Ohio | Common Sense Initiative

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Business Impact Analysis

Agency, Board, or Commission Name: OHIO DEPT. OF AGING

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

LONG-TERM CARE CONSUMER GUIDE

The rules of Chapter 173-45 of the Administrative Code implement and administer the Long-Term Care Consumer Guide pursuant to R.C. §§ 173.45 to 173.48 and 42 U.S.C. 1396a(a)(9)(D)

Rule Number(s): 173-45-01, 173-45-03, 173-45-04, 173-45-05, 173-45-06, 173-45-06.1, 173-45-06.2, 173-45-07, 173-45-08, 173-45-09, 173-45-10

Date of Submission for CSI Review: June 29, 2020

Public Comment Period End Date: July 12, 2020 at 11:59PM.

Rule Type/Number of Rules:
☐ **New/** 0 **rules**
☑ **Amended/** 11 **rules (FYR? ☑)**
☐ **No Change/** 0 **rules (FYR? ☐)**
☐ **Rescinded/** 0 **rules (FYR?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.

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?
   173-45-06 and 173-45-09 are the only rules in this chapter to create an adverse impact upon long-term care facilities. The remaining rules in the chapter primarily establish the Guide's content, features, operation, and administration. The checkboxes below pertain only to 173-45-06 and 173-45-09.

The rule(s):

☐ **a. Require 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.** 173-45-09

☑ **c. Requires specific expenditures or the report of information as a condition of compliance.** 173-45-06 and 173-45-09

☑ **d. Is likely to directly reduce the revenue or increase the expenses of the lines of business to which it will apply or applies.** 173-45-09

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.

In 2000, House Bill 403 (123rd G.A.) required ODA to adopt rules to implement and administer the Long-Term Care Consumer Guide (Guide). Today, those rules comprise Chapter 173-45 of the Administrative Code. The rules establish the Guide's content, features, operation, and administration.

ODA publishes the Guide on ODA's website. The Guide provides timely, comparative information about the following types of long-term care facilities (facilities) in Ohio:

- Nursing facilities.[1]
- Residential care facilities.[2]
- Class II residential facilities under the Dept. of Mental Health and Addiction Services.

The Guide provides information on each facility's inspection report from the Ohio Dept. of Health along with statewide and district averages for comparison. It provides consumer-satisfaction information, which is based on surveys of families and residents of facilities. Additionally, facilities can add information to the Guide about their specialized services, policies, staffing levels, quality, and bed capacities.

The following are the Guide's beneficiaries:

- Any Ohioan may use it—free of charge—as an unbiased resource when shopping for long-term care facilities. Ohioans want the long-term care options best-suited to meet their healthcare needs or the healthcare needs of their loved ones.
- Facilities benefit from being listed in the state's only one-stop, public, searchable database of long-term care facilities. The Guide provides facilities with opportunities to highlight their specialized services, policies, staffing

[1] Includes nursing homes, county homes, and skilled nursing units of hospitals whether or not those homes/units are certified for Medicare and Medicaid payment.
[2] *aka*, "assisted living."

levels, quality, and bed capacities. The Guide is a "matchmaker." It helps consumers with special healthcare needs to choose a facility that offers specialized services corresponding to their special healthcare needs.

To comply with 5-year review requirements, ODA has reviewed each rule in Chapter 173-45 and now proposes to make the following amendments:

- 173-45-01:
  - Add "Long-term care consumer guide" to the rule's title.
  - Insert "Ohio's" before "long-term care facilities" in (A).
  - Insert "residential facilities" in (A), after "county homes certified to receive medicare and medicaid reimbursement."
  - Add "residential facility" to the definition of "facility."
  - Redefine "Medicare" as having the same meaning as in R.C. §5162.01.
  - Define "residential facility."

- 173-45-03: Add "Long-term care consumer guide" to the rule's title.

- 173-45-04:
  - Add "Long-term care consumer guide" to the rule's title.
  - Replace "criteria" in (A) and (B) with "parameters."

- 173-45-05:
  - Add "Long-term care consumer guide" to the rule's title.
  - Replace "Chapter 173-45 of the Administrative Code" in (B)(6) with "this chapter." (*cf.*, §5.2.1 of the *Rule Drafting Manual*.[3])

- 173-45-06: Add "Long-term care consumer guide" to the rule's title.

- 173-45-06.1: Add "Long-term care consumer guide" to the rule's title.

- 173-45-06.2:
  - Add "Long-term care consumer guide" to the rule's title.
  - Replace "nursng" in (A)(1) with "nursing."
  - Delete (A)(2).

- 173-45-07: Add "Long-term care consumer guide" to the rule's title.

- 173-45-08:
  - Add "Long-term care consumer guide" to the rule's title.
  - Replace "Ohio department of health" with "ODH."

- 173-45-09: Add a reference to the invoice portal on aging.ohio.gov.

- 173-45-10: Add "Long-term care consumer guide" to the rule's title.

3. Please list the Ohio statutes that authorize the agency, board or commission to adopt the rule(s) and the statutes that amplify that authority.

R.C. §§ 121.07, 173.01, 173.02, and 173.49.

[3] LEGISLATIVE SERVICE COMMISSION, May 2006, 38.

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.

42 U.S.C. 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."

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

These rules exist to comply with the state laws mentioned in ODA's response to #2, which require ODA to adopt rules necessary to implement and administer R.C. §§ 173.45 to 173.48.

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 exist to comply with the state laws mentioned in ODA's response to #2.

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

ODA may determine that the rules in Chapter 173-45 are successful if the Guide continues to be useful for Ohioans and if ODA does not receive credible requests to amend the rules to make Guide useful.

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.

No.

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.

ODA's guide *Participating in ODA's Rule Development* and the main rules webpage on ODA's website encourage stakeholders and the general public to give input on improving ODA's rules and provide contact information for doing so.

On May 11, 2020, ODA sent an email to the following stakeholders to request their input for improving the current version of this chapter of rules:

- Chris Murray of Senior Health Sciences, Inc.
- Stephanie DeWees and Anne Shelley of LeadingAge Ohio.
- Jean Thompson for Ohio Assisted Living Assn.

- Mandy Smith of the Ohio Health Care Assn.

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

From each rule's effective date to the date of this BIA, ODA has received no input from stakeholders or the general public requesting improvements to any rule in this chapter.

To its May 11, 2020 emails, ODA received no requests from stakeholders to improve or otherwise amend the rules.

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?

ODA is not proposing to amend these rules based upon scientific data.

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?

R.C. §173.49 requires ODA to adopt rules necessary to implement and administer R.C. §§ 173.45 to 173.48. The U.S. Congress made further requirements for the Guide in 42 U.S.C. 1396a(a)(9)(D) which these rules implement. Therefore, ODA did not consider alternatives to adopting these rules.

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.***

ODA did not consider performance-based regulation for these rules. The rules of Chapter 173-45 primarily establish the Guide's content, features, operation, and administration.

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

R.C. §173.49 authorizes only ODA to adopt rules for the Guide. ODA's search of the Administrative Code found that no other state agency had adopted a rule regulating the Guide.

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.

Before the proposed new rules take effect, ODA will post them on ODA's website. ODA will also send an email to subscribers of our rule-notification service to feature the rule.

ODA ensures the veracity of the Guide to prevent a consumer with a specific healthcare need from being misinformed by erroneous information in the Guide. For example, the Guide may indicate that a facility offers the specialized service that corresponds to the consumer's specific healthcare needs, when it does not offer that specialized service.173-45-06 explains how ODA handles conflicting information between government reports and information being submitted to ODA by facilities for publication in the Guide.

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

All of Ohio's nursing homes (nursing facilities), RCFs, and residential facilities are affected by the Guide.

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

173-45-06 and 173-45-09 are the only rules in this chapter to create an adverse impact upon facilities.

173-45-06 requires facilities to submit information about their specialized services, policies, staffing levels, quality, and bed capacities to ODA for publication in the Guide.

173-45-09 implements the fees and penalties established by R.C. §173.48.

The remaining rules in the chapter primarily establish the Guide's content, features, operation, and administration.

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.

The adverse impact of 173-45-06 upon a facility is the time it takes the facility to supply ODA with information about its specialized services, policies, staffing levels, quality, and bed capacities to ODA for publication in the Guide.

The adverse impact of 173-45-09 upon a facility is one of the following fees, which are established under R.C. §173.48:

- Every Ohio nursing home must pay $650/year.
- Every Ohio RCF must pay $350/year.

Although the Guide publishes information on class II residential facilities under the Ohio Department of Mental Health and Addiction Services, R.C. §173.48 does not establish fees for that type of facility. Therefore, 173-45-09 does not require those class II residential facilities to pay a fee.

173-45-09 also includes the penalties established under R.C. §§ 131.02 and 173.48 for failure to pay the fee if 90 or more days after the payment deadline.

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

On 173-45-06:

- It would not be possible to implement an effective Guide if ODA did not require facilities to provide ODA with accurate information about their specialized services, policies, staffing levels, quality, and bed capacities to ODA for publication in the Guide. As stated in ODA's response to question #2, facilities benefit from being listed in the state's only one-stop, public, searchable database of facilities. The Guide provides facilities with opportunities to highlight

their specialized services, policies, staffing levels, quality, and bed capacities. The Guide is a "matchmaker." It helps consumers with special healthcare needs to choose a facility that offers specialized services they need.

- It would also not be possible to implement an effective Guide if ODA did not verify the accuracy of the information. ODA's goal is to protect consumers from making long-term care decisions that are dangerous to their health. For example, it is dangerous to mislead the public into believing that the state's only one-stop, public, searchable database of facilities indicates that a facility offers specialized services, if the facility does not offer those specialized services. Ensuring the veracity of the Guide may prevent a consumer with a specific healthcare need from entering a facility that does offer the necessary specialized services.

On 173-45-09: ODA requires facilities to pay the fee authorized by R.C. §173.48.

Regulatory Flexibility

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

Because the primary purpose of these rules is to ensure the health and safety of consumers searching for facilities that are appropriate for their needs, the rules treat all facilities the same, regardless of their 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?

The operation of the Guide is necessary to ensure the health and safety of consumers searching for facilities that are appropriate for their needs. In Chapter 173-45, only 173-45-09 implements penalties for late payments of 90 or more days after the payment deadline.

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

ODA and its designees are available to help facilities of all sizes with their questions. Any person may contact Tom Simmons, ODA's policy development manager, with questions about these rules.

Additionally, ODA maintains an online rules library to help facilities find rules regulating them. Facilities may access the online library 24 hours per day, 365 days per year at aging.ohio.