

Oregon’s Health Care Market Oversight Program
Summary of Input Received and Changes to the Rules after the 3rd Rules Advisory Committee Meeting

December 3, 2021

The Oregon Health Authority has hosted three rules advisory committee meetings and has modified the proposed rules. This document summarizes the input received on the third draft of the rules and OHA’s responses. All drafts and materials are posted on the program website:

<https://www.oregon.gov/oha/HPA/HP/Pages/health-care-market-oversight.aspx>.

Definitions

Input Received	OHA’s response
The definition of “administrative services” should not exclude the provision of pharmaceuticals and additional details are needed to clarify this term.	OHA revised the definition of administrative services to specify “relating to, supporting or facilitating the provision of patient care and services.”
The term “services that are essential to achieve health equity” lacks clarity and a definition.	The rules refer to this phrase, as its in statute. OHA plans to initiate a technical advisory group (TAG) to discuss sub-regulatory guidance on this topic.
Some RAC members recommend the presumption of rebuttable control should be set at 51%, not 25%. Other RAC members agree that the proposed thresholds are adequate.	The proposed rules establish the presumption of rebuttable control for insurers at 10%, thereby aligning with Oregon’s insurance code. The presumption of rebuttable control for other health care entities continues to be presumed at 25% in the proposed rule. If a transaction is covered (and therefore subject to review) because there is an acquisition of control and the entity wishes to argue there is no actual control, the entity may submit the three-question Rebutting Presumption of Control form to OHA. If OHA finds that the applicant successfully rebuts the presumption of control and the only reason the transaction was subject to review was the change in the control, then the transaction will not be subject to review. OHA also revised the rules such that acquisitions of control and acquisitions of more than 50% of voting securities requires review, in accordance with the statutory language, which uses the term “partial or complete controlling interest”. Additional clarity was added to rule that control is irrebuttably presumed at greater than 50%.

The term “corporate affiliation” should be defined.	OHA revised the rules accordingly. OHA also defined “independent practice association”, “provider”, and moved the definitions of revenue that were previously in another section into the definitions section.
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Covered and Material Transactions

Input Received	OHA’s response
New contracts, new clinical affiliations, and new contracting affiliations are covered transactions only if they eliminate or significantly reduce essential services.	OHA revised the rules accordingly.
The reference to “the elimination or significant reduction of essential services” is not defined enough for an entity to clearly know if a proposed transaction is subject to review.	OHA proposes to keep the concepts in rule but also plans to initiate a technical advisory group (TAG) to inform sub-regulatory guidance on this topic. The proposed rules compel OHA to issue such guidance.
Entities should be able to more clearly discern if their proposed transaction is covered or not.	OHA removed the language about “significantly increase market concentration” and replaced with “consolidate or combine providers of essential services when contracting payment rates with payers, insurers, or coordinated care organizations” and “consolidate or combine insurers when establishing health benefit premiums” so that the criteria are more objective. OHA also reorganized the Covered Transaction section so it more closely follows the statute.
The reference to “may increase the price of health care services” in 409-070-0015(2) should be “will increase the price of health care services.”	The draft rules align with the statute, which uses the phrase “ <u>may result in increases</u> in the price of health care” in in Section 1 (6)(a)(B). (emphasis added)
The reference to prenatal care should change to pregnancy care.	OHA revised the rules accordingly.

Excluded Transactions

Input Received	OHA’s response
Transactions that are corporate restructures should be excluded.	OHA revised the rules accordingly. Transactions that do not change the ultimate ownership or control of the entity and do not result in the acquisition of control of the entity by a person not previously affiliated with the entity are exempt.

Fee Schedule

Input Received	OHA’s response
It is not clear how OHA decided on the fee amounts. What’s the basis for the fee sizes?	OHA posted a Fees Development Memo, which outlines the program costs.
The fees should be based on the size of the transaction, not the size of the entities engaged in the transaction.	The draft rules align with the statute, which states in Section 4 “the Oregon Health Authority shall prescribe by rule a fee to be paid under section 2 (3) of this 2021 Act, <u>proportionate to the size of the parties to the transaction</u> , sufficient to reimburse the costs of administering section 2 of this 2021 Act.” (emphasis added)

Required Forms and Content of Forms

Input Received	OHA’s response
The forms are too lengthy and too administratively burdensome	OHA revised the forms, which are now much shorter. The Notice of Material Change Form is now two pages of questions.
The standards listed for the Analytic Framework include comparing quality and access measures to performance in other states, yet in many cases Oregon leads other states and there are no sufficient comparisons.	OHA revised the rules accordingly.
The requirement for entities to submit definitive agreements after the fact is unreasonable.	OHA previously modified the rules to allow for a term sheet, instead of all definitive agreements, to be submitted along with the notice of material change transaction. The proposed requirement in rule for entities to eventually submit the definitive agreement aligns with the legislative intent, which requires OHA to review proposed transactions. The definitive agreement is the terms of the transaction.
Entities should be able to meet with OHA and discuss a proposed transaction.	OHA revised the rules accordingly by specifying the availability of both a pre-filing conference and, if necessary, a comprehensive review conference in which OHA would share its expectations for the review timing, use of outside experts, the potential for involving a Community Review Board, and other issues.

Emergency Transactions Exempt from Review

Input Received	OHA's response
The rules should exempt from review emergency transactions that are needed as a result of a public health emergency.	OHA added new language to this effect.
OHA should specify that a decision for an emergency exemption should be made in no more than five days.	The proposed rules do not reflect this suggestion. OHA understands that time is of the essence during emergency situations and will review an entity's emergency exemption application as quickly as possible. The Emergency Exemption Form has also been revised to clarify that only that form need be submitted.
The rules should align with statute regarding when OHA should exempt an emergency transaction: if the transaction is urgently needed to protect the interest of consumers <u>and</u> to preserve the solvency of an entity.	OHA modified the rules accordingly.
OHA should disclose annually the number of exempted transactions and specify in rule that excessive use of the emergency exemption will result in stricter application of the standard.	In future reporting OHA will disclose the number of exempted transactions, but such a requirement need not be in rule. The proposed rules for emergency exemption are narrow enough that codifying consequences to overusing the exemption process is unnecessary.

Preliminary 30-day Review

Input Received	OHA's response
The rules should allow for a preliminary review to exceed 30 days, if necessary and if the parties agree.	The previous draft of the rules allowed for this.
The passive approval process proposed for 2022 should extend through 2023.	The proposed rules do not reflect this suggestion. The proposed rules allow for ten months of program ramp-up period with the passive approval process.
The decision criteria listed in this section should include improving health outcomes	The rule references OAR 409-070-0060, which now specifies improvements in health outcomes.
The rules should clarify that if at least one of the criteria is met, a comprehensive review is not necessary.	The proposed rules state "if the Authority determines that the transaction meets one or more of the following criteria..." and in the list of criteria uses the word "or" in the second to last criteria. The rules are clear that if one criteria is met, a comprehensive review is not needed.
One of the evaluations OHA should conduct when reviewing a proposed transaction should be its	OHA will include this in the Analytic Framework, which will be a sub-regulatory document.

impact on clinical learning opportunities for the next generation of health care providers.	
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Comprehensive Review

Input Received	OHA's response
Community Review Board members should have to file conflict of interest statements.	OHA revised the rules accordingly.
The rules should specify additional details as to when OHA will require a comprehensive review and when a Community Review Board will be necessary.	The proposed rules include the statutory criteria for when a comprehensive review is required. OHA will publish sub-regulatory guidance to provide additional details.
The criteria in the proposed rules regarding when OHA would approve a transaction are too broad.	OHA revised the rules accordingly and now more closely aligns with the statutory criteria.
Only large transactions that involve for-profit or private equity entities, or those that are reportable to the Federal Trade Commission under the Hart-Scott-Rodino Act should be subject to a comprehensive review.	The proposed rules do not reflect this suggestion, and instead lists the criteria in statute for when a comprehensive review is required.
Entities should be able to withdraw the proposed transaction and no longer incur any additional costs borne by OHA's use of outside advisors.	OHA revised the rules accordingly.
An entity's "commitment to addressing health disparities" is ill-defined and does not fully consider a demonstrable track record.	OHA revised the criteria in this section and this wording is no longer used.

Retaining Outside Advisors

Input Received	OHA's response
Outside advisors should not possess a conflict of interest, should protect confidential information and the costs should be reasonable and actual.	OHA modified the rules accordingly.
Proposing entities should be notified if OHA is going to use outside advisors.	OHA modified the rules accordingly.

Contested Care Hearings and Continuing Jurisdiction

Input Received	OHA's response
An entity requesting emergency exemption should be able to contest OHA's determination.	OHA revised the rules accordingly.
An entity should be able to contest OHA's determination that a comprehensive review is required.	The proposed rules allow for entities to appeal any final determination OHA makes. If OHA cannot approve or approve with conditions a proposed transaction after preliminary review, OHA conducts a comprehensive review. This is

	<p>not appealable because no decision about the transaction has been made. After the final order has been issued, an entity may appeal OHA's decision that the transaction could not have been approved or approved with conditions after preliminary review.</p>
<p>OHA's continuing jurisdiction should be limited to only the conditions imposed from a review. Clarify that OHA does not have the authority to impose conditions on a transaction that was not reviewed.</p>	<p>OHA revised the rules accordingly.</p>