

Date: February 1, 2022

To: Jeremy Vandehey, Health Policy & Analytics Division Director, Oregon Health Authority  
Zachary Goldman, Economic Policy Advisor, Oregon Health Authority

From: Kristen Downey, Director Government Affairs, Providence - Oregon

RE: Health Care Market Oversight Program: Draft Sub-regulatory Guidance

Thank you for the opportunity to provide comments on the first set of sub-regulatory documents, including “Criteria for Comprehensive Review of Material Change Transactions,” “Criteria for Community Review Boards,” and “Criteria for OHA use of outside advisors for material transaction review.”

While Providence appreciates the Oregon Health Authority’s continued effort to create clarity, the complexity for health care entities continues to grow with now having to navigate the law, regulations and seven (and counting) sub-regulatory guidance documents. With this complexity, and the learning curve anticipated for both the OHA and health care entities as this program is implemented, Providence respectfully requests consideration for on-going engagement with health care entity applicants by OHA throughout the review process. Ensuring the OHA has adequate clarity about the goals and structure of these transactions is critical to making informed decisions about a transaction’s potential impact.

#### **Criteria for Community Review Boards**

Providence would recommend the following changes to align with statutory authority outlined in House Bill 2362 and to provide clarity:

- **Type of transaction:** Add language to clarify that a community review board is not required for all transactions listed and add that OHA will not convene community review boards for “emergency reviews, transactions that are subject only to a preliminary review, or transactions that are unable to be reviewed within 30-days and are automatically moved to 180-day review per OAR 409-070-0055 Section (3).”
- **Potential to impact a large number of residents in this state:** Providence would suggest simplifying this section to state, “OHA will consider a proposed transaction to impact a “large number of residents in the state” if the transaction will impact 50,000 or more residents.” This simplifies the process, aligns with the statute, and ensures that transactions involving a party located in a metropolitan statistical area, that have minimal impact on residents, are not automatically subject to the review process by virtue of where one party to the transaction is located.
- **Significant change in the market share of an entity involved in the transaction:** Providence would recommend deleting the following unsupported assertion, “An entity that provides more services and generates more revenue would have a greater market share.”
- **References in this document to “US Department of Justice and Federal Trade Commission Horizontal Merger guidelines”** should be reevaluated by the OHA as its guidance does not accurately reflect the Guidelines. In particular, contrary to OHA’s suggestion, the Horizontal Merger Guidelines do not define what constitutes a “significant change in market share,” but set forth general

standards for when a change in HHI may raise competitive concerns. The Horizontal Merger Guidelines set forth a nuanced framework for evaluating proposed mergers, with market concentration being just “one useful indicator of likely competitive effects...used in conjunction with other evidence of competitive effects.” OHA’s adoption of the DOJ and FTC’s HHI thresholds, without reference to or consideration of any of the other many factors to be considered under the Horizontal Merger Guidelines, will lead to potentially problematic and inconsistent results. Further, OHA’s treatment of a “moderately concentrated market” (i.e., a market with an HHI between 1500 and 2500) with an HHI increase of more than 100 as presumptively problematic is particularly concerning in a state where many markets cannot support low market concentration. In many of Oregon’s lightly populated areas, which are too small to support more than one hospital or specialty practice, concentration is likely and often necessary to achieve economic efficiencies. OHA’s direction to treat a “moderately concentrated market” as a potentially problematic merger ignores the market realities faced by many of Oregon’s communities.

### **Criteria for Comprehensive Review of Material Change Transactions**

Based on the OHA’s statutory authority, and clear intent of the Oregon Legislature at passage of HB 2362, the Health Care Market Oversight program is intended to have a straightforward, 30-day review process for most transactions. It is the accountability of OHA to complete the 30-day review in that period. Providence urges the OHA to revise regulations and sub-regulatory guidance to reflect that.

Specific to the Equity Domain and the examples provided therein, we would appreciate clarity related to reduction in engagement with the local community. In our experience, the centralization of back-office services, like patient billing and relations, does not mean the local community will not be engaged. In fact, centralization can be a benefit by adding additional patient relation resources. A better example might be “reduction of community engagement in the hospital’s community benefit assessments and planning.”

### **Criteria for OHA use of outside advisors for material transaction review**

Providence would recommend deleting the following language, as it exceeds statutory authority, and it should not be the obligation of the public to manage the OHA’s contracts, “To avoid conflicts of interest and delays to transaction review, parties to a transaction should not engage any of OHA’s publicly announced outside advisors in connection with a material change transaction if the party has not previously engaged the advisor. Parties should not consult or contract with OHA’s publicly announced outside advisors for technical or other assistance with a material change transaction.” OHA can condition its engagements with vendors on the vendors not agreeing to provide services to potential applicants, but this obligation should not be placed on health care entities via sub-regulatory guidance.