OHA offer additional clarification and explanation with respect to the substitution for the "closely related to" language in the statute with the three specific relationships referenced in the rule and the impact of this substitution in terms of the types of health care-related companies that were meant to be covered by this statute. It would be helpful to confirm that the three specified relationships define the scope of how the agency will construe "closely related to."

i. On its face, the term "closely related to" is ambiguous and can be interpreted broadly to encompass entities with little nexus to the provision of health care services in Oregon—including, in OHA's own language, entities that are "many levels removed from patient care" and have a "limited footprint. . .in Oregon." [1] We believe that such a broad interpretation would be outside of the scope of the legislative intent of HB 2362, which demonstrates a clear focus on overseeing health care consolidation in the Oregon marketplace involving health care providers and entities intimately involved in the delivery of health care services such as hospitals, health insurance companies, and provider groups. We presume that the language in the rule was intended to provide clarity and put limits on the statute's reach.

ii. The public will benefit from such a more refined definition with criteria in order to clarify that the statute does not reach non-traditional health care industry participants such as service companies engaged in the health care industry, that do not provide health care items or services—management service organizations, electronic medical record companies, device and equipment suppliers, etc. From our experience with the HCMO Program, we understand that OHA has previously taken the position that

[1] HCMO 30-Day Review Summary Report: Transaction 004 - SDB Holdco, LLC, pg. 18. September 9, 2022.

management service organizations (including dental support organizations) are "health care entities" for review purposes, but there is nothing in the statute nor in the Proposed Rule that provides this authority. The basis for that interpretation remains unclear and should be clarified in the Proposed Rule if OHA will continue to take this position.

3. Comprehensive Review Fee Criteria (OAR 409-070-0030(3))

a. We understand that, as directed by statute, the Proposed Rule establishes program fees to start on January 1, 2023. Given that the Proposed Rule imposes fees of up to $100,000, it is critical for OHA to establish precise and fair rules that give entities adequate notice and opportunity to plan for such costs as part of the transaction. To avoid future confusion, we ask that OHA clarify the meaning of certain terms in OAR 409-070-0030(3) with respect to determination of fee amounts for comprehensive reviews.

b. Specifically, the Proposed Rule states that the fee amount for a comprehensive review "shall be based on the average annual revenue or projected revenue, as applicable, in accordance with OAR 409-070-0015(1), of the following **entity** (the "smaller entity"); (i) [f]or transactions between two entities, the **entity** with smaller revenue; or (ii) [f]or transactions **involving more than two entities**, the **entity** with the second largest annual revenue." OAR 409-070-0030(3). We query which entities should be taken into account for the purpose of calculating fee amounts.

   i. What does it mean for a transaction to "involve" more than two entities?

   ii. Are the relevant entities involved in the transaction here the Oregon entities? The parties directly entering into the transaction? Or all entities indirectly owned or affiliated with the parties to the transaction?

As demonstrated in the transaction notices and reviews to date under the HCMO Program, transactions can be complex, and may indirectly involve dozens of entities. Consider whether the Proposed Rule should address such complexities in detail or be revised to focus on the entities involved in the transaction that generate health care service revenue from Oregon residents. For example, the Notice of Material Change Transaction for Falcon Hospice states that the transaction is occurring between out-of-state entities ten levels above the Oregon hospice locations;[2] and the Notice of Material Change Transaction for Advantage Dental states that the transaction is occurring between out-of-state entities four entity levels above the applicant.[3] We note that if OHA were to decide that the fee amounts under OAR 409-070-0030(3) are based on the revenue of the "parties to the transaction" (in

[2] Notice of Material Change Transaction –Advantage Dental Services, LLC, pg. 2. March 1, 2022.
[3] Notice of Material Change Transaction – Falcon Hospice GP, LLC, pg. 4. June 9, 2022.

line with the proposed rules changes' definition of "revenue"),[4] the fees for these two transactions (and any other transactions occurring between out-of-state entities) would be based solely on the revenue of out-of-state entities, which would raise questions whether the regulation has an impermissible extra-territorial reach.

c. Given HB 2362's aim to support statewide goals related to the provision of health care in Oregon, consider whether any fees tied to OHA's reviews should similarly have a nexus to the state and be based on revenue of entities in the state. OHA's prior review reports support such interpretation. In the 30-day review summary report for Falcon Hospice, despite the indirect involvement of numerous entities in the organizational structure (including hospice agencies all over the country), OHA focuses the majority of its review on the impact of the transaction on the two Oregon agencies involved in the transaction.[5] To align the fee determination with the legislative focus on health care in Oregon, consider clarifying that the term "entity" under OAR 409-070-0030(3) only encompasses Oregon entities involved in the transaction.

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We thank you once again for the opportunity to provide comments to OHA's Proposed Rule for the HCMO program. We value OHA's willingness to consider our input given our experience with the HCMO Program thus far, and we look forward to continued collaboration.

Very truly yours,

Timothy M. McCrystal
Ropes & Gray, LLP

[4] The proposed rule changes define "'revenue' **of a party to the transaction**." OAR 409-070-0005(26).
[5] *See* HCMO 30-Day Review Summary Report: Transaction 002 – Falcon Hospice. July 14, 2022.