



## Common Sense Initiative

**Mike DeWine**, Governor  
**Jon Husted**, Lt. Governor

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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):

Nursing Facility Quality Indicators and Quality Payment Rate

Rule Number(s): 5160-3-58 (Amend)

Date of Submission for CSI Review: March 9, 2020

Public Comment Period End Date: March 15, 2020

Rule Type/Number of Rules:

New/\_\_\_ rule

No Change/\_\_\_ rules (FYR? \_\_\_)

Amended/\_\_\_1\_\_\_ rules (FYR? \_Yes\_)

Rescinded/\_\_\_ rules (FYR? \_\_\_)

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.*

#### **5160-3-58 (Amend) Nursing facilities (NFs): quality indicators and quality payment rate**

This rule sets forth the provisions for the nursing facility quality indicators as well as the methodology used to determine the nursing facility quality payment rate. The changes to the rule are:

- In paragraph (B), language determining the measurement period for state fiscal year 2017 is being deleted because it is obsolete. The remaining language regarding the measurement period is being reworded slightly for accuracy.
- In paragraph (C)(2), language is being modified so the antipsychotic medication use rate now will include short-stay residents who newly received an antipsychotic medication in conjunction with hospice care and also will include long-stay residents who received an antipsychotic medication in conjunction with hospice care.
- In paragraph (C)(5), the preferences for everyday living inventory (PELI) quality indicator is being replaced with the satisfaction survey quality indicator.
- Paragraph (E)(3) regarding the PELI quality indicator is being deleted because the PELI quality

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indicator is being replaced with the satisfaction survey quality indicator.

- In paragraph (F)(6), the word “and” is being removed to comply with LSC rule drafting guidelines.
- Regulatory restrictions are being removed.

**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.**

Authorizing Statute: ORC 5165.02

Amplifying Statute: ORC 5165.25

**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.**

The proposed rule does not implement a federal requirement.

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

The proposed rule does not exceed any federal requirements because there are no federal requirements for this regulation.

**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)?**

The public purpose of this rule is to ensure that points for quality indicators are awarded in a fair and consistent manner and that quality payments are calculated in a uniform and fiscally responsible manner.

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

The success of this rule will be measured by the extent to which the points for quality indicators are awarded and quality payments are calculated according to the provisions of this rule.

**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.*

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The proposed rule is 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 rule when the Department of Medicaid emailed the draft rule and a summary of the rule changes to the associations on November 1, 2019. Approximately 30 staff in the Ohio Department of Medicaid were also involved in review of the draft rule and were also emailed the draft rule and summary of changes on November 1, 2019. In addition, the managed care plans were emailed the draft rule for review on the same date.

**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 the nursing facility provider associations on the proposed draft rule.

One ODM staff member submitted input which consisted of requests for clarification on several provisions of the draft rule. Clarification/explanation of the provisions was provided. There were no changes to the rule as a result of this input.

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Two managed care plans commented on the draft rule. The first felt the hospice care provision should remain excluded from the antipsychotic medication use rate. The second wanted to know if it is intentional that the same measurement criteria is being applied to both the resident and family satisfaction surveys even though one survey is to be performed in even-numbered state fiscal years and the other in odd-numbered state fiscal years. No changes to the rule were made as a result of these two comments from the managed care plans. The rule is consistent with the terms of the amplifying statute.

**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 this rule.

**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 this rule.

**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 this rule does 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 rule as adopted by the Ohio Department of Medicaid will be available via 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 rule becomes effective.

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## **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**

This rule impacts approximately 960 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.*

**b.) and c.)**

There is no expected adverse impact to meet the quality indicators. It is standard practice for nursing homes to provide quality care so there would be no cost to meet the criteria.

In accordance with paragraph (E)(1) of this rule, a nursing facility will not receive a point for the pressure ulcer, antipsychotic medication, and unplanned weight loss quality indicators when the Department of Medicaid determines there is insufficient data to calculate a rate for these indicators. The cost to a nursing facility would be the facility's portion of the total amount of the quality funds to be paid statewide to all nursing facilities that the facility would now not receive.

In accordance with paragraph (E)(2) of this rule, a nursing facility will not receive a quality point for the employee retention quality indicator when the facility fails to complete section eight of the Department of Medicaid's nursing facility annual cost report. The cost to a nursing facility would be the facility's portion of the total amount of the quality funds to be paid statewide to all nursing facilities that the facility would now not receive.

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

The adverse impact associated with this rule is justified because the rule helps ensure the proper award of quality points and the proper calculation of quality payments for nursing facilities.

**Regulatory Flexibility**

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

No. The provisions in this rule 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 this regulation.

**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.