

Health Care Market Oversight

013 Kroger-Albertsons Community Review Board

Summary Report **DRAFT**

June 12, 2024 - **DRAFT**



About this Report

This report summarizes the work of the Kroger-Albertsons Community Review Board and the recommendations they made to the Oregon Health Authority about the Kroger-Albertsons transaction.

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Introduction

Health Care Market Oversight

In 2021, the Oregon Legislature passed [House Bill 2362](#), authorizing the Oregon Health Authority (OHA) to assume the responsibility of reviewing and deciding whether certain transactions involving health care entities should proceed in Oregon. In March 2022, OHA launched the Health Care Market Oversight program (HCMO). The HCMO program monitors changes to health care markets and reviews proposed health care transactions to ensure they support statewide goals related to cost, equity, access, and quality. HCMO is governed by [Oregon Revised Statute \(ORS\) 415.500 et seq.](#) and [Oregon Administrative Rules \(OAR\) 409-070-0000 through -0085](#).

In the authorizing statute, the Oregon Legislature specified what types of proposed transactions are subject to review and the criteria OHA must use when analyzing a given proposed transaction. The Oregon Legislature also authorized OHA to decide the outcome of a proposed transaction within 180 days. Once it receives such notification, OHA has 30 days to complete a preliminary review of the deal. If OHA has concerns about how the deal may impact people in Oregon, it may proceed to a comprehensive review, allowing for another 150 days of review time. OHA can pause the review period, as necessary, to request additional information from the entities and complete its review of the proposed transaction. After completing its review, OHA may approve, approve with conditions, or disapprove the transaction.

The Health Care Market Oversight program fits within OHA's broader mission of ensuring all people and communities can achieve optimum physical, mental, and social well-being through partnerships, prevention, and access to quality, affordable health care. The program also supports OHA's goal of eliminating health inequities by 2030.

HCMO Community Review Boards

Pursuant to [ORS 415.501\(7\)\(a\)](#) and [OAR 409-070-0062](#), OHA may convene a community review board (CRB) to provide input to OHA about transactions that receive a comprehensive review. CRBs are temporary groups and exist solely to provide input to OHA about a particular transaction. CRBs have two key roles:

1. Help OHA understand how a deal could affect people and communities in Oregon.
2. Make a recommendation about whether OHA should approve a deal to proceed as planned, apply conditions to the deal, or disapprove the deal. Community review boards and their members must follow the requirements outlined in HCMO's statute (ORS 415.501(11), 415.501(15), and 415.501(18) and rules OAR 409-070-0062).

CRBs can hold multiple meetings and up to two (2) public hearings to receive testimony and evidence from the entities before making a recommendation.

Proposed Transaction

The Kroger Co. (“Kroger”) is planning to purchase Albertsons Companies, Inc. (“Albertsons”) for \$24.6 billion. Kroger will acquire all outstanding shares of Albertsons stock and will take on \$4.7 billion of Albertsons’ net debt. Following the merger, Albertsons will become a subsidiary of Kroger. The entities state that the purpose of the transaction is to create a more competitive combined company. In the notice, Kroger states that it has no plans to reduce health care or pharmacy services in Oregon.

Together, Kroger and Albertsons operate 4,997 grocery stores nationwide, with 176 operating in Oregon. Kroger and Albertsons plan to sell 579 stores nationwide, including 62 grocery stores in Oregon, to C&S Wholesale Grocers (“C&S”). Divested stores would include 52 pharmacies located in these grocery stores. C&S Wholesale Grocers is planning to pay Kroger approximately \$2.9 billion for selected Kroger and Albertsons stores, brand names, distribution centers, and offices.

Separately from OHA’s review, the transaction is undergoing review by other state and federal agencies. The Federal Trade Commission (FTC) is pursuing an antitrust lawsuit to block the merger, and eight states (including [Oregon](#)) and D.C. have joined this suit.

OHA’s Review

On August 8, 2023, OHA accepted a complete notice of material change transaction (“notice”) from Kroger and Albertsons. OHA completed a preliminary review that assessed how the proposed transaction could affect market concentration and access to pharmacy services. OHA also looked at the scale of the transaction and which geographic regions may be impacted. During the review, OHA also conducted initial analyses on the potential impact of the proposed transaction on cost, quality, access, and health equity in Oregon. HCMO focuses on health care services and items, therefore the preliminary review focused on proposed transaction’s effects on prescription drug and pharmacy services.

In its preliminary review, OHA found that the transaction has the potential to:

- Significantly increase Kroger's market share, making it the largest pharmacy provider in the state.
- Impact a large number of people in the state, with more 99% of state residents residing in counties served by Kroger or Albertsons stores.

HCMO Review Timeline

08/08/23: OHA accepted a complete notice and began preliminary review.

9/06/23: OHA completed preliminary review and notified Kroger that the transaction required a comprehensive review.

12/18/23: OHA sent a request for information.

2/23/24: OHA sent a second request for information.

4/04/24: The Kroger CRB held its first meeting.

4/10/24: The Kroger CRB held its second meeting.

4/24/24: The Kroger CRB held a Public Hearing attended by representatives from Kroger, C&S, and Albertsons.

5/09/24: The Kroger CRB held its third meeting.

5/10/24: Kroger submitted responses to OHA’s December 2023 and February 2024 requests for information.

5/15/24: The Kroger CRB held its fourth meeting

5/29/24: The Kroger CRB held its fifth meeting

6/13/24: The Kroger CRB held its sixth and final meeting.

- Significantly impact access to care, particularly in rural communities, if the transaction results in store closures, disruptions to operations, or changes to accepted insurance plans.

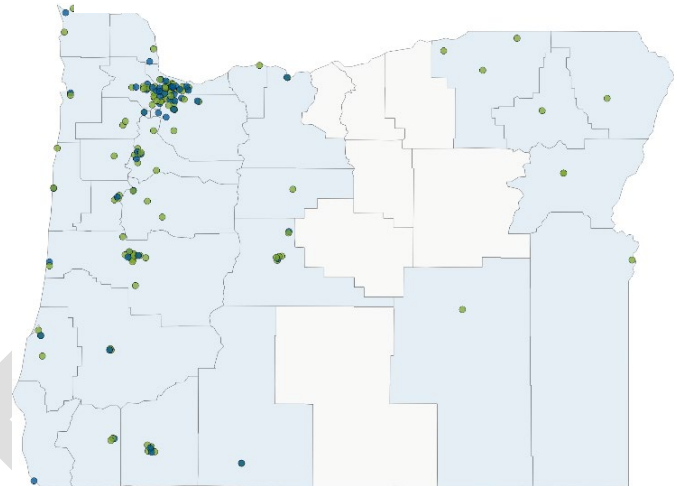
On September 6, 2023, after completing the preliminary review, OHA determined that the transaction warranted a comprehensive review. OHA published its [preliminary review report](#) and [determination letter](#). OHA also announced its plan to convene a CRB.

In December 2023 and February 2024, OHA requested information from the entities needed to continue the comprehensive review. Under HCMO statute and rules, OHA can toll (or “pause”) the 180-day review period if it requires more information from the entities. OHA tolled the review starting on December 19, 2023.

OHA received responses to the December 2023 and February 2024 information requests in May 2024. OHA has posted public-facing responses to the [website](#). The review period will remain tolled until OHA has confirmed that responses to all requests for information are complete.

OHA began accepting public comments on the proposed transaction in August 2023 and has received 153 [public comments](#) to date.

Map showing Oregon counties with a Kroger or Albertsons pharmacy location



The Kroger-Albertsons Community Review Board

Recruitment and Membership

In December 2023, OHA issued a call for applications for the Kroger-Albertsons CRB (“Kroger CRB”) and conducted outreach to recruit CRB members. Interested individuals were asked to complete and submit [application forms](#) (posted to HCMO’s website) by January 19, 2024. The recruitment period was open for approximately six weeks.

To be eligible for the CRB, members must live or work in an impacted area, have the ability to actively participate, and have relevant knowledge, experience, or background to contribute. Members can include people who live and work in affected communities, consumer advocates, health care experts, and health care providers. Members could be a patient or consumer, live near a facility, or have specific health care needs. No more than one third of the members may be people who represent institutional health care providers such as hospitals or health systems. Based on these criteria, OHA appointed seven community review board members.

Kroger CRB Members

- Jeanette Baxter
- David Hill
- Laura Johnson
- Dan Kennedy
- Kevin Knutson
- Craig Newton
- Alyssa Penicook

Meetings and Public Hearing

The Kroger-CRB first convened on April 4, 2024, and held a total of six regular meetings and one public hearing. These are summarized in the table below. All meetings were held virtually, hosted by OHA staff and facilitated by Artemis Consulting. Meetings were open to the public and conducted under the provisions of Oregon Public Meetings Law (ORS 192.610-690). A quorum of members was present at all meetings. Please see **Appendix A** for links to meeting materials and recordings.

Meeting Date	Purpose
04/04/2024	Orient members to HCMO, review the Kroger CRB processes and agreements, and discuss whether to hold a public hearing.
04/10/2024	Discuss the proposed transaction, the Oregon pharmacy landscape, why consolidation matters for healthcare, potential impacts in Oregon, and discuss members’ questions about the transaction.
04/24/2024 (Public Hearing)	Provide information about the proposed transaction and OHA’s review, hear from representatives from Kroger and Albertsons, and hear public comments.
05/09/2024	Discuss HCMO enforcement mechanisms, process questions, and key themes from public comments. Debrief public hearing and discuss impact the proposed transaction may have on the community, opportunities the proposed transaction may provide, CRB member concerns, and any outstanding questions members need answered to make a recommendation.
05/15/2024	Review responses from entities to requests for information, review issues raised by the Kroger CRB to date, and discuss ways to address concerns and support opportunities raised by the Kroger CRB

Meeting Date	Purpose
05/29/2024	Continue discussion from the last meeting on ways to address concerns and support opportunities raised by the Kroger CRB. Review the recommendation framework. Discuss the Kroger CRB’s recommendation to OHA and use a consensus decision-making model to make a recommendation.
06/13/2024	Formally approve the Kroger CRB’s written recommendation to OHA.

During regular meetings, Kroger-Albertsons CRB members shared their experiences obtaining pharmacy services in their communities, knowledge from working as licensed pharmacists or in other health system roles, and thoughts about potential impacts of the transaction on health care access, cost, and equity. Additionally, members articulated their questions about the transaction and identified additional information to request from the entities that would inform their recommendation.

Under HCMO’s statute, a CRB may decide to hold up to two public hearings. At its first meeting, the Kroger CRB decided unanimously to hold a public hearing. The purpose of the public hearing was to obtain verbal testimony from Kroger, Albertsons, and C&S and provide an opportunity for members of the public to provide comments verbally.

The Kroger-Albertsons CRB developed [questions](#) for the entities to address during the April 24, 2024, public hearing. Kroger, Albertsons, and C&S were represented by the following individuals at the hearing:

- Colleen Lindholz, President, Kroger Health, The Kroger Co.
- Anthony DalPonte, Senior Vice President of Pharmacy, Albertsons Companies, Inc.
- Roxanne Schwans, Head of Pharmacy, C&S Wholesale Grocers, LLC

These representatives were sworn in and provided verbal statements in response to the CRB’s questions. Eight members of the public provided verbal comments at the public hearing. A recording of public hearing is published [online](#).

The Kroger CRB developed its recommendation to OHA at its fifth meeting on May 29, 2024. The board used a consensus decision-making model to develop its recommendation.

Concerns and Opportunities Surfaced

Kroger CRB members discussed their concerns with the proposed transaction and potential opportunities that could arise. Members’ concerns generally fell into the following categories.

- **The merger won’t address existing pharmacy access issues.** Pharmacy customers across Oregon are already facing long wait times and traveling further for services due to staffing shortages and closures. Community members have voiced concerns about understaffing at Fred Meyer’s pharmacies. Kroger, Albertsons, and C&S have not presented any plans to address these issues.
- **C&S lacks the necessary experience to successfully operate the pharmacies.** C&S has very limited experience operating pharmacies. Many pharmacies are closing because they are losing money. Despite their commitments to not close any pharmacies, there is a real risk that C&S will need to close some pharmacies.

- **The commitments made by Kroger, Albertsons, and C&S are unclear and lack specifics.** The entities have not provided sufficient detail to the public about how they will operate the pharmacies after the transaction. For example, they did not specify the duration of their commitments to keep pharmacies open and retain pharmacy staff.
- **There is no clear plan or commitment to improve pharmacy working conditions, benefits, or compensation.** Pharmacy staff across Oregon are working long hours and experiencing high levels of stress and burnout. The entities haven't provided enough information on how they would make things better for pharmacy workers. For example, C&S has not presented a detailed plan for transitioning and retaining staff.
- **People may lose access to their local pharmacy due to changes in the insurance plans accepted.** It's doubtful that C&S will be able to negotiate contracts with the various PBMs to keep pharmacies in the same insurance plan networks and keep prescription costs unchanged. Fred Meyer pharmacies are no longer in-network for customers with TRICARE or other Express Scripts coverage. When Kroger takes over Albertsons, the same may be true for Albertsons pharmacies.
- **Rural and some inner-city communities are particularly vulnerable to access changes.** Pharmacy options are already very limited for people in many rural and some inner-city communities. Further closures or other access changes could make things even worse and potentially cut off access to life-saving medications.
- **There is a real risk of repeating the mistakes of previous mergers.** The merger of Albertsons and Safeway and the sale of Bi-Mart pharmacies to Walgreens both resulted in pharmacy closures.
- **The transaction would reduce competition among retail pharmacies.** The merged company would be by far the largest retail pharmacy chain in Oregon. Pharmacy customers would no longer benefit from competition between Kroger and Albertsons. Independent pharmacies may have a harder time competing against an even larger chain.
- **Large corporate pharmacy chains have a track record of putting profits ahead of patients.** Corporate pharmacy chains often cut staffing to increase profits for their shareholders.

The Kroger CRB also discussed how its concerns could potentially be addressed; see **Appendix B** for a summary.

Members identified three areas of opportunity associated with the transaction:

- **The transaction could bring renewed focus on improving health.** Expanded one-stop shopping for food and prescriptions could have positive impacts on community health.
- **C&S could partner with communities.** It could be positive to have a new business in the community if they come in as a community partner.
- **There are opportunities to improve pharmacy access.** If the entities open new stores and staff existing pharmacies adequately, access could improve.

Recommendation

This section summarizes the Kroger CRB's recommendation to OHA and outlines the criteria considered by the Kroger CRB in reaching its recommendation.

Approval Criteria

To arrive at a recommendation, the Kroger CRB reviewed publicly available information and considered potential impacts of the transaction on pharmacy services in Oregon. The Kroger CRB assessed whether the transaction met the following approval criteria under OAR 409-070-0060(6).

1. There is no substantial likelihood that the transaction would: (must meet both criteria)
 - a. Have material anticompetitive effects in the region; and
 - b. Otherwise be hazardous or prejudicial to consumers or the public.
2. The transaction will improve health outcomes for residents of this state or benefit the public good and communities by: (must meet at least one of these criteria)
 - a. Reducing the growth in patient costs or maintaining sustainable cost growth;
 - b. Increasing access to services in medically underserved areas;
 - c. Rectifying historical and contemporary factors contributing to a lack of health equity or access to services; or
 - d. Improving health outcomes for residents of this state.

Kroger CRB members also considered whether any reasonable conditions could be placed on the transaction that would accomplish the goals set out in the above criteria.

Recommendation

After reviewing and considering all available information, the Kroger CRB recommended that OHA disapprove the proposed Kroger-Albertsons transaction.

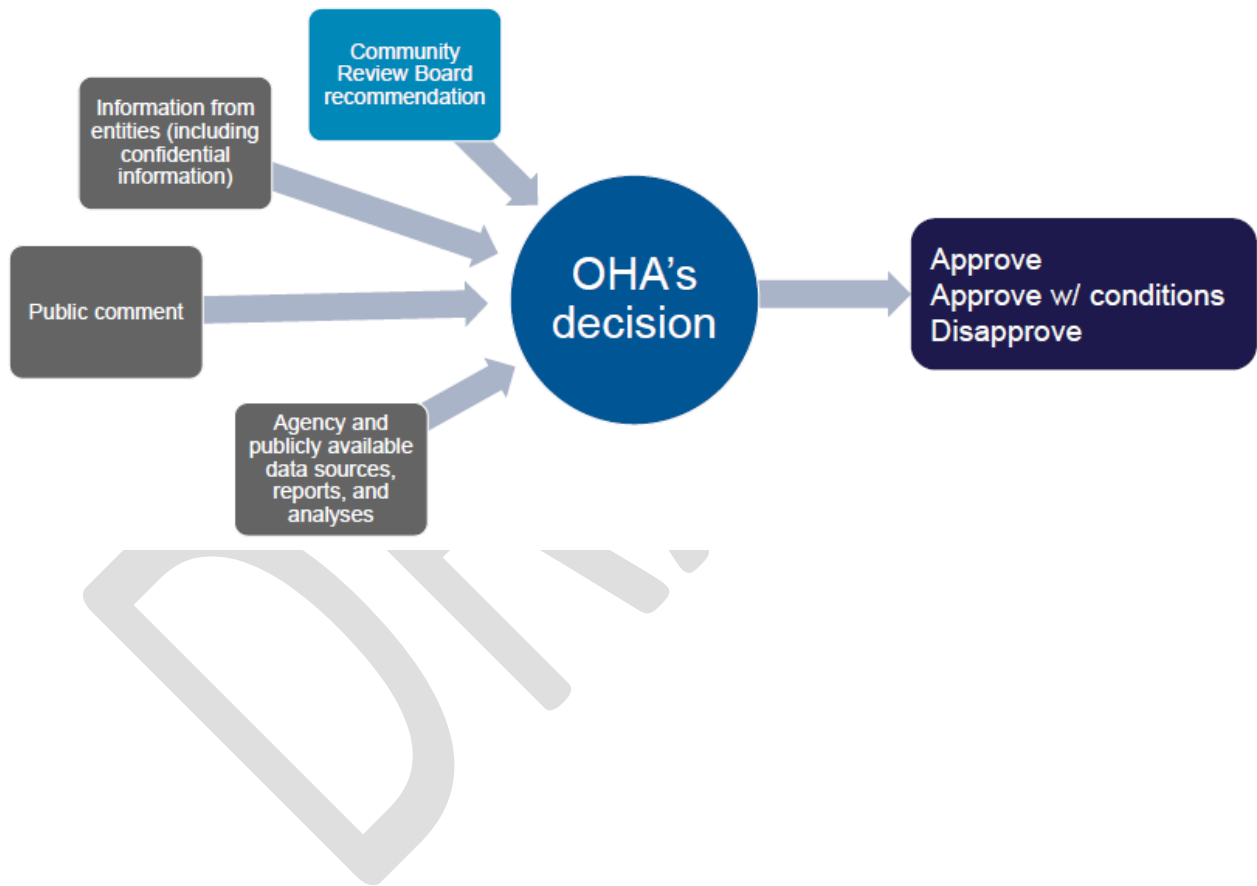
Based on the information made publicly available by Kroger, Albertsons, and C&S to date, the Kroger CRB unanimously concluded that the transaction does not meet any of the approval criteria under consideration. The Kroger CRB found the following:

- The transaction is likely to reduce competition among pharmacies in Oregon.
- The transaction is likely to be hazardous or prejudicial to consumers or the public.
- The transaction is unlikely to reduce patient costs or maintain sustainable cost growth.
- The transaction is unlikely to increase access to services.
- The transaction is unlikely to advance health equity or improve access to services.
- The transaction is unlikely to improve health outcomes for residents of this state.

The Kroger CRB's recommendation letter to OHA, attached as **Appendix C**, summarizes the reasoning behind these findings.

Next Steps

The Kroger CRB is expected to approve the recommendation letter at the June 13, 2024, meeting. The recommendation will be sent to OHA’s leadership on June [XX], 2024. OHA will consider the Kroger CRB’s recommendation as part of its comprehensive review, along with information provided by the entities, public comments, and other data and analyses. Once its comprehensive review is complete, OHA will issue a decision about whether the transaction may proceed as proposed. OHA may decide to approve the transaction, approve with conditions, or disapprove. Per state law, if OHA’s decision does not align with the Kroger CRB’s recommendation, OHA must explain its reasoning.



Abbreviations

CRB	Community Review Board
DOJ	Oregon Department of Justice
HCMO	Health Care Market Oversight program
OAR	Oregon Administrative Rule
OHA	Oregon Health Authority
ORS	Oregon Revised Statute
PBM	Pharmacy Benefit Manager

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Appendices

Appendix A: CRB meeting materials

Meeting	Meeting Materials
Meeting 1: April 4, 2024	Meeting recording <ul style="list-style-type: none"> • Meeting summary • Agenda • Slide presentation • Community Review Board Guide
Meeting 2: April 10, 2024	Meeting recording <ul style="list-style-type: none"> • Agenda • Slide presentation • Letter requesting entity attendance at public hearing
Public Hearing: April 24, 2024	Meeting recording <ul style="list-style-type: none"> • Agenda • Questions for Kroger, Albertsons, and C&S • Slides
Meeting 3: May 9, 2024	Meeting recording <ul style="list-style-type: none"> • Agenda • Slides
Meeting 4: May 15, 2024	Meeting recording <ul style="list-style-type: none"> • Agenda • Slides
Meeting 5: May 29, 2024	Meeting recording <ul style="list-style-type: none"> • Agenda • Kroger-Albertsons Equity Analysis • Slides
Meeting 6: June 13, 2024	Meeting recording <ul style="list-style-type: none"> • Agenda • Slides

Appendix B: Potential Ways to Address Concerns Raised by the Kroger CRB

Concern	Potential Ways to Address
The merger won't address existing access issues	<ul style="list-style-type: none"> • A framework for assessing capacity needs and providing notice when capacity will be exceeded. • A guarantee from the entities that access will be improved, with examples • A commitment to improve access • Provide evidence of the company working to understand their communities in Oregon • Commit to not closing any stores for 10-15 years following the transaction's close • Implement longer opening hours for pharmacies • Commit to offer or continue to offer online prescription refills • Implementation plan for digital pharmacy, including plans and timelines for transitioning to C&S mobile pharmacy platform
The lack of a plan to address staffing and workforce	<ul style="list-style-type: none"> • Provide detailed plan for C&S' hiring and retention of pharmacy employees, including both pharmacists and pharmacy technicians. • Commit to minimum staffing levels • Commit to staffing an additional pharmacist to be responsible for vaccinations if needed • Adopt a specific framework for assessing pharmacy staffing needs, including metrics and thresholds • Give frontline pharmacy managers the ability to call in more staff
That C&S lacks pharmacy experience	<ul style="list-style-type: none"> • Commitment by C&S to hiring enough frontline and upper management/operations staff with pharmacy experience. • Commitment by Kroger to provide the necessary support to C&S for operating pharmacies • Detailed plan for how Kroger will support C&S in operating pharmacies
The merger will reduce competition among pharmacies	No suggestions to address
Equity concerns for different communities	<ul style="list-style-type: none"> • Research by C&S on pharmacy needs of communities in Oregon where stores are being divested. • Engagement by C&S with communities in Oregon to understand pharmacy needs. • Commitment to not close pharmacies in rural areas. • Commitment to continue offering vaccination services at current or expanded levels. • Offering home delivery of prescriptions. • Plan for supporting employee diversity and creating a discrimination-free work environment

Concern	Potential Ways to Address
Repeating mistakes from past transactions	<ul style="list-style-type: none"> • Financial information demonstrating that financial performance/profitability of divested stores is at least equivalent to Kroger-acquired stores • See suggestions for workforce, access, pharmacy experience
Profit over patients	<ul style="list-style-type: none"> • More focus on improving the customer experience by gathering feedback/data from customers and developing performance metrics around service quality
There are unclear commitments from the entities	<ul style="list-style-type: none"> • Provide a clear timeline and commitment to keeping stores open; a plan to improve access; a plan to minimize impact on independent pharmacies

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Appendix C: Recommendation Letter to OHA

[[TO BE ADDED]]

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