

The following opinion -- by way of an Open Letter to the Governor and Attorney General-- appeared in the Lund Report (November 19, 2024).

Immediately before Election Day, the Oregon Health Authority completed its mandated preliminary antitrust review of the controversial proposal for OHSU to purchase the Legacy Health System. On November 4, the Authority's Health Care Market Oversight program rendered an equivocal assessment of the proposed agreement and immediately opened a comprehensive review that could take six months or more to complete.

Whether the Health Authority has the necessary capacity and single-minded commitment to make the critical antitrust examination demanded by a transaction of this scope and unique public importance is open to debate. If ultimately approved by OHA, the consolidation of OHSU and Legacy will reduce the number of competing healthcare options available in the marketplace from four (Kaiser, Providence, Legacy, and OHSU) to three. Beyond the direct consequences for the competitive landscape, the consolidation promises to have important implications—pro and con-- for the experience of patients, practitioners, the healthcare workforce, and Oregon's medical ecosystem.

If conducted according to the 2021 Oregon Market Oversight authorizing legislation, the review process will weigh the beneficial impact of the consolidation on cost, quality, access, and equitable service distribution against its competing risks. A recent issue

paper that reviewed a portfolio of completed (and far less complex) transactions in Oregon was submitted to state officials by a small group of senior-level, independent healthcare analysts. (I was a co-author). It found serious shortcomings with the OHA review process. The Authority's preliminary assessment of OHSU-Legacy does little to mitigate the concerns previously highlighted. https://www.oregon.gov/oha/HPA/HP/HCMOPageDocs/HCMO_Issue_Paper.pdf

By dint of the complexity, financial stakes, and public importance of the OHSU-Legacy transaction, the governor and the newly elected attorney general will inevitably be drawn into the controversy. And so they should be. They have vital roles to play to make certain the Health Authority does what is needed to safeguard the public interest and to counterbalance the parochial interests of the applicants.

In broad strokes, here are just a few of the weaknesses Governor Kotek and Attorney General-Elect Rayfield should address as top priorities:

1. OHA needs to demand far more from the transacting parties to explain their plans for the new, consolidated entity. Former Governor John Kitzhaber recently referred to this as OHSU's "intentions and strategic vision". OHA needs to require more specificity from the applicants by way of underlying assumptions and supporting evidence. It needs to be far more probing about key assertions advanced by the applicants. For example, OHSU-Legacy argue that the transaction is needed to stabilize Legacy's

financial status by addressing the volatility of its operating results. (Annual audit reports, however, suggest that Legacy has been affected more extensively by its investment performance than by the inadequacy of reimbursements).

The applicants also argue that the impact on costs would be negligible because the two systems are “complementary” and thus their consolidation would produce synergistic financial results. These are dubious propositions that demand rigorous scrutiny. OHA has authority to retain outside consultants to shore up its analytic capability at no cost to the state. The governor and AG should insist that OHA does precisely that.

2. The OHA Review Process is opaque and fails to meet the foundational legislative goals of transparency and public accountability. Applicants claim virtually unfiltered authority to declare that any data or information provided to OHA represent non-disclosable trade secrets or confidential documentation. Applicants have taken full advantage of this asserted authority to deny public access to the most consequential information. Secrecy even extends to the Community Review Panels created by statute to provide some vestige of public oversight. This makes a complete mockery of public accountability and should be a top priority for the governor and attorney general.

OHA has the authority to challenge claims of trade secrecy but has not done so. In specific response to the Issue Paper previously cited, OHA asserted “we are now scrutinizing entities’ claims of trade secret before we deem an entity’s notice of

material change transaction complete.” A public records request in the OHSU matter, however, documents that in no instance did OHA deny or even challenge a claim of trade secret before it accepted the notice of material change. Perhaps most important, OHA has the authority to reject applicants’ claims when it deems the public interest demands open access. The governor and attorney general should insist that OHA makes full and reasonable use of this countervailing public interest authority.

The proposed acquisition of Legacy by OHSU could not be more consequential for Oregon and Oregonians. It would affect the direction of patient care, the cost and accessibility of services, the medical workforce, the future of Oregon-owned health institutions, and the future of OHSU as a Medical School. It will take a significant commitment on the part of the Governor and the incoming Attorney General to ensure that the review process works effectively in the public interest.

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