

# CSI - Ohio

The Common Sense Initiative

## Business Impact Analysis

Agency Name: Department of Health

Regulation/Package Title: Chapter 3701-64 - Appeal of Denial of Long-Term Care Facility Certification

Rule Number(s): 3701-63-01 and 3701-63-02

Date: June 25, 2016

**Rule Type:**

☐ New

☒ Amended

☒ 5-Year Review

☐ Rescinded

The Common Sense Initiative was established by Executive Order 2011-01K and placed within the Office of the Lieutenant Governor. Under the CSI Initiative, agencies should balance the critical objectives of all regulations with the costs of compliance by the regulated parties. Agencies should promote transparency, consistency, predictability, and flexibility in regulatory activities. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

### **Regulatory Intent**

**1. Please briefly describe the draft regulation in plain language.**

*Please include the key provisions of the regulation as well as any proposed amendments.*

3701-64-01 - The rule sets forth the process for Medicaid certification by a long term care facility, to include hearing rights, informal reconsideration, and Chapter 119. appeal rights.

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An amendment has been made to correct a cross-reference to a section of the Revised Code.

3701-64-02 - The rule sets forth the process for ODH to issue a plan of correction to a nursing facility, and the process by which a facility may seek informal review of those deficiencies by ODH, to include a second level of review conducted by a hearing officer.

The rule has been amended to update cross-references to the Revised Code and the Code of Federal Regulations.

**2. Please list the Ohio statute authorizing the Agency to adopt this regulation.**

Section 3721.022 of the Revised Code.

**3. 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.*

No. While section 3721.022 of the Revised Code designates ODH as the state survey agency for the Medicare and Medicaid programs, these rules provide a process through which Ohio can protect the integrity of its investment in the Medicaid program and allowing due process for Medicaid-certified facilities.

Please note that appeals by Medicare-certified facilities are ultimately heard by the Centers for Medicare and Medicaid Services.

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

No.

**5. 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)?**

These rules give Ohio long term care facilities due process rights regarding proposed revocation of their Medicaid certification. Also included is the right to informal review of deficiencies cited during a health or life safety survey of the facility.

As a whole, the rules help protect Ohio's investment in the Medicaid program.

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

Measureable outcomes include both the number of hearings against facilities and the number of requested informal reviews for deficiencies. Generally, the success in this area is dictated

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by other rules and regulations, namely a facility's compliance with Chapter 3701-17 of the Administrative Code 42 CFR 483.

### **Development of the Regulation**

**7. 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.*

In addition to other state agencies, including the:

Department of Medicaid,

Department of Aging; and

State Long-Term Care Ombudsman

ODH submitted asked for comment on the current rules from stakeholders, including the:

Academy for Senior Health Sciences;

Leading Age Ohio;

Ohio Assisted Living Association; and

Ohio Health Care Association.

ODH received no response to this request.

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

ODH received no response to our request for comments.

**8. 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?**

Not applicable.

**9. 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?**

ODH did not consider any alternatives to the proposed regulation. Section 3721.022 of the Revised Code requires ODH to prescribe requirements in this area. The rule reflects the current statutory requirement.

**10. 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.***

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A performance based regulation was not deemed appropriate for this standard and not authorized by statute.

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

These rules set forth the process for a long term care facility to appeal revocation of certification and for informal review of any deficiencies cited on a survey. The Ohio Department of Medicaid, the administrator of the Medicaid program in Ohio, maintains authority over other aspects of the Medicaid program.

**12. 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.**

Survey staff responsible for inspecting long term care facilities for compliance with state and federal regulations are trained in the survey process and use a standard survey tool.

Additionally, the rules give long term care facilities due process rights, including informal reconsideration of a decision and Chapter 119. appeal rights.

**Adverse Impact to Business**

**13. 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;**

As of June 25, 2016, there are 962 long term care facilities in Ohio.

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

There is generally no adverse impact associated with these rules unless a long term care facility is out of compliance with Chapter 3701-17 of the Administrative Code or the requirements of 42 CFR 483.

**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.*

ODH estimates approximately 1 hour (which can vary based on the scope and severity of the deficiency cited) of facility staff time is dedicated to responding to a

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deficiency citation at an average hourly wage of \$46.47\* and assuming each response was done by the facility administrator.

ODH estimates requests for informal review and gathering of documentation take approximately 2 hours of staff time per deficiency at an average hourly wage of \$46.47\* and assuming each request was done by the facility administrator.

If a provider elects to request a hearing, costs associated with that hearing would be borne by the provider, including attorney's fees averaging \$300.00 per hour.#

\*Figures from United States Department of Labor, Bureau of Labor Statistics, Occupational Employment and Wages for the State of Ohio, May, 2015, using the code for Medical and Health Services Managers (11-9111).

#Figure estimated through information provided by stakeholders.

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

These rules implement section 3721.022 of the Revised Code, which designates the Ohio Department of Health as the state survey agency for Ohio and requires the adoption of rules to serve that function. Additionally, the rules set forth specific due process rights for long term care facilities.

**Regulatory Flexibility**

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

No. The rules apply to all long term care facilities regardless of the size of the business.

**16. 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?**

ODH is committed to the goal of ensuring that regulated customers have the opportunity to achieve compliance with ODH's procedural requirements. Therefore, when it is both feasible and appropriate, ODH will provide one (1) warning letter to a regulated customer who commits a first time or isolated violation of a "minor" paperwork or procedural requirement, such as failing to submit a timely and complete license renewal application or other required documentation to ODH. ODH will not impose a civil monetary penalty for such a violation, and will give the customer a reasonable amount of time to correct the violation, unless:

1. The violation constitutes a failure to comply with federal laws or regulations enforced by ODH, and the penalty is mandated by federal law;

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2. The Director of Health or one of his designees has determined that the violation poses an actual or potential threat to the health, safety, or welfare of the general public;
3. The violation involves knowing or willful conduct that may result in conviction for a felony;
4. Failure to impose the penalty would impede or interfere with the detection of criminal activity; or
5. The violation pertains to the assessment or collection of any monies owed to the state.

This Policy Statement should not be construed as a waiver of ODH's authority to enforce any law or regulation requiring a person or entity to obtain a valid permit or license before engaging in regulated activity, or enforce any other state or federal law.

This policy is available online at:

<http://www.odh.ohio.gov/rules/ombudsman/regulatoryombudsman.aspx>.

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

The agency maintains program staff that can assist and provide guidance to licensees through the Bureau Long Term Care Quality:

<http://www.odh.ohio.gov/odhprograms/ltc/nurhome/nurhome1.aspx> and <http://www.odh.ohio.gov/odhprograms/ltc/Residential%20Care%20Facilities/Main%20Page.aspx>, as well as the Bureau of Regulatory Enforcement: <http://www.odh.ohio.gov/odhprograms/rc/ANM.aspx>.