

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Ohio Department of Aging (ODA)

Regulation/Package Title: HB487: Residential Facilities

Rule Number(s): 173-14-01 and 173-45-02 [with special mention of 173-43-03]

Date: May 23, 2012 (revised)

Rule Type:

New
X Amended

X 5-Year Review
X Rescinded

The Common Sense Initiative was established by Executive Order 2011-01K and placed within the Office of the Lieutenant Governor. Under the CSI Initiative, agencies should balance the critical objectives of all regulations with the costs of compliance by the regulated parties. Agencies should promote transparency, consistency, predictability, and flexibility in regulatory activities. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

Regulatory Intent

1. Please briefly describe the draft regulation in plain language.

House Bill 487 (129th G.A.) changed a number of statutes to consolidate the classification of three types of facilities that the Ohio Department of Mental Health (ODMH) regulates into one type of facility. HB487 consolidated adult care facilities, adult foster homes, and residential facilities into residential facilities. Because statutes for the Ohio Department of Aging's (ODA's) Office of the State-Long-Term Care Ombudsman, Ohio Long-Term Care Consumer Guide, and Long-Term Care Consultation Program referred to these facilities, HB487 made collateral changes to sections 173.14, 173.45, 173.46, and 173.43 of the Revised Code. HB487's changes require ODA to take action on three rules to keep the rules in compliance with statute.

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- Rule 173-14-01 of the Administrative Code defines terms used in Chapter 173-14 of the Ohio Administrative Code, one of which is “long-term care facility.” The ombudsman has the authority to investigate complaints and advocate for long-term care consumers, including those residing in facilities defined as “long-term care facilities.” The rule defines a residential facility as a long-term care facility. ODA is proposing to amend the rule to make the definition of “long-term care facility” match that in section 173.14 of the Revised Code, as HB487 amended that section.
- Rule 173-45-02 of the Administrative Code lists the requirements for the Long-Term Care Consumer Guide Advisory Council, one of which is a requirement to consider the feasibility of listing residential facilities in the guide. (Section 173.46 of the Administrative Code gives ODA permissive authority to consider listing residential facilities in the guide.) Instead of amending rule 173-45-02 of the Administrative Code to make the language match HB487’s new “residential facility” language, ODA is proposing to rescind the rule. ODA’s review of the rule before the passage of HB487 indicated that the rule is no longer necessary.
- Rule 173-43-03 of the Administrative Code determines to whom long-term care consultations are provided and the conditions under which exceptions may be made. Because ODA has already filed, but not adopted, a proposed new version of rule 173-43-03 of the Administrative Code, ODA will refile that rule to amend language to match HB487’s reclassification of the ODMH’s facilities. Thus, rule 173-43-03 of the Administrative Code will undergo similar changes as rules 173-14-01 and 173-45-02 of the Administrative Code, but is not part of this rule package or the topic of this business impact analysis. ODA will refile rule 173-43-03 of the Administrative Code as part of a separate rule package.

2. Please list the Ohio statute authorizing the Agency to adopt this regulation.

Sections 173.01 and 173.02 of the Revised Code give ODA authority to adopt rule 173-14-01 of the Administrative Code.

Section 173.01, 173.02, and 173.49 of the Revised Code give ODA authority to adopt (or, in this case, “to rescind”) rule 173-45-02 of the Administrative Code.

3. Does the regulation implement a federal requirement?

Section 712(a)(5)(D) of the Older Americans Act of 1965, 79 Stat. 210, 42 U.S.C. 3001, as amended, and 45 C.F.R. 1321.11 require ODA to adopt rules to implement

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the state's policies for the Office of the State-Long-Term Care Ombudsman. Thus, there is a general federal requirement for ODA to adopt rules for the Office of the State-Long-Term Care Ombudsman.

No federal statutes, nor the Code of Federal Regulations, require ODA to adopt a rule to list the requirements for the Ohio Long-Term Care Consumer Guide Advisory Council. The Ohio Long-Term Care Consumer Guide is a creation of state law.

Is the proposed regulation being adopted or amended to enable the state to obtain or maintain approval to administer and enforce a federal law or to participate in a federal program?

No. ODA needs to redefine "long-term care facility" to match that HB487 made to section 173.14 of the Revised Code in order to maintain the authority of the Office of the State Long-Term Care Ombudsman in facilities that HB487 redefined.

- 4. If the regulation includes provisions not specifically required by the federal government, please explain the rationale for exceeding the federal requirement.**

For rule 173-14-01 of the Administrative Code, please see ODA's previous response.

ODA is not required by the federal government to maintain rule 173-45-02 of the Administrative Code and, as part of a five-year rule review, ODA is proposing to rescind that rule.

- 5. What is the public purpose for this regulation (i.e., why does the Agency feel that there needs to be any regulation in this area at all)?**

The Office of the State-Long-Term Care Ombudsman has the authority to investigate complaints and advocate for long-term care consumers, including those residing in facilities defined as "long-term care facilities." It is important that any mention of a facility in Chapter 173-14 of the Administrative Code has the same clear meaning throughout the entire chapter. Otherwise, an adversarial reader of the rules (*e.g.*, a facility that has a resident who has filed a complaint against the facility) may twist the interpretation of select references to facilities in Chapter 173-14 of the Administrative Code in a way that appears to exempt a facility from the program's ability to investigate complaints. Thus, it is important for ODA to define the term "long-term care facility" for the chapter to ensure that any mention of a facility in the chapter has the same meaning throughout the chapter.

Additionally, it is in the public's interest for ODA to amend the definition of "long-term care facility" in rule 173-14-01 of the Administrative Code so the rule does not defy

the intent of the Ohio General Assembly in HB487. ODA has no authority to maintain language in the Ohio Administrative Code that conflicts with the Ohio Revised Code.

As part of a five-year rule review, ODA has determined that there is not sufficient public purpose to maintain rule 173-45-02 of the Administrative Code. No statute requires the rule and, through the rule, ODA is—more-or-less—regulating itself. ODA may continue to convene the Ohio Long-Term Care Consumer Guide Advisory Council without the authority of rule 173-45-02 of the Administrative Code.

In summary, it is in the public's interest to update the definition of "long-term care facility" in rule 173-14-01 of the Administrative Code, but not in the public's interest to maintain rule 173-45-02 of the Administrative Code.

6. How will the Agency measure the success of this regulation in terms of outputs and/or outcomes?

ODA's measurement for the successful outcome of amending rule 173-14-01 of the Administrative Code will be:

- The elimination of any conflict with the intent of the Ohio General Assembly in HB487.
- HB487 collapsed the classification of adult care facilities and adult foster homes into the classification of residential facilities, but did not extend authority to the Office of the State Long-Term Care Ombudsman into existing residential facilities (*i.e.*, residential facilities that were not classified as "adult care facilities" or "adult foster homes" before the enactment of HB487). The Office of the State Long-Term Care Ombudsman will measure success as clear interpretation by the regional long-term care ombudsman offices on which they have authority to enter. The Office of the State Long-Term Care Ombudsman will track calls from ombudsman representatives and providers for six months to ensure success.

ODA's proposed rescission of rule 173-45-02 of the Administrative Code should not require any monitoring for success. ODA will continue to be able to conduct meetings of the advisory council without a rule to regulate itself or the council.

Development of the Regulation

7. Please list the stakeholders included by the Agency in the development or initial review of the draft regulation.

On May 21, 2012 and May 22, 2012, ODA contacted five statewide organizations that represent businesses that operate healthcare facilities into which the State

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Long-Term Care Ombudsman may investigate complaints or that the Ohio Long-Term Care Consumer Guide may list on ODA's website. The five statewide organizations were the Ohio Assisted Living Association, the Academy of Senior Health Sciences, Leading Age Ohio, Ohio Council of Behavioral Health & Family Services Providers, and the National Alliance on Mental Illness-Ohio. ODA emailed a representative from each of the organizations to notify them of the HB487's amendments, which would result in corresponding changes to ODA's rules.

Additionally, ODA posted copies of the rule proposals and the proposed draft of this BIA (dated May 23, 2012) on ODA's website for a public-public comment period that began on May 23, 2012 and ended on May 30, 2012.

8. What input was provided by the stakeholders, and how did that input affect the draft regulation being proposed by the Agency?

On May 21, 2012, the Ohio Assisted Living Association responded by saying, "We don't see an issue." As of May 23, 2012, no other statewide association—or any other entity—has raised an issue with this rule package.

9. What scientific data was used to develop the rule or the measurable outcomes of the rule? How does this data support the regulation being proposed?

The goal of this project is to implement HB487's amendments to sections 173.14 (ombudsman), 173.45 and 173.46 (consumer guide), and 173.43 (long-term care consultations) of the Revised Code into ODA's rules. This project did not involve the consideration of scientific data. If ODA had obtained scientific data that could influence a policy decision regarding these rules, ODA would still be bound to amend the rules so that they reflected the amendments to the corresponding statutes.

10. What alternative regulations (or specific provisions within the regulation) did the Agency consider, and why did it determine that these alternatives were not appropriate? If none, why didn't the Agency consider regulatory alternatives?

For rule 173-14-01 of the Administrative Code, ODA is proposing to only change the definition of "long-term care facility" so that it matches the new language for the same definition in section 173.14 of the Revised Code, as amended by H.B. No. 487 (129th G.A.). ODA does not have the authority to draft a rule to define the term in a manner that defies the intent of the legislature.

For rule 173-45-02 of the Administrative Code, instead of amending rule 173-45-02 of the Administrative Code to make the language match the new "residential facility" language in sections 173.45 and 173.46 of the Revised Code, as amended by

HB487, ODA is proposing to rescind the rule. ODA's review of the rule before the passage of HB487 indicated that the rule is no longer necessary.

11. Did the Agency specifically consider a performance-based regulation? Please explain.

Rules 173-14-01 of the Administrative Code does not require any Ohio business to perform any duty, so ODA did not consider performance-based regulations when considering how to amend rule 173-14-01 of the Administrative Code.

Rule 173-45-02 of the Administrative Code does not require any Ohio business to perform any duty, so ODA did not consider performance-based regulations when considering whether it would maintain rule 173-45-02 of the Administrative Code (with amendments) or rescind rule 143-45-02 of the Administrative Code.

12. What measures did the Agency take to ensure that this regulation does not duplicate an existing Ohio regulation?

ODA is the only state agency to regulate the Office of the State-Long-Term Care Ombudsman and the Long-Term Care Consumer Guide. Therefore, no other state agency may adopt a rule to create a duplicate regulation.

13. Please describe the Agency's plan for implementation of the regulation, including any measures to ensure that the regulation is applied consistently and predictably for the regulated community.

The goal of this project is to implement HB487's amendments to sections 173.14 and 173.45 of the Revised Code into ODA's rules. That, in itself, is the plan for implementation. The result of implementing the changes from HB487 into the rules should not make new requirements for the ombudsman program or the Long-Term Care Consumer Guide, nor make new requirements for facilities that the ombudsman program may investigate or that the consumer guide may list. In summary, ODA does not anticipate that the proposed amendments to rule 173-14-01 of the Administrative Code or the proposed rescission of rule 173-45-02 of the Administrative Code would involve any further implementation.

Adverse Impact to Business

14. Provide a summary of the estimated cost of compliance with the rule. Specifically, please do the following:

- a. Identify the scope of the impacted business community;
- b. Identify the nature of the adverse impact (e.g., license fees, fines, employer time for compliance); and
- c. Quantify the expected adverse impact from the regulation.

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The adverse impact can be quantified in terms of dollars, hours to comply, or other factors; and may be estimated for the entire regulated population or for a “representative business.” Please include the source for your information/estimated impact.

ODA’s rules for the Office of the State-Long-Term Care Ombudsman have an adverse impact upon facilities that the Office of the State-Long-Term Care Ombudsman has the authority to investigate. Facilities pay an annual bed fee pursuant to section 173.26 of the Revised Code and rule 173-14-27 of the Administrative Code.

However, HB487’s consolidation of the classification of the facilities that ODMH regulates should not change the number of homes that Office of the State-Long-Term Care Ombudsman may investigate.

In summary, there should be no new cost of compliance to amend the definition of “long-term care facility” in rule 173-14-01 of the Administrative Code to match the change HB487 made to the same definition in section 173.14 of the Revised Code.

Rule 173-45-02 of the Administrative Code merely regulates an advisory council that recommends program changes over the Ohio Long-Term Care Consumer Guide. The rescission of that rule should create no adverse impact upon any business.

15. Why did the Agency determine that the regulatory intent justifies the adverse impact to the regulated business community?

ODA has determined that, although the Office of the State-Long-Term Care Ombudsman—by nature—has an adverse impact upon long-term care facilities and long-term care providers if a person contacts the State Long-Term Care Ombudsman office to register a complaint on behalf of a resident of those facilities. A long-term care facility or long-term care provider about whom the State Long-Term Care Ombudsman’s office receives no complaints would not see any adverse impact. Additionally, ODA is merely proposing to amend the definition of “long-term care facility” to match the definition of section 173.14 of the Revised Code, as amended by HB487. In doing so, ODA is not creating any adverse impact.

As part of the five-year rule review process, ODA has determined that regulating the Ohio Long-Term Care Consumer Guide Advisory Council is unnecessary. ODA is proposing to rescind rule 173-45-02 of the Administrative Code as a result.

Regulatory Flexibility

16. Does the regulation provide any exemptions or alternative means of compliance for small businesses? Please explain.

Rule 173-14-01 of the Administrative Code does not make special requirements or special exceptions for Ohio's small businesses. Section 173.14 of the Revised Code, as amended by HB487, defines the long-term care facilities—whether small or large businesses—that are subject to investigations of complaints by the Office of the State-Long-Term Care Ombudsman. ODA has neither the authority nor the desire to exempt a small business from the ability to be subject to a complaint investigation.

Instead of amending rule 173-45-02 of the Administrative Code to make the language match HB487's new "residential facility" language, ODA is proposing to rescind the rule. ODA's review of the rule before the passage of HB487 indicated that the rule is no longer necessary.

17. How will the agency apply Ohio Revised Code section 119.14 (waiver of fines and penalties for paperwork violations and first-time offenders) into implementation of the regulation?

Rule 173-14-01 of the Administrative Code merely introduces Chapter 173-14 of the Administrative Code and defines terms used in that chapter. The rule does make paperwork requirements for Ohio businesses.

ODA is proposing to rescind rule 173-45-02 of the Administrative Code. ODA's review of the rule before the passage of HB487 indicated that the rule is no longer necessary. It will, therefore, create no paperwork requirements for Ohio businesses.

18. What resources are available to assist small businesses with compliance of the regulation?

If any small business believes that any element of either rule requires compliance, it may contact ODA's policy manager at rules@age.state.oh.us for clarification. The small business may also contact the Common-Sense Initiative Office.