



November 30, 2021

Patrick Allen, Director
Jeremy Vandehey, Health Policy & Analytics Division Director
Oregon Health Authority
500 Summer Street NE, E-20
Salem, OR 97301

Directors Allen and Vandehey:

The Oregon Ambulatory Survey Center Association appreciates the continued opportunity to provide feedback regarding the implementation of House Bill 2362. We were grateful to the Agency for the changes incorporated in the last iteration of the Draft Rules – this was a demonstration of the success of a collaborative process. Thank you for hearing and acting upon the feedback provided.

Following is our feedback on the rules reviewed in the RAC meeting on 11/15/21.

Page 3 – OAR 409-070-0005 – Material Change Transactions: Definitions

- Issue with Paragraph 12 (b)
 - This language broadens the scope of the definition of "Essential Services" such that the ambiguity serves only to force ASCs to submit for an Optional Application for Determination of Covered Transaction Status as defined in OAR 409-070-0042.
 - Submission of an Optional Application will undoubtedly add time to the process of approval for a transaction to move forward, and many ASCs that have reached the point of consideration of an acquisition or merger are in need of a capital infusion in order to sustain their business.

Page 5 – OAR 409-070-0010 – Material Change Transactions: Covered Transactions

- Issue with Paragraph 1c(A)
 - In many cases, the formation of a JV partnership serves to fortify ASC operations, infuse capital to serve the purpose of improved and enhanced equipment, and sustain an ASC that is struggling to remain solvent while advancing efforts to provide care for the community.
- Issue with Paragraph (1)c(iii) and (2)(b)
 - These rules imply that covered transactions would include situations that both "increase market concentration among health care providers" and "[reduce the] number of providers" in communities. We would ask for clarity in determining how "increase" and "reduction" are assessed.

- In (2)(b), we wonder how "culturally competent providers" will be defined, and request clarification on the entity that will bear the onus of determining a reduction in health care interpreters, as interpreters are often not employees of the health care entity.

Page 9 – OAR 409-070-0015 – Material Change Transactions: Materiality Standard

- Issue with removal of 3(c) - unclear about the impact of this deletion.
- Issue with fee schedule (see below)

Page 11 – OAR 409-070-0020 – Material Change Transactions: Excluded Transactions

- Issue with

Page 23 – OAR 409-070-0050 – Material Change Transactions: Retention of Outside Advisors

- Issue with (1)(2) and (3)
 - We appreciate the provision for reconcilable and detailed invoices.
 - 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.
 - 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 24 - 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.
- The fees may tip ASCs over the threshold of viability, let alone the time it would take to help an ASC realize a pathway to solvency, improved operations, and continued service to the community.

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 . . .” without defined objectives, this provides suspension of a transaction subsequent to its receipt of Agency approval. The perpetual nature of the proposed rule has the potential to leave small and medium-sized healthcare entities without resources, including critical access to capital. In addition, the administrative expense associated with ongoing review 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 would request defined criteria that would move the transaction out of the conditional approval status.

Page 33 – OAR 409-070-0080 – Material Change Transactions: Continuing Jurisdiction; Information Requests

- Issue with (1) and (2)
 - While we appreciate there may be an interest in validating transactions follow the intent of the Statute, we are concerned about the impact associated with monitoring of approved transactions into perpetuity.
 - In addition to the OHA's current ability to provide ASCs with the ability to participate in provision of services for Medicare beneficiaries, ASCs are held to State and Federal regulatory and accreditation requirements for as long as they are providing care to patients.
 - The addition of continued jurisdiction as set forth in Paragraph (1), “. . . from time to time may require that the parties provide such information, reports, analyses and documentation as the Authority may require in order to monitor and assess the impacts and effects of the material change transaction . . .” creates the need for ASCs to establish administrative framework to support audits that may or may not occur on an intermittent basis without established criteria for what may merit this audit process.

- If the Agency would like to establish a validation process, OASCA would request that this be clarified to establish, at a minimum: Frequency (annual, quarterly, etc.), criteria that may warrant initiation of a validation process, notice period to organization, and post-approval time period at which time validation process would no longer be required.

HCMO Fee Schedule – Table 1

- The published fee schedule implies it may change (escalate) after 6/30/23. We would request clarification as to the mechanism that will serve as the basis for any intended changes to the fee schedule moving forward.
- While we can appreciate that the fee needs to support the program, we would like to make the point that this will stagnate important transactions for ASCs to expand healthcare services and lower-cost surgical options. We compel the Agency to acknowledge that the fees listed in Table 1 are not inclusive of the costs associated with outside advisors for both the OHA and DOJ and, under such considerations, jointly appreciate the financial burden this would impose on small/medium-sized health care entities, including ASCs.

We are grateful your thoughtful approach and appreciate the complexity of this process. We hope our input has provided you with helpful insights into the unintended consequences the rules may impose for small- and medium-sized health care entities like ASCs. We 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