



## Common Sense Initiative

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

**Joseph Baker**, Director

### Business Impact Analysis

Agency, Board, or Commission Name: Ohio Department of Health

Rule Contact Name and Contact Information:

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

Appeal of Denial of Long-Term Care Facility Certification

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

Submission for CSI Review: 12/02/2022

Public Comment Period End Date: 01/03/2023

Rule Type/Number of Rules:

New/\_\_\_ rules

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

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

Rescinded/\_\_\_ rules (FYR?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.**

3701-63-01 - 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.

3701-63-02 - 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.

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.**

Section 3721.022 of the Revised Code.

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?**

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

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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.

- 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.**

No

- 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)?**

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.

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

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

- 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?**

No

### **Development of the Regulation**

- 9. Please list the stakeholders included by the Agency in the development or initial review of the draft regulation.**

Department of Medicaid,

Department of Aging; and

State Long-Term Care Ombudsman

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

There were no requests for revisions from the stakeholders.

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**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?**

Not applicable

**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?**

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.

**13. 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.

**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.**

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**

**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, and**
- b. Quantify and identify the nature of all adverse impact (e.g., fees, fines, employer time for compliance, etc.).**

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.

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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 deficiency citation at an average hourly wage of \$48.72\* 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 \$48.72\* 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, 2021, using the code for Medical and Health Services Managers (11-9111).

**16. Are there any proposed changes to the rules that will reduce a regulatory burden imposed on the business community? Please identify.**

No, the two rules represent statutory requirements.

**17. 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**

**18. 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.

**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?**

ODH's Regulatory Ombudsman has set forth a policy for ODH to follow regarding the waiver of fines and penalties for paperwork violations and first-time offenders. ODH implements this policy as part of its business process. Information regarding this policy can be found online at: <https://odh.ohio.gov/wps/portal/gov/odh/about-us/offices-bureaus-and-departments/Office-of-General-Counsel/Statement-on-Paperwork-Violations/>

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**20. 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 of Regulatory Operations and the Bureau of Survey and Certification.

<https://odh.ohio.gov/know-our-programs/nursing-homes-facilities/nursinghomesfacilities>