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Hospitals & Clinics

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Oct. 29, 2021

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Directors Allen and Vandehey,

RE: HB 2362 rulemaking, first draft (OAR 409-070-0000 – 409-070-0085)

Thank you for the opportunity to comment on the proposed rules regarding the Health Care Market Oversight Program. Salem Health is a mission-based non-profit organization governed by a volunteer board of directors. For over 100 years, Salem Health has planned for and met the health care needs of the mid-Willamette Valley. Our desire is to continue fulfilling this mission, as a community-based organization, for another 100 years.

We share the stated goals of HB 2362, to protect access and lower health care costs for the community we serve. We are concerned that as written, the implementation rules could in fact increase costs, reduce access and stifle the innovation that must drive health care in Oregon. Please consider the following comments as you work to refine the rules.

Broadly speaking, Salem Health believes the rules should reflect the following principles. The rules should:

- Stay true to legislative scope and intent, focused on large mergers and acquisitions, not routine transactions or innovative relationships.

- Not increase the cost of care or add to the administrative burden of normal operations.

- Be consistent, fair, predictable, and contain metrics that are quantifiable and objective in nature.

- Be written in a clear and straightforward manner, using plain language, to ensure that the public is able to read and understand the rules (ORS 183.750 and OHA Writing Style Manual).

Based on these principles, we have listed questions and concerns, along with related examples, and some suggested language or action below.

OAR 409-070-0005 – Definitions

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Section 7 – The bar for control is too low at 10 percent. We suggest that it be set at 51 percent.

Section 8 – Remove the definition of "Control Affiliate." This is not mentioned in the bill language, and it serves no purpose in the rules.

Section 15g – This definition is overly broad and has the potential to include organizations with whom hospitals routinely contract for both high- and low-dollar items but who have revenues that meet the $10 million threshold. This would have the effect of running routine health system procurements through the Oregon Health Authority, which is not within the scope of the bill or legislative intent.

Section 20 – For the same reasons set forth in Section 7 above, we recommend that 10 percent be changed to 51 percent.

We request the addition of a definition for "eliminate or significantly reduce" to increase clarity of the rules and ensure consistent enforcement.

OAR 409-070-0010 – MATERIAL CHANGE TRANSACTIONS: Covered Transactions

We request removal of the term "control affiliate" from this section. This term is not used in the bill and does not add to the clarity of the administrative rules as proposed. Section 1e – Correct language to be in alignment with the bill, "… that will eliminate or significantly reduce essential services as provided…"

Section 2e – Because this section of rule includes shared services, business operations, or jointly offered products and professional services, it has the effect of including many daily operations that do not rise to the level of a merger or acquisition. In addition, our reading of this section is that it could have a chilling effect on innovation that has the ability to increase access to care, increase the quality of care, reduce the cost of care, and/or provide additional services.

Section 4 – We suggest the following language to bring the rules into greater alignment with the bill. "New clinical affiliations and new contracting affiliations between or among health care entities, or between or among health care entities and another type of counterparty, are covered transactions if they eliminate or significantly reduce essential services and include one or more of the following:"

Section 4a – Because every ambulatory setting is covered, then every clinical relationship will require review. We are concerned about having to submit application for such a large volume of transactions covered by this language, and OHA's ability to review them in a timely fashion. Clinical relationships between organizations, such as sharing of physician resources and provision of inpatient consultation coverage, have helped hospitals weather COVID-19 and the surge by allowing greater flexibility in staffing. Further, this language seems to include joint training programs, use of video technology, and sharing of hospitalists or intensivists. These clinical collaborations do not reduce access to or quality of care. In fact, they increase access and reduce cost. These types of granular but important transactions should not be subject to review, so we request that this section be removed from rule.

Section 4c –This section of rule could jeopardize our ability to participate in collaborations like a pharmaceutical buying group, a crucial part of our strategy to control drug costs. When "clinical affiliations"

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result in lower costs, greater access to care, and or provision of new and needed services, this section should not apply.

Section 4d – When new contracting affiliations result in economies of scale that serve to lower the cost of care, entities should be assured that they will not need to submit for review or will be fast-tracked through the review process.

OAR 409-070-0015

Section 1 - Language should be changed to clarify that revenue projections for a new entity are as of the date of filing.

Section 4bD – There is no statute numbered ORS 414.855.

OAR 409-070-0020 MATERIAL CHANGE TRANSACTIONS: Excluded Transactions

If a transaction is excluded, no filing should be required. Anything else will result in drastically increased administrative paperwork and delay for operational transactions that occur on a regular basis. We request removal of this section of rule or clarification that excluded transactions do not require a filing.

Section 2 – It is not clear whether pharmacy, food services, language, environmental/maintenance services, engineering, and/or non-medical transportation are included in this section of rule. If they are, that should be part of the rule language. If they are not, OHA should provide process documents that specifically exclude them.

OAR 409-070-0022 MATERIAL CHANGE TRANSACTIONS: Emergency and Exempt Transactions

Section 1 – We are concerned that the Authority's determination in this section of rule carries with it no appeal rights. Further, there is no clarity around the methodology the Authority will use to make a final determination.

OAR 409-070-0025 MATERIAL CHANGE TRANSACTIONS: Disclaimers of Affiliation

Section 1 – As we have already noted, the 10 percent threshold is too low and defies the original intent of the bill to capture changes in control, not changes in minority ownership. The figure should be changed to 51 percent and the requirement to rebut the Authority's presumption should not be required.

OAR 409-070-0045 MATERIAL CHANGE TRANSACTIONS: Form and Content of Notice of Material Change Transaction

Section 4 – The requirement to provide complete and final executed copies of all documents associated with the transaction is not realistic, given that the Authority has the ability to approve a transaction with conditions that could materially affect the content of said documents. This provision of rule unnecessarily adds to the costs associated with regulation. If not changed, it could also be responsible for preventing transactions that have the power to benefit the public through increased access to care.

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Section 5 – The Authority has 180 days to complete review of a material change transaction, so tolling the clock should not be necessary.

OAR 409-070-0050 MATERIAL CHANGE TRANSACTIONS: Retention of Outside Advisors

Section 1 – We are concerned that this section of rule appears to allow the Authority to excuse itself from following established procurement law when hiring outside advisors. This is beyond the scope of the bill and should be removed. Further, communications between the Authority and their advisors should be should be released to parties to the transaction under review upon request.

Section 2 – The Authority seems to grant to itself the ability to reimburse for expenses associated with "unallocated staff or interagency costs." This is beyond the scope of the bill and should be removed. It is unclear the amount that the Authority expects to spend on outside advisors and how those bills will affect the ability of transactions to move forward. The Authority should provide an estimate of costs that are statutorily billable to the parties to the transaction before moving forward with extended review. In the event that costs are higher than anticipated, the Authority should provide a revised estimate to parties to the transaction. In addition, the Authority should provide a biennial report of these billings to the Legislature as part of capturing the relative effectiveness of the program and the cost that is being passed on the health system and consumers.

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

Section 3 – If the Authority does not a complete a preliminary review within 30 days, then the transaction should be considered approved without conditions, rather than subject to comprehensive review.

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

Section 5 – The draft rules are not written in plain language – a concern that we state at the beginning of our letter. This fact would make it difficult for a review board to come to consensus on and provide meaningful written recommendations to the Authority regarding the transaction at hand.

Section 7 – What evidence of "consideration" will be provided to the parties to a transaction?

Section 8 – By what method will the Authority weight conflicts in the outcome of the tests in this section of rule? For example, a transaction might increase the cost of care, but result in greater access to or equitable provision of care.

Section 8h – This section of rule is not quantifiable and it is not within the scope of the bill. It should be removed, unless the Authority can provide both statutory underpinning and a legitimate methodology to objectively determine the "competence, experience and integrity of the persons" under examination.

OAR 409-070-0065 MATERIAL CHANGE TRANSACTIONS: Conditional Approval; Suspension of Proposed Material Change Transaction

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Section 2 – In the event that the Authority approves a transaction with conditions, those conditions would necessarily affect the executed documents required in OAR 409-070-0045(4). Thus, executed documents should not be required as part of a filing.

OAR 409-070-0070 MATERIAL CHANGE TRANSACTIONS: Confidentiality

Section 3 – In the event that a material change transaction is submitted with confidential information and a review board is appointed, the review board members should sign non-disclosure agreements, copies of which should be available to the parties to the transaction upon request.

OAR 409-070-0080 MATERIAL CHANGE TRANSACTIONS: Continuing Jurisdiction; Information Requests

Further clarity is needed in this section of rule. If the parties do not know what "information, reports, analyses and documentation" the Authority may require or how often they will make these requests, it will be impossible to successfully comply with this provision of rule. We request clarity regarding how the Authority intends to enforce this rule and at what point specific metrics and timing would be divulged to parties to a transaction. In the event that data collection to comply with this portion of rule results in increased costs to parties to a transaction, by what method will these increased costs be reported to the Authority and, eventually, the Legislature?

Thank you for the opportunity to inform this rule development. Please do not hesitate to reach out if you have questions about these comments, or would like to discuss the ramifications of specific rule applications.

Sincerely,

James Parr
Chief financial officer
Salem Health