

CONCISE EXPLANATORY STATEMENT

In accordance with the Administrative Procedures Act, R.I. Gen. Laws § 42-35-2.6, the following is a concise explanatory statement:

AGENCY: Rhode Island Department of Health

DIVISION: N/A

RULE IDENTIFIER: 216-RICR-40-10-1

RULE TITLE: Licensure of Nursing Facilities

REASON FOR RULEMAKING: The Rhode Island Department of Health is proposing amendments to the regulation, Licensing of Nursing Homes, in order to remove incorporated references, update incorporated references to more recent versions, add definitions for “lessee”, “licensee”, “management company”, “operator”, and “owner”, and revise definitions of “advanced practice registered nurse”, “capacity”, “change in operator”, “change in owner”, “controlling person”, “equity” and “nursing facility.”

The regulation also clarifies the relationships among owners and operators which arise as a result of the separation of operation from ownership, including that the owner of a nursing facility is the person that holds title to the real property; that a change in owner must be reviewed by the Department; that the operator of a nursing facility is the person that is responsible for the operation of the facility; that managers only assist operators of nursing facilities; that lessees can also be operators; and that nursing facility licenses are customarily held by the operator.

Finally, the regulation also requires two employees certified in Basic Life Support (BLS) to be present in the nursing facility at all times.

ANY FINDINGS REQUIRED BY LAW AS A PREREQUISITE TO THE EFFECTIVENESS OF THE RULE: N/A

TESTIMONY AND COMMENTS:

Comments were received and testimony was offered regarding opposition to § 1.5(F) that would require nursing facilities to maintain an equity position throughout the period of licensure, including renewals. Arguments offered included that the equity as it is defined in the regulations and, particularly, its maintenance beyond the initial approval of same by the Department, exceeded statutory authority and was unworkable for a variety of business reasons that could not be appropriately addressed through a variance process. The only persuasive argument was that it would require an applicant who didn't refinance to pay the buyer the equity required then place the same amount aside, thus, representing a doubling of the equity contribution.

As to statutory authority, R. I. Gen. Laws § 23-17-14.3(1) requires the Health Services Council to consider an applicant's commitment in reviewing applications for initial licensure or change in owner, operator, or lessee. The requirement that an applicant

contribute non-debt funds to acquire a nursing facility has a long history. The policy was initially adopted to serve as evidence of the applicant's financial commitment and the variance procedure set forth at § 1.20.2 of these regulations (and unchanged hereby) has been available to such applicants. Notwithstanding those facts, the Department was concerned that applicants were rendering hollow the claim of commitment by refinancing their debt shortly after approval and the Department sought to stifle that practice.

The comments and testimony suggest, however, that applicants would simply maintain equity through the very refinancing process the Department was attempting to curtail. In light of that, the Department has reviewed its authorities and believes it can assure that licensees have sufficient resources to operate nursing facilities throughout the licensure period through enforcement of R.I. Gen. Laws § 23-17-5.1(a) and the regulations promulgated pursuant thereto. Accordingly, the Department will remove the references to maintenance of equity at §§ 1.5(F), 1.7(A), 1.7(G)(1)(c) and 1.7(G)(2)(a)(1). *The Department thanks you for this comment.*

Comments were received and testimony was offered objecting to requiring that owners of real property used by a nursing facility be subject to change in ownership review. Arguments made included that such review exceeded the Department's statutory authority, that it would deter quality owners and operators from investing in Rhode Island because of the current length of time involved in such reviews, and that no other state requires review of real estate owners where such owners are different from licensees.

The Department does have the requisite statutory authority. A health care facility is defined at R. I. Gen. Laws § 23-17-2 (9) as, "any institutional health-service facility...place, building...used, operated or engaged in providing health care services..." The definition of nursing facility at § 1.3(A)(39) in these regulations has been amended to include "building or portion thereof." While the Department has not previously reviewed changes of ownership involving operators monetizing their real estate assets, recent experience demonstrates that the separation of ownership from operations has been associated with compromised care for affected nursing facility residents, in certain circumstances, both in Rhode Island and in other states across the country.

Accordingly, with the promulgation of these regulations, the Department is clarifying a statutory authority that it had not exercised prior to October 2, 2023. With respect to the time line for conducting such reviews, the application for real estate owners will be more focused on the history of the new real estate owner with regard to its ownership of health care properties in Rhode Island and other jurisdictions and the terms of the lease agreement between the real estate owner and the operator. The Department's interest is to assure that nursing facility residents are not adversely affected by either the division of responsibilities between the owner of the land and building and the operator of the service provided within that space or the diversion of operator funds to above market rents.

The Department acknowledges that the change in effective control review process has been lengthy on occasion for a number of reasons over the past several years but, in many cases, the applicant contributed as much or more to the delay experienced.

Notably, no nursing facility has ever exercised its legal remedies in Superior Court to compel the Department to act in a more expeditious manner. The Department anticipates that reviews of changes in real estate owners will be much shorter than reviews of changes in operators.

Finally, the allegation that no other state reviews changes with regard to nursing facility real estate owners does not provide the Department with a justification to not review situations that have proven to be problematic, particularly where the statutory authority to do so exists. The Department is changing the first sentence of § 1.16(D) to reinforce that the statutory language addresses action and not liability. *These comments will not be accepted at this time.*

A comment was received expressing concern at the lack of a definition for a “significant change” to a management contract. This term was in the regulations prior to these amendments and the Department did not make any change to it. The Department does not feel there is a need to specify the types of changes that are considered significant. As has always been the case, facilities that are concerned that changes being proposed to a management contract may be viewed as significant by the Department may submit them for advance review. Nevertheless, the Department will take the comment under advisement, monitor the situation, and consider it as part of future amendments. *This comment will not be accepted at this time.*

A comment was received requesting the removal of "employees only" in the two-person 24/7 Basic Life Saving (BLS) requirement, to permit temporary agency staff to be included in such requirement. BLS training is available to laypersons and health care workers alike, and RIDOH believes that having two persons BLS-trained in the facility 24/7 is prudent. However, the “employees only” provision has been removed from § 1.16.6(C)(4) and the comment has been accepted.

FINAL CHANGES TO THE TEXT OF THE RULE (POST-HEARING):

§ 1.5(F) relating to maintenance of equity for the licensure period is removed in its entirety.

§ 1.6(D) is amended by changing the first sentence to read as follows: “ In accordance with R. I. Gen. Laws § 23-17-4(a), a person that conducts or maintains a nursing facility in a building that is owned by another person is acting jointly or severally with the building owner to do so.”

§1.7 (A), relating to the text removed from §1.7(G)(1)(c) and §1.7(G)(2)(a)(1) (see below), is removed in its entirety.

§ 1.7(G)(1)(c) removes text, “including maintenance throughout the period of licensure, including all subsequent renewals, of the minimum equity position approved by the licensing agency at the time of initial licensure or change in effective control.”

§ 1.7(G)(2)(a)(1) removes text, “and the maintenance of same by the licensee throughout the period of licensure, including all renewals thereof.”

§ 1.16.6.(C)(4) removes the phrase, “These persons must be employees of the facility...”

REGULATORY ANALYSIS:

In development of this rule, consideration was given to:

- 1) Alternative approaches;
- 2) Overlap or duplication with other statutory and regulatory provisions; and
- 3) Significant economic impact on small business.

No alternative approach, duplication or overlap was identified based on available information. RIDOH has determined that the benefits of the rule justify its costs.