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Directors Allen and Vandehey:

The Oregon Ambulatory Survey Center Association appreciates the opportunity to provide feedback regarding the implementation of House Bill 2362. We have been following the process for development of the rules that ultimately forge a path forward, and provide our feedback on the last iteration of the rules as of 11/4/21, as follows.

Page 8 – OAR 409-070-0015 Material Change Transactions: Materiality Standard

- Issue with Paragraph (1)
  - 3-year lookback is egregious
  - There is a material benefit to communities in terms of expanding access to healthcare services and providing a lower cost option when JV entities are formed in order to fortify small/medium ASCs.
  - Assigning the fee schedule as referenced in 1(c) would have a chilling effect on the ability of small/medium ASCs to consider partnerships that could help them remain open and available to the community.
  - The fees outlined are egregious and untenable, even under the least expensive circumstances.
  - Under many JV partnership structures, the fees referenced in 1(c) would be paid on a prorata basis and would present barriers for small/medium ASCs to consider strategic partnerships that would allow them to remain relevant, available, and – most importantly – open for patient care.

Page 14 – OAR 409-070-0030 Material Change Transactions: Requirement to File a Notice of Material Change Transaction

- Issue with (2)
  - "If the Authority determines that a health care entity has failed to timely file a notice of material change transaction pursuant to this subsection, the Authority may refer the health care entity to the Oregon Department of Justice."

- This language implies criminal investigation if a health care entity and subjects nearly every transaction to this process in an effort to avoid criminal penalties.
- We believe this is outside of the scope of the legislation as written, and ask that it be removed completely.

Page 18 – OAR 409-070-0045 Material Change Transactions: Form and Contents of Notice of Material Change Transaction

- Issue with 4(a)(A) and (B)
  - We are unclear as to why there is a requirement to provide definitive agreements and/or a detailed description of any respect in which the definitive agreements depart from the term sheet no later than 15 days before closing (A) or 15 days after commencement of the comprehensive review period (B).
  - In subsection B specifically, we would ask why the 15-day timeframe is applied given the fact that this assumes a comprehensive review process. The comprehensive review period as outlined in 0060 (9) imposes a 180-day or more time period by which the Authority and/or the Department will issue a proposed order. Under the best circumstances, 6 months after an entity files a notice of material change transaction. The 15-day timeframe as outlined in 4(a)(B) is restrictive, time-consuming, costly, and unnecessary, given the nature of the comprehensive review process as described and the timeframes thereby imposed upon the transaction.

Page 20 – OAR 409-070-0050 Material Change Transactions: Retention of Outside Advisors

- Issue with (1)(2) and (3)
  - Not only would ASCs need to consider the indefinite financial impact of carrying the expense of the Authority's actuaries, accountants, consultants, legal counsel and other advisors not otherwise a part of the Authority's staff, but the revised rules include the same expense considerations for the DOJ.
  - Again – often, ASCs considering mergers, acquisitions, and partnerships are small/medium sized businesses who are under financial strain. The financial burden associated with carrying these undefined expenses for an indefinite period of time would cripple the ability of ASCs to create important strategies to expand access, preserve patient care, secure lower cost options for patients, and offer continuation of services to communities.
  - Under (3), not only is the ASC expected to pay for these indefinite and unknown expenses, but the ASC is expected to remit payment within 30 days of after receipt of an invoice that is not only unpredictable but unreconcilable from the standpoint of the healthcare entity. This will undoubtedly stall if not kill opportunities for innovation.
    - The costs of the OHA review and risk of a requirement to hire an unlimited number of consultants should not be the burden of the applicant. This will discourage innovation and improved patient care.

Page 22 – OAR 409-070-0055 Material Change Transactions: Preliminary 30-day Review of a Notice of Material Change Transaction

- Issue with (3)
  - This is unprecedented and does not align with other state regulatory processes of similar intent.
  - For example, according to ORS 723.022(3) relating to financial institution review process:
    - **ORS 723.022 Amendment of articles and bylaws; fee; rules.** (1) The articles of incorporation or the bylaws may be amended as provided in the bylaws. Amendments to the articles of incorporation or bylaws shall be submitted to the Director of the Department of Consumer and Business Services, together with a fee established by rule of the director.
    - (2) Amendments to articles of incorporation are effective upon approval in writing by the director.
    - **Amendments to bylaws submitted to the director in accordance with subsection (1) of this section become effective 30 days after submission, unless the director, within that time, notifies the submitter in writing that the director either disapproves the amendments or requires submission of additional information. If the director requires submission of additional information, the amendments become effective 30 days after the date the information is submitted, unless the director disapproves the amendments within that time.** [1975 c.652 §6; 1991 c.635 §1; 1999 c.185 §4; 2017 c.35 §1]
  - Not only does this impose an unprecedented process, it is also a mechanism that would stifle innovation. Providers seeking capital through an acquisition or partnership are typically in a time-sensitive situation and require imminent support – 180+ days to complete a review process alone, plus the associated administrative expense and burden, would prevent collaborative attempts to expand healthcare delivery and enhance patient care.
- Failure of the Authority to complete preliminary review within 30 calendar days should not stall, impede, or prevent transactions from moving forward. Again, time is of the essence when it comes to considerations of an ASC to merge, partner, or consider acquisition. Small/medium ASCs may not have 30 days, let alone 210 days. Applying this to an unprecedented scenario such as Covid, many ASCs would not have been able to sustain had it not been for partnerships in the community that provided for access to Covid testing, vaccinations, PPE, and even staff. Had they been required to wait 30+ days to act on important, patient care-preserving, activities and partnerships, many ASCs would have been forced to close indefinitely. We do not support imposing timeframes that further delay transactions from moving forward.

Page 23 – OAR 409-070-0060 Material Change Transactions: Comprehensive Review of a Notice of a Material Change Transaction

- Issue with (2)(3)

- We believe the lack of notice of conflicts of interest by the CRB is in opposition with the intent of the Bill, specifically page 5, Section 11(a).
    - HB2362 requires that Page 5, Section (11)(a) A review board convened by the authority under subsection (7) of this section must consist of members of the affected community, consumer advocates and health care experts. No more than 1/3 of the members of the review board may be representatives of institutional health care providers. 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. (b) A member of a review board shall file a notice of conflict of interest and the notice shall be made public.
    - Unfortunately, in Section 2, there is no "d" requiring a conflict of interest statement from the members of the Community Review Board. We believe this needs to be fixed.
    - **Confidentiality** is not protected under these rules. This is yet another provision that will discourage innovation and partnerships and harm efforts to improve patient care or retain services, especially in rural and underserved areas.
    - Entities need a guarantee that their confidential financial information or financial status won't be publicized, released, or used to their detriment.
    - Because the rules don't ensure against conflicts of interest by members of the Community Review Board, a member of this board who has a conflict or is in direct competition or opposition with the applicant, would gain inappropriate levels of exposure to confidential information.
    - What is the penalty, if any, for releasing or revealing "CONFIDENTIAL" materials by a member of the Community Review Board?
- Issue with (9**)**
    - We question the required extension of time related to a tribal consultation. And request clarification on this process.

Page 26 – OAR 409-070-0065. MATERIAL CHANGE TRANSACTIONS: Conditional Approval; Suspension of Proposed Material Change Transaction

- Issue with (1) and (2)
    - Conditional approval, as outlined in the revised draft rule, implies an indeterminate burden – administrative and otherwise – that cannot be reasonably anticipated let alone sustained.
    - In (2), specifically the language providing that the Authority may suspend the effective date of the transaction for such reasonable time....The perpetual nature of the proposed rule and the associated administrative expense would increase the cost of the transaction and, in turn, the cost of healthcare delivery overall.
    - The proposed rule is undefined and unrestricted – it essentially provides the OHA the ability to require anything of the applying entity.

We are grateful for your consideration of the concerns and issues outlined herein, and look forward to continuing the collaborative process through the Rule Advisory Committee and issuance of public comment from the perspective of our organization and its members.

Sincerely,

Chris Skagen, Executive Director, Oregon Ambulatory Surgery Center Association

Erin Hardwick, Board Member, Oregon Ambulatory Surgery Center Association