Hospital Association of Oregon

November 21, 2024

Health Care Market Oversight
Oregon Health Authority
500 Summer Street, NE, E-20
Salem, OR 97301-1097

Submitted electronically to: HCMO.info@oha.Oregon.gov; zachary.k.goldman@oha.oregon.gov

RE: Health Care Market Oversight Program Proposed Permanent Rules OAR 409-070-0000 through 409-070-0085.

The Hospital Association of Oregon appreciates the opportunity to provide written comments on the updated proposed revisions to the permanent rules for the Health Care Market Oversight ("HCMO") program, filed on October 3, 2024.

In our letter to the Oregon Health Authority (OHA) dated September 11, 2024, the Hospital Association raised several concerns about a prior version of these proposed rules. We are disappointed that OHA has not addressed or responded to those concerns. Accordingly, this letter reiterates those concerns while raising a new concern about a rule change that appears to conflict with the HCMO program's authorizing statute.

In 2021, the Oregon legislature passed HB 2362, a state law creating the HCMO program. The HCMO program gives the Oregon Health Authority (OHA) significant power to approve, disapprove, or approve with conditions "material change transactions" involving health care entities. Given the unprecedented and ill-defined delegation of that power to OHA, the Hospital Association filed a complaint in federal court challenging HB 2362 on constitutional grounds. That litigation is ongoing, and the Hospital Association continues to believe that the HCMO violates the federal and state constitutions. Nothing in this letter should be interpreted as a waiver or compromise of the Hospital Association's position or arguments in that litigation.

The Hospital Association is engaging in this rulemaking process to try to help OHA create a more efficient program. Although we hope our suggestions help to achieve those objectives, we continue to believe that OHA cannot cure the fundamental constitutional defects through rulemaking.

4000 Kruse Way Place
Building 2, Suite 100
Lake Oswego, Oregon, 97035

Phone: 503.636.2204
Email: info@oregonhospitals.org
Web: oregonhospitals.org

409-070-0005 Definitions

Person

~~(24) "Person" has the meaning given in ORS 731.116.~~

(24) "Person" means an individual, corporation, association, partnership, limited liability company, limited liability partnership, political subdivision, joint stock company, trust or unincorporated organization, or an entity or combination of entities similar to the entities described in this paragraph.

This proposed change substantially expands the scope of the definition of person and creates ambiguity. For example, when would an "entity or combination of entities" qualify as a person? Does it depend on whether there is common ownership? Does a contractual relationship qualify? Does the HCMO program now apply to counties because a "person" includes political subdivisions?

We are aware of no issues in applying the existing definition of "person," which aligns with the intended scope of the statute.

- ***Request***: We request that OHA retain the existing definition of "person" at OAR 409-070-0005(24) and not adopt the proposed revision.

  (24) "Person" has the meaning given in ORS 731.116.

409-070-0015 Materiality Standard

Newly Organized Legal Entity

(1) Pursuant to ORS 415.500(6) and (9) and ORS 415.501(4), a covered transaction under OAR 409-070-0010 is a material change transaction and ~~shall~~ must be subject to review under these rules if:

(a) At least one party to the transaction had average annual revenue of $25 million or more in the party's three most recent fiscal years; and

(b) Another party to the transaction:

(A) Had average annual revenue of $10 million or more in that party's three most recent three [sic] fiscal years; or

(B) If such party is a newly organized legal entity, is projected to have at least $10 million in revenue over its first full year of operation at normal levels of utilization or operation. A party is a newly organized legal entity if:

~~(i) The entity is newly formed or capitalized in connection with~~ the ~~transaction or in connection to a health care entity for the purposes of a transaction including but not limited to a special purpose entity; or~~

~~(ii) The~~ entity is an existing entity whose form of ownership is changed in connection with the transaction. Changes in the form of ownership include but are

4000 Kruse Way Place
Building 2, Suite 100
Lake Oswego, Oregon, 97035

Phone: 503.636.2204
Email: info@oregonhospitals.org
Web: oregonhospitals.org

not limited to a change from physician-owned to private equity-owned and publicly-held to a privately-held form of ownership.

We support the deletion of language previously included in OAR 409-070-0015(1)(b)(B)(i), including the text related to a "special purpose entity," as this language was confusing and arbitrary in its application. Whether a transaction is subject to review should not turn on whether an entity chooses to effectuate the transaction via a subsidiary, as this has no bearing on the purpose, significance, or effect of the transaction.

We have concerns with OAR 409-070-0015(1)(b)(B)(ii). Specifically, what does it mean for an entity to change its "form of ownership"? We are not aware of a legal definition of "form of ownership," and the examples provided ("physician-owned" and "private equity-owned") appear to refer to types of owners, rather than "form of ownership." It is also not clear what standards parties should use to identify their existing "form of ownership." And it is not clear what standards OHA will use to determine whether the form of ownership has "changed." Moreover, the statute does not include the phrase "form of ownership," nor does it give OHA the authority to review a transaction solely based on the identity of the purchaser (e.g. a nonprofit rather than a physician).

Instead, the provisions regarding "newly organized entity" should apply only if the formation of such an entity is itself a covered transaction. The formation of an entity can be a covered transaction only under OAR 409-070-0010(1)(e) (*i.e.* a new partnership, joint venture, accountable care organization, parent organization or management services organization that will reduce essential services or combine providers in contracting payment rates). Accordingly, all language regarding "form of ownership" should be deleted and replaced with a definition of newly organized entity that cross references OAR 409-070-0010(1)(e).

- ***Request***: We request that OHA revise the proposed rule at OAR 409-070-0015 (1)(b)(B) as follows:

  If such party is a newly organized legal entity, is projected to have at least $10 million in revenue over its first full year of operation at normal levels of utilization or operation. A party is a newly organized legal entity if it is an entity described in OAR 409-070-0010(e).

409-070-0015 Materiality Standard

In-State Entity

(2) A covered transaction under OAR 409-070-0010 that qualifies as material under paragraph (1) of this rule ~~shall~~must be subject to review under these rules notwithstanding that the transaction

4000 Kruse Way Place
Building 2, Suite 100
Lake Oswego, Oregon, 97035

Phone: 503.636.2204
Email: info@oregonhospitals.org
Web: oregonhospitals.org

involves a health care entity ~~located~~ in this state and an out-of-state entity if the transaction may increase the price of health care services or limit access to health care services in this state.

(a) For the purpose of these rules, an entity is considered in-state if it:

(A) is based or domiciled in Oregon;

(B) owns or operates business locations in Oregon;

(C) is registered with the Oregon Secretary of State to conduct business in Oregon;

(D) is engaged in profit-seeking activity in Oregon; or

(E) provides health care services to residents of Oregon.

The definition of "in-state" entity is overly broad and vague. An entity should not be considered "in-state" merely because it "provides health care services to residents of Oregon." This would render a Florida entity "in-state" merely because it treats an Oregon resident who is visiting Disney World. It would be a waste of taxpayer dollars and government resources for OHA to review transactions involving entities that do not provide any services in the state. Similarly, there is no accepted definition of what it means to be "engaged in profit seeking activity in Oregon." Does this mean a nonprofit entity can never meet this standard? What if the company serves patients in Oregon, but pursuant to a contract in another state? This language creates unnecessary ambiguity.

- ***Request***: We request that OHA: define "in-state entity" based on in-state activities. Specifically, we request that OAR 409-070-0015(2)(a) read in whole:

(a) *For the purpose of these rules, an entity is considered in-state if it:*

(A) is based or domiciled in Oregon, or

(B) is registered with the Oregon Secretary of State to conduct business in Oregon.

409-070-0015 Materiality Standard

Out-of-State Entity

(2) A covered transaction under OAR 409-070-0010 that qualifies as material under paragraph (1) of this rule ~~shall~~ must be subject to review under these rules notwithstanding that the transaction involves a health care entity ~~located~~ in this state and an out-of-state entity if the transaction may increase the price of health care services or limit access to health care services in this state.

. . .

(b) An entity that is domiciled outside of Oregon and registered to conduct business in Oregon may be considered out-of-state under these rules if:

(A) the entity served no more than 100 Oregon residents annually for each of the three previous fiscal years; or

(B) the entity is a health care insurer, the proposed transaction involves only health care insurers, and the combined market share held by the health care insurer immediately after the completion of the proposed transaction does not exceed five percent of the total market share in any market.

4000 Kruse Way Place
Building 2, Suite 100
Lake Oswego, Oregon, 97035

Phone: 503.636.2204
Email: info@oregonhospitals.org
Web: oregonhospitals.org

This out-of-state criteria has no basis in the statute, and we oppose it. The statute simply uses the phrase "out-of-state entity." The phrase "out-of-state entity" has a common meaning, and we should expect that is what legislators expected when they reviewed this statute.

The rule that OHA proposed creates an arbitrary standard (no more than 100 Oregon residents in each of the last three years) that has no basis in statute, and it will create practical challenges. First, this 100 Oregon residents threshold will result in OHA reviewing many transactions that have no plausible impact on the state. Oregon residents routinely seek services at out-of-state providers, either because they travel to a center of excellence (e.g. St. Jude Children's Research Hospital) or seek care while on vacation. Accordingly, a test solely based on serving Oregonians will invariably capture entities that conduct no in-state business, contravening the legislature's intent to exempt out-of-state entities from the statute.

Moreover, multi-state health care entities frequently serve a nominal number of Oregonians despite having no meaningful in-state presence. It would be a waste of taxpayer dollars and government resources for OHA to review a transaction involving an entity that, for example, served 101 Oregon residents three years ago and for each year since then. Any threshold for determining whether an entity is out-of-state should take into account whether the entity has sufficient in-state business to have a meaningful impact on care delivery.

And finally, not all health care entities have an effective way of tracking an individual's "residence." Mailing addresses and place of service are imperfect proxies for an individual's actual place of residence. This is especially true with entities that provide services in states bordering Oregon.

An out-of-state entity should be any entity that does not provide patient care services in Oregon or does not derive substantial revenue from the provision of health care services in Oregon.

- ***Request***: We request that OHA revise OAR 409-070-0015(2)(b)(A) as follows:
  An entity that is domiciled outside of Oregon and registered to conduct business in Oregon shall be considered out-of-state under these rules if the entity collected less than $10 million in net patient revenue from services provided in Oregon over the last fiscal year.

4000 Kruse Way Place
Building 2, Suite 100
Lake Oswego, Oregon, 97035

Phone: 503.636.2204
Email: info@oregonhospitals.org
Web: oregonhospitals.org

409-070-0015 Materiality Standard

Increase the price or limit access

ORS 415.500(6)(a)(B) dictates that a transaction involving an out-of-state entity will nonetheless be subject to review if it "may result in increases in the price of health care or limit access to health care services in this state." The proposed permanent rules provide no guidance on how OHA will assess whether a transaction "may increase the price of health care services or limit access to health care services in this state."

The guidance[1] published by OHA on this subject, which was effective July 19, 2024, provides little clarity and seems to suggest (wrongly) that the out-of-state exception is never available. The guidance states that a transaction "may increase the price of health care services" if the transaction is "*[a]ny type of consolidation*, including horizontal, vertical, and cross-market consolidation." (emphasis added). Every transaction results in some level of consolidation. So, under OHA's guidance, how would a transaction ever qualify for the exception created by the legislature?

Similarly, the July guidance states that a transaction has the potential to limit access to health care services "**unless** the transaction is structured so as to preclude any changes in decision-making authority pertaining to access to health care services in Oregon, including the types of services available, staffing of services, contracting with payers, and any other matters that have the potential to change access to health care services for people in Oregon." (emphasis in original). A change of control transaction, by definition, changes decision-making authority (see OAR 409-070-0005(8)). Thus, read literally, this OHA guidance suggests that no change of control transaction could ever qualify for the out-of-state exception. Such unclear, standardless guidance invites arbitrary enforcement.

- ***Request***: We request that OHA revise the proposed rules to include objective standards to determine whether a transaction qualifies for the out-of-state exception at OAR 409-070-0015(2), and that such standards exempt transactions involving out-of-state entities that have no reasonable likelihood of increasing costs or reducing access.

409-070-0050

Retention of Outside Advisors

(1) Pursuant to ORS 415.501(14), the Authority or the Department of Justice may retain at the expense of the parties to a material change transaction any actuaries, accountants, consultants,

[1] OHA, HCMO Guidance, Out-of-State Entities (July 19, 2024) available at https://www.oregon.gov/oha/HPA/HP/HCMOPageDocs/hcmo-out-of-state-entities.pdf

4000 Kruse Way Place
Building 2, Suite 100
Lake Oswego, Oregon, 97035

Phone: 503.636.2204
Email: info@oregonhospitals.org
Web: oregonhospitals.org

legal counsel and other advisors not otherwise a part of the Authority's staff as the Authority may reasonably need to assist the Authority in reviewing the proposed material change transaction. The ~~retention of such advisors shall not be subject to any otherwise applicable procurement process, provided that the Authority or the Department of Justice, as applicable, shall make a determination that such advisors have the requisite qualifications and expertise to review the proposed transaction. The Authority or the Department of Justice, as applicable, shall~~ Authority or the Department of Justice, as applicable, must require that the retained advisors certify…

OHA engages outside advisors to assist OHA in its review of transactions. OHA passes through the costs of its outside advisors to the parties to the transaction, such as a hospital. The cost of OHA's outside advisors is an extraordinary burden on the parties to a transaction, often far outstripping the baseline filing fees. Currently, the parties have no ability to audit or challenge an invoice, and OHA has no incentive to limit the costs passed through to the parties.

- ***Request***: We request that OHA clarify the intent and effect of this proposed change and put processes in place to bring transparency and oversight to the fees charged by outside advisors.

409-070-0062 Community Review Board

(4) Community review board members ~~shall~~must declare any potential or actual conflict of interest by filing a notice, pursuant to ORS 415.501(11)(b). A notice of conflict of interest for an appointed community review board member will be made public. If the Authority determines that a member of the community review board has an actual conflict of interest, the member ~~shall~~must abstain from participating in community review board actions related to the conflict of interest. A conflict of interest exists when a community review board member:

~~(a) Is employed by an entity that is a party to the transaction under review;~~

~~(b) Is employed by a similar sized competitor to an entity that is a party to the transaction under review;~~

(c) . . .

If read independently, this proposed change would appear to permit OHA to appoint to the community review board both (a) an employee of an entity that is party to the transaction and (b) an employee of a competitor to an entity that is a party to the transaction. However, ORS 415.501(11) prohibits such appointments. The statute dictates that:

4000 Kruse Way Place
Building 2, Suite 100
Lake Oswego, Oregon, 97035

Phone: 503.636.2204
Email: info@oregonhospitals.org
Web: oregonhospitals.org

The authority *may not* appoint to a review board an individual who is employed by an entity that is a party to the transaction that is under review or is employed by a competitor that is of a similar size to an entity that is a party to the transaction. (emphasis added.)

Accordingly, this proposed rule appears to permit what the HCMO authorizing statute prohibits.

- **Request** We request that OHA avoid any statutory conflict by retaining the existing rule text, which prohibits OHA from appointing to the community review board either employees of an entity that is a party to the transaction or employees of competitors to an entity that is a party to the transaction.

409-070-0082

Follow-up Analyses After the Material Change Transaction

(2) The Authority may require that the parties provide such information, reports, analyses and documentation as the Authority may require in order to monitor and assess the impacts and effects of the material change transaction as required in ORS 415.501(19), including specifically, but without limitation, the effects and status of the material change transaction under OAR 409-070-0065 and OAR 409-070-0060(5).

Any follow-up review should focus on specific issues of concern identified in the initial review and should not burden the parties to provide data that is either irrelevant to the initial approval decision or that OHA could obtain elsewhere (e.g. from the APAC database).

- ***Request***: We request that OHA revise OAR 409-070-0082(2) as follows:

  (2) The Authority may require that the parties provide such information, reports, analyses and documentation as the Authority may require in order to assess the entities' compliance with conditions placed on the transaction, if any, as required in ORS 415.501(19).

409-070-0085 Information Requests

The Authority may request additional information, or clarification of submitted information, from parties to proceed with its review of a material change transaction under these rules. The Authority must notify the parties of the information or clarification that is required to be submitted to the Authority, and the parties must promptly reply to such requests. The running of the period for review of the material change transaction will be tolled upon such notification and will resume when the Authority deems the information request to be complete.

4000 Kruse Way Place
Building 2, Suite 100
Lake Oswego, Oregon, 97035

Phone: 503.636.2204
Email: info@oregonhospitals.org
Web: oregonhospitals.org

We understand OHA's need to collect information from the parties and the problems that can arise if the parties do not respond promptly. However, the automatic and unilateral tolling of the 180-day review period for each information request exceeds OHA's statutory authority and is unnecessary given available alternatives.

The HCMO authorizing statute is clear: OHA "*shall* complete the comprehensive review no later than 180 days after receipt of the notice *unless* the parties to the transaction agree to an extension of time." ORS 415.501(7)(emphasis added). Nothing in OHA's authorizing statute gives OHA the authority to unilaterally extend this 180-day review period.[2] Indeed, the obligation for OHA to complete its review within 180 days is the cornerstone of the overall structure of the statute. Parties to a material change transaction must file the notice no less than 180 days prior to the transaction date; OHA then has the parallel statutory obligation to complete its review within 180 days so that, if approved, the transaction can close on the transaction date. If OHA tolls the review period every time it requires clarification, the obligation to file 180-days in advance is meaningless as OHA has no parallel obligation to complete its review within any knowable timeframe.

Moreover, automatic and unilateral tolling is unnecessary. OHA could equally give the parties a reasonable deadline to respond to supplemental information requests. If the parties fail to respond by such date, OHA could give the parties an option either to (a) extend the review period by mutual consent, or (b) suffer a negative inference in the final review report based on their failure to respond in a timely manner.

We have no doubt that it is a difficult task for OHA to engage in these reviews and complete its work in a timely manner. It is an enormously burdensome and frustrating process for hospitals, too. The HCMO program is diverting dollars that could be spent on patient care to compliance with this program, and the HCMO program is slowing down transactions that benefit Oregon communities.

---

[2] ORS 415.501(10) states that OHA "may suspend a proposed material change transaction" if "necessary to conduct an examination and complete an analysis of whether the transaction is consistent" with the HCMO standards for approval. Suspending a transaction is not synonymous with tolling the review period. "Suspending" a transaction means preventing the parties from closing the transaction. This may be necessary if the parties fail to file a notice 180 days in advance, or if the parties fail to comply with conditions imposed by OHA. Language authorizing OHA to suspend a transaction does not give OHA the authority to suspend the review period, or alter OHA's separate obligation to complete its review within 180 days.

4000 Kruse Way Place
Building 2, Suite 100
Lake Oswego, Oregon, 97035

Phone: 503.636.2204
Email: info@oregonhospitals.org
Web: oregonhospitals.org

Hospitals, and other health care entities, do not have unilateral authority to say this is hard and give themselves more time. OHA does not have that authority either, and it should not purport to have it through this rule. All sides must work efficiently and effectively to ensure our communities have access to health care in this state. We strongly encourage OHA to simplify the process and this program, and create objective, clear standards for those under its enforcement authority.

- ***Request***: We request that OHA retain the existing language in OAR 409-070-0060(2) giving the parties at least 15 calendar days to respond to supplemental information request and remove any language purporting to give OHA the unilateral authority to extend the review period.

Ongoing Ambiguities

Finally, we encourage OHA to engage in further rulemaking to reduce the number of ongoing ambiguities in the law, such as ambiguities relating to the calculation of "revenue." As noted above, although we hope our suggestions help to achieve a more efficient program, we continue to believe that OHA cannot cure the fundamental constitutional defects through rulemaking.

Thank you for your consideration of our comments.

Sincerely,

Meghan Bours Slotemaker
Executive Vice President, General Counsel
Hospital Association of Oregon

4000 Kruse Way Place
Building 2, Suite 100
Lake Oswego, Oregon, 97035

Phone: 503.636.2204
Email: info@oregonhospitals.org
Web: oregonhospitals.org