Date: November 22, 2021

To: Pat Allen, Director, Oregon Health Authority
Jeremy Vandehey, Health Policy & Analytics Division Director, Oregon Health Authority

From: Jessica Adamson, Executive Director Government Affairs, Providence
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RE: House Bill 2362: Rules Advisory Committee – Draft rules dated, Nov. 10, 2021

Throughout both the legislative and regulatory processes, Providence has consistently engaged in stakeholder conversations related to House Bill 2362. In these conversations the legislative intent, to review large scale mergers and affiliations between health care entities that truly impact control or governance, has been clear. Providence encourages the Oregon Health Authority to reevaluate key aspects of the rules drafted Nov. 10, 2021, to ensure we do not stifle collaboration and innovation in the state. In order to reach our shared goals around health equity, affordability, access and quality, health care entities must be able to partner and innovate.

Further below, we detail Providence's specific concerns with the proposed rule language, but, first, we would like to preface our comments by highlighting some of the priority issues that need further consideration by the OHA before moving forward with final rules.

- **Objective standards that are clear, predictable and fair:** It is critical that health care entities and the public understand the criteria by which a transaction will be evaluated. The final rules should include objective criteria specifically related to "essential to achieve health equity," "the elimination or significant reduction of essential services," and the proposed "Analytical Framework." We would also recommend looking to the substantial body of federal antitrust law in assessing whether transactions "Significantly increase market concentration among health care providers when contracting with payers, insurers, or coordinated care organizations."
- **The evaluation of "control":** The low percentage thresholds of 10 percent (insurers) and 25 percent (health care entities) do not equate to control in health care. To align with the legislative intent of capturing large-scale transactions, "control" should in fact mean control with a minimum threshold, if needed, of 51 percent or more for both insurers and health care entities. Since the rules cover some minority interest transactions, that significantly increase market concentration among health care providers, the program will still capture small shifts in assets so there is no need to define control as something less than control.
- **Timeline clarification:** The final rules should align with the legislative intent that most reportable transactions will be resolved through the 30-day review process and OHA should be accountable for meeting the 30-day timeline or the transaction should be deemed approved. A presumption that large transactions that include for-profit and private equity, or are reportable under the Hart-Scott-Rodino ("HSR") Act to the Federal Trade Commission, will be subject to the 180-day review process could simplify the OHA's role in having to make decisions regarding what types of transactions that go through the more comprehensive review process and bring clarity to health care entities and other stakeholders.
- **Fees methodology:** One of the most significant barriers for small and independent providers are the fees, particularly when the fees are based on the size of the entities and not the value of the

transactions. There are many revenue neutral transactions, critical to preserving access and autonomy of private practices, that may not move forward because of the significant expenses envisioned in the proposed rule. If the OHA moves forward with the current direction, considering only the size of the entities and not the type and size of "covered transactions", we believe many beneficial collaborations will not occur because of the cost concerns associated with the filing fees.

- **Continuing jurisdiction:** We believe these provisions are outside the OHA's statutory authority which limits on-going oversight to reporting requirements and specific situations with conditional approval. The current language means that full approval is never final.
- **Notification form:** The complexity and cost associated with completing the proposed material change form causes serious concerns. While we respect that the OHA needs a certain level of information to determine how to proceed with review, the onerous amount of detail, like requiring identity and background of individuals, for every transaction is unreasonable. We would recommend looking to the Washington notice form as an example of basic information that balances the interests of health care entities and the OHA.

**OAR 409-070-0000 Material Change Transactions: Scope and Purpose**

Section (3) – Providence would recommend that the OHA add a subsection stating that one of the goals for reviewing transactions is "a process that is objective, clear, fair, and consistent."

**OAR 409-070-0005 Material Change Transactions: Definitions**

Providence would recommend that the following definitions be changed to align with the statutory authority outlined in House Bill 2362:

- "Administrative services" – This definition remains incredibly broad and creates confusion about what "the rendering of health care to patients" and "the provision of pharmaceuticals" includes. If excluding day-to-day transactions is the OHA's objective, the definition of administrative services should exclude acquisition of things (pharmaceuticals, supplies, technology, EHR, etc.), contracts necessary to carry out day-to-day business (telehealth, training, call coverage, transfer agreements, etc.) and collaboration between health care entities for purposes of value-based contracting and reducing the total cost of care.
- "Covered transaction" - Throughout the rules and the form, OHA creates unnecessary confusion about what transactions are covered transactions. We recommend the OHA clarify that covered transactions are only transactions that "result in the elimination or significant reduction of essential services, that meet materiality standards, and are not exempt from review."
- "Essential services" - This definition needs to align with the OHA's statutory authority and clarify the objective standards that will apply when evaluating a transaction. This includes clarity about services to achieve health equity to ensure health care entities know if they need to file and that the standards are applied consistently.
- "Material change transaction" – The definition should clarify that material change transactions required to be reported to the OHA only include transactions that meet materiality standards and are not exempt from review.

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

While we appreciate the changes in the latest draft of the rules, based on the OHA's statutory authority, the entire section should only apply to transactions that will eliminate or significantly reduce essential services.

- Section (2) – Providence has two primary concerns with how this section was drafted. The first is that it is forward looking. When a transaction is a year or more out, with many unknowns, it is not possible to say definitively if there will be an impact on things like providers, distance traveled, or appointment times. Secondly, it is unclear if any change outlined in (a-h), regardless of how insignificant the impact, will be considered material. There needs to be a reasonability test and the OHA should provide guidance on how these standards will be measured.
    - (d) As a Catholic health care system, Providence objects to this provision as being outside the scope of the authorizing statute and asks that it be removed. The restrictions described in the provision should be allowed, particularly if there is no net change in access to essential services (and we note, that 0010(2)(e) covers situations involving an actual reduction in essential service). Conscience objections are protected by the First Amendment, affirmed in law, and nothing in the regulations should require us to file notice based on these objections nor should we be prevented from practicing in a way that is consistent with our sincerely held religious beliefs, which is constitutionally protected.

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

- Section (2) – To align with statute, this language should be changed from "if the transaction may increase the price of health care services" to "if the transaction will increase the price of health care services."

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

In order to align with statutory authority and intent, Providence would recommend the OHA consider incorporating the following provisions in this section:

- Material change transactions necessary to respond to a Public Health Emergency, and temporary in nature, should receive a presumption of approval under this regulation.
- Streamline the process so decisions can be made quickly and enforce that with a timeline of no more than five days.
- The process should be collaborative with discussions between the OHA and the parties to the transaction in real-time.
- Define the objective standards on which the OHA will decide to approve emergency transactions.
- For purposes of balancing community-good with transparency, rather than community engagement in the emergency approval process, the OHA should consider requiring an entity to submit information in writing post-decision.
- An opportunity for an appeals process should be allowed, on an accelerated basis.

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

In alignment with statutory intent, Providence strongly recommends that the OHA reevaluate the concept of "control" throughout the rules and increase it to 51 percent or more. It is not common, outside of publicly traded securities, for control to be found at the low thresholds that have proposed, especially in the health care industry in Oregon and, therefore, these low thresholds of ten to twenty-five percent, should not be utilized by the OHA to presume control.

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

Providence would suggest the OHA add language speaking to the opportunity for health care entities under review to meaningfully engage throughout the process, in order to provide clarity and ensure decisions are made based on accurate assumptions. In addition, we request consideration for the following:

- Section (2) – Providence believes that the inclusion of Attorney General review and approval of hospital transfers is outside the OHA's statutory authority, and these regulations should have no influence on the standing AG process and regulations.
- Section (3) - Confidentiality protections here, and throughout the document, need to be strengthened.

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

- Section (4)(a) – While we appreciate the allowance of a term sheet, to our point above about providing information necessary to make an informed decision – requiring submission of definitive agreements after the fact is unreasonable. Additionally, because of the scale of transactions required to be reviewed, these requirements would not even apply to all transactions.
- Section (5) – Rule language should clarify that the statutory timeline is 180-days. Generally, the timeline references throughout this process needs to be defined.
- Section (7) – Requirements that statements of revenue be prepared by a duly qualified and credentialed accounting expert are unreasonable and would add significant cost to the process without additional value.
- Section (8) – While we appreciate the reference to an objective "Analytic Framework," in alignment with statute and for purposes of transparency and consistency, these standards need to be established in rule.

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

Providence would recommend that the OHA consider a framework that limits cost and manages confidentiality. The use of consultants to review transactions with limited value will substantially increase the cost of health care. To right-size these costs we would recommend a cap on the total costs of outside advisors, that a cost estimate is provided to entities prior to the spending occurring, and that entities have an opportunity to withdraw if they choose not to move forward with a transaction because of the cost.

- Section (1) - Providence would recommend the following changes:
    - Requiring these outside advisors to go through a conflict-of-interest review publicly.
    - Requiring that actuaries, accountants, and legal counsel are "duly qualified and licensed in the State of Oregon."
    - Delete "consultants" and "other advisors" – The OHA should list each type of advisor for which we might need to make payment.

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

The Oregon Legislature clearly intended to have a simple and straight-forward 30-day review process for transactions that did not have significant impact on the community and did not change the control or ownership of a health care entity. To this end, Providence encourages the OHA to clarify in rule that most

transactions will be resolved through the 30-day review process and only large transactions that include for-profit and private equity or are reportable under the Hart-Scott-Rodino ("HSR") Act to the Federal Trade Commission will be subject to the 180-day review process.

- Section (2)(a-e) – Objective criteria needs to be established for each subsection and the OHA needs to define the process for decision making in rule.
- Section (3) – It is the accountability of OHA to complete the 30-day review in that time period. If review is not complete by the OHA within the statutory timeframe, the transaction should be deemed approved. If this is not possible, we suggest the OHA either allow parties to extend from 30-day to 60-day without the need for a full review or allow the entities to withdraw.

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

- Section (2) – For clarity about the process and what requires certain levels of review, Providence would request that the OHA clearly define the circumstances that would require a community review board. Based on the scale of transactions that could fall into a 180-day review, seating a review board every time is unnecessary.
    - (a-c) - The criteria needs to be objective and each subsection needs to define the process for decision making.
- Section (3) – The review board process needs to be clarified and aligned with provisions in House Bill 2362, this would include: Adding disclosure of conflicts of interest and making that information public; aiming to seat a fair and equitable board; and requiring members to sign non-disclosure agreements and be liable for inappropriate disclosures.
- Section (6) - Rules need to outline two separate processes for engagement – one for parties engaged in the transaction and one for the public. These are complex transactions and it's important that the OHA engage with parties to ensure there is clarity about the goals and structure of these transactions. Providence would recommend that the OHA include the following in rule:
    - 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 the 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 the OHA issuing a decision, and the parties must be given a meaningful opportunity to respond to the proposed conditions, including proposing alternative conditions. The OHA will provide a reasoned decision if rejecting proposed alternative conditions from parties to a transaction.
- Section (8) – As noted several times throughout our comments, the criteria for the entirety of this section needs to be objective and each subsection needs to define the process for how the OHA will make a decision. Language that needs to be clarified includes subjective findings about an organizations commitment to addressing health disparities and inequities, and that a health care entity or transaction has the accountability to carry out Oregon Health Policy Board's political priorities.

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

- Section (1) – For clarity and consistency in how conditions are applied, Providence recommends deleting the direct reference to OAR 409-070-0000. Rather, the rules should specify that any conditions will aim to address the specific concerns regarding the material change transaction. The OHA does not have statutory authority to impose conditions on a transaction that does not originate from the comprehensive review process.

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

Providence has a series of concerns with this section, but most importantly entities must have appeal rights that can provide fair and timely relief. The OHA does not have the authority to preempt this right or limit the facts at our disposal, especially if we have been given no opportunity throughout the process to confirm the facts are accurate and consistent with our intentions.

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

Continuing jurisdiction is outside the OHA's statutory authority Providence would recommend that the OHA limit continuing jurisdiction to periodic reports to confirm compliance with conditions of approval, otherwise full approval is never final.

**Notice of Material Change Form**

Providence believes that RAC participants should be allowed to review and provide comment on the revised form before final rules are filed with the Secretary of State. Based on the original version, the form would require significant resources and funds to complete. The final form needs to balance the capacity and cost to health care entities involved, while ensuring OHA has the necessary information to make an objective decision about next steps. Providence would recommend that the OHA consider a form similar to that established in the State of Washington for material change notification.