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1-800-955-3352
MAIN OFFICE

503-238-6692
FAX

3536 SE 26TH AVE
PORTLAND, OR 97202

@SEIU49
TWITTER

SEIU LOCAL 49
FACEBOOK

www.SEIU49.ORG

October 29, 2021

Pat Allen, Director, Oregon Health Authority
500 Summer Street NE, E-20
Salem, OR 97301

Delivered electronically to: hcmo.info@dhsoha.state.or.us

RE: Rules Advisory Committee for the Health Care Market Oversight Program

Dear Director Allen,

We appreciate the opportunity to participate in the Rules Advisory Committee for the Health Care Market Oversight Program. The first meeting on October 25 was a good start to finalizing the draft rules.

In addition to our contributions during the meeting, this letter provides more detailed suggestions about the draft rules. We have structured our feedback by rule section and subsection, providing both general feedback and line edits where applicable.

As a general comment, we wanted to commend you for the comprehensive, robust structure and vision embodied in the initial set of draft rules. As you know, the Health Care Market Oversight Program is an essential complement to Oregon's Sustainable Health Care Cost Growth Target and other work to rein in the growth of health care costs. While we have suggestions for improvement, we believe as a whole the draft rules appropriately reflect the role this new program will play in maintaining Oregonians' access to quality, affordable, equitable health care services.

We look forward to continued work on the Rules Advisory Committee and partnership with OHA to ensure these rules live up to the legislation's promise. Please do not hesitate to reach out if you should require further clarification on any of the points outlined below.

Sincerely,

Felisa Hagins
Political Director

FEEDBACK ON 10.18.21 DRAFT RULES FOR HEALTH CARE MARKET OVERSIGHT PROGRAM

OAR 409-070-0000: Scope & Purpose

- **(2)** We support the rules as drafted, including the phrase "goals of the Authority," as the goals of the Oregon Health Authority are clearly related to the pursuit of affordable, quality care and health equity.
- **(3)(a)** *Improving health, increasing the quality, reliability, availability and continuity of care and reducing the cost of care for ~~all~~ Oregonians.*
    - We support the striking of "all" and agree that measuring reduction in the cost of care across the whole state is unreasonable. We hope that the same rationale will be applied to other portions of the rule as well (edits below).
    - If the intent of the "all" is to convey equity, an alternate phrase could likely fulfill that purpose.
- **(3)(c)** We are supportive of the rule language as drafted and believe the selected adjectives are appropropriate and reflective of the intent of the sponsoring legislation.

In addition, we do not believe that the prevention of a delay in the delivery of care is needed or reflective of the statute. Moreover, (3)(a) already references quality and continuity of care.

OAR 409-070-0005: Definitions

- **(4)** AVP Methodologies: We believe the AVP exclusion should be used to reward entities moving to spheres in which prices per service are not relevant. The sponsoring legislation explicitly discusses concerns about the cost of care. Therefore, the exclusion should reward only those agreements necessary for a non-fee-for-service arrangement, defined as category 4 and higher (rather than 3A and higher).
- **(7)** Control: We are strongly supportive of the definition as currently drafted. We believe that entities holding less than a majority ownership stake can still have substantial influence over a company's decisions. OHA's proposal reflects the spirit of the law, which seeks to review transactions that transfer power and control. Even a relatively small ownership percentage transfer can be significant. Moreover, the statute explicitly calls out partial or complete control, and does not explicitly include the word "majority." We believe OHA has drafted this definition appropriately.
- **(8)** Control affiliate: We are strongly supportive of the drafted definition. It impressively addresses the statute's call to recognize relationships between organizations (whether direct or indirect) and acknowledges the reality of complex and varied corporate arrangements.
- **(13)** Essential Services: We are supportive of the definition of essential services as presented. In addition, this definition is provided in the statute, so the rules cannot deviate from it (see Section 1(2)).
    - **(13)(b)** There was some criticism during the first RAC meeting that (13)(b) is too vague. While we are not opposed to adding specificity, we think there is value to communities and the industry in keeping the language as is. The current language

allows maximum flexibility to meet the needs of unique communities and recognize individual attributes that any one transaction may possess.

- **(15)(g)** While clarity may be required to avoid OHA weighing in on "day-to-day transactions" (such as purchase orders for gloves), the language as drafted does not deviate from the definition required by statute. In fact, the newly proposed words clarify that "health care items or services" (already in Section 1 of statute) applies to physical, behavioral and dental health. This is not an expansion of the statute; it is merely clarification we think is appropriate.

OAR 409-070-0010: Covered Transactions

- **(1)(e)** We support the draft language using the word "may" in this section. We have seen transactions occur in communities where the parties vaguely referenced non-specific reductions in services and refused to disclose to the community what was under consideration and why. New arrangements that may reduce essential services should be subject to review as a material change transaction so that there is full transparency and the Authority can assess if any conditions are necessary to protect patient and community interests.
- **(2)(e)** Shared services or business operations services would only be a qualifying transaction "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." We understand this to mean that entities could share services as much as desired as long as it was not accompanied with a change in control. If that understanding is correct, we are supportive of the draft language.
- **(2)(f) and (2)(g)** We support the draft as is, considering that both of these provisions are required by statute per Section 1(1)(b).
- **(4)** We appreciate the holistic approach that the draft rule reflects and are also sympathetic to concerns raised in the first meeting of the RAC by industry representatives. We do want to underscore that this section only applies to <u>new</u> clinical affiliations and new contracting affiliations. Also, it is critical to note that the statute clearly excludes "Contracts under which one health care entity, for and on behalf of a second health care entity, provides patient care and services or provides administrative services relating to, supporting or facilitating the provision of patient care and services, if the second health care entity: (i) Maintains responsibility, oversight and control over the patient care and services; and (ii) Bills and receives reimbursement for the patient care and services." (Statute: Section 1(6)(b)(D))

OAR 409-070-0015: Materiality Standard

- **(1)** We are supportive of the rules as drafted, including the reference to projected revenue over the first full year of operation at normal levels of utilization or operation. This is the language used by the Certificate of Need program and presumably is therefore already familiar to many health care entities.
- **(3)** We are supportive of this draft language and believe that, while not a direct quote, it is reflective of the statute.
- **(4)(b)(a)** We suggest a minor edit to the definition of net patient revenue to reflect that not all entities will be non-profits:

- *"Net patient revenue" means the total amount of income, after allowance for contractual amounts, charity care (at cost, for non-profit health systems) and bad debt, received for patient care and services, including*:

OAR 409-070-0020: Excluded Transactions

- **(3)(b)** We strongly support this exemption, but believe it should be a meaningful agreement to be exempted. If the duration of the agreement is part of the disclosure, it will aid the regulatory body in validating the exclusion. As such, we propose the following addition to this language:
  - *Identification of the AVP methodologies that will be used in, or otherwise supported or promoted by, the transaction and an explanation of how those AVP methodologies will be applied in the transaction to meet the health care cost growth targets under ORS 442.386, including duration of the AVP agreement.*

OAR 409-070-0022: Emergency and Exempt Transactions

- **(1)** We believe it is important that the emergency exemption not be used for solvency issues alone; the failure to complete the transaction must also have a negative impact on consumers. Therefore, the "or" must be changed to an "and." This change is needed to conform with Section (2)(8)(a) of the statute.
  - *The Authority, for good cause shown, may exempt an otherwise covered transaction from review 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 and to preserve the solvency of an entity other than a domestic health insurer.*
- **(4)** We understand that emergency situations may develop and appreciate the flexibility written into the draft rules. While a pre-closure public notification and/or comment period is not required, it leaves the Authority or Department flexibility to determine if it is necessary given the unique situation. We see value in that. In response to concerns expressed in the first RAC meeting, we do think it is possible to add that the notification is done in a timely manner so as to not unduly delay the transaction. We do not have the expectation that every emergency transaction will be publicly disclosed prior to completion. However, we do expect a public notification of all emergency transactions in a timely manner, even if post-facto.
- **(5)** We believe it is important to have transparency about how often transactions are qualifying for different exemption clauses. We respectfully suggest two changes here. First, that "publish" be replaced with the more accurate word "clarify." Second, that "and disclose the frequency with which transactions are exempted under such categories" be added to the end of the sentence.
  - *The Authority may ~~publish~~ clarify from time to time a list of ~~other~~ categories or types of transactions that shall be exempt from review under these rules and disclose the frequency with which transactions are exempted under such categories.*
- **ADD (6)** We believe that if there is the unfortunate situation of entities creating the conditions for an emergency or purposefully delaying until urgent to avoid review, the pattern should be noted and there be consequences. Therefore we suggest the following

addition:

- *Repeat, excessive use of the emergency exemption by related entities will result in stricter application of the standard.*

OAR 409-070-0025: Disclaimers of Affiliation

(1) We support this definition as written, including the reference to 10 percent.

OAR 409-070-0030: Requirement to File a Notice of Material Change Transaction

- **(1)(b)** Typo, delete the repetitive "to."
- **(3)** We believe the fee should be commensurate with the size of the transaction, not the participating organization(s).
- **General question**: 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 and Contents of Notice of Material Change Transaction

- **(4)** While we appreciate the draft requirement 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 think there should be some increased flexibility in this area, but also are directly aware of community decisions being informed by "term sheets" that when inked in a final agreement disclosed more impacts to services than was previously known. 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.
- **(10)** We believe the Authority intends to notify applicants if any clarification is required, and so the "may notify" should be replaced with "will notify."

OAR 409-070-0050: Retention of Outside Advisors

- We are supportive of this section of draft rules. We believe that transactions will be varied and each is due its relevant expertise to assess its impact according to the criteria laid out in the final statute and rule. The ability to retain outside advisors is critical to assuming the Authority, Agency, or any applicable review body not only has the capacity to move the review forward in a timely manner, but also the correct expertise. We believe this is in the interest of both applicants and impacted communities.

OAR 409-070-0055: Preliminary 30-Day Review of a Notice of Material Change Transaction

- **(2)(c)** We believe it is mandatory to meet the criteria described in (2)(c). The statute states in Section 2(5): "No later than 30 days after receiving a notice described in subsections (3) and (4) of this section, the authority shall conduct a preliminary review to determine if the transaction has the potential to have a negative impact on access to affordable health care in this state and meets the criteria in subsection (9) of this section." Subsection 9 is reflected in the rules in OAR 409-070-0060.

OAR 409-070-0060: Comprehensive Review of a Notice of a Material Change Transaction

- **(8)(a)** We believe that "commitment" is ill-defined and more reflective of intentions on paper than actual work. We suggest deleting reference to commitment and instead add that assessing if a transaction will reduce health disparities can be informed by a) the purpose and plan of the transaction itself and b) entities' track records.
- **(8)(e)** Competition is not effectively measured on a statewide basis, so we want to be clear that it could be measured on a more appropriate scale (where applicable).
    - *The transaction or the completion of the transaction would substantially diminish competition in this state or a region of the state.*
- **Proposed Addition**:
  Overall, we believe that while section (8) is a quality draft, it is not entirely reflective of the statue. The statute requires that transactions will benefit the public good to move forward. This is outlined in Section 2(9)(a) of the legislation. We propose the following edits to reflect this:

  (8) The Authority shall approve, or approve with conditions as provided in OAR 409-070-0065, a material change transaction, or, in the case of a material change transaction involving a domestic health insurer, recommend to the Department that the transaction be approved if the conditions under [NEW SECTION] are met and, unless the Authority makes any one or more of the following findings and conclusions:

  (NEW SECTION #) In order to approve a transaction after a comprehensive review the Authority must conclude that either:

  (a) the transaction will, on balance, benefit the public good and impacted communities by:

  (A) Reducing the growth in patient costs in accordance with the health care cost growth targets established under ORS 442.386 or maintain a rate of cost growth that exceeds the target that the entity demonstrates is the best interest of the public;

  (B) Increasing access to services in medically underserved areas; or

  (C) Rectifying historical and contemporary factors contributing to a lack of health equities or access to services; or

  (b) The transaction is likely to improve health outcomes for residents of the state and there is no substantial likelihood of anticompetitive effects from the transaction that outweigh the benefits of the transaction in increasing or maintaining services to underserved population.

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; Information Requests

- **Question:** We are supportive of the rules as drafted, but want to be assured that this area 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.