Ohio | Common Sense Initiative

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Business Impact Analysis

Agency, Board, or Commission Name: The Ohio Department of Medicaid
Rule Contact Name and Contact Information:

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Regulation/Package Title (a general description of the rules' substantive content):

Five-Year Review – Resident Protection Fund and Resource Assessment Notice Rules for Nursing Facilities

Rule Number(s): 5160-3-03.2 (Rescind), 5160-3-03.2 (New), 5160-3-16.1 (Rescind)

Date of Submission for CSI Review: September 17, 2019

Public Comment Period End Date: September 24, 2019

Rule Type/Number of Rules:

New/_1__ rule
Amended/____ rules (FYR? ___)
No Change/____ rules (FYR? ___)
Rescinded/__2__ rules (FYR? _Yes__)

The Common Sense Initiative is established in R.C. 107.61 to eliminate excessive and duplicative rules and regulations that stand in the way of job creation. Under the Common Sense Initiative, agencies must balance the critical objectives of regulations that have an adverse impact on business with the costs of compliance by the regulated parties. Agencies should promote transparency, responsiveness, predictability, and flexibility while developing regulations that are fair and easy to follow. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

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Reason for Submission

1. **R.C. 106.03 and 106.031 require agencies, when reviewing a rule, to determine whether the rule has an adverse impact on businesses as defined by R.C. 107.52. If the agency determines that it does, it must complete a business impact analysis and submit the rule for CSI review.**

   Which adverse impact(s) to businesses has the agency determined the rule(s) create?

   The rule(s):

   a. ☐ **Requires a license, permit, or any other prior authorization to engage in or operate a line of business.**

   b. ☒ **Imposes a criminal penalty, a civil penalty, or another sanction, or creates a cause of action for failure to comply with its terms.**

   c. ☒ **Requires specific expenditures or the report of information as a condition of compliance.**

   d. ☐ **Is likely to directly reduce the revenue or increase the expenses of the lines of business to which it will apply or applies.**

Regulatory Intent

2. **Please briefly describe the draft regulation in plain language.**
   Please include the key provisions of the regulation as well as any proposed amendments.

   5160-3-03.2 (Rescind) Nursing facilities (NFs): resident protection fund and collection of fines

   This rule sets forth the provisions for the resident protection fund, including fund management and disbursement, required annual reporting, the methods and procedures for collection of fines that are subsequently deposited into the resident protection fund, and the purposes for which the money in the fund may be used. This rule was reviewed pursuant to a five-year rule review. As a result of that review, this rule is being proposed for rescission, and is being replaced by new rule 5160-3-03.2.

   5160-3-03.2 (New) Nursing facilities (NFs): resident protection fund

   This rule sets forth the provisions for the resident protection fund, including management

and disbursement of funds, the methods and procedures for collection of fines that are subsequently deposited into the resident protection fund, and the purposes for which the money in the fund may be used. This rule is replacing rule 5160-3-03.2, which is being proposed for rescission. The adverse impacts of this rule are part of the preexisting content of the rule. The proposed changes to the rule are:

- In paragraph (A), the definitions of "Certification requirements," "Deficiency," "Dually participating facility," and "Noncompliance" are being deleted because they are not used in the rule.
- Paragraph (B)(1) is being deleted because the process it describes is obsolete.
- In new paragraph (B)(4), language is being added to clarify that, if a nursing facility is not actively participating in the Medicaid program and fails to adhere to the terms of a payment agreement or fails to select a payment option within ten days, the facility's fine shall be referred to the Attorney General's Office for collection.
- In paragraph (C)(2), the phrase "in which deficiencies are found" is being deleted in order to align with federal regulations. Additionally, language is being deleted regarding the need for prior approval by CMS for all uses of CMP funds because the requirement is contained in federal regulations.
- In paragraph (E), language is being changed in order to describe the Ohio Department of Medicaid's current process for the disbursement of monies in the resident protection fund.
- Paragraph (F) is being deleted because the annual report process it describes is obsolete.
- Paragraph headers are being added to paragraphs (D) and (E), and paragraphs are being re-numbered and re-lettered as necessary.

5160-3-16.1 (Rescind) Nursing facilities (NFs): resource assessment notice

This rule sets forth the resource assessment notice provisions for nursing facilities. As a result of five-year review, this rule is being proposed for rescission because the requirement for a resource assessment notice is specified in federal regulations.

3. Please list the Ohio statute(s) that authorize the agency, board or commission to adopt the rule(s) and the statute(s) that amplify that authority.

5160-3-03.2 (Rescind)

Authorizing Statute: ORC 5162.02

Amplifying Statute: ORC 5162.66

5160-3-03.2 (New)

Authorizing Statute: ORC 5165.02

Amplifying Statute: ORC 5162.66

5160-3-16.1 (Rescind)

Authorizing Statute: ORC 5162.02

Amplifying Statute: ORC 5162.03

4. **Does the regulation implement a federal requirement? 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?**
If yes, please briefly explain the source and substance of the federal requirement.

5160-3-03.2 (Rescind)

The proposed rule does not implement a federal requirement.

5160-3-03.2 (New)

The proposed rule does not implement a federal requirement.

5160-3-16.1 (Rescind)

This rule implements the federal requirement in 42 C.F.R. 483.10 that requires nursing facilities to furnish to each resident a written description of legal rights that includes a description of the requirements and procedures for establishing eligibility for Medicaid, including the right to request an assessment of resources under section 1924(c) of the Social Security Act.

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

The proposed rules do not exceed any federal requirements.

6. **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)?**

5160-3-03.2 (Rescind)

Not applicable. This rule is being proposed for rescission.

5160-3-03.2 (New)

The public purpose of this rule is to ensure the collection of civil money penalty fines and the administration and management of the Resident Protection Fund are accomplished in a fiscally responsible manner.

5160-3-16.1 (Rescind)

Not applicable. This rule is being proposed for rescission.

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

5160-3-03.2 (Rescind)

Not applicable. This rule is being proposed for rescission.

5160-3-03.2 (New)

The success of this rule will be measured by the extent to which the provisions for the collection of civil money penalty fines and the administration and management of the Resident Protection Fund are made in accordance with this rule.

5160-3-16.1 (Rescind)

Not applicable. This rule is being proposed for rescission.

8. **Are any of the proposed rules contained in this rule package being submitted pursuant to R.C. 101.352, 101.353, 106.032, 121.93, or 121.931?**
If yes, please specify the rule number(s), the specific R.C. section requiring this submission, and a detailed explanation.

The proposed rules are not being submitted pursuant to R.C. 101.352, 101.353, 106.032, 121.93 or 121.931.

Development of the Regulation

9. **Please list the stakeholders included by the Agency in the development or initial review of the draft regulation.**
If applicable, please include the date and medium by which the stakeholders were initially contacted.

The primary stakeholders are Ohio's three nursing facility provider associations. The nursing facility provider associations in Ohio are:

- Ohio Health Care Association (OHCA)

- The Academy of Senior Health Sciences, Inc.
- LeadingAge Ohio

Ohio's nursing facility provider associations represent and advocate for small and large nursing facilities and nursing facilities with both individual and group ownership, publicly-traded and government-owned properties, and for-profit and non-profit facilities. In addition to representing and advocating for nursing facilities, the associations are informational and educational resources to Ohio's nursing facilities, their suppliers, consultants, and the public at large.

The nursing facility provider associations were involved in review of the draft rules when the Department of Medicaid emailed the draft rules and a summary of the rule changes to the associations on July 2, 2019.

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

No input was provided by stakeholders on the proposed draft rules.

11. 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?

Scientific data was not applicable to the development of these rules.

12. 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?

No alternative regulations were considered. The Department of Medicaid considers Administrative Code rules the most appropriate type of regulation for the provisions contained in these rules.

13. Did the Agency specifically consider a performance-based regulation? Please explain. ***Performance-based regulations define the required outcome, but don't dictate the process the regulated stakeholders must use to achieve compliance.***

Performance-based regulations are not considered appropriate for these regulations.

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

The Department of Medicaid's staff reviewed the applicable ORC and OAC to ensure these rules do not duplicate any of the Department of Medicaid's rules or any other regulations in the ORC or OAC.

15. 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 final rules as adopted by the Ohio Department of Medicaid will be posted on the Department's website at http://medicaid.ohio.gov/RESOURCES/LegalandContracts/Rules.aspx. In addition, the Department will notify stakeholders during regular Provider Association meetings when the final rules become effective.

Adverse Impact to Business

16. 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; and

These rules impact approximately 970 nursing facilities in Ohio that choose to participate in the Medicaid program. Provider participation in the Medicaid program is optional and at the provider's discretion.

b. Identify the nature of all adverse impact (e.g., fees, fines, employer time for compliance,); and

Compliance with Medicaid program requirements is mandatory for providers who choose to participate in the program and may result in administrative costs as detailed below.

c. Quantify the expected adverse impact from the regulation.

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.

5160-3-03.2 (Rescind)

b.) and c.)

NOTE: The Department of Medicaid emailed the CSIO on April 16, 2020 to notify them that the department identified an additional adverse impact that had been inadvertently omitted from the BIA. On May 1, 2020, ODM revised the BIA to include the following adverse impact contained in paragraph (B) of this rule:

In accordance with paragraph (B) of this rule, if a nursing facility fails to adhere to the terms of a payment agreement or fails to select a payment option within 10 days of notification of available options, the Department of Medicaid shall immediately implement collection from an actively participating facility by Medicaid payment offset or, if the facility is no longer active in the Medicaid program, referral to the Attorney General's office. The amount of the fine can vary greatly, with the calculation based on the severity of the deficiency and the number of days during which the deficiency occurred, with greater fines for more severe deficiencies and for those that last for a longer period of time. Fines can range anywhere from a few thousand dollars to hundreds of thousands of dollars.

In accordance with paragraph (B)(4) of this rule, not later than 10 days after notification of available payment options, a nursing facility shall select a payment option and advise the Department of Medicaid in writing. The Department of Medicaid estimates it will take a nursing facility's accountant approximately 0.5 hours at the rate of approximately $32.00 per hour (total estimated cost: $16.00) to select a payment option and advise the Department in writing.

5160-3-03.2 (New)

b). and c.)

In accordance with paragraph (B)(3) of this rule, when the Department of Medicaid attempts to collect a CMP fine and notifies the facility via certified mail of the available payment options, the facility shall select a payment option and advise the Department in writing. The Department of Medicaid estimates it will take a nursing facility's accountant approximately 0.5 hours at the rate of approximately $32.00 per hour (total estimated cost: $16.00) to select a payment option and advise the Department in writing.

NOTE: The Department of Medicaid emailed the CSIO on April 16, 2020 to notify them that the department identified an additional adverse impact that had been inadvertently omitted from the BIA. On May 1, 2020, ODM revised the BIA to include the following adverse impact contained in paragraph (B)(4) of this rule:

In accordance with paragraph (B)(4) of this rule, if an actively participating nursing facility fails to adhere to the terms of the payment agreement or fails to select a payment option within 10 days, the Department of Medicaid shall immediately implement collection by Medicaid payment offset. If a facility is not actively participating in the Medicaid program, the fine shall be referred to the Attorney General's Office for collection. The amount of the fine can vary greatly, with the calculation based on the severity of the deficiency and the number of days during which the deficiency occurred, with greater

fines for more severe deficiencies and for those that last for a longer period of time. Fines can range anywhere from a few thousand dollars to hundreds of thousands of dollars.

5160-3-16.1 (Rescind)

b). and c).

In accordance with paragraph (B)(1) of this rule, a nursing facility shall furnish written notice at the time of admission to all individuals with a spouse living in the community of the individual's right to have a resource assessment performed by the county Department of Job and Family Services (CDJFS). In accordance with paragraph (B)(2) of this rule, a nursing facility must also give a copy of the resource assessment notice to the resident's family member, legal guardian, or authorized agent, send a copy of the signed notice to the CDJFS within five working days, and post an unsigned copy of the notice in a prominent, publicly accessible place within the facility. The Department of Medicaid estimates it will take a nursing facility staff member approximately 1.25 hours at an estimated rate of approximately $16.00 per hour (total estimated cost: $20.00) to complete the tasks specified above. However, posting the unsigned copy of the notice within the facility is a one-time task that would not be necessary each time a new individual with a community spouse is admitted to the facility.

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

5160-3-03.2 (Rescind)

Not applicable. This rule is being proposed for rescission.

5160-3-03.2 (New)

The adverse impact associated with this rule is justified because the rule helps ensure proper collection of civil money penalty fines, and fiscally responsible management of the monies in the Resident Protection Fund.

5160-3-16.1 (Rescind)

Not applicable. This rule is being proposed for rescission.

Regulatory Flexibility

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

No. The provisions in these rules are the same for all nursing facilities regardless of size.

19. 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?

ORC section 119.14 is not applicable to these regulations.

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

Providers in need of assistance may contact the Department of Medicaid, Bureau of Long-Term Services and Supports at (614) 466-6742.