

Date: October 8, 2021

To: Pat Allen, Director, Oregon Health Authority  
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From: Lisa Vance, President Strategy and Operations, Providence  
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RE: House Bill 2362: Rules Advisory Committee

Providence appreciates the opportunity to provide feedback on the implementation of House Bill 2362. We have been tracking the conversation at the Oregon Health Policy Board related to the framework for moving forward and understand the Oregon Health Authority is taking a thoughtful approach. Providence's detailed feedback, related to the areas requested by the OHA, are outlined below. We appreciate your considerations and look forward to participating in a detailed discussion during the Rules Advisory Committee.

#### **Define terms that are in the statute**

**Define covered transactions that “will significantly reduce essential services”** to clearly establish a statewide standard that all health care entities know they will need to meet.

- **Recommendation:** Providence would recommend a two-part test that considers entity specific change and looks at the broader community impact on access and ability to meet need. Reduction of services, especially those that are costly to maintain and duplicative, may in fact be a benefit and reduce the total cost of care.

**Define “new entity”** in a manner consistent with recognized standards.

- **Recommendation:** We would recommend that OHA align this definition with Washington State to clarify that a “merger, acquisition, or contracting affiliation between two or more hospitals, hospital systems, or provider organizations only qualifies as a material change if the hospitals, hospital systems, or provider organizations did not previously have common ownership or a contracting affiliation.” This definition would make clear that reorganization, inter-company agreements and changes in ownership under same controlling entity, would not be considered a new entity.

**Define new entity that reaches “\$10M in first full year of operation”** to reduce confusion about how this will be calculated.

- **Recommendation:** When calculating estimated revenue in the first full year of operation, Providence would suggest these estimates be based on pro forma estimates, transactions of significance will have pro formas so we believe this is a reasonable limitation.

**Define value-based purchasing** to align with total cost of care and VBP compact language.

- **Recommendation:** Alignment with our statewide goals around VBP is an important part of this work. To this end, we would recommend using Oregon's VBP collaborative compact definition, which is defined to include HCP-LAN Categories 3A and higher. This encompasses payment models with upside risk only, combined upside and downside risk, as well as prospective payment models.

**Address any collaborative effort involving the Oregon Health Authority, the Department of Consumer and Business Services, or the Department of Justice**

Providence would urge the OHA to limit duplication where possible, particularly as it relates to antitrust review. We understand there are many discussions happening between agencies and efforts in place to hire staff that can manage coordination across agencies. The following are some guidelines we hope the OHA will consider.

▪ **Recommendations:**

- **Department of Consumer and Business Services, insurer oversight:** The current process for insurer oversight in Oregon works well, we should preserve DCBS’ role in reviewing and making final decisions regarding all insurer-to-insurer transactions captured by the Form A process.
- **OHA and DCBS, Medicaid oversight:** Providence would recommend that the OHA provide clarification in rule related to the process for Medicaid and Coordinated Care Organizations.
- **OHA and Department of Justice health care entity oversight:** Providence urges the OHA not to create duplicative antitrust reviews and defer to DOJ. The DOJ has institutional experience as an antitrust enforcer and authority under Section 16 of the Clayton Act, 15 U.S.C. § 26 to seek relief for transactions that raise antitrust concerns. The following language would be valuable in articulating this process, “The antitrust assessment of a material change transaction presumptively will be conducted by DOJ, and there will be a clearance decision within 10 days of a notice of material change transaction ensuring that only one agency conducts the antitrust review.”

**Outline the process for the notice of a material change transaction**

When developing a process for notification of material change transaction, Providence would suggest keeping this as simple and straight-forward as possible while ensuring that the OHA has adequate information to proceed as required by law.

**Notification requirements/form to OHA**

- **Recommendation:** Providence has experience with similar requirements in other states and would recommend that the OHA consider something like the form used for notification in Washington State. This notification form contains information that is consistent with information that would be available in a Letter of Intent or term sheet, which are important foundational documents to any material change transactions. For reference, Washington State’s Notice of Material Change Form can be found [here](#).

**Confidentiality for 30-day and 180-day review**

- **Recommendation:** In accordance with confidentiality protections established in statute, Providence would suggest OHA include the following language in rule, “Information and documents submitted to the Oregon Health Authority, Department of Consumer and Business Services or Oregon Department of Justice, including the notice form for a material change transaction, shall be maintained and used in the same manner and under the same protections from disclosure under any public records law as provided in ORS 646.836.”

## **Describe how the Oregon Health Authority will conduct the 30-day preliminary review**

### **Timeline for 30-day review**

- **Recommendation:** In alignment with statute and for purposes of clarity, Providence would recommend stating in rule that the 30-day review period starts the same day an entity provides notification of material change to OHA.

### **Key considerations/criteria for the 30-day**

Consistent with the legislative intent, rules established by the OHA should clarify the assumption that nearly all transactions will be resolved through the 30-day review process. If this process is working correctly, minor transactions and increases in ownership that don't dramatically reduce services or will preserve existing access should be subject to 30-day review. Only large hospital-to-hospital transactions would be subject to the 180-day review.

- **Recommendation:** For consistency and clarity, Providence would recommend that the OHA align with the U.S. DOJ's "Statements of Antitrust Enforcement Policy in Health Care" ([link](#)) for similar transactions. This will ensure there is some alignment in standards and limit the type of transactions that would need to go through a more extensive 180-day review process. U.S. DOJ presumption standards for the 30-day review process that Providence would recommend include:
  - "Federal Statement 1 (regarding hospital mergers): The Agencies will not challenge any merger between two general acute-care hospitals where one of the hospitals (1) has an average of fewer than 100 licensed beds over the three most recent years, and (2) has an average daily inpatient census of fewer than 40 patients over the three most recent years, absent extraordinary circumstances.
  - Federal Statement 2 (regarding high-tech/expensive equipment): The Agencies will not challenge under the antitrust laws any joint venture among hospitals to purchase or otherwise share the ownership cost of, operate, and market the related services of, high-technology or other expensive health care equipment if the joint venture includes only the number of hospitals whose participation is needed to support the equipment, absent extraordinary circumstances.
  - Federal Statement 7 (regarding joint purchasing arrangements): The Agencies will not challenge, absent extraordinary circumstances, any joint purchasing arrangement among health care providers where two conditions are present: (1) the purchases account for less than 35 percent of the total sales of the purchased product or service in the relevant market; and (2) the cost of the products and services purchased jointly accounts for less than 20 percent of the total revenues from all products or services sold by each competing participant in the joint purchasing arrangement."

### **Considerations for requesting additional information**

- **Recommendation:** Even the 30-day review process can become inefficient and expensive if parameters are not established. Specifically, Providence would recommend that the OHA exclude electronic-discovery from the 30-day review.

## **Describe how the Oregon Health Authority will determine the need for a comprehensive review and a review board of stakeholders, when applicable**

### **Timeline for 180-day review**

- **Recommendation:** In alignment with statute and for purposes of clarity, Providence would recommend stating in rule that the 180-day review period starts the same day an entity provides notification of material change to OHA.

### **Triggers for 180-day review**

As stated above, Providence strongly encourages the OHA to clarify in rule that most transactions will be resolved through the 30-day review process and only large transactions go through the 180-day review process. Specifically, Providence would recommend that two types of material change transactions have a presumptive 180-day review established in rule.

- **Recommendation:**

- **A presumptive 180-day review of transactions that include for-profit and private equity in health care providers, physician groups, hospitals and health systems.** This would allow the OHA to ensure that short-term revenue growth, at the expense of quality of care and patient wellbeing, is limited. Note, this would not include day-to-day transactions all health care entities have to engage in with for-profits, including for-profit vendors and technology/data entities.
- **A presumptive 180-day review of large transactions** reportable under the Hart-Scott-Rodino (“HSR”) Act to the Federal Trade Commission. This will allow the OHA to set a clear standard and capture transactions of significant value and size.

### **Exempt an entity from the 180-day notice requirement if there is an emergency situation**

- **Recommendation:** Providence would suggest that the OHA work to preserve access to health care services whenever possible. We would recommend that emergency situations include any loss of health care capacity that will impact access to health care in the community, including availability of emergency medical services.

### **Outline the processes mentioned in the statute**

#### **180-day review form/information criteria**

It is important that health care entities under review have an opportunity to meaningfully engage in the process and requests that the OHA consider the following.

- **Recommendations:**

- If the OHA engages an expert, any findings will be made available to the parties at least 30 days prior to a public meeting or decision making meeting by a review board. Parties to a transaction shall have the opportunity to submit their own report in response to one from the OHA expert in advance of a public meeting or meeting of a review board.
- Any complaints regarding a potential transaction received by OHA and used to render a decision should be made available to the parties in advance of a public meeting or meeting of the review board.
- Any potential conditions imposed in connection with approval of a transaction must be made available to the parties at least 45-days in advance of OHA issuing a decision, and the parties must be given a meaningful opportunity to respond to the proposed conditions, including proposing alternative conditions. OHA will provide a reasoned decision if rejecting proposed alternative conditions from parties to a transaction.

#### **Review committee meetings and membership**

- **Recommendation:** It is important to Providence that the rules establish a balanced review committee with limited conflicts of interest, that is not privy to political influence. It will also be important that all meetings be required to meet public meetings requirements.

### **Measuring effects of transaction on access, cost, equity, quality**

- **Recommendation:** In order to ensure consistency, OHA needs to establish a standard process for measuring access, cost, equity, and quality. Providence would suggest parties to the transaction be accountable for providing evidence to support access, cost, equity, and quality, and that the information provided be considered prima facie (accepted as correct until proved otherwise). Specifically related to access, we would encourage the OHA to measure access in totality and not by specific service lines. As noted above, closure of costly, duplicative service can occur in service to a community and our broader efforts to reduce the total cost of care.

### **Post-determination engagement and accountabilities**

Providence suggests that the rules create a framework for what happens after the review processes are complete. A couple of the most critical components are outlined below.

- **Recommendations:**
  - **Entity appeal** – Due to the time sensitivity of many transactions, Providence would propose no internal appeals process within the OHA and instead that the OHA recognize that parties may need to resolve appeals quickly and for good cause parties may seek accelerated disposition from superior court, and an appellate court if a determination proceeds up on further appeal. This would allow final decisions to be subject to petitions in superior court under ORS 183.484.
  - **Scope of conditions on transaction** – Providence would like to see clarity in the rules that there will be no conditions on services provided once a transaction is approved that are unrelated to concerns found during the review process.
  - **Fees** – We request that the rules cap fees that can be charged to parties under review and clarify that other agency costs, like those of the DOJ, not be included in the entity fee.