

**MEMORANDUM**

**TO:** Kaye Norton, Ohio Department of Health

**FROM:** Mark Hamlin, Director of Regulatory Policy

**DATE:** May 23, 2013

**RE:** **CSI Review – Certificate of Need (OAC Chapter 3701-12)**

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On behalf of Lt. Governor Mary Taylor, and pursuant to the authority granted to the Common Sense Initiative (CSI) Office under Ohio Revised Code (ORC) section 107.54, the CSI Office has reviewed the abovementioned administrative rule package and associated Business Impact Analysis. This memo represents the CSI Office's comments to the Agency as provided for in ORC 107.54.

**Analysis**

The Ohio Department of Health (ODH) is proposing amendments to Chapter 3701-12 of the Ohio Administrative Code (OAC). The rule package contains twelve amended rules, two new rules, and one rescinded rule. The rules set forth in Chapter 3701-12 establish the reviewability, application, approval, and monitoring requirements for the Certificate of Need (CON) program.

According to ODH, the CON program ensures the public access to quality long-term care services by requiring review and approval of activities involving the location and utilization of long-term care beds and services. The BIA states that if there were no review system in place, there would be no assurance of the equitable and efficient distributions of long-term care beds and facilities in each of Ohio's counties. ODH has drafted the proposed revisions to comply with statutory changes found in House Bill 487 that became effective September 2012.

The following are examples of activities that require Certificate of Need review and approval:

- The development of a new long-term care facility.
- The replacement of an existing long-term care facility.

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- The renovation of a long-term care facility that involves a capital expenditure of \$2 million or more, not including expenditures for equipment.
- An increase in long-term care bed capacity.
- A relocation of long-term care beds from one site to another.

The Department contacted stakeholders in December 2012 requesting comments and convened a stakeholders meeting in February 2013. ODH made several revisions as a result of the comments received.

The scope of the impacted business community includes individuals and organizations pursuing the development or renovation of a long-term care facility. The application fee for projects not involving capital expenditure is increasing from \$3,000 to \$5,000 under the proposed changes. For projects involving capital expenditures, the fee will be the greater of \$5,000 or 1.5 percent of the capital expenditure proposed, with a maximum fee of \$20,000. The time needed to prepare and submit information for the CON program varies based on size and complexity of the project, according to the Department's BIA. Fines are imposed for carrying out a reviewable activity without receiving CON approval and are listed in ORC 3702.54.

ODH believes the simplification and clarification of the CON application process will reduce the applicant's administrative burden. Overall, applicants will pay at a minimum \$2,000 more in fees but the cap will continue to remain at \$20,000. However, ODH explains that the fees in this program have not increased since 1989, and its BIA provides a thorough analysis of the operating costs and needs of the program.

During the CSI review process, two related comments were submitted expressing concern with the proposed amendment to OAC 3701-12-18, defining the term "commencement of construction." Ohio Revised Code section 3702.524 requires that construction commence within 24 months of a certificate of need being granted, and the Department's proposal requires the placement, modification, or removal of an integral part of the structure. According to the commenters, this definition creates a new requirement that will be unnecessarily burdensome and could lead to significant economic impact by stopping projects that don't have physical work done on the structure within two years.

In response to these comments, the Department notes that the proposed definition does not create a new requirement; it simply codifies the existing definition which is already used within the CON application. Moreover, the Department notes that it is not aware of any CON project failing to meet the 24 month deadline due to the requirements of the definition. Finally, the Department asserts that the "commencement of construction" definition is consistent with the statutory intent that once approved, CON projects should be implemented with all due diligence. As a result, the Department has chosen not to make changes to the rules in response to these comments.

After reviewing the rule package, the CSI Office is not suggesting any changes with respect to the rule or the BIA for the following reasons:

- The BIA submitted by ODH was accurate and complete and did not raise any ongoing issues.

- The Department provided an appropriate response to the comments received during the comment period, justifying those provisions of the rule package that were called into question.
- Generally, the rule package satisfactorily meets the standards espoused by the CSI Office.

### **Recommendations**

For the reasons explained above this office does not have any recommendations regarding this rule change.

### **Conclusion**

Based on the above comments, the CSI Office concludes that the Department should proceed with the formal filing of this rule package with the Joint Committee on Agency Rule Review.