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Directors Allen and Vandehey,

On behalf of Oregon's 62 hospitals and the communities they serve, the Oregon Association of Hospitals and Health Systems (OAHHS) appreciates this opportunity to provide written feedback as an early step in the rulemaking process to implement House Bill 2362.

HB 2362 is comprehensive legislation. It regulates—in a significant manner—large portions of the healthcare delivery system for many Oregonians. It will require complex analyses among at least three State agencies in areas of clinical care, finance, access, equity and cost. As a result, it is important that the administrative structures and regulations that implement the law are reasoned and reflect an understanding of the issues that all stakeholders raise. A rulemaking process with only two meetings will not yield the thoughtful regulations that are needed. We request that your rulemaking process be expanded to add additional meetings to ensure that the products of the process will meet the legislative objectives and not have unintended consequences on healthcare delivery in this State.

OAHHS supports the goals of reducing cost and protecting and improving access to health care. We remain concerned that the process prescribed by HB 2362 will ultimately have the opposite effect. To prevent such an outcome, it is crucial that the implementing rules do the following:

- Avoid unnecessary cost and administrative complexity.
- Protect and advance the ongoing work across the state to achieve policy goals around the cost growth target, value-based payment, quality, and health equity by allowing transactions that further those goals to proceed without disruption or delay.
- Ensure that the “emergency situation exemption” is applied to avoid delaying or prohibiting transactions that are necessary to preserve the availability of quality health care in a community.
- Incorporate frequent opportunities for communication and collaboration between OHA, the parties to the proposed transaction, and other reviewing agencies as applicable, to ensure transparency, efficiency, and the robust exchange of relevant data and information.
- Set forth standards and processes that are predictable and fair.

Below, we provide specific recommendations for rulemaking to help achieve these objectives.

## 1. Define Terms

- Define “eliminate or significantly reduce essential services” to mean that access to a service within the service areas of the entities, taken as a whole and among all service providers in the service areas, would be reduced, as a direct result of the material change transaction, by more than 50% and the remaining service providers will not have the capacity to increase service provision sufficient to meet the current need for the essential service within the service areas.
- A “new” contract or affiliation should mean that the entities have never had a written contract or affiliation between them covering the same subject matter of the contract or affiliation.
- A “corporate affiliation” should additionally mean that any partial change in interest or control has the effect of changing who can, unilaterally, control the entity. A corporate reorganization or restructure should be excluded from the definition of a corporate affiliation and should also not constitute a material change transaction.
- “Hospital system” should mean an entity that has as a primary function the provision of health care items or services and is a parent or subsidiary of an entity that operates a hospital.
- Projections of \$10M in revenue in the first full year of operation at normal levels of utilization or operation should be the revenue projected by the entities.
- The rules should indicate that each of the following meets the statutory standard of “Is necessary . . . to adopt advance value-based payment methodologies to meet the health care cost growth targets under ORS 442.386.”
  - Any transaction (affiliation, contract, etc.) that either lowers the cost of care or includes a value-based payment methodology as payment for a health care item or service; or
  - Transactions to form a new partnership, joint venture, accountable care organization, parent or management services organization when such new entity will deliver health care items or services to patients; or
  - Any new partnership, joint venture, accountable care organization, parent or management services organization that will initiate or expand health care items or services delivery in a setting or through a delivery mechanism that will lower the cost of that health care item or service or the total cost of care associated with the patient receiving the health care item or service, or increase quality of care and patient outcomes.

## 2. Collaboration between the Agencies

Where both OHA and the Oregon Department of Justice receive notice of a material change transaction, the agencies shall meet with the notice-filing party within 10 days of filing to discuss with the party how the authority and the department can work together and with the party to increase efficiency and expediency of review, while decreasing expense. The authority and department shall coordinate their reviews to avoid duplication of effort, reduce review time, and produce consistent findings and conclusions.

## 3. Process for Notice of a Material Change Transaction

**Form and manner of notice submission.** The transactions that do not meet the statutory requirements for filing a notice do not require submission to OHA. The required notice should be submitted by a health care entity proposing to engage in a material change transaction. The notice shall be in writing and submitted to an individual identified by OHA, with a copy to the Department of Justice if applicable. The notice would commence the 30-day statutory period (and, if needed, the 180-day period) and would set forth:

- Relevant parties to the proposed material change transaction
- Description of the proposed material change transaction
- Whether and why the proposed material change transaction fits the criteria for approval within the initial 30-day preliminary review period.
- Whether and why comprehensive review is needed.
- Whether and why a review board is needed.

**Initial, Informal Meeting.** Because timeliness with respect to healthcare transactions and contracts can be imperative, clear communications between the entities and OHA will be important. As a result, an entity should have the right, upon request of an entity, to meet with OHA decision-makers within 10 days of filing the initial notice and within the initial 30-day preliminary review period, to discuss the material change transaction, process, and review considerations.

**Opportunity for Input Prior to Decisions.** Prior to the finalization or publication of any OHA decision relating to a material change transaction, including a decision to engage in comprehensive review, appoint a review board, hold a public hearing, solicit public comment, etc., OHA shall notify the entities involved in the material change transaction of the proposed decision, provide its rationale, and offer the entities an opportunity to have meaningful input into the proposed decision before it is finalized.

## 4. How 30-day Review will be Conducted

No later than 30 days after receiving the appropriate notice, OHA is required by statute to undertake a preliminary review to determine “whether the transaction has the potential to have a

negative impact on access to affordable health care in this state and meets the criteria in subsection (9)[.]” The subsection (9) criteria appears to require A or B, and C, as follows:

- A. The transaction will benefit the public good and communities by:
  - Reducing the growth in patient costs in accordance with the health care cost growth targets or maintaining a rate of cost growth that is higher than the cost growth target but is in the best interest of the public;
  - Increasing access to services in medically underserved areas; or
  - Rectifying historical and contemporary factors contributing to a lack of health equities or access to services; or
- B. The transaction will improve health outcomes for Oregonians.
- C. There is no substantial likelihood of anticompetitive effects from the transaction that outweigh the benefits of the transaction in increasing or maintaining services to underserved populations.

OAHHS requests that the foregoing criteria be evaluated as follows:

- At the time of initial notification, an entity shall submit a concise statement to OHA addressing the criteria. In addition to the criteria, OHA shall also consider the ramifications to the public good and local communities if no material change transaction were to take place. OHA shall presume that the entity’s statements, coupled with some evidence in support (references to transaction or contractual commitments or affidavits of knowledgeable persons), meet the criteria. An entity shall also be allowed to submit written expressions of community support, which support shall give rise to a presumption by OHA of benefit to the public good and communities.
- In undertaking the preliminary, 30-day review, the OHA shall presume that any transaction meets the criteria for approval within the 30-day period, without conditions, when the entity’s statements, coupled with some evidence in support, indicates a reduction in the historical total cost of care associated with a patient population or the historical cost of care for a particular health care item or service.
- The burden shall be on OHA to demonstrate, by clear and convincing evidence, that the entity’s statement and evidence do not meet the criteria. If OHA meets its burden, then it may approve with conditions the material change transaction or offer the entities a comprehensive review. OHA must issue its determination and rationale in writing. If OHA does not meet its burden, then the material change transaction shall be approved without conditions within the 30-day period.

## **5. Need for Comprehensive Review and a Review Board, if applicable**

The bill states that the criteria for when to conduct a comprehensive review and appoint a review board “must include, but is not limited to:”

- The potential loss or change in access to essential services;
- The potential to impact a large number of residents in the state; or
- A significant change in the market share of an entity involved in transaction.

OAHHS requests that the following criteria also be included:

- Each of the foregoing criteria must be “foreseeable and as a direct result of” the proposed material change transaction.
- OHA shall also consider what effect no material change transaction would have on quality of care, access to care, community need and movement towards value-based care.
- OHA shall presume the conclusions and determinations of the boards of directors (or the equivalent) of the entities meet the criteria in relation to quality, services, access, value-based care and community needs, unless OHA demonstrates clear and convincing evidence to the contrary.

OAHHS also requests that the criteria for appointing a review board require OHA to demonstrate that public hearings and public comments are inadequate to obtain public input and that only the appointment of a review board will allow community interests to be expressed. A presumption shall exist that a review board is not necessary.

## **6. Emergency Situation Exemption**

OHA has the authority to exempt an entity from filing a notice with OHA if “there is an emergency situation that threatens immediate care services and the transaction is urgently needed to protect the interests of consumers.”

This standard should be applied as follows:

- The transaction is needed, in the reasonable judgment of an entity, to (i) avoid reduction of healthcare services, (ii) maintain solvency of an entity or a service line, (iii) address or avoid accreditation, certification or licensure deficiencies, (iv) avoid a projected negative operating margin for an entity or service line, (v) meet regulatory, tax-exemption, contractual or other legal obligations (including bond or other covenants), (vi) address significant staffing shortages, (vii) address a public health emergency or (viii) ensure the delivery of safe care.

A party requesting an emergency situation exemption shall submit the request to OHA in writing explaining the nature of the transaction and information in support of its request. OHA shall review the request within seven business days and provide a verbal response to the requesting entity within the seven business day period, indicating whether the OHA is inclined to grant the request and providing the party an opportunity to respond to any concerns OHA may have about the request within a time-frame acceptable to the party. A final decision by OHA on the request shall be issued by OHA in writing within 10 business days of the party’s response to OHA unless the party grants an extension of time to OHA.

## **7. Outline Processes**

As described above, each step of the review process should include ample opportunity for dialogue, collaboration, and exchange of information. This includes setting clear expectations regarding the timeline of events throughout the process.

If OHA fails to respond to the initial notification from an entity within the 30-day preliminary review period, the proposed transaction shall automatically be deemed to satisfy the applicable criteria for approval without conditions and may proceed.

## **8. Other Issues**

Prior to OHA issuing or publishing any analyses or conclusions following the conclusion of a material change transaction, OHA shall provide the parties to the material change transaction with a draft analysis and conclusions, and a reasonable opportunity to comment on the draft prior to its finalization and publication. Further, if requested to do so by a party to the material change transaction, OHA shall publish a statement provided by a party to the material change transaction along with OHA's analysis and conclusions.

Sincerely,

A handwritten signature in black ink, appearing to read "Andi Easton". The signature is fluid and cursive, with a large initial "A" and "E".

Andi Easton  
Vice President of Government Affairs  
Oregon Association of Hospitals and Health Systems