Common Sense Initiative

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

Joseph Baker, *Director*

Business Impact Analysis

Agency, Board, or Commission Name: The Ohio Department of Medicaid

Rule Contact Name and Contact Information: Tommi Potter, ODM Rules Administrator
Rules@medicaid.ohio.gov

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

Nursing Facilities (NF) Private Rooms

Rule Number(s): 5160-3-16.3 (Rescind/New)

Date of Submission for CSI Review: 12/18/23

Public Comment Period End Date: 12/26/23

Rule Type/Number of Rules:

New/_1__ rules

No Change/____ rules (FYR? ___)

Amended/____ rules (FYR? ___)

Rescinded/___1_ rules (FYR? Y___)

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.

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.**

   Rule 5160-3-16.3, entitled "Nursing facilities (NFs): private rooms" sets forth provisions for private rooms in nursing facilities. This rule is being proposed for rescission and is being replaced by new rule 5160-3-16.3, since more than fifty percent of the rule is being amended.

   Rule 5160-3-16.3, entitled "Nursing facilities (NFs): private rooms" sets forth the provisions of the private room coverage policy and reimbursement rates, including incentive payments for approved providers. This rule is being proposed for adoption to implement provisions of Section 5165.158 of Am Sub HB 33, 135th General Assembly. To be eligible for incentive payment, facilities must submit an application and be determined eligible by Ohio Department of Medicaid (ODM), pending approval by the Centers for Medicare and Medicaid Services (CMS) for nursing facility private room incentive payments. This rule is being proposed for adoption and replaces rule 5160-3-16.3, which is being proposed for rescission. The differences between this rule and the rule it is replacing are:

   - In paragraph (A)(3), new language is being added regarding providing private room accommodation in accordance with sections 5165.01 and 5165.158 of the Revised Code.
   - In paragraphs (B)(1)(2)(3) language is being updated for payment reimbursement for private rooms.
   - In paragraph (C)(1)(2), the process to apply and receive the private room incentive payment is being added.

- In paragraph (C)(3), reconsideration language is being added.
- In paragraph (C)(4), change of operator language is being added.
- Regulatory restrictions are being removed from the rescinded rule and are not being added to the new rule.
- Paragraphs are being re-numbered as necessary.

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.**

   Rule 5160-3-16.3 (Rescind)

   Statutory Authority: 5160.02, 5165.02

   Rule 5160-3-16.3 (New)

   Statutory Authority: 5160.02, 5165.02

   Amplifies: Sections 5165.01 and 5165.158 of Am Sub HB 33, Ohio 135th General Assembly

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?**

   Rule 5160-3-16.3 (Rescind)

   No, this regulation does not implement a federal requirement.

   Rule 5160-3-16.3 (New)

   No, this regulation does not implement a federal requirement.

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

   Rule 5160-3-16.3 (Rescind)

   Not applicable. This rule does not implement a federal requirement.

   Rule 5160-3-16.3 (New)

   Not applicable. This rule does not implement a federal requirement.

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)?**

   Rule 5160-3-16.3 (Rescind)

   Not applicable. This rule addresses payment for private rooms in a NF.

Rule 5160-3-16.3 (New)

The public purpose of this regulation is to provide private room incentive payments for Medicaid individuals receiving services in an approved nursing facility. These changes are intended to promote quality of care through the increased availability of private rooms.

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

Rule 5160-3-16.3 (Rescind)

Not applicable. This rule is being proposed for rescission.

Rule 5160-3-16.3 (New)

The success of this regulation will be measured by the extent to which providers apply for and are approved for private room incentive payments. Quality measures will be monitored based on a facility's overall star rating.

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.

None of the proposed rules are being submitted pursuant to these specified sections of the Revised Code.

Development of the Regulation

9. **Please list the stakeholders included by the Agency in the development or initial review of the draft regulation.**
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 invited to review the draft rule following the Department of Medicaid meeting with them to discuss the draft rule on December 14, 2023.

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

    ODM is responding to all questions following the December 14, 2023, meeting. Feedback was reviewed and rule revisions were not needed as a result.

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 because the legislation allowed for rules. The Department of Medicaid considers Administrative Code rules the most appropriate type of regulation for the provisions contained in these rules.

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

    This rule has been reviewed by the Department of Medicaid's staff, including legal staff, to ensure there is no duplication within the agency's rules or any others in the Ohio Revised Code or the Ohio Administrative Code.

14. **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 Department will notify stakeholders during regular provider association meetings when the final rules become effective. The department also issued several communications to nursing facilities and the three associations regarding the application process. Additionally, ODM providers are encouraged to register to receive RuleWatch notifications of ODM filings.

Adverse Impact to Business

15. **Provide a summary of the estimated cost of compliance with the rule(s). Specifically, please do the following:**
    a. **Identify the scope of the impacted business community**

    These rules impact approximately 940 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. Quantify and identify the nature of all adverse impact (e.g., fees, fines, employer time for compliance, etc.).

5160-3.16.3 (Rescinded)

Compliance with Medicaid program requirements is mandatory for providers who choose to participate as Medicaid providers and may result in administrative costs as detailed below. Providers who choose to receive private room incentive payments must apply.

The Department is unable to quantify the amount of time the nursing facility will be involved in activities related to preparing and issuing notices to a resident's representative or family member when they choose to pay an additional amount for a private room not approved by the department. These activities will vary by facility since it is impossible to know which individuals will be interested in paying extra for a private room, as applicable.

5160-3-16.3 (New)

Compliance with Medicaid program requirements is mandatory for providers who choose to participate as Medicaid providers and may result in administrative costs as detailed below. Providers who choose to receive private room incentive payments must apply.

The Department is unable to quantify the amount of time the nursing facility will be involved in activities related to preparing and issuing notices to a resident's representative or family member when they choose to pay an additional amount for a private room not approved by the department. These activities will vary by facility since it is impossible to know which individuals will be interested in paying extra for a private room, as applicable.

The department anticipates that a nursing facility administrator may perform all of the following activities at an average cost of $72 per hour:

In accordance with paragraph (C)(1) the department anticipates it will take two hours to prepare the information and documentation needed to submit an application for the facility, at an estimated cost of $144.

In accordance with paragraph (C)(1)(a) the department anticipates it will take 30 minutes to submit the online application, at an estimated cost of $36.

In accordance with paragraph (C)(2)(b) the department anticipates it will take one hour to submit additional information requested by the department, at an estimated cost of $72.

In accordance with paragraph (C)(3) the department anticipates it will take one hour to submit a reconsideration for any denial, at an estimated cost of $72.

In accordance with paragraph(C)(4) the department anticipates it will take one hour to attest that the original information submitted by the nursing facility prior to a change of operator is true and accurate and to disclose any information that is different from the original application submission, at an estimated cost of $72.

The Department is unable to quantify the amount of time the nursing facility will be involved in activities related to the surrendering of beds or facility renovations in order to qualify for private room incentive payments. These activities will vary by facility since it is impossible to know how many beds a facility will surrender.

16. **Are there any proposed changes to the rules that will <u>reduce</u> a regulatory burden imposed on the business community? Please identify. *(Reductions in regulatory burden may include streamlining reporting processes, simplifying rules to improve readability, eliminating requirements, reducing compliance time or fees, or other related factors).***

    The regulatory restrictions have all been removed from the rescinded rule and are not being added to the new rule.

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

    The adverse impact of this rule is justified because this rule implements Sections 5165.01 and 5165.158 of Am Sub HB 33, Ohio 135th General Assembly.

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 Bureau of Long-Term Services and Supports at NF_PrivateRoom@medicaid.ohio.gov

TO BE RESCINDED

5160-3-16.3 **Nursing facilities (NFs): private rooms.**

(A) Medical necessity.

(1) A nursing facility (NF) operator shall provide private room accommodations, if available, for a medicaid eligible resident if the resident requires a private room due to medical necessity such as the need for infection control.

(2) Medicaid payment shall be considered payment in full, and no supplemental payment may be requested or accepted from a resident or from a resident's authorized representative or family.

(B) Semiprivate or ward accommodations unavailable.

(1) Medicaid shall not pay more for a private room than the current medicaid per diem rate the facility is receiving if semiprivate or ward accommodations are not available.

(2) Medicaid payment shall be considered payment in full, and no supplemental payment may be requested or accepted from a resident or from a resident's authorized representative or family.

(C) Supplemental payment.

If semiprivate or ward accommodations are available and are offered to a resident but the resident or the resident's representative or family member makes a written request for a private room, the private room shall be considered a non-covered service for which the facility may seek supplemental payment from the resident or from the resident's authorized representative or family. Such supplemental payment shall conform to all of the following:

(1) The supplemental payment amount shall represent no more than the difference between the charge to a private pay resident for a semiprivate room and the charge to a private pay resident for a private room; and

(2) The charge for the private room shall not include charges for services covered by medicaid, whether or not medicaid payment meets a NF operator's costs for the per diem services; and

(3) A NF operator shall detail both monthly and annual supplemental charges, if applicable, on a resident's statement of charges so that the additional cost of a private room is evident to the resident and to the resident's authorized representative and family; and

(4) The written request for a private room shall be kept in the resident's file; and

(5) The amount of any supplemental payment shall not be considered when calculating the resident's patient liability.

Effective:

Five Year Review (FYR) Dates:

_____

Certification

_____

Date

Promulgated Under:	119.03
Statutory Authority:	null
Rule Amplifies:	null

DRAFT - NOT FOR FILING

5160:3-16-3 Nursing facilities (NFs): private rooms.

(A) A NF may provide private room accommodations, if available, as follows:

(1) For a medicaid eligible resident if the resident requires a private room due to medical necessity such as the need for infection control or for therapeutic purposes;

(2) Semi-private or ward accommodations are not available;

(3) In accordance with sections 5165.01 and 5165.158 of the Revised Code.

(B) Reimbursement for private rooms

(1) Unless approved for a private room incentive payment pursuant to section 5165.158 of the Revised Code, medicaid payment for private rooms permitted under paragraphs (A)(1) and (A)(2) of this rule will be paid in accordance with section 5165.15 of the Revised Code.

(2) Private room incentive payments will only be available to approved providers and will be paid an amount in addition to the total per medicaid day payment rate determined for the facility under section 5165.15 of the Revised Code:

(3) Except as otherwise provided herein, medicaid payment for private rooms is considered payment in full, and no supplemental payment may be requested or accepted from a resident or from a resident's authorized representative or family.

(4) If semiprivate or ward accommodations are available and are offered to a resident but the resident or the resident's representative or family member makes a written request for a private room, the private room will be considered a non-covered service for which the facility may seek supplemental payment from the resident or from the resident's authorized representative or family as follows:

(a) The supplemental payment amount will represent no more than the difference between the charge to a private pay resident for a semiprivate room and the charge to a private pay resident for a private room; and

(b) The charge for the private room cannot include charges for services covered by medicaid, whether or not medicaid payment meets a NF’s costs for the per diem services; and

(c) A NF should detail both monthly and annual supplemental charges, if applicable, on a resident's statement of charges so that the additional cost of a private room is evident to the resident and to the resident's authorized representative and family; and

(d) The written request for a private room will be kept in the resident's file; and

(e) The amount of any supplemental payment will not be considered when calculating the resident's patient liability.

(C) Private room incentive payment

(1) Application process

The following information is to be submitted to the Ohio department of medicaid (department) by a NF seeking a private room incentive payment to demonstrate that the room meets the prerequisites identified

in section 5165.158 of the Revised Code.

(a) Application in the form and manner prescribed by the department.

(b) List of all NF rooms and their corresponding number of beds, designating the rooms for which private room incentive payment approval is requested and identifying which rooms are category one and category two private rooms as defined in section 5165.158 of the Revised Code.

(c) Floor plan of the entire facility which identifies and shows the location of each private room with the designated room number and designated bathroom. Arrows should indicate the path between each resident room and the bathroom and each resident room and the hallway.

(d) Documentation evidencing the private room meets the criteria in paragraph (C)(2) of section 5165.158 of the Revised Code.

(e) Attestation in the form and manner prescribed by the department that the information submitted by the facility is accurate and truthful.

(2) Approval process

Applications will be held in a pending status in the order received until the centers for medicare and medicaid services (CMS) approves the private room incentive payments and the department determines a NF is qualified for the private room incentive payment.

(a) The department will review all applications and supporting information to determine if a NF is eligible to receive the incentive payment for private rooms.

(b) Additional information may be requested by the department to ensure a NF's eligibility. NFs will have ten business days from the date of the request to provide this additional information. Failure to submit the requested information within ten business days will invalidate the original application submission. NFs with invalidated applications may reapply.

(c) The department reserves the right to conduct on-site visits as part of this process.

(d) Eligible applications will be approved in the order received until the funding limit identified in the Revised Code is reached.

(e) A NF that is approved will receive written authorization from the department including the effective date for the approval.

(3) Reconsideration

A NF that submits an application that is denied by the department may request a reconsideration. The reconsideration will be conducted by the department director, assistant director, or deputy director over the area where the contestation arose, or their designee, provided the person conducting the reconsideration was not involved in the original decision. The denial decision will include information about deadlines and supporting documentation needed for submission of the reconsideration. Deadlines will be no fewer than thirty days from the date on the notice of the denial decision. Reconsideration requests and supporting documentation received after the deadline may be considered at the department's discretion. Reconsideration decisions will not be further reconsidered.

(4) Change of operator.

DRAFT - NOT FOR FILING

If a NF notifies the department of its intent to change operator and an application for private room incentive payments is in a pending status, the new operator will not need to reapply and will maintain the NF's order in the pending status. The new operator will need to attest that the original information submitted by the NF is true and accurate and disclose any information that is different from the original application submission.