# Oregon Law to Enhance Oversight of Healthcare Mergers & Acquisitions Faces Legal Challenge

In recent years, increased scrutiny over the impacts of consolidation in the healthcare industry has driven both antitrust enforcers and policymakers at the federal and state levels to enhance their efforts to address and remedy the source of the issue by improving oversight and review of potential anticompetitive healthcare mergers and acquisitions, both before and after the transaction. As the federal agencies review and revise their merger review guidelines and reporting requirements, several states have also introduced legislation to enhance their review and oversight authority of healthcare transactions in their state.

In 2021, Oregon became one of the state leaders in expanded oversight authority of healthcare transactions through its Health Care Market Oversight Program, which sought to prevent anticompetitive consolidation in health care and maintain affordability of care. As the first state to give a health care market oversight agency the authority to block or place conditions on any healthcare entity transaction, Oregon is facing resistance and legal challenges to the law from industry groups. In this post, we take a look at what the law does, break down the legal arguments in the lawsuit filed against the state, and examine what it could potentially mean for other states looking to impose similar requirements.

**THE LAW: Or. Rev. Stat. §§ 415.500 et seq. (HB 2362)**

In the 2021 legislative term, the Oregon legislature passed House Bill 2362, which was signed into law and became effective January 1, 2022. The law, codified at Or. Rev. Stat. §§ 415.500 et seq., requires health care entities to provide prior notice and obtain approval from the Oregon Health Authority (OHA) before a material change transaction, defined in the statute as mergers, acquisitions or affiliations of an entity with an average of $25 million or more in net patient revenue in each of the preceding three fiscal years with an entity with an average of $10 million or more in net patient revenue in each of the preceding three fiscal years. It also

provides authority for OHA to establish review criteria for the approval of these healthcare transactions based on specified factors.

This pre-transaction review authority is one of the most expansive in the country. It applies to all healthcare entities including hospitals and physician organizations that meet the material change revenue threshold and gives OHA the authority to approve, conditionally approve, or disapprove the transaction based on whether the transaction has the potential to have a negative impact on cost, access, quality, and equity of health care services in Oregon. Notably, the new statutory authority provided OHA with the authority to develop and establish the review criteria by adopting rules necessary to carry out the provisions under the statute. Accordingly, under subsequently adopted sub-regulatory guidance Or. Admin. R. 409-070-0000 et seq., OHA established the Health Care Market Oversight (HCMO) program to review material change transactions.

Specifically, the HCMO program will first conduct a 30-day preliminary review and approve the transaction if it meets factors laid out in the statute. If the HCMO program determines that the transaction warrants comprehensive review given its size and effects, it can require the transaction to undergo a comprehensive review to determine if the transaction will: 1) have material anticompetitive effects in the region not outweighed by benefits in increasing or maintaining services to underserved populations; 2) be contrary to law; 3) jeopardize the financial stability of a health care entity in the transaction; or 4) be hazardous or prejudicial to the public (see Source authored report for details).

This comprehensive review must be completed within 180 days and OHA may conduct up to two public hearings to seek public input, to be held in the service area of the entities involved. The law also provides provisions for fees associated with the administrative review and penalties for noncompliance with the requirements under the law. Since its launch and implementation beginning March 2022, the HCMO program has reviewed a number of reported material change transactions and continues to do so.

**THE LAWSUIT: Oregon Association of Hospitals and Health Systems v. State of Oregon and Oregon Health Authority**

On October 3, 2022, the Oregon Association of Hospitals and Health Systems, the trade group representing hospitals in Oregon, filed a lawsuit in district court against the state and OHA, claiming that the law "gives OHA the unprecedented authority to approve, deny, and dictate the terms of a broad array of transactions and relationships involving health care entities" in violation of the 14th Amendment and the Oregon Constitution, and "threatens to deter or delay transactions that would benefit Oregon communities… and will add costs to [the] already strained health care system." Specifically, Plaintiffs argue that the law lacks sufficient standards by which to evaluate transactions, improperly expands the power of OHA, and imposes unnecessary delays that impede access to care.

Claim 1: Unconstitutional Vagueness of the Law

The Due Process Clause under the 14th Amendment of the Constitution requires that a law must give fair notice of what it prohibits and not be so vague that it authorizes random or discriminatory enforcement. The Plaintiffs claim that the language of the new law is so broad and vague that it establishes no standards for what conduct is prohibited or when penalties for noncompliance are triggered. As such, Plaintiffs argue that the law provides OHA with "boundless authority to deny or dictate conditions on a wide array of health care-related relationships (including contracts), partnerships, and transactions without any statutory limits on either the criteria that OHA may use to review transactions, or the types of conditions it may place on such transactions." As to the potential fees related to the review of the transactions, Plaintiffs say the law effectively gives OHA a blank check to impose costs on Oregon health care providers, without providing sufficient notice concerning how the costs are calculated.

Claim 2: Legislature's Unconstitutional Delegation of Authority

According to the nondelegation doctrine of the Oregon Constitution, the legislature is prevented from delegating legislative authority to executive agencies to preserve the constitutional separation of powers. Specific to the law being challenged, Plaintiffs claim that it (1) fails to contain objective legislative standards or a fully expressed legislative policy that guides the exercise of the delegated authority and (2) fails to furnish adequate safeguards to those who are affected by the

administrative action.

First, Plaintiffs claim that the new law improperly delegates to OHA, an administrative agency, the legislative authority to define on an ad hoc basis most of the operative terms of the law, such as "health equity," "corporate affiliation," and "essential services." As a result, Plaintiffs argue that the legislature impermissibly gave OHA the power to make law by leaving it to OHA to decide the entities covered by the statute and the type of transactions regulated and allowing the agency to determine the criteria used to approve, deny, or impose conditions on the transactions.

Second, the law delegates certain responsibilities to two different boards without including a conflict-of-interest policy to ensure safeguards. The Oregon Health Policy Board, a nine-member citizen board, is delegated with determining certain review criteria and definition of the term "health equity," and a community review board consisting of "members of the affected community, consumer advocates and health care experts" is delegated with the initial factfinding responsibilities in the comprehensive review process.

The complaint concludes that due to the legislation's lack of meaningful or applicable standards, OHA has unilaterally created its own legislative criteria through rulemaking and sub-regulatory guidance in a way that is vague and arbitrary. This approach fails to give parties fair notice and creates the risk of arbitrary and unfair decision-making.

**WHAT'S NEXT**

The state moved for summary judgement on May 26, 2023, and Plaintiffs filed a cross-motion for summary judgment on July 14, 2023 with request for oral argument. Briefs have been submitted by both parties as of September. The court's adjudication of some of the claims in this case may have significant impacts on other states looking to propose or implement similar legislation.

Importantly, Oregon's oversight program is significantly different from other state

health care market oversight programs, such as the Office of Health Care Affordability (OHCA) in California and the Health Policy Commission (HPC) in Massachusetts because it has the authority to block of place conditions on transactions. OHCA and the HPC do not have the authority to block or place conditions on material change healthcare transactions.  OHCA and the HPC have a mission of transparency and in evaluating reportable transactions based on public input. OHCA and the HPC may hold public hearings and publish reports, which the attorney general or other state agency can use to block or condition the transaction under other state or federal laws. The more limited authority may make those states less susceptible to legal challenges compared to Oregon's law.

Consequently, this lawsuit may serve as a lesson for states that are considering to adopt a healthcare market oversight program to monitor consolidation trends in their state, particularly if the challenge to Oregon's program proves successful, as the hospital industry would undoubtedly pursue similar actions on similar constitutional grounds. The Source will be closely tracking the litigation and be sure to bring the latest developments and analysis in this case.