PacificSource

November 4, 2021

Zachary Goldman, MPP
Oregon Health Authority
Barbara Roberts Human Services Building
500 Summer Street NE, E-64
Salem, OR 97301

Delivered via email: hcmo.info@dhsoha.state.or.us

Re: PacificSource Comments on Health Care Market Oversight Rules, First Draft

Dear Mr. Goldman:

The PacificSource companies (we) are independent, not-for-profit health insurance providers based in Oregon. We serve over 500,000 commercial, Medicaid, and Medicare Advantage members in four states. PacificSource Community Solutions is the contracted coordinated care organization (CCO) in Central Oregon, the Columbia River Gorge, Marion & Polk Counties, and Lane County. Our mission is to provide better health, better care, and better value to the people and communities we serve.

Thank you for the opportunity to provide written comment on the proposed rules implementing 2021 House Bill 2362[1] (Act), pertaining to health care mergers and acquisitions and creating a review and approval process by the Oregon Health Authority (Authority). We raised a number of questions and comments at the initial rulemaking advisory committee on October 25. We limit the content of this comment letter to those items we raised in the rulemaking advisory committee so that the Authority may fully consider them. As we noted in the rulemaking advisory committee, we offer these comments in the spirit of crafting workable standards from the Act. We may have additional comments as the authority releases further revisions of the proposed rules.

In general terms, we remained concerned that the policy choices outlined in the proposed rules will deter positive transactions. The chilling effect of another layer of review means that transactions may never materialize if parties have to risk public disclosure of confidential financial details in order to obtain approval. In addition, as now structured the transaction review procedure will default to a comprehensive process if the Authority simply does not act on a preliminary review. This potentially places all transactions under the Act into a lengthy and unnecessary review process.

Below, our comments are organized by proposed rule.

Proposed OAR 409-070-0000 (Authority and Purpose)

[1] 2021 Or Laws ch 615.

- In section (2) of the proposed rule, we believe that the phrase "[p]romoting the "goals of the Authority" is not consistent with the Act. If the purpose statement is needed in the rules, we would ask that the proposed rules instead mirror the language of the Act – i.e., that the rules "advance the goals set forth in OAR 414.018." Also, we note an apparent conflict between the citation in the act regarding the Oregon Integrated and Coordinated Health Care Delivery System (ORS 414.570) and the rule citation (ORS 414.620).

Proposed OAR 409-070-0005 (Definitions)

- In section (4) of the proposed rule, we suggest embedding the Oregon Value-Based Payment Compact into the rule as an exhibit. 47 signatories, covering approximately 73% of all Oregonians, have already agreed to a definition of value-based payment models that includes "HCP-LAN Categories 3A and higher."[2] If and when signatories agree to re-define value-based payment models to include population-based payments (i.e., 4A and higher in the HCP-LAN categories), the Authority may re-adopt the definitional rule with an updated exhibit.
- In Section (7) of the proposed rule, the proposed rules define "control" as holding power over 10% of an entity's voting securities. In its ordinary usage, "control" means "the direct or indirect power to direct the management and policies of a person or entity, whether through ownership, by voting securities, by contract, or otherwise[.]"[3] Control is about the unilateral ability to shape policy, not just the ability to influence policy through soft power. With that standard in mind, if a percentage is still desired 51% would be more appropriate *prima facie* level of ownership to determine control.
- In section (13) of the proposed rule, we ask that the Authority clarify that the definition of "essential services" refers only to transactions involving Medicaid CCO entities subject to the prioritized list of services under the Oregon Health Plan. The Prioritized List does not apply to commercial health plans, and commercial health plans already adhere to essential health benefits in the Affordable Care Act and Oregon regulations.[4]
- In section (17) of the proposed rule, we ask that the Authority amend the definition of health equity in the proposed rule to mirror the definition that Oregon Health Policy Board adopted. The Act defined health equity as having the meaning "prescribed by the Oregon Health Policy Board and adopted by the authority by rule." The definition of health equity adopted by the Oregon Health Policy Board is:

  > Oregon will have established a health system that creates health equity when all people can reach their full health potential and well-being and are not disadvantaged by their race, ethnicity, language, disability, age, gender, gender identity, sexual orientation, social class, intersections among these communities or identities, or other socially determined circumstances.

  In contrast, the definition of health equity from the proposed rule:

  > [A] health system having and offering infrastructure, facilities, services, geographic coverage, affordability and all other relevant features, conditions and capabilities that will provide all people with the opportunity and reasonable expectation that they can reach their full health potential and well-being and are not disadvantaged by their race, ethnicity, language,

[2] *See* https://orhealthleadershipcouncil.org/wp-content/uploads/2021/10/Oregon-VBP-Compact.pdf.
[3] *Black's Law Dictionary* 330 (7th ed 1999) (definition of "control.")
[4] *See* OAR 836-053-0012 (essential health benefits for plan years beginning on and after January 1, 2017); OAR 836-053-0013 (Oregon standard bronze and silver health benefit plans).

disability, age, gender, gender identity, sexual orientation, social class, intersections among these communities or identities, or their socially determined circumstances.

- In section (20) of the proposed rule, we noted in the rulemaking advisory committee that the definition of "significant portion" did not appear in the Act, and may be an artifact of legislative discussions that did not move forward. As the definition only appears once in the rules, we question if the definition is necessary.

Proposed OAR 409-070-0010 (Covered Transactions)

- In section (1), subsection (a) of the proposed rule, we request clarification on whether the term "consolidation" includes corporate reorganizations that do not result in a change of control. These transactions should be exempt from the review process.
- In section (2), subsection (a) of the proposed rule, the language suggests that "ceding control" must be in terms of setting governance policy or directing the overall affairs of the business, not simply outsourcing of administrative functions.
- In section (2), subsection (f) of the proposed rule, we do not believe it possible to merge tax identification numbers.[5]
- In section (2), subsection (g) of the proposed rule, includes "[t]ransactions that provide for shared corporate governance." The rules go on to define covered transactions in a way that would require review of agreements that share governance functions, but keep the entities separately controlled. We would suggest this definition be clarified to exclude covered transactions that do not result in a change in direct governance policy.

Proposed OAR 409-070-0015 (Materiality Standard)

- In section (2) of the proposed rule, we asked in the RAC meeting whether other jurisdictions require GAAP-compliant profit/loss statements for merger and acquisition review. If in the event that the Authority determines that GAAP-compliant statements are not required, we would ask that the requirement be removed.
- In section (3) of the proposed rule, we raised concerns that the trigger for intervention and review of out-of-state transactions may apply differently than what is described in the Act; to avoid a conflict we recommend either the Authority mirror the statutory provision or remove it.

Proposed OAR 409-070-0020 (Excluded Transactions)

- In section (1), subsection (d), paragraph (C) of the proposed rule, we could not discern what provision in the Act needed interpreted through the addition of the paragraph. The inclusion goes beyond the criteria already in the Act, and without more explanation as to its purpose it should be removed.
- In section (2), subparagraph (b) of the proposed rule, describing what types of transactions are not "medical services contract(s)," we recommend removing the clause "or under any other law authorizing the creation of a professional organization." This statutory language is actually a grant of rulemaking authority to the Authority, and in order to minimize confusion, the Authority could remove that clause from these rules.

[5] *See* https://www.irs.gov/businesses/small-businesses-self-employed/do-you-need-a-new-ein.

Proposed OAR 409-070-0022 (Emergency and Exempt Transactions)

- In section (1) of the proposed rule, we raised concerns about appeals of a decision to require review of a material change transaction in an emergency situation. The rule states that the Authority's decision is final, not appealable and interlocutory (i.e., not final; other than a final order). It is our understanding that a decision to require the filing may affect the rights of the entity requesting emergency relief (the right of an insurer to remain a going concern), and should be subject to some level of notice and opportunity to be heard. As we noted in the rulemaking advisory committee meeting, this emergency determination is not appealable, whereas the presumption of control in proposed OAR 409-070-0025 is appealable. One possible way to address this inconsistency is to mirror the process in proposed OAR 409-070-0025 in this rule.
- As drafted, section (2) of the proposed rule appears to conflict with ORS 734.043 *et seq*., which governs the supervision, rehabilitation or liquidation of an insurance carrier in Oregon. Under its authority, the Department of Consumer and Business Services (DCBS) could potentially 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 the Department must make certain findings about the condition of the insurer prior to acting, meeting the statute provides a *per se* case of an emergency.

  Similarly, we also ask the Authority to reconcile this filing requirement with OAR 410-141-5365, which allows the Oregon Health 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. Presumably, the Authority would need to act speedily and without the application of the coordinated care organization if it operated in a hazardous manner. Situations where the Authority orders an action related to "hazardous operation" of a CCO, should also be considered a *per se* case of an emergency.

  One possible way to reconcile all three sources of law is simply to add a new section (5):

  > **(5) 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.**

- In section (3) of the proposed rule, we ask to the extent possible that this process be streamlined to prevent costly delays. In a true emergency situation, agencies and parties have little time to go through an involved paper process. Others commented on allowing for face-to-face negotiation, which we agree could help resolve issues and create agreement on proceeding through troubled times. The Department and the Authority should be free to negotiate with the entity in a hazardous condition and memorialize the agreement through an administrative order.
- In section (4) of the proposed rule, we have strong concerns about broadly publishing an application for an emergency transaction. Normally emergency actions taken against an entity in a hazardous financial condition need to remain confidential in order to limit further damage to the company –and by extension its members and providers. Similar to fears of a "bank run" in prudential financial regulation, premature public disclosure and publication of

an emergency condition could cause further crippling financial harm as providers, members and others cease to do business with the entity.

- Finally, we believe that section (5) of the rule should be removed. To the extent the Authority wishes to exempt additional transactions from the reach of these rules, this should be done through the rulemaking process, where interested parties of all types may discuss the benefits and challenges with exempting a particular transaction. The Act and the interpretive regulations are too consequential for these blanket exemption decisions to be made without a public rulemaking process.

Proposed OAR 409-070-0035 (Material Change Transactions Involving a Domestic Insurer)

- In section (1), subsection (a), the Insurance Code already requires the Department to hold a hearing on a proposed merger or acquisition, whether or not OHA recommends a review board. This is one example where to the extent possible the Authority should attempt to rely on existing procedures as much as possible to create a speedy, efficient and effective process.
- In section (1), subsection (b), we do not believe that the Authority intended to deliver a "final order" to the Department after a review of a Form A transaction. We would recommend the Authority substitute "recommendation" for “final order.”
- In section (3) of the proposed rule, we ask that the Authority confirm our understanding that information involving a domestic insurer is not discoverable, not to be disclosed or subject to subpoena, as described in ORS 705.137.

Proposed OAR 409-070-0045 (Form and Contents of Notice of Material Change Transaction)

In section (5) of the proposed rule, please clarify whether in the case where an applicant files an incomplete notice of material change transaction, the tolling of the review period also applies to the 30-day clock for making a preliminary determination.

Thank you again for the opportunity to participate and provide comments on the proposed rules. We look forward to providing comment on the rest of the rules (proposed OAR 409-070-0050, 409-070-0055 and 409-070-0060). For questions or concerns, please contact me at 503.949.3620 or richard.blackwell@pacificsource.com.

Sincerely,

/s

Richard Blackwell
Director, Oregon Government Relations