Strengthening HCMO: An Issue Paper

Overview and Objectives

The OHA-HCMO program has a novel responsibility for safeguarding the public interest and public safety from the risks of hazardous corporate consolidations in the state's healthcare ecosystem. The pace of mergers, acquisitions, and other forms of consolidation has accelerated in Oregon and elsewhere. With it, reports of adverse effects on patients, providers, workers, and healthcare markets have become increasingly pressing.

Although the Legislature has created a program that in statute ensures that proposed transactions will not negatively impact access to health care, quality of patient care, costs for consumers and payers, or health equity, and has given OHA the structural tools for addressing the dangers of corporate consolidation, the HCMO program processes are still very much a work-in-progress. To best serve Oregonians, the program processes urgently need to be strengthened.

This Issue Paper

- Highlights some of the top-line problems associated with the structure, capacity and ability of the HCMO program to safeguard the public interest,
- Indicates sources of structural problems (e.g., statute, rules, internal program guidance) that may impede effectiveness,
- Provides examples of implementation problems drawn from selected transactions, and
- Suggests some constructive solutions for strengthening HCMO's structure and capacity.

Limitations: This Paper Is Not

- Meant to be a comprehensive or systematic review, evaluation, or analysis of the entire HCMO program.
- Intended as a source of detailed legislative or regulatory changes and/or language.

Proposed Solutions: Highlights

HCMO should:

- Sharpen its focus and give greater emphasis to the most significant cost, access, quality, equity, and competitive problems raised by particular transactions
- Make greater use of external subject matter experts, empirical studies, available datasets, and analytic methodologies to help focus and inform its analysis
- Seek historical experience data from applicants to deepen HCMO's understanding of their past performance record
- Revise its public records/trade secret disclosure policy in favor of providing far greater public access to applicant-supplied information
- Clearly define the strategy for using "conditions" and post-transaction compliance as ways of optimizing the performance of the healthcare system.

The Preliminary Review Process

Overall Observations: HCMO's approach to the Preliminary Review phase does not: (1) always focus on the most significant cost, access, quality, equity, and competitive problems presented by the particular transactions under review; (2) always take full advantage of external sources of subject matter expertise, empirical studies, available datasets, and analytic methodologies that could contribute to a more rigorous transaction review process; (3) offer a clear indication that HCMO is building a consistent and coherent sequence of precedents for the ongoing review of program criteria; or (4) have a well-defined strategy for using "conditions" and post-transaction compliance as ways of optimizing the performance of the healthcare system.

Because HCMO sometimes fails to delineate the problems of greatest potential importance to the transaction, it does not necessarily ask Applicants the most cogent clarifying questions, fashion follow-up information requests, identify the most appropriate databases, and apply the best analytic strategies and models. The observed result is that HCMO's Preliminary Review Process may address "low-hanging" questions at the expense of more consequential issues.

Selected Issues: (1) Private Equity Investment

Acquisitions and related transactions involving **private-equity investors** (PEI) are becoming more frequent in Oregon and elsewhere. Because PEI business models are typically structured to provide short-term financial returns, transactions may pose special problems in each of the domains reviewed by HCMO. For example, to extract value from acquisitions in the home health, hospice and palliative care sector as quickly as possible, PEI's tend to adopt profit-maximizing strategies that support margins in excess of 40% and look for opportunities to maximize short term capital gains by flipping assets.[1]

The **KAH (Gentiva)-Falcon** transaction (002) exemplifies HCMO's limited analysis of the potential impact of PEI ownership. While the Preliminary Review recognized the existence of potential problems involving billing practices, quality, and market concentration, it deflected the first (cost) to "follow-up review" and the second (quality) to a U.S. Senate investigation (which never materialized). As for the third, it found that concentration (measured by the HHI Index) did exceed HCMO's standard (in the Salem PSA) but concluded the "OHA does not have concerns about consolidation resulting from this transaction" and thus failed to even perform the cost-benefit analysis set forth in the Analytic Framework.

HCMO did not focus on the known impact of the Medicare Hospice Benefit's fixed per-diem payment methodology for quality, cost and access—as reported in the literature, litigation, and special studies--and failed to question how PEI's—as acquirers-- were likely to respond. While its Report on the KAH-Falcon transaction recognized the inadequacy of the administrative datasets used to measure quality,

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[1] See, Teno, Hospice Acquisitions by Profit-Driven Private Equity Firms (JAMA Health Forum 2021); Scheffler, Monetizing Medicine https://www.antitrustinstitute.org/wp-content/uploads/2024/02/AAI-UCB-EG-Private-Equity-Physician-Practice-Report-Addenda_FINAL.pdf; FTC v. US Anesthesia Partners https://litigationtracker.law.georgetown.edu/litigation/federal-trade-commission-v-u-s-anesthesia-partners-inc-et-al/; Willkie, Farr, Gallagher, FTC-DOJ-HHS Investigation of PEI https://www.willkie.com/-/media/files/publications/2024/03/ftc_doj_and_hhs_launch_cross_government_inquiry_on_private_equity_investment_in_healthcare.pdf; Bain & Co. Global Healthcare Private Equity Report 2024 https://www.bain.com/globalassets/noindex/2024/bain_report_global_healthcare_private_equity_2024.pdf); Appelbaum, Eileen, and Rosemary Batt. "Preying on the Dying: Private Equity Gets Rich." (2023).

cost, and access, there is no indication that it fully identified and made use of other available sources of data—public or private. For instance, HCMO could have but did not appear to request historical hospice data from Clayton, Dublier & Rice (CD&R), the equity-investor involved in this Project (and the purchaser of Humana's hospice business). It could have used these data to make a comparative analysis with projects that were not owned by PEI entities. Finally, in the KAH (Gentiva)-Falcon transaction, HCMO relied on Humana's maintenance of service commitment while noting that Humana intended to sell a major share of its hospice business. (HCMO did not reconcile the two).

Selected Issues: (2) Vertical Integration-Payor/Provider Conglomeration

Consolidation of payor entities (e.g. health insurance plans) with service providers (e.g. medical clinics, hospitals, physician groups) at different tiers of the health industry structure is an important component of the growing trend toward vertically integrated health service organizations.[2]

Vertical (payer-provider) integration is widespread in Oregon. Rising concerns, as illustrated by UnitedHealthcare (UHG), derive from the aggregate power payor entities have to drive cost, quality, and access to services and to restrict competition in local markets.[3]

OHA-HCMO reviewed a LHC merger Transaction (003) in 2022 and an Amedisys Transaction (014) in 2023-2024. The LHC home health and hospice transaction was approved in the Preliminary Review stage without conditions. The Amedisys transaction went onto Comprehensive Review.

Overall, HCMO's review of the LHC transaction was superficial and conclusory. It did not make a full-blown attempt to identify and drill down into the potential risk factors generated by the UHG home health and hospice merger proposal—either at the horizontal or vertical level-- and did not make findings based on specific facts. Instead, it dismissed risks casually and substituted insufficiently documented determinations that "we [OHA/HCMO] are "not concerned with" for affirmative findings premised on stated facts. Finally, even having recognized certain areas of uncertainty related to post-transaction performance, HCMO did not stipulate any conditions or establish a defined monitoring and compliance provision. The sole means of assuring compliance with a defined condition is to enforce the Applicant's responsibility to file answers to questions: there is no financial or behavior sanction and thus conditions are basically toothless. We believe sufficient authority exists for effective conditioning and compliance, but at this point, we will await OHA's assessment of this issue.

Soon after the approval of the LHC transaction, UHG submitted a proposal for the acquisition of another home health, hospice, and palliative care provider, Amedisys. If Amedisys and LHC combined in a division of UGC/Optum, it would be the largest provider of home health and hospice services

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[2] See, Rooke-Ley, Medicare Advantage en=WTUq1aMRT_8AAAAA:gBqejgxqnmNGlujpz3SObfknZyxTuG0YO_d3K8lulblNWWrx1uLYeNQKborGci2NAh1MP4-afb7EyLA; Federal Trade Commission, Complaint in the Matter of United Health Group and DaVita Inc; Kim, The Optum-Atrius Transaction https://www.proquest.com/docview/2798279384?fromopenview=true&pq-origsite=gscholar&sourcetype=Scholarly%20Journals.)

[3] For an overview of issues, see, Letter from Sen. Elizabeth Warren and Rep. Pramila Jayapal to Assistant Attorney General Jonathan Kanter re Amedisys (October 3, 2023). https://www.warren.senate.gov/imo/media/doc/2023.10.03%20Letter%20to%20DOJ%20and%20FTC%20re%20United%20Health%20Amedisys%20Acquistion.pdf)

nationwide. The Oregon Amedisys transaction raised both vertical and horizontal merger issues since LHC and Amedisys providers would operate in overlapping market areas.

Focusing on the preliminary review of the Amedisys transaction, HCMO compiled a comprehensive list of generalized public concerns associated with vertical consolidation but did not adequately probe either the vertical or the horizontal threats to competition, cost, quality, equity, or accessibility specific to this particular proposal. In addition, questions about data and related matters pose problems for the analysis and conclusions reported by OHA/HCMO.

Data Issues in the Process

One specific shortcoming is that the data reported in the two transactions are muddled and potentially incompatible. To start with, the market areas defined in the two transactions are inconsistent. In one transaction, for example, the PSA for home health and hospices in the Portland and Salem market are combined; in the other the PSA for Portland and Salem are analyzed and reported separately. Similar inconsistencies are found in the Grants Pass-Roseburg-Medford market areas. There is no indication that the reason for the inconsistency has to do with changing utilization trends at the zip code level. Inconsistent reporting makes the tracking of trends virtually impossible.

A related problem appears to be the inconsistency between pre and post- transaction HHI index values reported in the respective Reports. From what we have been able to see, the acquisition of Amedisys should increase home health and hospice concentration ratios in the Salem-Portland and Roseburg areas far more than the data would suggest. To the extent Transaction analysis presented in the Amedisys report is meant to reflect UHG's aggregate presence (LHC and Amedisys) in these market areas—as it should--a more detailed analysis of the data would be important.

Horizontal and vertical consolidation threats

Horizontal Analysis. We calculated the pre-transaction HHI Index Values for Home Health services in the combined Portland-Salem PSA from data reported in HCMO's LHC Preliminary Review Report and its Amedisys Report. In the LHC Report, the pre-merger HHI was 1909 (moderately concentrated). After the LHC acquisition-- but before any impact of the Amedisys acquisition-- the HHI in the combined Portland-Salem PSA rose to 4048 (highly concentrated). (The post-transaction HHI calculated by HCMO increased only to 4207—far less than we would have anticipated. (This has implications for the "level of concern" HCMO may express for the anticompetitive effects of the horizontal transaction. See, Appendix B of the Analytic Framework.)

Unless HCMO determined that the incremental anticompetitive impact of the Amedisys transaction was outweighed by a favorable impact on the availability of home health services to underserved populations, it would need to find that the calculated increase in the concentration ratio did <u>not</u> present a material threat to home health service prices (including copays), costs, and competition in the market area before approving the transaction. Clearly, as UHG/Optum increases its consolidated control of local markets, it will have additional leverage over prices. If the effects are not seen immediately following approval of a transaction, then they are likely to occur sometime thereafter. (To the extent UHG/Optum was to argue that each home health agency involved in the transaction would operate independently, it would be important for HCMO to require a formal statement that could be validated in post-transaction

compliance). Simulating the impact of the Amedisys transaction will pose a significant challenge to HCMO analysts.

Vertical Analysis. The effects of the Amedisys transaction for the well-being of patients and families merits special attention. Especially in a risk environment where value-based contracting is designed to determine financial outcomes for providers and payors, it is vital that payors (like UHG) not pressure care groups they own or influence to optimize margins at the expense of the care they deliver. This is always a threat of incentive reimbursement yet it is worth noting that HCMO explicitly established a condition to safeguard against clinical intrusion in the Agility-Keiper Spine Transaction (017).[4]

A second concern is that conglomerates such as UHG which control and try to maximize net revenue from various business units may have economic incentives that are not compatible with particular HCMO criteria such as equity.

One possible analytic model for looking directly at this potential problem would involve the organization of palliative services for fragile individuals often at the end of life. Ideally, a healthcare conglomerate like UHG/Optum, has the resources needed to organize and deliver services tailored to the clinical needs and wishes of patients and families. Case studies published by Optum Northern California report successful efforts to grow the palliative care business, serve more patients, reduce undesirable hospitalization and emergency care utilization rates, and improve patient-family satisfaction. At the same time, their reports clearly point out that they target palliative care to families able to contribute their own resources to the delivery of care. That would tend to exclude families without the time, financial, emotional capacity and other resources Optum says are needed to contribute to the co-production of care. A special analysis of the equitable distribution of palliative care services might be an approach to the clarification of these issues.

Selected Issues: (3) Serial Acquisitions

Antitrust regulators have begun to highlight growing evidence of a business strategy involving "serial acquisitions" (also known as "rollups") wherein an acquiring entity purchases numerous smaller-sized entities in a common market area over some period of time. Having aggregated its position, the acquirer adopts market-wide policies and practices that may have anti-competitive effects.

The Oregon Amedisys transaction is a representative type of rollup; it is one of many that UHG/Optum has launched in other states. As discussed above, the immediate impact along the I-5 Corridor is to concentrate home health and hospice markets without providing offsetting public benefits.

Following lawsuits against the acquirers of anesthesiology practices and dialysis providers by serial purchasers, the FTC is now undertaking a broader study of the potentially anticompetitive ramifications of serial acquisitions and has indicated an interest in learning about other examples.

It would be valuable if one aspect of HCMO's Comprehensive Review of the Amedisys deal involved an examination of anticompetitive business strategies at the PSA level. One of many possible issues could

[4] See, Order at section 2.d. https://www.oregon.gov/oha/HPA/HP/HCMOPageDocs/017-Agility-Keiper-order.pdf. Note also that UHG has had a prior history of intervening with physician practices for financial advantage. See, https://www.justice.gov/opa/pr/united-states-intervenes-false-claims-act-lawsuits-against-evercare-hospice-and-palliative).

focus on the use of monopoly power to leverage UHG/Optum-LHC-Amedisys contracting with other payors and its impact on market shares.

The Comprehensive Review Process

Many of the issues flagged in the Preliminary Review section, above, extend to the Comprehensive Review Phase of the HCMO process and will not be revisited here.

Instead, this section will concentrate on the need for HCMO to make better use of external subject matter expertise and public input and to address existing barriers to effective engagement.

HCMO could strengthen its review process by making the data gathering and public access provisions more robust.

We believe HCMO has sufficient legal authority to establish the framework of the application and the terms of its review process; to retain experts to assist in the Preliminary and Comprehensive review process (with full access to "confidential/trade secret data") and with full expenses borne by Applicants, to require Applicants to produce data and other information satisfactory to HCMO, and to suspend the review pending satisfaction of data requests.

In the Preliminary Review section, we observed that HCMO did not always focus its analysis as specifically as it could, did not necessarily frame its review in the most important issues, data, and analytic methods pertinent to the Application, and did not fashion and analyze the most informative follow-up data requests.

These are among the most important and fundamental shortcomings of the HCMO process. An important element of a remedial approach would involve more extensive and effective use of external subject matter experts to: (1) review and analyze Notices of Material Change ("Filings") and Requests for Emergency Exemption, (2) advise HCMO of issues pertinent to the application of statutory and regulatory review criteria and the Analytic Framework, (3) summarize the empirical literature and other sources of pertinent information (e.g. litigation, SEC filings, FTC, DoJ, Congressional and other public reports); (4) advise HCMO about existing data sets, and (5) assist HCMO frame initial information requests including data requirements and analytic methodologies. Analogous assistance would be called for in conjunction with the Comprehensive Review.

HCMO Rules contemplate convening Community Review Panels to advise the agency about issues of access, project scope, and change in market share. OAR 409-070-0062 provides that in deciding whether to convene a Community Review Panel, HCMO shall consider access, scope of the transaction, and change in market share. HCMO should clarify that these factors are not exclusive and that other factors such as cost, quality, equity, and public interest can also be a basis for convening a Community Review Panel.

The most glaring barrier to meaningful public engagement is that Community Review Panels have no access to the data and information currently designated as "confidential or trade secret protected" by Applicants. It is completely needless to argue this point except to question whether HCMO believes it has sufficient discretion on its own to overrule such designations and on what basis.

To overcome the barriers just addressed, we suggest that the Community Review Panel be given access to the data and information needed to fulfill its advisory responsibility for approval, disapproval, and

conditioning of transactions on the same terms and conditions as any external advisor to HCMO. If new legislation is required to facilitate this change, HCMO should explore provisional options such as appointing members of the Community Review Panels as expert advisors for purposes of the statute.

Further, to the extent the Review Panel must decide on technical issues related to the approval of transactions, members should have access to independent technical experts retained by HCMO with the costs borne by Applicants.

Finally, members of Community Review Panels should have authority to incorporate in the record of the transaction their views and comments pertaining to any explanation provided by HCMO for disagreeing with the Panel's recommendations. Those views should be posted on the HCMO Transaction Page. No additional authority is required for this change.

Summary

We hope our comments suggest areas OHA/HCMO and others including interested legislative and public stakeholders will agree are meaningful and achievable in practice. We hope they provide an agenda for discussion and that decision-level OHA/HCMO leaders will wish to engage us in consideration of specific reform measures and other considerations. We very much appreciate your full interest in this important matter.

Respectfully submitted, September 20, 2024,

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