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TEMPORARY ADMINISTRATIVE ORDER
INCLUDING STATEMENT OF NEED & JUSTIFICATION

PH 44-2023

CHAPTER 333
OREGON HEALTH AUTHORITY
PUBLIC HEALTH DIVISION

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ARCHIVES DIVISION
SECRETARY OF STATE
& LEGISLATIVE COUNSEL

FILING CAPTION: Projects and Proposals Subject to Certificate of Need Review

EFFECTIVE DATE: 09/21/2023 THROUGH 03/18/2024

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NEED FOR THE RULE(S):

The Oregon Health Authority (OHA) is temporarily amending OAR 333-550-0010 relating to projects and proposals subject to Certificate of Need (CN) review. The purpose of the amendments is to specify that changes in health services that include the transfer of health services within the same service area (as defined in OAR 333-590-0040), within the same health system, after the closure of one hospital, and that do not result in a substantial increase in services, do not meet the statutory definition for a "new hospital", and therefore, are not subject to Certificate of Need review. These amendments are necessary because the current rules do not contemplate this narrow subset of changes in services.

JUSTIFICATION OF TEMPORARY FILING:

The Oregon Health Authority (OHA) finds that failure to act promptly will not serve the public interest, OHA, and Certificate of Need (CN) applicants. These rule amendments will allow OHA to preserve services in a community where the closure of a hospital would otherwise result in reduced access to critical specialty care. Without these amendments, the CN program would be required to use current rules, which include any changes in services for a new hospital as subject to Certificate of Need. The rule will allow OHA to efficiently work to preserve needed specialty care.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

ORS chapter 413: https://www.oregonlegislature.gov/bills_laws/ors/ors413.html

ORS chapter 441: https://www.oregonlegislature.gov/bills_laws/ors/ors441.html

ORS chapter 442: https://www.oregonlegislature.gov/bills_laws/ors/ors442.html

AMEND: 333-550-0010

RULE SUMMARY: Amend OAR 333-550-0010:

OAR 333-550-0010 is being amended to specify that for Letters of Intent (LOIs) submitted on or after September 1, 2023, the Oregon Health Authority, Public Health Division will not consider a project or proposal to be a change in service or a new service if it meets certain criteria adopted in rule. The amendments also specify that a project

determined to have met the criteria adopted in rule will cease operations at the initiating hospital within 60 days of the service being provided at the receiving hospital.

CHANGES TO RULE:

333-550-0010

Health Services Subject to Review ¶

(1) Pursuant to ORS 442.315(1), a certificate of need must be obtained from the eDivision prior to the offering or development of any new hospital or new skilled nursing or intermediate care service or facility, other than a facility, as defined in ORS 441.065, except as provided in section (12) of this rule.¶

(2) A new hospital is any facility that did not offer inpatient hospital services on a regular basis within its service area within the prior 12-month period and is initiating or proposing to initiate such services. For the purposes of this section, the service area of an existing general hospital will be determined in accordance with the provisions of OAR 333-590-0040 but shall not extend beyond a seven-mile radius from the main hospital campus. A new hospital is not created by the reinstatement of services by an established hospital which has experienced an interruption of services of less than 12 months. A change in category of license for an already operating hospital does not create a new hospital unless the hospital proposes to offer one or more new services not encompassed within its existing license (e.g., a facility for the treatment of alcoholism or drug abuse which proposes to offer inpatient psychiatric services). A new hospital does not include the expansion of an existing hospital at its current site; but it does include any replacement, rebuilding or relocation of an existing hospital that involves a substantial increase or change in the services offered. The definition of "rebuilding" contained in subsection (3)(c) of this rule will also be used for the purposes of this section. For the purposes of this section, a substantial increase in services will be considered to include any increase in the total facility bed capacity or in the bed capacity of any hospital service of greater than ten beds or ten percent of the bed capacity of the facility or service. A substantial change in the services offered will be considered to include any establishment of a new health service, as defined in section (4) of this rule.¶

(3) A new skilled nursing or intermediate care service or facility includes any of the following:¶

(a) The initiation of inpatient skilled nursing or intermediate care services by a new facility or by a health care facility that did not offer such services within the prior 12-month period. A change in ownership of a long-term care facility is not considered to constitute establishment of a new facility. A change in the services of an existing long-term care facility is not considered to constitute the establishment of a new facility or service, unless the new services are not within the scope of services allowable under a long-term care facility license and require licensure under a hospital licensure category;¶

(b) An increase in the skilled nursing or intermediate care bed capacity of a long-term care facility by more than 10 beds or more than 10 percent of the current long-term care bed capacity, whichever is less, within a two-year period after the most recent previous increase in beds at the facility. The date of the most recent increase in capacity will be considered to be the date on which a revised license was issued by the Seniors and People with Disabilities Division reflecting the new licensed capacity. In calculating 10 percent of a facility's capacity, the eDivision will round up to the nearest whole number;¶

(c) The rebuilding of an existing long-term care facility. "Rebuilding" is considered to include any construction project in which at least 50 percent of the square footage of the existing building or buildings is demolished and replaced through new construction; or remodeling which is so extensive that the cost of the remodeling is at least 50 percent of the estimated replacement cost of the facility; or remodeling which involves replacement through new construction of at least 50 percent of the facility's structural bed capacity;¶

(d) The relocation of an existing long-term care facility building to a new site;¶

(e) The relocation of existing long-term care beds from one licensed health care facility to another.¶

(4) A new hospital health service is any health services except basic health services as defined in ORS 442.315(9) that were not offered in or through the hospital on a regular basis within the 12-month period prior to the time such services are proposed to be offered, provided that the annual operating expenses exceed \$500,000 in the first full year of operation at normal levels of utilization. Such operating expenses shall include a full allotment of ongoing expense items attributable to the health service. In other words, if any expense item is budgeted in the first year of operation at a level substantially lower than that which will be incurred routinely in future years, the routine level of allocation will be used. However, the development of operating units or areas of the hospital dedicated exclusively to the provision of ambulatory surgery services shall not be subject to review. In addition, the reinstatement of an established service which has been interrupted for less than 12 months shall not be considered to constitute the establishment of a new service.¶

(5) In determining whether annual operating expenses for a proposed new hospital service exceed \$500,000, the eDivision will consider all direct and indirect costs which are properly allocable to the service, whether or not such

costs are already being incurred.¶

(6) A service is considered to have been established as an existing service once it has been continuously offered by the hospital for a period of at least 12 months.¶

(7) In determining, under section (4) of this rule, whether a health service has been or will be offered on a regular basis, the ~~d~~Division shall consider, as appropriate and among others, the following:¶

(a) Whether there was or will be a change in staffing in terms of quantity, training or qualifications;¶

(b) Whether there has been or will be substantial change in the amount of reimbursement as a result of the proposed service;¶

(c) Whether there has been or will be substantial change in the standards of care, levels of care, or methods of care;¶

(d) Whether there has been or will be substantial change in the type or category of patients;¶

(e) Whether there has been or will be a fixed and definable area for the primary use of the service;¶

(f) Whether there has been or will be specialized equipment available for use in connection with the service;¶

(g) The number of patients served during the last 12 months versus the number of patients expected to be served in the subsequent 12 months; and¶

(h) The current maximum number of patients which can be served versus the proposed maximum number of patients to be served.¶

(8) Section (7) of this rule can also be used to distinguish one health service from another.¶

(9) In determining, under section (4) of this rule, whether a health service is or will be offered in or through a hospital, the ~~d~~Division shall consider, as appropriate, the following:¶

(a) Whether or not the majority of patients served or to be served by such health services are the hospital's patients;¶

(b) Whether or not the staff or portions of the staff for the health service will be employed or contracted by the hospital;¶

(c) Whether the hospital will receive reimbursement for the rendering of health services;¶

(d) Whether inpatients of a hospital will be served; and¶

(e) The type of legal entity involved, its ownership, and its corporate parts and relationships.¶

(10) Pursuant to ORS 442.315(6), a certificate of need shall not be transferred. A transfer will be considered to have occurred if there is a change in ownership of a service, item of equipment, or facility prior to the completion of a project for which a certificate of need has been issued, provided that the change of ownership will result in the provision of affected services in a substantially different manner of different location from that contemplated in the certificate of need application.¶

(11) Nothing in this chapter limits the responsibility of the applicant to provide, or the ~~d~~Division to require sufficient data on which to assess the capital costs and the financial impact of a proposal prior to issuing a certificate of need decision. Where determined appropriate by the ~~d~~Division, Forms CN-3 through CN-9 and additional forms, when necessary, together with suitable explanations and required narrative, will be required of a lessor, owner, or other provider of land and/or improvements to the applicant. See ~~division 580~~.¶

~~[ED. NOTE: Forms referenced are available from the agency.]~~OAR chapter 333, division 580.¶

(12) For Letters of Intent submitted on or after September 1, 2023, notwithstanding any other section in this rule, the Division will not consider a project to be a change in service if the proposed project meets the criteria below:¶

(a) The project is the transfer of a service between hospitals within the same health system currently licensed and operating;¶

(b) The hospital initiating the transfer of service and the hospital receiving the transferred service are within the same service area utilizing the methodology in OAR 333-590-0040; ¶

(c) Both hospitals are within a seven-mile radius of each other; and¶

(d) The transfer does not result in more than a 10 percent increase in bed capacity at the receiving hospital. ¶

(13) A project that is determined to meet the criteria under section (12) of this rule, must cease providing the service at the initiating hospital within 60 days of the service being provided at the receiving hospital.

Statutory/Other Authority: ORS 431.120(6), 442.015, 442.315

Statutes/Other Implemented: ORS 431.120(6), 442.315