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ONLINE PUBLIC-COMMENT PERIOD LONG-TERM CARE CONSUMER GUIDE FEES

NOVEMBER 6, 2017

173-45-09 implements the annual fees, their invoicing, and certifying cases of unpaid fees to the Ohio Attorney General for collection purposes. Because Am. Sub. House Bill No. 49 of the 132nd General Assembly amended the penalties for unpaid fees in ORC §173.48, ODA proposes to amend 173-45-09 to implement new penalty language into this rule.

ODA also reviewed this rule top-to-bottom, as required at least once before each rule's 5-year deadline. As a result of the review, ODA proposes to revise and reorganize the rule to be similar to the recently revised and reorganized bed-fee rule for the State Long-Term Care Ombudsman Program (173-14-28).

The public is welcome to review the proposed new rule and offer recommendations for improving it. ODA will share the comments it receives with the Common-Sense Initiative Office (CSIO), which will review the rule at the same time. CSIO's mission is to reduce unnecessary adverse impacts of state rules on Ohio businesses.

Please submit all comments no later than **Sunday, November 19, 2017** at 11:59PM. To make a comment, please (1) email rules@age.ohio.gov and place the rule number in the subject line or (2) use the "[submit comment](#)" button in ODA's online rules library.

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: OHIO DEPARTMENT OF AGING

Package Title: LONG-TERM CARE CONSUMER GUIDE: FEES, INVOICES, PENALTIES

Rule Number: 173-45-09

Date: November 3, 2017, revised on November 8, 2017

Rule Types:

- ☒ 5-Year Review
- ☒ Rescinded
- ☒ New
- ☐ Amended
- ☐ No change

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 regulations in plain language.

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

OVERVIEW

ODA operates the [Long-Term Care Consumer Guide](#) (Guide). It is available to the public at no cost to the public. ORC §173.48 is the basis for this rule. It authorizes ODA to charge nursing homes and residential care facilities (RCFs) to annual fees for the operation of the Guide.

173-45-09 implements the annual fees, their invoicing, and certifying cases of unpaid fees to the Ohio Attorney General for collection purposes. Because [Am. Sub. House Bill No. 49](#) of the 132nd General Assembly (HB49) amended the penalties for unpaid fees in ORC §173.48, ODA now proposes to amend 173-45-09 to implement new penalty language into this rule.

Additionally, ODA proposes to review this rule top-to-bottom, as required at least once before each rule's 5-year deadline.

To implement the aforementioned amendments, ODA proposes to rescind the current rule and adopting a new rule in its place to comply with the LSC's 50% guideline.¹

¹ OHIO LEGISLATIVE SERVICE COMMISSION, *Rule Drafting Manual*, 4th ed., (May, 2006) §4.3.1.

SPECIFIC AMENDMENTS

Beginning on September 29, 2017, ORC §173.48, as amended by HB49, has authorized ODA to assess “late penalties” to late payments of annual fees. The section (1) authorizes ODA to establish a deadline to pay the annual fee and (2) stipulates that the penalty is a doubling of the fee if not paid 90 days after the deadline ODA establishes. ODA proposes to establish the deadline in (B)(2) as 30 days after the date on which ODA mailed the invoice to a facility. ODA proposes to insert (C)(1) to incorporate the penalty language HB49 added to ORC §173.48.

Additionally, ODA is reorganizing and revising this rule in the same manner it recently reorganized and revised the [bed-fee rule](#). As such, the proposed new rule, in comparison to the current rule it will replace, has the following differences:

- The new rule would no longer require nursing homes and RCFs to mail payment of fees to the Long-Term Care Consumer Guide Fund because such facilities must pay the state treasurer. Instead, it requires ODA's invoice to indicate the available methods of payment. This also negates the need to include the mailing address in the rule, because available methods of payment may not involve mailing a check or may have different mailing addresses.
- The new rule uses *invoice* instead of *billing statement*.
- The new rule uses *deadline for receipt of payment*, which ODA defines in (B)(3) as “thirty days after the date on which ODA mailed the invoice to the facility.” (C)(1) and (C)(2) refer back to this date.

2. Please list the Ohio statute authorizing the Agency to adopt these regulations.

ORC §§ [173.01](#), [173.02](#), and [173.49](#).

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.

Although Chapter 173-45 implements federal law,² 173-45-09 only implements state law—specifically ORC [§173.48](#).

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

173-45-09 doesn't implement a federal requirement and doesn't exceed federal requirements.

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)?

This rule's public purpose is best seen in context of the entire chapter. There are at least four public purposes for Chapter 173-45:

1. The rules exist to comply with state law. (This is the case for 173-45-09.)
2. The rules exist to comply with federal law. (This is not the case for 173-45-09.)
3. The rules benefit the public because any Ohioans may use the Guide as an unbiased resource when shopping for nursing facilities and residential care facilities. Ohioans want to live in facilities that are best-united to meet their

² §1902(a)(9)(D) of the Social Security Act, as amended by §6102(d)(2)(D) of the Affordable Care Act [or 42 USC 1396a(a)(9)(D)], requires “that the State maintain a consumer-oriented website providing useful information to consumers regarding all skilled nursing facilities and all nursing facilities in the State, including for each facility, Form 2567 state inspection reports (or a successor form), complaint investigation reports, the facility's plan of correction, and such other information that the State or the Secretary considers useful in assisting the public to assess the quality of long term care options and the quality of care provided by individual facilities.” House Bill 403 (123rd General Assembly) required ODA to adopt rules to implement the Guide over a decade before the Affordable Care Act (2000).

healthcare needs or the healthcare needs of their loved ones. (Fees generated from 173-45-09 support the Guide's operation.)

4. The rules benefit nursing facilities and residential care facilities that are listed in the Guide. The Guide is the state's only one-stop, public, searchable database of such facilities. The Guide provides facilities with opportunities to highlight their specialized services, policies, staffing levels, quality and bed capacities. The Guide is sort of a "matchmaker." Merely being listed in the Guide could help consumers and facilities, because the Guide helps consumers choose facilities. Furthermore, because the Guide lists each facility's specialized services, it helps consumers with special healthcare needs who are shopping for nursing home to choose a facility based on the knowledge that some facilities offer specialized services that correspond to their special healthcare needs. (Again, fees generated from 173-45-09 support the Guide's operation.)

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

ODA will monitor the receipt of Consumer Guide Fees from nursing homes and RCFs.

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.

On September 22, 2017, ODA emailed the following businesses and organizations to inform them of an opportunity to review this rule and other rules then provide ODA with recommendations for improving this rule and other rules:

- **4 Providers:**
 - Alzheimer's and Dementia Care Services.
 - Home Care by Black Stone.
 - National Church Residences (NCR).
 - Senior Resource Connection.
- **7 Provider Associations:**
 - LeadingAge Ohio.
 - Ohio Academy of Senior Health Sciences, Inc.
 - Ohio Assisted Living Association.
 - Ohio Association of Medical Equipment Services.
 - Ohio Council for Home Care and Hospice.
 - Ohio Health Care Association.
 - Ohio Jewish Communities.
- **1 PASSPORT Administrative Agency:** Catholic Social Services of the Miami Valley.
- **1 Association Representing Many PASSPORT Administrative Agencies:** Ohio Association of Area Agencies on Aging (O4A).

ODA requested responding before September 30, but later extended the deadline to October 2.

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

In response to ODA's email invitations on September 22, 2017 to review, and comment upon, this and other rules, and ODA received 4 comments from 2 stakeholders. ODA lists those comments, and ODA's responses, in the table below.

	COMMENTS	ODA'S RESPONSES
1	<p>ON IMPLEMENTING HB49'S PENALTY FOR UNPAID FEES LeadingAge Ohio understands that ODA has the authority under House Bill 49 to implement the penalty for late payments and does not oppose ODA implementing its statutory authority.</p> <p><i>LeadingAge Ohio</i></p>	Thank you.
2	<p>ON IMPLEMENTING HB49'S PENALTY FOR UNPAID FEES It is understandable to have late penalty fees, it may be worth having some sort of grace period in case individuals are late (i.e. no later than 30 days after due date.)</p> <p><i>Alzheimer's and Dementia Care Services</i></p>	HB49 amended ORC §173.48 to give a 90-day period before the fee was doubled, so this rule also gives a 90-day period.
3	<p>ON MATCHING THIS RULE'S LANGUAGE (TO THE DEGREE APPROPRIATE) AND ORGANIZATION TO A SIMILAR FEE RULE (173-14-28), WHICH ODA RECENTLY UPDATED The more you can match the language and rules in code, the better for everyone. Sometimes it is hard to stay on top of changes and sometimes as a provider, I have had to "dig" for rules. While it seems easy, there are so many rules and it is not always easy to find information. The more they can be cross referenced, the better.</p> <p><i>Alzheimer's and Dementia Care Services</i></p>	Thank you. In this case, the rules don't cross-reference one another because they're different programs that don't interact with one another. However, they both charge fees to the same entities, so ODA believes most of the language should be the same between the 2 rules so the experience of paying a fee for an ODA program is the same regardless of the program.
4	<p>ON MATCHING THIS RULE'S LANGUAGE (TO THE DEGREE APPROPRIATE) AND ORGANIZATION TO A SIMILAR FEE RULE (173-14-28), WHICH ODA RECENTLY UPDATED Yes</p> <p><i>LeadingAge Ohio</i></p>	Thank you.

No stakeholder emailed on September 22, 2017 responded to the question, "Do you recommend other amendments?"

9. 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?

ODA is not proposing to amend this rule based upon scientific data.

10. 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?

ODA did not consider alternative regulations because ORC §173.48 establishes the amount of the fees requires payment of the fees, and establishes the penalties for late payment or non-payment.

11. 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.

Penalties are inherently performance-based standards. ODA's proposal to implement the penalty language amended into ORC §173.48 by HB49 into 173-45-09 would implement performance-based standards into this rule. Nursing homes and RCFs paying annual fees in a timely manner pay no penalties. Nursing homes and RCFs not paying annual fees in a timely manner pay penalties.

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

ORC §173.49 authorized ODA to adopt rules to implement the Guide. No other state agency has such an authorization.

13. 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.

ODA will publish this rule in the Register of Ohio. ORC §119.0137 of the Revised Code says publication of a newly-adopted rule in the Register of Ohio "is sufficient to give notice of the content of the document to a person who is subject to or affected by the content."

Before this rule would take effect, ODA will post them on ODA's [website](#). ODA also sends an email to subscribers of our rule-notification service to feature the rule.

Adverse Impact to Business

14. 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;

This rule impacts Ohio's nursing homes and RCFs. Presently, Ohio has almost 1,000 nursing homes³ and over 600 RCFs.⁴

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

This rule has 2 types of adverse impacts:

1. The fee itself.
2. Penalties for not paying or paying the fee late, as follows:
 - a. The doubling of the fees if not paid before the 90th day after the payment deadline (i.e., 120 days after the invoice date).
 - b. The effect of collections activities required by ORC §131.02. The current rule requires ODA to certify for collection from the Ohio Attorney General fee obligations unpaid 45 days after the payment deadline (i.e., 75 days after the invoice date). ODA proposes to extend the time between the invoice date and the day it certifies to 120 days after the invoice date.

³ OHIO DEPT. OF AGING, *Long-Term Care Consumer Guide* (as viewed on [this webpage](#), Mar. 24, 2017).

⁴ *Ibid.*

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.

173-45-09 implements the requirement in ORC §173.48 for nursing homes to pay \$650 per year and RCFs to pay \$350 per year. The table below shows how much the Treasurer of Ohio has deposited into the State Long-Term Care Consumer Guide Fund in recent fiscal years.⁵

FY 2012 Actual	FY 2013 Actual	FY 2014 Actual	FY 2015 Actual	FY 2016 Actual	FY 2017 Adj. Approp.
\$802,336	\$860,101 ⁶	\$794,502	\$788,228	\$825,898	\$861,135

The adverse impact of missing a deadline may involve financial penalties, including doubling of the fees pursuant to ORC §173.48 and interest assessed by the Ohio Attorney General pursuant to ORC §131.02. Nursing homes and RCFs only incur such penalties if they miss deadlines to pay the annual fees. Because ODA proposes to extend the time between the invoice date and the date it certifies an unpaid fee obligation to the Ohio Attorney General for collection from 45 days after the payment deadline (i.e., 75 days after the invoice date) to 120 days after the invoice date, less nursing homes and RCFs are likely to incur as many penalties.

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

ODA has an obligation to accurately implement ORC §173.48 into this rule to leave no discrepancy between the two portions of law over penalties for late payments.

Regulatory Flexibility

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

This rule treats all nursing homes and RCFs the same regardless of workforce size. ODA does not discriminate between providers based upon the size of their business or organization. Nursing homes and RCFs are typically small businesses according to ORC [§119.14](#).

17. 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?

ODA complies with the requirement in §119.14 to exempt small businesses from penalties for first-time paperwork violations if the business timely corrects the violation, but not if the violation is ineligible for such an exemption according to §119.14(C).

⁵ The amounts collected each FY include interest assessed by the Ohio Attorney General on late payments.

⁶ \$61,000 of the amount collected for only this FY was a one-time payment from the Ohio Dept. of Mental Health and Addiction Services for work ODA performed in the Guide on their behalf.

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

The state long-term care ombudsman office is available to help nursing homes and RCFs with their questions about the Long-Term Care Consumer Guide or the collection of fees. Additionally, any person may contact [Tom Simmons](#), ODA's policy development manager, with questions about rules.

Additionally, ODA maintains an [online rules library](#) to help nursing homes and RCFs find rules regulating them. Nursing homes, RCFs and the general public may access the online library 24 hours per day, 365 days per year.

TO BE RESCINDED

173-45-09

Fees.

(A) Consumer guide fee:

- (1) For the publication of the guide, ODA shall collect the following annual consumer guide fees from facilities:
 - (a) From nursing facilities, ODA shall collect six hundred fifty dollars.
 - (b) From residential care facilities, ODA shall collect three hundred fifty dollars.
- (2) Each facility shall pay the consumer guide fee in full to ODA in fewer than thirty days after the date on which ODA mailed the billing statement to the facility.
- (3) ODA shall certify to the Ohio attorney general the amount of any payment it does not receive from a facility in fewer than forty-five days after the date on which ODA mailed the billing statement to the facility.

(B) Billing statement: One time, every year, ODA shall bill each facility for the consumer guide fee. In each billing statement, ODA shall include the following:

- (1) A description of the time period covered by the billing statement.
- (2) A statement indicating that the facility shall pay ODA in fewer than thirty days after the date on which ODA mailed the billing statement to the facility.
- (3) A statement indicating that the facility shall make the payment in the form of a check or money order payable to the "Long-Term Care Consumer Guide Fund."
- (4) The address to which the facility shall mail the payment.
- (5) A statement indicating that ODA may certify to the office of the attorney general for collection any fee that is not paid in fewer than forty-five days after the date on which ODA mailed the billing statement to the facility.

Effective:

Five Year Review (FYR) Dates:

Certification

Date

Promulgated Under:	119.03
Statutory Authority:	173.01, 173.02, 173.49
Rule Amplifies:	173.45
Prior Effective Dates:	01/12/2001, 09/07/2006, 08/30/2010, 09/29/2011, 12/01/2015, 08/01/2016

173-45-09

Long-term care consumer guide: fees, invoices, and penalties.

(A) Fees: For the operation of the guide, ODA shall collect the following annual consumer guide fees from facilities:

(1) From nursing facilities, ODA shall collect six hundred fifty dollars.

(2) From residential care facilities, ODA shall collect three hundred fifty dollars.

(B) Invoices: Annually, ODA shall provide each facility described in paragraphs (A)(1)(a) and (A)(1)(b) of this rule with an invoice requesting payment of the consumer guide fee. The invoice shall include all the following information:

(1) The time period covered by the invoice.

(2) The deadline for receipt of payment, which shall be thirty days after the mailing date indicated on the invoice.

(3) The available methods of payment.

(4) The consequences of late payment and non-payment.

(C) Penalties:

(1) Division (A)(3) of section 173.48 of the Revised Code requires a facility that fails, within ninety days after the deadline for receipt of payment, to pay the consumer guide fee to be assessed at two times the original invoiced amount.

(2) For purposes of section 131.02 of the Revised Code, ODA shall certify to the attorney general any payment not received by ODA within ninety days after the deadline for receipt of payment.

Replaces: 173-45-09

Effective:

Five Year Review (FYR) Dates:

Certification

Date

Promulgated Under: 119.03

Statutory Authority: 173.01, 173.02, 173.49

Rule Amplifies: 173.48

Prior Effective Dates: 01/12/2001, 09/07/2006, 08/30/2010, 09/29/2011,
12/01/2015, 08/01/2016