Thank you for the opportunity to provide comments on the second draft of the HB 2362 Healthcare Market Oversight (HCMO) rules. As outlined in our first letter, the organizations listed above are dedicated to providing access to quality healthcare across Oregon, and include many small and independent clinic owners operating outside of the larger hospital systems.

We appreciate the Authority providing updated drafts and materials, and scheduling additional RAC meetings. Following review of the second draft of the rules, and after the first RAC meeting, we are left with several suggestions for improvement and outstanding questions.

- It is not clear if entities who fall under an exclusion need to apply for the exclusion. Entities that are clearly excluded should not have to file for an official exclusion. If the rules are not revised and an application for exclusion is necessary for each transaction, further clarity is needed on the frequency of applications, and what that process will entail.
- The rules as drafted are broad in that they go beyond mergers and acquisitions and appear to cover many day to day operational issues, negotiations over equipment purchases, collaborations to reduce costs of things like insurance, etc. Language was added in the second draft of the rules that seems to attempt to address some of this, but it appears that entities would need to file for every exemption.
- The fees outlined in Table 1 are very concerning (minimum of $25,000), especially considering the broadness of the rules.

- Outside of the high filing fees, entities must pay all legal and consultant costs for the Authority, and now DOJ, with no cap. This is concerning, especially to smaller entities and considering the broadness of the rules.
- We are concerned that the Authority will be unable to meet the 30-day timeline considering the broad application of the rules and sheer volume of anticipated applications. As drafted, when the Authority is unable to meet this deadline, an application is automatically advanced to a comprehensive review, which will add additional costs to the entities.
- There is general concern about how the Authority intends to enforce the program if standards being developed through rulemaking are not clear at the outset of the program. Using language such as making referrals to the Department of Justice (*see* OAR 409-070-0030(2)) or building in language about filing false or misleading information (*see* OAR 409-070-0080(2)) sets a tone at the outset that this is potentially a civil and criminal sanctioning program rather than a health care community standard-building program.

Additional concerns by section:
OAR 409-070-0005. MATERIAL CHANGE TRANSACTIONS: Definitions
It is not clear how price negotiating power will be measured by the Authority, this term newly appears several times in the second draft of the rules.

OAR 409-070-0010. MATERIAL CHANGE TRANSACTIONS: Covered Transactions
The amendment to Section 3 to include the language on price negotiating power is concerning, as it is not clear how this is measured. As well, we fear that this will ultimately have a negative impact on costs. If entities are unable to work together to negotiate the price of equipment, for instance, each will end up paying more.

We appreciate the edits made in the second draft of the rules regarding "day to day" operations contracts or transactions that should be excluded from oversight at the first RAC meeting. However, there are many "day to day" operations that are pulled in even with these edits. The above group maintains that call panels should not be pulled into review, nor should contracts with provider groups. We recommend removing the transactions in OAR 409-070-0010 Section 4(a), 4(b), 4(c), and 4(d) and adding these to OAR 409-070-0020 as "Excluded Transactions." This is keeping with the intent of HB 2362 not to regulate the day-to-day functioning of the health system, as these activities are necessary for the provision of medical services and may be considered as such under these rules.

OAR 409-070-0020. MATERIAL CHANGE TRANSACITONS: Excluded Transactions
It is still not clear if entities who know they are exempt either because they do not meet the materiality standard or because they fall under another exemption still need to file notice of every transaction and apply for an exemption. While we do not believe this to be the legislative intent of the bill, there are several sections containing concerning language that seems to point to an application being necessary for all transactions: Section 3 under Covered Transactions

(the language “may be subject…”); Section 3 and 4 under Excluded Transactions; Section 2(e) of Preliminary 30-Day Review of a Notice of Material Change Transaction.

Entities that are clearly excluded should not have to file for an official exclusion. If the rules are not revised and an application for exclusion is necessary for each transaction, further clarity is needed on the frequency of applications, and what that process will entail.

While we appreciate the exclusion of administrative services and the purchasing of goods, we believe that the definition of administrative services is too narrow.

Further, it is concerning that under Section 3, entities still need to provide notice of the transaction and the necessary information for an exclusion, which we assume carries filing fees—but at the very least will slow the process unnecessarily and will carry administrative costs for the entities.

OAR 409-070-0022. MATERIAL CHANGE TRANSACTIONS: Emergency and Exempt Transactions
As mentioned at the first RAC meeting, we have concerns with the section on emergency and exempt transactions. As others at the RAC detailed, we believe that these emergency exemption should only be used in a true emergency, and as such, we feel that the information requested by the authority is too onerous, and that the public comment period and publishing of the cover sheet is inappropriate and will dissolve public confidence unnecessarily (Section 5). Additionally, we encourage changing section 6 in order to promote fairness and transparency:

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

As well, it appears that Section 1b disallows the sale of a practice to qualify for an emergency exemption, which is concerning.

OAR 409-070-0030. MATERIAL CHANGE TRANSACTIONS: Requirement to File a Notice of Material Change Transaction
We appreciate that the proposed structure is a sliding scale, but note that the fees outlined are exorbitant and unworkable, especially for smaller providers such as those who have signed on to this letter, and especially considering that the fees do not capture additional costs for outside advisors, which are currently not capped.

The sliding scale should apply not just to the size of the entity, but also to the size of the transaction.

OAR 409-070-0042. MATERIAL CHANGE TRANSACTIONS: Declaratory Rulings
We appreciate the new addition of the Declaratory Rulings section, but are disappointed to see that the service will carry a base fee and require reimbursement for OHA expenses, which again are not capped. In order to ensure maximum compliance, the Authority should offer this guidance free of charge, and on a shorter timeline.

OAR 409-070-0050. MATERIAL CHANGE TRANSACTIONS: Retention of Outside Advisors
While we did not cover the retention of outside advisors at our first meeting, we do have suggestions, which we can re-state at the next RAC meeting. The addition the Department of Justice to the requirements is concerning. As well, expenses of legal counsel, accountants and other consultants should be capped. And, entities should be made aware of the potential costs upfront, with an option to dispute excessive costs following the transaction.

Additionally, approval of the transaction should not hinge on reimbursement for the consultants, especially since the hiring of and associated costs are entirely outside of the entities control. The legislation was articulated by proponents as an attempt to deal with issues that are of general public interest. Therefore, at least a portion of the obligation for this "public interest" review should fall on state government. Expecting businesses, especially many small and medium size businesses, to foot the entire bill is unreasonable, and will stifle collaboration, innovation and efforts to expand and/or improve patient care. It appears that the minimum that a transaction might cost for an applicant is $25,000. This will immediately dissuade many of our groups from even contemplating changes that could fall under these broad provisions.

OAR 409-070-0055. MATERIAL CHANGE TRANSACTIONS: Preliminary 30-Day Review of a Notice of Material Change Transaction
As outlined in our first letter, we maintain that the findings of the preliminary 30-day review should be disputable. The Authority should acknowledge receipt of the application, and should provide parties with regular updates. As well, if the Authority is unable to meet the 30-day deadline outlined in statute and this rule, the transaction should be automatically approved (Section 3). This is especially concerning to smaller clinics and practices who have less of an ability to pay for extensive consultant fees that may come with a comprehensive review. This requested change is consistent with existing Oregon statute in other areas, including ORS 723.022 (3).

OAR 409-070-0060. MATERIAL CHANGE TRANSACTIONS: Comprehensive Review of a Notice of Material Change Transaction
If a transaction is going to be subject to the comprehensive review, there needs to be clear, fair and transparent standards included in the rule as to when the review boards will be engaged, and the membership makeup of the boards. Stating that the authority "may" include the appointment of a community review board does not give confidence for a such a process. As well, meetings of the review board should be subject to public meetings laws, and should be held virtually to encourage participation.

We request the proposed OAR 409-070-0060 Paragraph 8(d) be stricken and replaced with: "(d) The transaction would eliminate or significantly reduce essential services." This is keeping with the language of the bill, and "essential services" is defined elsewhere in the rulemaking; the elements enumerated in Section 8(d) add vague new components that are subjective and inject inappropriate political considerations into the process, i.e., "Satisfy the policy priorities of the Oregon Health Policy Board." Further, we ask that "significantly reduce" be defined as

eliminating access to 50% or more of essential services (as defined in the proposed OAR 409-070-0005.

Section 8(g) does not allow for the situation where a retiring physician might liquidate their assets as part of a sale process, and is a concern. Allowing a clinic to acquire a retiring doctor's clinic, rather than outright closing it, is preferrable to maintain community access.

Section 8(h) is an arbitrary standard and should not be included in these rules, as the rules should be focused on creating a fair, transparent, and efficient process.

OAR 409-070-0070. MATERIAL CHANGE TRANSACTIONS: Confidentiality
The language around confidentiality is not strong enough, even in the revised version of the rules. We suggest that working documents remain confidential and that a summary be made available for public inspection. Further, we ask that Community Review Board members be subject to the same confidentiality requirements as agency officials. This provision was clearly included in HB2362, but not included in the rules.

Thank you for consideration of the above comments. The groups signatory to this letter look forward to reviewing future drafts of this rule, and to participating in forthcoming RAC meetings. Since the RAC was unable to discuss the entire rule during the first meeting, we appreciate the addition of the November 15 meeting.

Sabrina Riggs	sabrina@daltonadvocacy.com
Courtni Dresser	courtni@theoma.org
Jen Lewis-Goff	jlewis-goff@oregondental.org
Kristine Phillips Evertz	kristinepe@summitstrategies.us
Dan Cushing	cushing@pwlobby.com