

**MEMORANDUM**

TO: Selina Jackson, Ohio Department of Health

FROM: Tess Eckstein, Regulatory Policy Advocate

DATE: October 17, 2016

RE: **CSI Review – Certificate of Need Program: Long-term Care Facilities and Beds (OAC 3701-12-23)**

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 (BIA). This memo represents the CSI Office's comments to the Agency as provided for in ORC 107.54.

Analysis

This rule package consists of one amended rule being proposed by the Ohio Department of Health (ODH). The rule package was submitted to the CSI Office on September 13, 2016, and the comment period remained open until October 13, 2016.

The Certificate of Need (CON) program ensures 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. Specifically, rule 3701-12-23 establishes review criteria for long-term care facilities and beds, as well as the formula for calculating state and county bed needs. An amendment is being proposed to remove a less-than-50-bed restriction from CON consideration and from the comparative review criteria for the awarding of points. By way of this amendment, ODH seeks to incorporate a statutory requirement, provide clarification of CON procedures, and remain in line with industry trends. This revision was initially included in a 2015 five-year review, agreed upon by stakeholders, and included in the BIA for that review. However, due to a filing oversight, a prior draft that did not include the revision was submitted as the final version.

The rule impacts all individuals or organizations pursuing the development or replacement of a new or existing long-term care facility; an increase in long-term care bed capacity; a relocation of

these beds; the expenditure of more than 110 percent of the maximum expenditure specified in an approved CON application; or the renovation of, or addition to, a facility that involves expenditure of \$2 million or more. In addition, the rule affects anyone who fails to conduct a reviewable activity in accordance with an approved application for which a CON was granted, if the change is made within five years of implementation. Though not associated with the proposed amendment, potential adverse impacts of the rule include application fees of \$5,000 for a project not involving capital expenditure and the greater of \$5,000 or 1.5 percent of the proposed capital expenditure, with a maximum fee of \$20,000, for a project involving capital expenditure. There may also be a fine imposed for carrying out a reviewable activity without receiving CON approval, or a penalty imposed if more than 110 percent of the maximum capital expenditure stated in a certificate is expended. Finally, there is an adverse impact associated with the time necessary to prepare, submit, and provide necessary follow-up information to the CON program.

The BIA claims that the rule is justified because it ensures the availability of long-term care at appropriate levels for consumers of long-term care services. This is especially prevalent because demand for long-term care services is expected to increase as life expectancy in the United States continues to increase. Without these review procedures, there would be no assurance of the equitable and efficient distribution of long-term care beds and facilities in each county.

ODH contacted nine key stakeholders, as well as the Ohio Department of Medicaid and Ohio Department of Aging, regarding the rule. The rule was reviewed early in 2015 as part of the five-year review process. Another stakeholder meeting was held in March 2015, and additional approval of the proposed amendment was received from stakeholders in April 2015. No comments in opposition to removing the less-than-50-bed restriction were submitted. During the CSI public comment period, one comment was submitted that did not oppose removing the restriction but recommended that the entire section in question be eliminated to remove additional requirements. ODH did not amend the rule based on this suggestion because it is still necessary to have criteria for consideration of the need for, and purpose of, long-term care projects as part of the CON process. Still, ODH will further consider the recommendation during planned future revisions, when amendments can be proposed to all affected stakeholders. Since no additional comments were submitted indicating that the rule is overly burdensome, the CSI Office has determined the purpose of the rule to be justified.

Recommendations

For the reasons discussed above, the CSI Office does not have any recommendations for this rule package.

Conclusion

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

cc: Mark Hamlin, Lt. Governor's Office