



Health Care Market Oversight Program (HB 2362 from the 2021 regular session)
Draft Rules for the Rules Advisory Committee meetings
November 1, 2021

OAR 409-070-0000. MATERIAL CHANGE TRANSACTIONS: Scope and Purpose

(1) OAR 409-070-0000 through OAR 409-070-0085 are adopted pursuant to authority in section 2 of the 2021 Act. OAR 409-070-0000 through OAR 409-070-0085 govern the procedure for filing notices of material change transactions and the criteria and procedure for review of material change transactions.

(2) The purpose of these rules is to promote the public interest, to advance the goals of the Authority and the Oregon Integrated and Coordinated Care Delivery System described in ORS 414.018 and ORS 414.620, and to promote alignment among entities to improve efficiency and increase value in Oregon's health care system.

(3) The Authority and the Department shall aim to achieve the following goals when reviewing proposed material change transactions:

- (a) Improving health, increasing the quality, reliability, availability and continuity of care and reducing the cost of care for people living in Oregon.
- (b) Achieving health equity and equitable access to care.
- (c) A process that is transparent, robust and informed by the public, including the local community, through meaningful engagement.
- (d) Using resources wisely and in collaboration with the Department when applicable.

OAR 409-070-0005. MATERIAL CHANGE TRANSACTIONS: Definitions

When used and not otherwise defined in OAR 409-070-000 through OAR-600-0085, the following terms shall have the meaning given in this section:

- (1) “2021 Act” means 2021 Oregon Laws Ch. 615 (H.B. 2362).
- (2) “Administrative services” means support and administration services, outsourced and subcontracted services and other equivalent services and servicing arrangements, however described or denominated, but excluding (i) comprehensive management services, (ii) the rendering of health care to patients, and (iii) the provision of pharmaceuticals.
- (3) “Affiliate” means a legal entity that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, another legal entity.
- (4) “Authority” means the Oregon Health Authority.
- (5) “AVP methodologies” means the advanced value-based payment models (3A and higher) described in the Oregon Value-Based Payment Compact (June 28, 2021).¹
- (6) “Carrier” means (a) a carrier as defined in ORS 743B.005 (but excluding subsection (d) thereof) or (b) any person that offers Medicare Advantage plans in this state.
- (7) “Charitable organization” has the meaning given in ORS 128.620.
- (8) “Control” means the direct or indirect power to manage a legal entity or set the legal entity’s policies, whether by owning voting securities, by contract other than a commercial contract for goods or nonmanagement services, or otherwise, unless the power is the result of an official position or corporate office.
- (9) “Control affiliate” means an affiliate of a health care entity that directly or indirectly, through one or more intermediaries, controls the health care entity.
- (10) “Coordinated care organization” has the meaning given in ORS 414.025.
- (11) “Covered transaction” means a transaction described in OAR 409-070-0010.
- (12) “Department” means the Department of Consumer and Business Services.
- (13) “Domestic health insurer” means an insurer as defined in ORS 731.106 or a health care service contractor as defined in ORS 750.005 that is formed under the laws of this state and has a certificate of authority from the Department to insure personal health risks, or pay for or provide health care services, whether in the form of indemnity insurance, managed care products or any other form or type of individual or group health insurance or health care service contract.

¹ See <http://orhealthleadershipcouncil.org/wp-content/uploads/2021/09/Oregon-VBP-Compact>,

(14) “Essential services” means:

- (a) Services based upon the prioritized list of health services developed and updated by the Health Evidence Review Commission under ORS 414.690, as in effect at the time of notice submission; and
- (b) Services that are essential to achieve health equity.

(15) “Health benefit plan” has the meaning given in ORS 743B.005.

(16) “Health care entity” includes all of the following:

- (a) An individual health professional licensed or certified in this state.
- (b) A hospital, as defined in ORS 442.015.
- (c) A hospital system.
- (d) A carrier that offers a health benefit plan or Medicare Advantage plan in this state.
- (e) A coordinated care organization or a prepaid managed care health services organization, as the term is defined in ORS 414.025.
- (f) An insurance holding company system as defined in ORS 732.548 or a CCO holding company system as defined in OAR 410-141-5285.
- (g) Any other entity that has as a primary function the provision of health care items or services, including physical, behavioral or dental health items or services, or that is a parent organization of, or is an entity closely related to, an entity that has as a primary function the provision of such health care items or services.

(17) “Health care entity” does not include:

- (a) Long term care facilities, as defined in ORS 442.015.
- (b) Facilities licensed and operated under ORS 443.400 through 443.455.

(18) “Health equity” means a health system having and offering infrastructure, facilities, services, geographic coverage, affordability and all other relevant features, conditions and capabilities that will provide all people with the opportunity and reasonable expectation that they can reach their full health potential and well-being and are not disadvantaged by their race, ethnicity, language, disability, age, gender, gender identity, sexual orientation, social class, intersections among these communities or identities, or their socially determined circumstances.

(19) “Hospital” has the meaning given in ORS 442.015.

(20) “Material change transaction” means a covered transaction that is material under the materiality standards set forth in OAR 409-070-0015.

(21) “Person” has the meaning given in ORS 731.116.

(22) “Price negotiation power” means the economic power of an entity or entities to negotiate the price of health care services.

(23) “Program website” means the Authority’s website for the Health Care Market Oversight Program, currently at <https://www.oregon.gov/oha/HPA/HP/Pages/health-care-market-oversight.aspx>.

(24) “Significant portion” means, when acquired in one transaction or in a related or integrated series of transactions within any consecutive twelve-month period, (a) ten percent (10%) or more of the assets, liabilities, products or health care services or facilities of an insurer or coordinated care organization; or (b) twenty-five percent (25%) or more of the assets, liabilities, products or health care services or facilities of any other legal entity.

(25) “Term sheet” means a memorandum of understanding or letter of intent setting forth the negotiated terms and conditions of the proposed transaction in reasonable detail, signed by the parties to a proposed transaction.

(26) “These rules” means the rules set forth in OAR 409-070-000 through OAR 406-070-0085.

(27) “Voting security” means a security that entitles the owner or holder of the security to vote at a meeting of shareholders, a membership interest having voting rights in a limited liability company or nonprofit corporation, a partnership interest having voting rights in a limited or general partnership or any other type of instrument that confers on the holder of the instrument voting rights in the governance of a legal entity. A “voting security” also includes a security that is convertible into a voting security or that is evidence of a right to acquire a voting security.

OAR 409-070-0010. MATERIAL CHANGE TRANSACTIONS: Covered Transactions

(1) Subject to the materiality standards under OAR 409-070-0015, transactions that are subject to review under these rules include the following:

- (a) A merger or consolidation of a health care entity or control affiliate with another entity.
- (b) An acquisition of control of a health care entity or a control affiliate.
- (c) A corporate affiliation involving a health care entity or control affiliate as provided in paragraph (2) of this rule.
- (d) Transactions to form a new partnership, joint venture, accountable care organization, parent organization or management services organization as provided in paragraph (3) of this rule.
- (e) New contracts, new clinical affiliations and new contracting affiliations between or among health care entities or control affiliates or between or among health care entities or control affiliates and another type of counterparty that may eliminate or significantly reduce essential services as provided in paragraph (4) of this rule.

(2) A corporate affiliation is a transaction in which a legal entity acquires or attempts to acquire control of a health care entity or control affiliate, or enters into an agreement or other arrangement for shared or common control of the legal entity and the health care entity or control affiliate. A corporate affiliation includes, without limitation, any of the following transactions if, as a result thereof, the legal entity would directly or indirectly control the health care entity or any control affiliate, or would be under common control with the health care entity or control affiliate:

- (a) Any transaction that results in one or more of the parties ceding control, in whole or in part, to a counterparty or to a third party, including without limitation, strategic alliances, shared service arrangements, out-sourcing arrangements and other forms of commercial combinations, however described or denominated.
- (b) An agreement to exchange securities for any voting security of a health care entity or control affiliate if the exchange would result in the acquiror having control of the health care entity or control affiliate.
- (c) Merging or consolidating with a health care entity or control affiliate.
- (d) Acquiring or entering into an agreement to acquire all or substantially all of the assets and operations of a health care entity or control affiliate.
- (e) Entering into an agreement pursuant to which a legal entity and a health care entity or control affiliate arrange for shared services, business operations or jointly offered products and professional services through a joint venture affiliate or otherwise.

- (f) Transactions that merge tax identification numbers.
- (g) Transactions that provide for shared corporate governance.
- (h) Any other arrangement that brings together under common ownership or control all or a significant portion of the assets, liabilities, products or health care services or facilities of two or more legal entities, at least one of which is a health care entity or control affiliate.

(3) Transactions that form a new partnership, joint venture, accountable care organization, parent organization or management services organization, and that pool price negotiation power or change control of a health care entity, may be subject to review if the new legal entity (i) is a health care entity, (ii) owns or controls, or has been organized to own or control one or more health care entities, or (iii) will provide essential services to, or manage the delivery of essential services by, one or more health care entities. Filing and review, if required under this paragraph, shall be in addition to, not in lieu of, any other regulatory application, review, approval, licensing or permitting process that may be required by law in connection with the formation of the new legal entity.

(4) New clinical affiliations and new contracting affiliations that are between or among health care entities or control affiliates, or between or among health care entities or control affiliates and another type of counterparty, and that pool price negotiation power or change control of a health care entity, are covered transactions if they include one or more of the following:

- (a) Clinical affiliations between two or more health care providers or provider organizations for the purpose of increasing the level of collaboration in the provision of health care services, including, but not limited to, sharing of physician resources in hospital or other ambulatory settings, co-branding, expedited transfers to advanced care settings, provision of inpatient consultation coverage or call coverage, enhanced electronic access and communication, co-located services, provision of capital for service site development, joint training programs, video technology to increase access to expert resources or sharing of hospitalists or intensivists.
- (b) Clinical affiliations under which a provider, provider group or clinic affiliates with a hospital, hospital system, insurer, insurance holding company system, CCO holding company system, or other type of health care provider.
- (c) Clinical affiliations include both horizontal and vertical combinations, shared service arrangements, outsourcing arrangements and combinations of providers to form provider networks.
- (d) New contracting affiliations between or among provider organizations and/or providers for the purpose of negotiating, representing, or otherwise acting to establish contracts for the payment of health care services, including payment rates, incentives, and operating terms, with a carrier or third-party administrator. New contracting affiliations include, without limitation, (i) affiliations among providers to share functions for

economy of scale and (ii) hospital system provider agreements with practice groups or clinics.

(5) Agreements between an affiliate and a health care entity that are subject to ORS 732.574(2)(d)(D) are not subject to review under these rules.

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OAR 409-070-0015. MATERIAL CHANGE TRANSACTIONS: Materiality Standard

(1) A covered transaction under OAR 409-070-0010 is a material change transaction and shall be subject to review under these rules if at least one party to the transaction had average annual revenue of \$25 million or more in the party's three most recent fiscal years and another party to the transaction (i) had average annual revenue of \$10 million or more in that party's three most recent three fiscal years or (ii) if such party is a newly organized legal entity, is projected to have at least \$10 million in revenue over its first full year of operation at normal levels of utilization or operation.

(2) A covered transaction under OAR 409-070-0010 that qualifies as material under paragraph (1) of this rule shall be subject to review under these rules notwithstanding that the transaction involves a health care entity located in this state and an out-of-state entity if the transaction may increase the price of health care services or limit access to health care services in this state.

(3) For purposes of these rules, the following definitions shall apply:

(a) "Revenue" means:

(A) Net patient revenue; or

(B) The gross amount of premiums received by a health care entity that are derived from health benefit plans.

(b) "Net patient revenue" means the total amount of income, after allowance for contractual amounts, charity care and bad debt, received for patient care and services, including:

(A) Value-based payments;

(B) Incentive payments;

(C) Capitation payments or payments under any similar contractual arrangement for the prepayment or reimbursement of patient care and services; and

(D) Any payment received by a hospital to reimburse a hospital assessment under ORS 414.855

(c) In Table 1 (Filing Fees), "transaction size" means the revenue of the party described in paragraph (1) of this rule that has the smaller revenue.

OAR 409-070-0020. MATERIAL CHANGE TRANSACTIONS: Excluded Transactions

(1) The following transactions are not material change transactions subject to review under these rules:

- (a) A clinical affiliation of health care entities formed to collaborate on clinical trials or graduate medical education programs.
- (b) A medical services contract or an extension of a medical services contract as described in paragraph (2) of this rule.
- (c) Subject to compliance with paragraph (3) of this rule, an affiliation that:
 - (A) (i) does not impact the corporate leadership, governance or control of a health care entity, and (ii) is necessary to adopt AVP methodologies to meet the health care cost growth targets under ORS 442.386; or
 - (B) (i) is designed and intended to enable a party to purchase or otherwise acquire goods or administrative services, and (ii) does not pool or increase either party's price negotiation power.
- (d) Contracts under which one health care entity, for and on behalf of a second health care entity, provides patient care and related services or provides administrative services relating to, supporting or facilitating the provision of patient care and services, if the second health care entity:
 - (A) Maintains responsibility, oversight and control over the patient care and related services;
 - (B) Bills and receives reimbursement for the patient care and related services; and
 - (C) Does not share revenue with the first entity except for situations covered in (c)(A) of this subsection.
- (e) Transactions in which a participant that is a health center as defined in 42 U.S.C. 254b, while meeting all of the participant's obligations, acquires, affiliates with, partners with or enters into any agreement with another entity unless the transaction would result in the participant no longer qualifying as a health center under 42 U.S.C. 254b.

(2) For purposes of paragraph (1)(b) of this rule:

- (a) A "medical services contract" means a contract to provide medical or mental health services, including physical, behavioral or dental health services, entered into by:
 - (A) A carrier and an independent practice association;

(B) A carrier, coordinated care organization, independent practice association or network of providers and one or more providers, as defined in ORS 743B.001;

(C) An independent practice association and an individual health professional or an organization of health care providers;

(D) A medical, dental, vision or mental health clinic; or

(E) A medical, dental, vision or mental health clinic and an individual health professional to provide medical, dental, vision or mental health services.

(b) A “medical services contract” does not include a contract of employment or a contract creating a legal entity and ownership of the legal entity that is authorized under ORS chapter 58, 60 or 70 or under any other law authorizing the creation of a professional organization similar to those authorized by ORS chapter 58, 60 or 70.

(3) To qualify for exclusion under paragraph 1(c) of this rule, a party to the transaction shall file a written application with the Authority, which shall include, as applicable, either:

(a) (i) An explanation of the factual basis and grounds on which the applicant submits that the transaction will not impact the corporate leadership, governance or control of a health care entity, and (ii) identification of the AVP methodologies that will be used in, or otherwise supported or promoted by, the transaction and an explanation of how those AVP methodologies will be applied in the transaction to meet the health care cost growth targets under ORS 442.386; or

(b) Identification of the goods or administrative services that will be purchased or otherwise acquired and an explanation of the reasons why the transaction will not increase price negotiation power of either party

An application for exclusion filed under this paragraph (3) shall be deemed to have been granted by the Authority unless the applicant is notified that the application has been denied within the thirty-day period following the application date.

(4) Upon review of a complete notice of material change transaction submitted in accordance with OAR 409-070-0030(1)(a) and OAR 409-070-0045(5), the Authority may determine that the transaction qualifies as an excluded transaction under this rule. The Authority shall provide the parties with written notice of that determination, following which the notice shall be deemed withdrawn and all further proceedings in respect of the notice shall be terminated and ended.

OAR 409-070-0022. MATERIAL CHANGE TRANSACTIONS: Emergency and Exempt Transactions

(1) The Authority, for good cause shown, may exempt an otherwise covered transaction from review if the Authority finds that:

(a) There is an emergency situation which immediately threatens health care services and the transaction is urgently needed to protect the interest of consumers or to preserve the solvency of an entity other than a domestic health insurer; or

(b) The proposed transaction is not being made or entered into for the purpose, and will not have the effect of, changing or influencing the control or ownership of a health care entity other than a domestic health insurer, or is otherwise not comprehended within the purposes of these rules.

(2) If a proposed transaction would otherwise be subject to review because it involves a change in control of a domestic health insurer, the Department, in consultation with the Authority, for good cause shown, may exempt the transaction from review if the Department finds that:

(a) There is an emergency situation which immediately threatens health care services and the transaction is urgently needed to protect the interest of consumers or to preserve the solvency of the domestic health insurer; or

(b) The proposed transaction is not being made or entered into for the purpose, and will not have the effect of, changing or influencing the control or ownership of a domestic insurer, or is otherwise not comprehended within the purposes of these rules.

(3) An applicant for exemptive relief under paragraph (1) shall provide the Authority, and an applicant for exemptive relief under paragraph (2) of this rule shall provide the Department, with the following:

(a) A detailed explanation of the grounds for the application, including a complete statement of the facts, circumstances and conditions which justify exemptive relief and the conditions necessitating immediate relief;

(b) A detailed explanation of all the terms, conditions and agreements that comprise the transaction and the manner in which such terms, conditions and agreements will respond to the conditions necessitating expedited consideration of the exemption application;

(c) A detailed explanation of the reasons why either:

(i) The transaction is in the public interest and in the interest of those consumers and markets that are or will be served by the parties following closing of the transaction; or

(ii) The proposed transaction is not being made or entered into for the purpose, and will not have the effect of, changing or influencing the control or ownership of a health care entity, or is otherwise not comprehended within the purposes of these rules.

(d) If the application for exemptive relief requires or otherwise is based upon, in whole or in part, a disclaimer of a rebuttable presumption of control, the application shall include a disclaimer of affiliation meeting the requirements of OAR 409-070-0025.

(e) Such additional information, documents and analysis as the Authority or the Department, as applicable, may require in order to evaluate the application and the asserted grounds for exemptive relief;

(f) An undertaking by the parties to make such further filings with, and submit such further information to, the Authority or the Department, as applicable and to cooperate with and assist the Authority or the Department, as applicable, in conducting such further investigations, hearings and examinations, as may be required following the allowance of exemptive relief for the transaction;

(g) Payment of a filing fee in accordance with Table 1; and

(h) An undertaking by the parties to reimburse the Authority for expenses described in OAR 409-070-0050.

(4) The Authority with respect to an application filed under paragraph (1) of this rule, and provide a period for the filing of comments in respect of the application, if the Authority determines the public interest in providing comments outweighs the interest in confidentiality of the applicant for exemptive relief. The Authority shall provide the applicant with ten calendar days' advance notice of its determination to seek public comments on the application.

(5) The Department shall promptly provide an application filed under paragraph (2) of this rule to the Authority, and such an application shall be deemed to include an express consent to the sharing between the Authority and the Department of such application and all material in connection therewith. The Department may publish the cover sheet of such an application, and provide a period for the filing of comments in respect of the application, if the Department determines the public interest in providing comments outweighs the interest in confidentiality of the applicant for exemptive relief. The Department shall provide the applicant with ten calendar days' advance notice of its determination to seek public comments on the application.

(6) The Authority may publish from time to time a list of other categories or types of transactions that shall be exempt from review under these rules.

OAR 409-070-0025. MATERIAL CHANGE TRANSACTIONS: Disclaimers of Affiliation

(1) For an insurer or coordinated care organization, “control” shall be rebuttably presumed to exist if a person or legal entity, directly or indirectly, has voting control over ten percent (10%) or more of any class of voting securities of the domestic insurer or coordinated care organization or a control affiliate of the domestic insurer or coordinated care organization.

(2) For a health care entity that is not an insurer or coordinated care organization, “control” shall be rebuttably presumed to exist if a person or legal entity, directly or indirectly, has voting control over twenty-five percent (25%) or more of any class of voting securities of the health care entity or a control affiliate of the health care entity.

(3) A person may rebut this presumption with a showing in the manner provided in paragraph (4) of this rule that control does not (or would not) exist in fact. The Authority may determine, after giving persons that have an interest in the Authority’s determination notice and opportunity to be heard and after making specific findings of fact to support the determination, that control exists (or would exist) in fact, notwithstanding the absence of a presumption of control.

(4) Any person may file with the Authority a disclaimer of affiliation with any other person in respect of a transaction that otherwise may be subject to review as a covered transaction under these rules. The disclaimer must fully disclose all material relationships and bases for affiliation between the applicant and the person to which the disclaimer of affiliation applies, as well as the basis for disclaiming the affiliation.

(5) A disclaimer application filed under this section is effective unless within thirty calendar days after the Authority receives the disclaimer the Authority notifies the applicant that the disclaimer has been disallowed.

(6) The Authority shall grant a hearing if the disclaimer application is denied and the applicant makes a written request for hearing within five calendar days following the denial of the application, which shall be governed by the procedures set forth in OAR 409-070-0075.

(7) Subsections (3) to (6) do not apply to control of an insurer or coordinated care organization. For an insurer, the disclaimer of affiliation procedure is in ORS 732.568. For a coordinated care organization, the disclaimer of affiliation procedure is in OAR 410-141-5315.

OAR 409-070-0030. MATERIAL CHANGE TRANSACTIONS: Requirement to File a Notice of Material Change Transaction

(1) Any health care entity shall:

(a) Submit to the Authority a notice of material change transaction not involving an activity described in ORS 732.521 with respect to a domestic health insurer. The notice shall contain the information required under OAR 409-070-0045.

(b) Submit to the Department a notice of material change transaction for an activity described in ORS 732.521 with respect to a domestic health insurer. The notice shall be submitted as an addendum to filings required by ORS 732.517 to ORS 732.546 or ORS 732.576. The Department shall promptly provide to the Authority the notice submitted under this subsection to enable to the Authority to conduct its review in accordance with OAR 409-070-0035.

(2) The notice of material change transaction required under paragraph (1) of this rule shall be filed not fewer than 180 calendar days prior to the proposed effective date of the material change transaction. For purposes of OAR 409-070-0000 to OAR 409-070-0085, the effective date of a material change transaction is the date when the proposed transaction will be consummated or closed. 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.

(3) An initial filing fee in accordance with Table 1 shall be paid to the Authority together with the submission of a notice of material change transaction pursuant to paragraph (1) of this rule.

OAR 409-070-0035. MATERIAL CHANGE TRANSACTIONS: Material Change Transaction Involving a Domestic Health Insurer

(1) The Authority shall review a proposed material change transaction for an activity described in ORS 732.521 with respect to a domestic health insurer pursuant to the procedures set forth in OAR 409-070-0055 (preliminary review) and, if applicable, OAR 409-070-0060 (comprehensive review).

(a) At the conclusion of the preliminary review period provided in OAR 409-070-0055, the Authority shall report to the Department (a) the results of the Authority's review under OAR 409-070-0055 or (b) that the Authority intends to review the proposed material change transaction under OAR 409-070-0060, including whether the Authority intends to appoint a community review board as provided in such section.

(b) If the Authority reviews the proposed material change transaction under OAR 409-070-0060, it shall promptly provide to the Department the final order described in such section.

(c) The periods for review under OAR 409-070-0055 and OAR 409-070-0060 shall begin running upon the Authority's receipt from the Department of a complete notice of material change transaction as required under OAR 409-070-0030(1)(b) and subject to OAR 409-070-0045(5).

(2) The Department shall receive and consider the results of the Authority's review prior to entering its decision on the proposed material change transaction. The Department shall coordinate with the Authority to incorporate the results of the Authority's review into the final determination issued by the Department pursuant to ORS 732.528 or ORS 732.542, as applicable.

(3) The filing of a notice of material change transaction that is subject to review by each of the Authority and the Department under this rule shall be deemed to include an express consent to the sharing between the Authority and the Department of confidential material submitted in connection with such proposed material change transaction. Confidential material provided by any party in connection with such proposed material change transaction shall be maintained as confidential material in accordance with ORS 705.137 and Section 13 of the 2021 Act, and OAR 409-070-0070, and may be shared between the Authority and the Department pursuant to ORS 705.137(3)(b)&(c) and (4), and ORS 192.355(1), (9), (10) and (31), as applicable. Such sharing shall not constitute a waiver of the confidential status of such materials.

OAR 409-070-0040. MATERIAL CHANGE TRANSACTIONS: Material Change Transaction Involving a Charitable Organization or Hospital

(1) The parties shall provide a copy of any notice of a material change transaction involving a health care entity that is, controls, or is controlled by a charitable organization to the Charitable Activities Section of the Oregon Department of Justice in addition to the notice submitted to the Authority in accordance with OAR 409-070-0030(1)(a).

(2) To the extent applicable, a health care entity involved in a material change transaction remains subject to the charitable registration and reporting requirements contained in ORS 128.610 *et seq.* and to the Attorney General notification and other provisions contained in ORS Chapter 65, the Nonprofit Corporations Act, including Attorney General review and approval of hospital transfers within the scope of ORS 65.803.

(3) The filing of a notice of material change transaction that is subject to review by each of the Authority and the Charitable Activities Section of the Oregon Department of Justice under this rule shall be deemed to include an express consent to the sharing between the Authority and the Department of Justice of confidential material submitted in connection with such proposed material change transaction. The Authority may consult with the Department of Justice regarding the potential effects of a proposed material change transaction on the charitable organization or its assets or charitable assets held by a health care entity. Confidential material provided by any party in connection with such proposed material change transaction shall be maintained as confidential material in accordance with OAR 409-070-0070. Such sharing shall not constitute a waiver of the confidential status of such materials.

(4) The Authority may condition its approval of a material change transaction involving a health care entity that is, controls, or is controlled by a charitable organization on a required filing with, and approval by, the Charitable Activities Section of the Oregon Department of Justice.

OAR 409-070-0042. MATERIAL CHANGE TRANSACTIONS: Declaratory Rulings

(1) This rule applies to petitions for declaratory ruling with respect to the applicability to any person, property, or state of facts of:

- (a) Section 2 of the 2021 Act; or
- (b) OAR 409-070-0000 to OAR 409-070-0085.

(2) Declaratory rulings are governed by ORS 183.410, the Attorney General's Uniform Rules for Declaratory Rulings (OAR 137-002-0010 through 137-002-0060), and this rule.

(3) A petition for declaratory ruling must include all information required under OAR 137-002-0010 together with:

- (a) Payment of a filing fee of [\$]; and
- (b) An undertaking by the parties to reimburse the Authority for expenses described in OAR 409-070-0050.

(4) Upon petition by an interested party, the Authority may issue, or refuse to issue, declaratory rulings. The Authority shall notify the petitioner in writing of its decision within 60 days following receipt of the petition by the Authority. The decision to refuse to give a declaratory ruling is not subject to judicial review. Absent the Authority's issuance of a declaratory ruling, the filing of a petition for declaratory ruling does not toll any timelines or notice requirements under these rules.

(5) If a petition for declaratory ruling does not comply with all the provisions of this rule, the Authority will acknowledge the petition and notify petitioner of the requirements that have not been met. Petitioner must provide any additional required information within [] calendar days or the petition for declaratory ruling will be closed and the Authority will notify petitioner that a declaratory ruling will not be issued.

(6) An interested person or entity may petition the Authority for permission to participate in the declaratory ruling proceeding as a party.

(7) A party may request a hearing with the Authority on all issues to be addressed by a declaratory ruling. The request must be in writing. The petition for declaratory ruling will be decided on the facts stated in the petition and no other testimony or evidence may be submitted. All parties will have the right to file briefs to present legal arguments. Parties may request the opportunity to present oral argument.

(8) A declaratory ruling is subject to judicial review under ORS 183.480 in the Court of Appeals.

OAR 409-070-0045. MATERIAL CHANGE TRANSACTIONS: Form and Contents of Notice of Material Change Transaction

(1) A notice of material change transaction required to be filed under OAR 409-070-0030(1)(a) shall be made using the form available at the Program website. All instructions, whether appearing under the items of the form or elsewhere, are to be omitted. Unless expressly provided otherwise, if any item is inapplicable or the answer to any item is in the negative, a statement to that effect shall be made.

(2) One complete copy of the notice, including exhibits and all other papers and documents filed as part of the notice, shall be filed with the Authority by electronic delivery. The notice shall be signed and certified in the manner prescribed in the form notice. If the signature of any person is affixed pursuant to a power of attorney or other similar authority, a copy of such power of attorney or other authority shall also be filed with the notice.

(3) All copies of any financial statements or exhibits shall be clear, easily readable and suitable for printing. Debits in credit categories and credits in debit categories shall be designated so as to be clearly distinguishable as such. The notice and statements therein must be in the English language and monetary values shall be stated in United States currency. If any exhibit or other paper or document filed with the notice is in a foreign language, it shall be accompanied by a translation into the English language. Any monetary value shown in a foreign currency shall be converted into United States currency.

(4) A notice of material change transaction shall include either complete and final executed copies of all the definitive agreements pursuant to which the transaction will be documented and closed or a term sheet. If a notice is filed on the basis of a term sheet, then:

(a) The parties must furnish the Authority with complete and final executed copies of all the definitive agreements pursuant to which the transaction will be documented and closed, together with a detailed description of any respect in which the definitive agreements depart from the term sheet, no later than:

(A) Fifteen days before closing the transaction, if the Authority approved the transaction without comprehensive review; or

(B) Fifteen days after the commencement of the comprehensive review period, if the transaction was not approved following preliminary review. If the parties are unable to furnish complete and final executed copies of all the definitive agreements within that fifteen day period, then the running of the period for review of the notice shall be tolled upon such notification and shall not resume until the parties have furnished such executed copies.

(b) To the extent that the definitive agreements materially deviate from the term sheet, the Authority may, in its sole discretion, extend the review period and may withdraw or modify an order based on the term sheet.

(5) If the Authority considers a notice of material change transaction to be incomplete for any reason, or if the Authority requires additional information or clarification of any information to proceed with its review, the Authority may notify the parties of the information or clarification that is required. The running of the period for review of the notice shall be tolled upon such notification and shall not resume until the parties have fully and completely responded to the Authority's request and the Authority deems the notice complete.

(6) Any party that has filed a notice of material change transaction shall promptly advise the Authority of any changes in the information so furnished on the notice arising subsequent to the date upon which the information was furnished but prior to disposition of the material change transaction by the Authority.

(7) The Authority may require that statements of revenue and revenue projections be presented in accordance with generally accepted accounting principles or statutory accounting principles, as applicable, and be prepared by a duly qualified and credentialed accounting expert.

(8) The Authority's review of a notice of material change will be based on an Analytic Framework, published on the Program website, with standards that:

(a) Are clear, fair, predictable, and consistent;

(b) Use measures of quality and access that can be meaningfully compared to performance in other states or across Oregon, as well as over time; and

(c) Include equity analyses that stratify cost, quality, and access data by the characteristics specified in the definition of health equity to the greatest extent allowable by data availability.

OAR 409-070-0050. MATERIAL CHANGE TRANSACTIONS: Retention of Outside Advisors

(1) The Authority or the Department of Justice may retain at the expense of the parties to a material change transaction any actuaries, accountants, consultants, legal counsel and other advisors not otherwise a part of the Authority's staff as the Authority may reasonably need to assist the Authority in reviewing the proposed material change transaction. The retention of such advisors shall not be subject to any otherwise applicable procurement process. All communications, whether written or oral, between the Authority and such advisors shall be confidential and exempt from public disclosure as provided in section 13(b) of the 2021 Act.

(2) The parties to a material change transaction shall reimburse the Authority on a monthly basis, within thirty calendar days after receipt of an invoice from the Authority, for all costs incurred by the Authority in connection with its review of the material change transaction. Such costs shall include, but are not limited to, the costs and expenses of any advisors retained by the Authority or the Department of Justice pursuant to paragraph (1) and its other out-of-pocket costs but excluding any unallocated staff or interagency costs of the Authority.

(3) Any approval of a material change transaction shall be conditioned on the parties reimbursing the Authority pursuant to paragraph (2). The obligation of the parties to reimburse the Authority does not depend on whether the Authority approves the transaction. The obligation to reimburse is an obligation of the person filing the notice of material change transaction and any other parties to the transaction designated by the Authority.

OAR 409-070-0055. MATERIAL CHANGE TRANSACTIONS: Preliminary 30-Day Review of a Notice of Material Change Transaction

(1) After receipt of a complete notice of material change transaction in accordance with OAR 409-070-0030(1)(a) and OAR 409-070-0045(5), the Authority shall complete a preliminary review to determine whether the proposed material change transaction meets one or more of the criteria set forth in paragraph (2) of this rule.

(2) At the conclusion of the preliminary review described in paragraph (1) of this rule, the Authority shall approve, or approve with conditions as provided in OAR 409-070-0065, a material change transaction, or, in the case of a material change transaction involving a domestic health insurer, recommend to the Department that the transaction be approved, if the Authority determines that the transaction meets one or more of the following criteria:

- (a) The material change transaction is in the interest of consumers and is urgently necessary to maintain the solvency of an entity involved in the transaction;
- (b) The material change transaction does not have the potential to have a negative impact on access to affordable health care in Oregon;
- (c) The material change transaction is likely to meet the criteria set forth in OAR 409-070-0060;
- (d) The material change transaction is not likely to substantially alter the delivery of health care in Oregon; or
- (e) Comprehensive review of the material change transaction is not warranted given the size and effects of the transaction.

After conducting a preliminary review, if the Authority determines that a material change transaction does not meet one or more of the criteria set forth in this paragraph (2), the Authority shall conduct a comprehensive review pursuant to OAR 409-070-0060.

(3) Unless extended by agreement among the Authority and the parties to a proposed material change transaction, the Authority shall complete the preliminary review described in paragraph (1) within 30 calendar days of the Authority's receipt of a complete notice of material change transaction. The Authority shall notify the parties at the conclusion of the preliminary review period the results of the preliminary review. If the Authority fails to complete such preliminary review within 30 calendar days of the Authority's receipt of a complete notice of material change transaction, the proposed material change transaction shall be subject to the comprehensive review procedure provided in OAR 409-070-0060.

OAR 409-070-0060. MATERIAL CHANGE TRANSACTIONS: Comprehensive Review of a Notice of a Material Change Transaction

- (1) The Authority shall conduct a comprehensive review of a proposed transaction if the Authority determines not to approve the transaction at the conclusion of its preliminary review.
- (2) A comprehensive review may include the appointment by the Authority of a community review board to participate in the conduct of the comprehensive review and the making of recommendations to the Authority on the approval or disapproval of the transaction, or the approval of the transaction as modified or subject to conditions. The Authority may determine to convene a community review board in its discretion, with due consideration given to the potential impacts of the proposed transaction, including, but not limited to, the following:
 - (a) The potential loss or change in access to essential services.
 - (b) The potential to impact a large number of residents in this state.
 - (c) A significant change in the market share of an entity involved in the transaction.
- (3) A community review board convened by the Authority under paragraph (2) of this rule shall consist of members of the affected community, consumer advocates and health care experts. Not more than one-third of the members of the community review board may be representatives of corporate health care providers. The Authority may not appoint to a community 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.
- (4) Hearings and proceedings before a community review board shall be conducted pursuant to subsections (15) through (17) of section 2 of the 2021 Act.
- (5) A community review board shall make written recommendations to the Authority on a proposed transaction based on the criteria listed in paragraphs (2) and (8) of this rule.
- (6) The Authority shall issue a proposed order at the conclusion of its comprehensive review and shall allow the parties and the public a reasonable opportunity to make written comments to the proposed order. If the comprehensive review includes a community review board, recommendations of the community review board shall be in writing and appended to the proposed order. Unless otherwise directed by the Authority, written comments to the proposed order shall be filed with the Authority within thirty calendar days following publication of the proposed order. The Authority shall make any filed comments available to the public promptly following receipt.
- (7) The Authority shall consider the parties' and the public's written exceptions and issue a final order setting forth the Authority's findings and conclusions in respect of the proposed transaction. If the comprehensive review included a community review board, the Authority's findings and conclusions shall include an explanation of the reasons why the Authority accepted, rejected or modified the recommendations of the community review board. The final order shall include any commitments by the health care entity to continue services currently provided by the

health care entity. A party to the proposed transaction may contest the final order as provided in OAR 409-070-0075.

(8) The Authority shall approve, or approve with conditions as provided in OAR 409-070-0065, a material change transaction, or, in the case of a material change transaction involving a domestic health insurer, shall recommend to the Department that the transaction be approved, unless the Authority makes any one or more of the following findings and conclusions:

- (a) The transaction or completing the transaction is likely to reduce an organization's demonstrated commitment to addressing health disparities and inequities, create or increase disparities or inequities, or make it more difficult to achieve health equity in the state.
- (b) The transaction is contrary to law.
- (c) The transaction is inequitable or unfair to the public at large or to consumers of health care services in any product or geographic market affected by the proposed transaction.
- (d) The transaction would substantially reduce:
 - (A) The security of and service to be rendered to consumers involved in the proposed transaction or would otherwise prejudice the interests of such consumers or other people in this state;
 - (B) Access to and quality of health care for people in this state, including access to essential services, or would substantially increase the cost of health care for people in this state; or
 - (C) The ability of any party involved in the proposed transaction to:
 - (i) Perform its contractual obligations;
 - (ii) Innovate, coordinate care, provide value, and deliver high-quality services;
 - (iii) Address health disparities and inequities;
 - (iv) Be strongly connected to the community served by any party;
 - (v) Provide services cost effectively and within health care cost growth targets established under ORS 442.386;
 - (vi) Provide access to services in medically underserved areas;
 - (vii) Support social determinants of health in the community served by any party; or

(viii) Satisfy the policy priorities of the Oregon Health Policy Board posted by the Authority on its program website at the time of the notice submission.

(e) The transaction or the completion of the transaction would substantially diminish competition in this state or tend to create a monopoly. A transaction that the Authority determines would substantially diminish competition in this state or tend to create a monopoly may be approved if either (i) the Authority determines that the increase or maintenance of services to underserved populations outweighs the anticompetitive effects or (ii) within a specific period of time a party removes the basis upon which the Authority would have otherwise disapproved the transaction. The Authority may condition its approval of a material change transaction on the removal of any anticompetitive effects identified by the Oregon Department of Justice.

(f) The financial condition of any acquiring party might jeopardize the financial stability of the party being acquired.

(g) The plans or proposals that an acquiring party has to liquidate the party, sell the party's assets or consolidate or merge the party with any person, or to make any other material change in the party's business or corporate structure or management, are unfair and unreasonable to consumers and not in the public interest.

(h) The competence, experience and integrity of the persons that would control the operation of the party are such that permitting the transaction or permitting completion of the transaction would not be in the interest of consumers and the public.

(i) The transaction or completing the transaction is likely to be hazardous or prejudicial to consumers or the public.

(9) Unless extended by agreement among the Authority, the Department, as applicable, and the parties to the proposed transaction, the Authority shall issue a proposed order following its comprehensive review within 180 calendar days of the filing of a complete notice of material change transaction, subject to tolling or extension as provided in these rules. A transaction may be disapproved if the parties do not agree to an extension of time necessary to accomplish a tribal consultation.

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

(1) Following completion of a preliminary review pursuant to OAR 409-070-0055 or a comprehensive review pursuant to OAR 409-070-0060, the Authority may approve a material change transaction with conditions designed to further the purposes and goals described in OAR 409-070-0000.

(2) If the Authority approves a material change transaction with conditions as set forth in paragraph (1) of this rule, the Authority may suspend the effective date of the transaction for such reasonable time as necessary to conduct an examination and complete an analysis of whether the conditions have been satisfied.

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OAR 409-070-0070. MATERIAL CHANGE TRANSACTIONS: Confidentiality

(1) An applicant for review of a material change transaction may designate portions of a notice and any documents thereafter submitted by the applicant in support of the notice as confidential. The applicant shall file two versions of the notice. One shall be marked as “CONFIDENTIAL” and shall contain the full unredacted version of the notice or supporting materials and shall be maintained as such by the Authority and the Department. The second shall be marked as “PUBLIC” and shall contain a redacted version of the notice or supporting materials (from which the confidential portions have been removed or obscured) and shall be made available to the public by the Authority. An applicant claiming confidentiality in respect of portions of a notice, or any documents thereafter submitted by the applicant in support of the notice, shall include a redaction log that provides a reasonably detailed statement of the grounds on which confidentiality is claimed, citing the applicable statutory basis for confidentiality of each portion.

(2) Confidential materials filed by an applicant in connection with a transaction that is subject to review by each of the Authority and the Department shall be maintained as confidential materials in accordance with paragraph (1) of this rule, section 2(13)(c) of the 2021 Act and ORS 705.137.

(3) If a comprehensive review includes the appointment by the Authority of a community review board, the Authority, in its discretion, may condition further consideration of the transaction on consent by the applicant to the disclosure of confidential portions of the filing or supporting materials to the community review board, as the Authority deems necessary under the circumstances.

OAR 409-070-0075. MATERIAL CHANGE TRANSACTION: Contested Case Hearings

- (1) The Authority shall hold a contested case hearing upon a written request for a hearing within the time specified in paragraph (3) of this rule by a person aggrieved by any act, threatened act or failure of the Authority to act under section 2 of the 2021 Act or OAR 409-070-0000 to OAR 409-070-0085.
- (2) Contested case hearings shall be conducted pursuant to ORS 183.411 through ORS 183.497 and the Attorney General's Uniform and Model Rules of Procedure for the Office of Administrative Hearings, OAR 137-003-0501 through OAR 137-003-0700, and the provisions of this rule.
- (3) A party to a material change transaction that wishes to contest a final order issued by the Authority must request a hearing within 15 calendar days from the date of service of the final order and a notice of right to a hearing.
- (4) The Authority's determination not to approve a transaction at the conclusion of the preliminary review period pursuant to OAR 409-070-0055 shall be interlocutory and shall not be reviewable by appeal.
- (5) The issues to be considered in a contested case conducted pursuant to this rule shall be limited in scope to the facts and conclusions contained in the final order.
- (6) In a contested case conducted pursuant to this rule, the party requesting the contested case hearing shall have the burden of proof.
- (7) In a contested case conducted pursuant to this rule, an administrative law judge assigned by the Office of Administrative Hearings shall serve a proposed order on all parties and the Authority, unless prior to the hearing the Authority notifies the administrative law judge that a final order may be served, within 30 calendar days of the close of the evidentiary record in the contested case.
- (8) The Authority shall issue a final order within 30 days of receipt of the proposed order, which may adopt some or all of the proposed order, as the Authority shall determine in its sole discretion. The final order is effective immediately upon being signed or as otherwise provided in the order.
- (9) The time limits established in paragraphs (7) and (8) of this rule may be waived or shortened by agreement among the parties and the Authority.
- (10) All contested case hearing decisions are subject to judicial review under ORS 183.482 in the Court of Appeals.
- (11) In cases where the decision is to be made by the Department, contested case hearings for a domestic insurer shall be conducted by the Department in accordance with ORS 732.526.

OAR 409-070-0080. MATERIAL CHANGE TRANSACTIONS: Continuing Jurisdiction; Information Requests

- (1) Following approval of a material change transaction, the Authority shall retain and have continuing jurisdiction over the parties and the transaction, and 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, including specifically, but without limitation, the effects and status of the material change transaction under OAR 409-070-0060(2) and (8).
- (2) No person shall file or cause to be filed with the Authority or DCBS any notice, article, certificate, report, statement, application or any other information required or permitted to be so filed and known to such person to be false or misleading in any material respect.

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OAR 409-070-0085. MATERIAL CHANGE TRANSACTIONS: Effective Date; Implementation

- (1) The effective date of these rules is March 1, 2022.
- (2) These rules shall apply to transactions closed or scheduled to close on or after March 1, 2022.
- (3) Material change transactions that are documented by one or more definitive agreements entered into on or after March 1, 2022, shall be processed in accordance with these rules' standard provisions and timelines for preliminary and comprehensive review.
- (4) If a material change transaction (i) has been documented by one or more definitive agreements entered into before March 1, 2022, (ii) is expected to close after March 1, 2022 but before August 28, 2022, and (iii) requires comprehensive review, the 180-day period for comprehensive review provided in OAR 409-070-0060(9) may be waived or reduced in the Authority's discretion, with due consideration being given to the date on which the notice was received, the public importance and complexity of the transaction, and the Authority's current workloads, staffing and resources. The notice for a material change transaction that is eligible for a waiver or reduction in the comprehensive review period under this rule shall include a statement of the reasons why expedited review is required and the date by which a decision on the transaction is requested. In no event shall the Authority waive the preliminary review required by OAR 409-070-0055.