NOTICE OF PROPOSED RULEMAKING HEARING*
A Statement of Need and Fiscal Impact accompanies this form.

Department of Human Services, Aging and People with Disabilities 411

Agency and Division Administrative Rules Chapter Number
Christina Hartman 500 Summer Street NE, E-10 (503) 945-6398
Salem, OR 97301-1074

Rules Coordinator Address Telephone

RULE CAPTION
Nursing Facility Closure
Not more than 15 words that reasonably identifies the subject matter of the agency’s intended action.

March 17, 2014 3:30 p.m. Human Services Building Staff
500 Summer Street NE, Rm. 160
Salem, Oregon 97301

Hearing Date Time Location Hearings Officer

Auxiliary aids for persons with disabilities are available upon advance request.

RULEMAKING ACTION
Secure approval of new rule numbers (Adopted or Renumbered rules) with the Administrative Rules Unit prior to filing.

ADOPT:

AMEND:
411-085-0025, 411-085-0210, 411-088-0020, 411-088-0070, 411-088-0080,
411-089-0030

REPEAL:
Temporary Rules 411-085-0025(T), 411-085-0210(T), 411-088-0070(T)

RENUMBER:

AMEND & RENUMBER:

Stat. Auth.: ORS 410.070, 414.065, 441.055, 441.615, 441.637, 441.710, 441.715,
441.990

Other Auth.: 42 CFR 483.75(r)(s), 42 CFR 483.12(a)(8), 42 CFR 488.446

Stats. Implemented: ORS 410.070, 414.065, 441.055, 441.600, 441.615, 441.637, 441.715,
441.990
The Department of Human Services (Department) is proposing to amend the nursing facility rules set forth in OAR chapter 411, divisions 085, 088, and 089 to make permanent temporary rule language that became effective on October 7, 2013 and to align with final rules issued by the Centers for Medicare and Medicaid Services (CMS) that implements Section 6113 of the Patient Protection and Affordable Care Act (PPACA).

The proposed rules ensure that, in the case of a facility closure, individuals serving as administrators provide written notification of the impending closure to the residents and other required individuals at least 60 days prior to impending closure and create a plan for the relocation of the residents. Administrators who fail to comply with the new closure requirements may be subject to civil monetary penalties and exclusion from Federal health care program participation. Hearing rights apply.

The Agency requests public comment on whether other options should be considered for achieving the rule’s substantive goals while reducing the negative economic impact of the rule on business.

March 21, 2014 at 5 p.m.
Last Day for Public Comment (Last day to submit written comments to the Rules Coordinator)

Approved  P. Donna Keddy, Director, Licensing and Regulatory Oversight  02/11/2014
Signature Date
Statement of Need and Fiscal Impact


Statutory Authority: ORS 410.070, 414.065, 441.055, 441.615, 441.637, 441.710, 441.715, 441.990

Other Authority: 42 CFR 483.75(r)(s), 42 CFR 483.12(a)(8), 42 CFR 488.446

Stats. Implemented: ORS 410.070, 414.065, 441.055, 441.600, 441.615, 441.637, 441.715, 441.990

Need for the Rule(s):

The Department needs to permanently amend the rules in OAR chapter 411, divisions 085, 088, and 089 to make permanent the temporary rules that became effective on October 7, 2013 and to align with final rules issued by CMS that implements Section 6113 of the PPACA.

The proposed rules require, in the case of a facility closure, individuals serving as administrators provide written notification of the impending closure to residents and other required individuals at least 60 days prior to impending closure and create a plan for the relocation of residents. Administrators who fail to comply with the new closure requirements may be subject to civil monetary penalties and exclusion from Federal health care program participation. Hearing rights apply.

Documents Relied Upon, and where they are available:
1. 42 CFR 483.75(r)(s) Administration

Available at: http://www.ecfr.gov/cgi-bin/text-index?c=ecfr&SID=d0ef338bab192b780f2991405094126e&rgn=div8&view=text&node=42:5.0.1.1.2.2.7.17&idno=42
2. 42 CFR 483.12(a)(8) Admission, transfer and discharge rights
Available at: http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&SID=d0ef338bab192b780f2991405094126e&rgn=div8&view=text&node=42:5.0.1.1.2.2.7.4&idno=42

Available at: http://www.ecfr.gov/cgi-bin/text-idx?SID=d1d351e1b6330d69ac2697e120a4b97f&node=42:5.0.1.1.6.6.14.27&rgn=div8

4. Federal Register, Vol. 78, No. 53, pages 16795-16806

5. CMS Survey and Certification Memorandum 13-50-NH

Fiscal and Economic Impact:
Statement of Cost of Compliance:
1. Impact on state agencies, units of local government and the public (ORS 183.335(2)(b)(E)):

The Department estimates that amending the rules in OAR chapter 411, divisions 085, 088, and 089 will have the following fiscal and economic impact:

State Agencies: The proposed rule changes codify provider requirements that the Department has historically required and implemented. The Department is not expecting a fiscal or economic impact to the Department or other state agencies as a result of the proposed changes.

Units of Local Government: The proposed rule changes codify provider requirements that the Department has historically required and implemented. The Department is not expecting a fiscal or economic impact to county-operated Area Agencies on Aging as a result of the proposed changes.

Nursing Facility Residents: The Department is not expecting any additional fiscal and economic impact on nursing facility residents because the proposed rule changes are considered a nursing facility administrative service that is included in the bundled rate.

Nursing Facilities: The Department is expecting the development of the new policy required in OAR 411-085-0210 to be $400 per nursing facility.

For a nursing facility to cease operations, distribute notices, and develop resident transition and facility closure plans, the Department is expecting the fiscal and economic impact on the nursing facility to be:

- For a 40 bed facility: $10,772 per facility;
- For a 50 bed facility: $13,116 per facility; and
- For a 60 bed facility: $15,459 per facility.
**Public:** The Department is not expecting any fiscal or economic impact on the public because implementation is exclusively for nursing facilities.

2. Cost of compliance effect on small business (ORS 183.336):
   a. Estimate the number of small businesses and types of business and industries with small businesses subject to the rule:
   There are approximately 138 nursing facilities impacted by the proposed rule changes. There are 18 nursing facilities that may be considered small businesses as defined in ORS 183.310.

   b. Projected reporting, recordkeeping and other administrative activities required for compliance, including costs of professional services:
   The proposed rule changes impact nursing facilities as described above in the Department's statement of cost of compliance.

   c. Equipment, supplies, labor and increased administration required for compliance:
   The proposed rule changes impact nursing facilities as described above in the Department's statement of cost of compliance.

How were small businesses involved in the development of this rule?
Small businesses as defined in ORS 183.310 were represented by Leading Age Oregon and the Oregon Health Care Association through the Administrative Rule Advisory Committee. Small businesses will also be included in the public review and comment period.

Administrative Rule Advisory Committee consulted?:
Yes. The Administrative Rule Advisory Committee included representation from nursing facilities, Oregon Health Care Association, Leading Age Oregon, Oregon Association of Area Agencies on Aging and Disabilities, the Long Term Care Ombudsman, Governor's Commission on Senior Services, Oregon Disabilities Commission, Oregon Law Center, Lane County Legal Aid and Advocacy, Oregon Health Authority, and the Department.

**Approved** P. Donna Keddy, Director, Licensing and Regulatory Oversight 02/11/2014

Signature Date
411-085-0025 Change of Ownership or Operator/Cessation of Business and Closure

(1) PENDING CHANGE OF OWNERSHIP/MANAGEMENT OR OPERATOR.

(a) When a change of ownership or a change of operator is contemplated, the licensee and the prospective licensee must each notify the Department in writing of the contemplated change. The notice of change of ownership or operator must be received by the Department at least 45 days prior to the proposed date of transfer. A shorter timeframe may be allowed at the sole discretion of the Department. The notification must be in writing and must include the following:

(aA) Name and signature of the current licensee;

(bB) The name of the prospective licensee;

(cC) The proposed date of the transfer;

(dD) Type of transfer (e.g., sale, lease, rental, etc.); and

(eE) A complete, signed nursing facility application from the prospective licensee.

(2b) EFFECTIVE DATE OF CHANGE. The prospective licensee may not assume possession or control of the facility until after the prospective licensee has been notified by the Department that its license application has been approved.
(3c) LICENSEE RESPONSIBLE. The current licensee(s) is/are responsible for the operation of the facility and resident care provided therein until a new license is issued to a new owner or manager or the facility operation is closed.

(42) FACILITY CLOSURE.

(a) NOTICE OF INTENT TO CLOSE. Before a licensee ceases operation of and closes a facility, the licensee must notify the Department of the impending closure in writing at least 90 days prior to the proposed date of closure.

(b) SERVICES AND OPERATION DURING CLOSURE. The licensee is responsible for the operation of the facility and for the resident care provided therein until all residents are transferred and the facility is closed. EXCEPTION: When the closure date is established by The Department.

(c) RESIDENT RECORDS. The licensee is responsible for the transfer and retention of resident clinical records according to OAR 411-086-0300.

(d) PROPOSED RESIDENT TRANSITION PLAN.

(A) The nursing facility administrator must submit a proposed resident transition plan to the Department for review and approval 75 days prior to the anticipated date of closure. The proposed resident transition plan must:

(i) Include resident-specific transition plans based on current and accurate assessments of each resident’s needs, preferences, and best interests;

(ii) In collaboration with the Department, identify potential transition settings that are available and appropriate in terms of quality, services, and location;

(iii) In collaboration with the Department, include a proposed time table for resident assessments, planning conferences, and transitions;
(iv) Include the resources, policies, and procedures that the facility must provide or arrange in order to plan and implement the transitions; and

(v) Include a list of the residents to be transitioned, including each resident’s current level of care, a brief description of any special needs or conditions, and the name and address of the resident’s guardian (if applicable). The list of residents to be transitioned must include:

(I) Residents that are eligible to return to the facility following hospitalization as described in OAR 411-088-0050; and

(II) Residents that are temporarily absent from the facility and have secured a bedhold as described in OAR 411-070-0110.

(B) Resident transitions must comply with OAR 411-088-0020(1)(f) and OAR 411-088-0070(1)(g), (3)(d), and (4) (Transfers).

(e) PROPOSED FACILITY CLOSURE PLAN. The nursing facility administrator must submit a proposed facility closure plan to the Department for review and approval 75 days prior to the anticipated date of closure. The proposed facility closure plan must include:

(A) A description of operations during the closure period;

(B) The plan to assure adequate staff, supplies, and services necessary to provide resident care during the closure period;

(C) The primary contact responsible for daily facility operations during the closure period;

(D) The primary contact responsible for the oversight of those managing the facility during the closure period;
(E) The Department-approved estimated date of closure; and

(F) The address where the licensee may be reached following facility closure.

(f) ADDITIONAL INFORMATION. Upon request, the administrator must provide the Department with any additional information related to resident transfer or facility operations during the closure period.

(g) DEPARTMENT APPROVAL. The Department shall notify the facility of the Department's approval within 10 days of receipt of the facility's proposed resident transition plan and facility closure plan.

(A) If the Department disapproves a proposed plan, the Department shall work with the facility to modify the plan.

(B) No residents may be transitioned until the Department approves the proposed plan or until a modified plan is agreed upon.

(C) If a plan is not approved or agreed upon within 30 days of receipt of the intent to close, the Department may initiate actions for temporary management according to OAR 411-089-0075.

(D) The Department may provide or arrange for resident transitions in order to minimize resident trauma and to ensure the orderly transition of residents.

(h) NOTICE TO RESIDENTS AND OTHER REQUIRED PARTIES. The administrator must provide written notice in accordance with OAR 411-088-0070(1)(g), (3)(d), and (4).

(3) ADMISSIONS.

(a) The administrator must assure that the facility does not admit new residents on or after the date the 60-day notice is issued to the resident and required parties according to OAR 411-088-0020(1)(f) and 411-088-0070(1)(g), (3)(d), and (4).
(b) A resident who is eligible to return to a facility following hospitalization per OAR 411-088-0050 may return to a facility that is in the process of closing.

(c) A resident who is eligible to readmit to a facility following discharge per OAR 411-088-0060 may readmit to a facility that is in the process of closing.

(d) A resident who is temporarily absent from a facility per OAR 411-070-0110 may return to a facility that is in the process of closing.

Stat. Auth.: ORS 410.070, & 441.055, and 441.615
Stats. Implemented: ORS 441.055 & and 441.615

411-085-0210 Facility Policies

(1) POLICIES REQUIRED. A Quality Assessment and Assurance Committee must develop and adopt facility policies. The policies must be followed by the facility staff and evaluated annually by the Quality Assessment and Assurance Committee and rewritten as needed. Policies must be adopted regarding:

(a) Admission, fees, and services;

(b) Transfer and discharge, including discharge planning;

(c) Physician services;

(d) Nursing services;

(e) Dietary services;

(f) Rehabilitative services and restorative services;

(g) Pharmaceutical services, including self administration;

(h) Care of residents in an emergency;

(i) Activities;
(j) Social services;

(k) Clinical records;

(l) Infection control;

(m) Diagnostic services;

(n) Oral care and dental services;

(o) Accident prevention and reporting of incidents;

(p) Housekeeping services and preventive maintenance;

(q) Employee orientation and inservice;

(r) Laundry services;

(s) Possession of firearms and ammunition;

(t) Consultant services; and

(u) Resident grievances; and

(v) Facility closure. The policy must identify an administrator’s responsibility to assure compliance with OAR 411-085-0025, OAR 411-088-0020(1)(f), and OAR 411-088-0070(1)(g), (3)(d), and (4).

(2) DOCUMENTATION. Each policy must be in writing and must specify the last date at which such the policy was last reviewed by the Quality Assessment and Assurance Committee.

Stat. Auth.: ORS 410.070, &-441.055, and 441.615
Stats. Implemented: ORS 441.055 &-and 441.615
411-088-0020 Basis for Involuntary Transfer

Upon compliance with these transfer rules (OAR 411-088), an involuntary transfer of a resident may be made when one of the reasons specified in section (1) or section (2) of this rule exists.

(1) MEDICAL and AND WELFARE REASONS.

(a) A resident may be transferred when the resident's physician states in writing that:

(A) The resident's health has improved sufficiently so the resident no longer needs the services provided by the facility; or

(B) The facility is unable to meet the resident's needs and the facility has identified another environment available to the resident which can better meet the resident's needs. The Division-Department shall assist the facility in the facility's effort to identify another environment for the resident.

(b) A resident may be transferred when the Division-Department Administrator or the State Fire Marshal states in writing the safety of the resident (or other people in the facility) is endangered and justifies the transfer;

(c) A resident may be transferred when the behavior of the resident creates a serious and immediate threat to the resident or to other residents or people in the facility and all reasonable alternatives to transfer (consistent with the attending physician's orders) have been attempted and documented in the resident's
medical record. Such alternatives may include but are not limited to chemical or physical restraints and medication;

(d) A resident may be transferred when the resident has a medical emergency;

(e) A resident may be transferred when governmental action results in the revoking or declining to renew a facility's certification or license being revoked or not renewed;

(f) A resident may be transferred when the-a facility intends to terminate operation as a nursing facility, and: The facility must:

(A) Certifies in writing to the Division Department the license is to be irrevocably terminated as described in OAR 411-085-0025; and

(B) Establishes to the satisfaction of the Division it has made Department that arrangements to accomplish all necessary transfers are made in a safe manner with adequate resident involvement and follow-up for each resident to minimize negative effects of the transfer;

(g) A resident may be transferred from a facility when the resident has been accepted for the purpose of receiving post-hospital extended care services or specialized services, as from a facility under a physician's orders for such facility services and has, may be transferred from the facility when, according to the physician's written opinion, the resident has improved sufficiently so the resident and no longer needs the post-hospital extended care services or specialized services provided by the facility.

(A) The purpose of the admission, including the program of care, projected course of treatment and the expected length of stay, must have been agreed to in writing by the resident (or his/her legal representative who is so authorized to make such an agreement) at or prior to admission.
(B) The facility shall identify another environment available to the resident which is appropriate to meet the resident's needs.

(C) The Notice of transfer may be issued at the time of admission or later and shall be based upon the projected course of treatment.

(2) NON-PAYMENT REASONS. A resident may be transferred when there is a non-payment of facility charges for the resident and payment for the stay is not available through Medicaid, Medicare, or other third party reimbursement.

(a) A resident may not be transferred if, prior to actual transfer, delinquent charges are paid.

(b) A resident may not be transferred for delinquent charges if payment for current charges is available through Medicaid, Medicare, or other third party reimbursement.

(3) CONVICTION OF A SEX CRIME.

(a) A resident who was admitted January 1, 2006 or later may be moved without advance notice if all of the following are met:

(aA) The facility was not notified prior to admission that the resident is on probation, parole, or post-prison supervision after being convicted of a sex crime;

(bB) The facility learns that the resident is on probation, parole, or post-prison supervision after being convicted of a sex crime; and

(cC) The resident presents a current risk of harm to another resident, staff, or visitor in the facility, as evidenced by:

(Ai) Current or recent sexual inappropriateness, aggressive behavior of a sexual nature or verbal threats of a sexual nature; and
Current communication from the State Board of Parole and Post-Prison Supervision, Department of Corrections, or community corrections agency parole or probation officer that the individual's Static 99 score or other assessment indicates a probable sexual re-offense risk to others in the facility.

Prior to the move, the facility must contact DHS Central Office by telephone and review the criteria in paragraphs (8)(c)(A)&(B)-subsection (a) of this rulesection. DHS will advise the facility if rule criteria for immediate move out are not met. DHS will assist in locating placement options.

The facility must issue a written move-out notice must be completed on a Department approved form. The form must be filled out in its entirety and a copy of the notice delivered in person, to the resident, or the resident's legal representative, if applicable. Where a person-resident lacks capacity and there is no legal representative, a copy of the notice to move-out must be immediately faxed to the State Long-Term Care Ombudsman.

Prior to the move, the facility must orally review the notice and right to object with the resident or if applicable, the resident's legal representative and determine if a hearing is requested. A request for hearing does not delay the involuntary transfer. The facility must immediately telephone DHS Central Office when a hearing is requested. The hearing must be held within five business days of the resident's move. An informal conference may not be held prior to the hearing.

Stat. Auth.: ORS 441.055, 441.605, & 443.410
Stats. Implemented: ORS 441.055, 441.600, 441.605, 441.615, 443.410, & 181.586
411-088-0070 Notice Requirements

(1) NOTICE LENGTH:

(a) Any person transferred shall be provided a facility must provide a resident transferred from the facility a minimum of 30 days prior written notice (Exhibit 1) by the facility unless otherwise provided under this section.

(b) Any person resident may be involuntarily transferred under OAR 411-088-0020(1)(b) (Life or Safety Threat) or OAR 411-088-0020(1)(c) (Behavior Problem) with fewer than 30 days prior written notice (Exhibit 1) if the reason for such the transfer constitutes an emergency. However, the facility shall must give as much prior written notice (Exhibit 1) as the emergency permits.

(c) Any resident may be involuntarily transferred under OAR 411-088-0020(1)(d) (Medical Emergency) with no prior notice. However, the facility shall must give written notice (Exhibit 1 or 2) before giving the resident's bed to another person.

(d) Any person resident involuntarily transferred under OAR 411-088-0020(1)(g) (Post-Hospital Extended Care Services or Specialized Services) and cared for in the facility for less than 30 days may be transferred with fewer than 30 days' prior written notice.

(A) In such cases, the person shall resident must be provided with written notice no shorter than the length of the resident's current stay in the nursing facility.

(B) The notice shall may be issued at the time of the resident's admission or as soon as the length of time for projected course of treatment can be is estimated.

(C) Section (1)(d) of this rule does not apply if the resident had a right of readmission to the same facility as described in OAR 411-088-0060 prior to the hospital, surgical, or emergency department services.
(e) Any facility must provide a resident involuntarily transferred under OAR 411-088-0020(1)(b) or (e) (Governmental Action) shall be provided a minimum of 14 days prior written notice (Exhibit 1).

(f) Any person a facility must immediately notify a resident denied the right of return or the right of readmission shall be notified by the facility immediately and provided written notice (Exhibit 2). The facility must also provide the resident written notice that is mailed (registered or certified) or delivered in person within five days from the date of request for return or readmission. A denial of right of return or readmission is allowable only if there is good cause to believe the resident lacks such right (see OAR 411-088-0050, OAR 411-088-0060, and OAR 411-088-0080).

(g) A facility must provide written notice to a resident involuntarily transferred under OAR 411-088-0020(1)(f) (Termination of Operations as a Nursing Facility).

(A) In the case of voluntary closure, written notice must be provided 60 days prior to facility closure.

(B) In the case of involuntary closure, written notice must be provided as determined by the Department.

(gh) Any resident may voluntarily transfer from a facility. However, the facility shall provide written notice (Exhibit 1) to a resident voluntarily transferring from a facility pursuant to this rule and shall maintain the signed consent form in the resident's medical record.

(2) NOTIFICATION LIST. The facility shall maintain and keep current in the resident's record the name, address, and telephone number of the resident's legal representative, if any, and of any person designated by the resident or the resident's legal representative to receive notice of the transfer. The facility shall also record the name, address, and telephone number of any person who has demonstrated consistent concern for the resident if the resident has no one who is currently involved and who has been designated by the resident.

(3) NOTICE DISTRIBUTION. Notice shall be provided to:
(a) The resident or former resident, as appropriate;

(b) All persons required to be listed in the resident's medical record under section (2) of this rule;

(c) The local unit of the Seniors Aging and People with Disabilities Division or Type B Area Agency on Aging. The notice does not need to be provided to the local unit of the Seniors Aging and People with Disabilities Division or Type B Area Agency on Aging if the resident is private pay and the resident's stay(s) in the facility totals 30 days or less; and

(d) The Long-Term Care Ombudsman if there is no one currently involved and designated by the resident. Written notice must be provided to the Long-Term Care Ombudsman in the case of an involuntary transfer under OAR 411-088-0020(1)(f) (Termination of Nursing Facility Operations).

(4) NOTICE FORMAT STANDARD NOTICE REQUIRED. Each notice shall be in the same format and shall have the same content as that provided in Exhibit 1 Written notice must be provided using Form # 0509 (Notice of Transfer), or Exhibit 2 Form # 0510 (Denial of Readmission/Return), or Form #0509L (Resident Letter Nursing Facility Closure), as appropriate. Forms may be accessed electronically from the Department's Forms Server (https://aix-xweb1p.state.or.us/es_xweb/FORMS/) or from the Department by request.

(a) Each notice provided to a residents, and persons the people required to be listed in the resident's medical record under section (2) of this rule shall must be accompanied by a copy of the Seniors Aging and People with Disabilities Division's brochure, "Leaving the Nursing Facility" (Form #9847).

(b) In the case of involuntary transfer under OAR 411-088-0020(1)(f) (Termination of Nursing Facility Operations), Form #0509L (Resident Letter Nursing Facility Closure) must be distributed with Form #0509 (Notice of Transfer).
5 NOTICE SERVICE. (b) If the person receiving notice as described in section (3) of this rule is a resident at the facility, the notice shall be served. Facility must personally serve the written notice to the resident. All other notices required by this rule, including notices to persons who are no longer former residents, must be either served personally or delivered by registered or certified mail.

(c) Both exhibits are incorporated by this reference as a part of this rule.

Stat. Auth.: ORS 441.055 & ORS and 441.605615
Stats. Implemented: ORS 441.055, ORS 441.600, 441.605, & ORS and 441.615

411-088-0080 Informal Conference and Hearing

(1) Conference and Hearing Required. A person resident who is to be involuntarily transferred, or refused the right of return or readmission, shall be entitled to an informal conference and hearing as provided in this rule.

(2) Conference Request: CONFERENCE REQUEST.

(a) Upon receipt of a notice, the resident, or any designated agency, designated to receive the notice or person acting on the resident's behalf, may request an informal conference on the form provided on the brochure, "Leaving the Nursing Facility":

(A) The request for informal conference must be mailed to the Division-Department within ten 10 business days of the service or delivery of the notice. The Division-Department shall immediately notify the licensee of the request;

(B) The Division-Department may extend the time allowed for requesting an informal conference if it determines that good cause exists for failure to make a timely request;

(C) Any facility management personnel, or employee involved in providing nursing or other direct care, who receives any oral or written indication of a desire for an informal conference from
a resident shall must immediately notify the facility administrator. The administrator shall must immediately thereupon provide notification to the Division Department.

(b) A resident may not be transferred after having requested an informal conference, or after facility staff or the licensee has knowledge of any indication of a resident's desire for an informal conference, until:

(A) Disposition of the request has been completed to the satisfaction of all parties; or

(B) Authorization for transfer is provided by the Hearings Officer pursuant to this section rule.

(3) Informal Conference: INFORMAL CONFERENCE.

(a) The Division Department shall hold an informal conference as promptly as reasonably possible, but in no event later than ten 10 days (unless a later date is agreed upon by both the facility and the persons/agencies requesting the conference) after the request is received unless a later date is agreed upon by both the facility and the person or agency requesting the conference. The Division Department shall give telephone notice (where a telephone number is available) and send written notice of the time and place of the informal conference to the facility and all persons entitled to the notice. The purpose of the informal conference is to resolve the matter without a formal hearing. If a resolution is reached at the informal conference, it will the resolution shall be reduced to writing and no formal hearing will shall be held.

(b) The proceedings shall be conducted at the facility where the resident is located unless an alternate site is agreed upon by both the licensee and the persons/agencies or agency requesting the informal conference.

(c) At the end of the informal conference, if at the end of an informal conference the licensee wishes to proceed with the transfer, the Division Department shall ask if the resident or any party-person or agency representing the resident wishes to request a hearing.
(4) Hearing

(a) **Hearings shall be** conducted as a contested case in accordance with the Administrative Procedures Act, ORS Chapter 183, and the rules of the **Division Department** adopted thereunder. Parties to the hearing **shall must** be the resident (or former resident) and the licensee. The Hearings Officer is delegated the authority to issue the final order and shall do so.

(b) If, pursuant to section (3) of this rule, the **Division Department** receives (orally or in writing) a request for a hearing, the **Division will Department shall** set the date, time, and place of the hearing as promptly as possible. Unless a later date is agreed upon by both the licensee and the person(s) requesting the hearing, the hearing **shall must** be held no later than 30 days after the informal conference.

(c) An expedited hearing must be conducted in the case of an involuntary transfer under OAR 411-088-0020(1)(f) (Termination of Nursing Facility Operations).

(A) To request an expedited hearing, the resident or any agency or person designated to act on the resident's behalf must verbally request or submit a completed and signed Hearing Request form. The request for an expedited hearing must be received by the Department within 10 business days after an informal conference.

(B) The Department may extend the time allowed for requesting an expedited hearing if the Department determines that good cause exists for failure to make a timely request.

(C) An expedited hearing shall be conducted within 5 business days of request. The final order shall be issued within 48 hours following the hearing.

(ed) Nothing herein shall be construed to prohibit, at the election of the **Division Department** and with the consent of all interested parties, a hearing immediately following the **an** informal conference.
(de) The Division Department shall provide all persons and entities listed in OAR 411-088-0070(3) and the licensee with notification of the hearing. The hearing notification shall be served on the parties personally or by registered or certified mail.

(ef) At the hearing, the facility shall must proceed first by presentation of evidence in support of the transfer of the resident, or of refusal to provide right of return or readmission of the former resident. The person or persons requesting the hearing shall must follow the facility by presentation of evidence in support of their objection to the transfer, or of the request of right of return or readmission.

(A) In a hearing concerning right of readmission, the only questions raised shall be whether the application was timely, whether the former resident is eligible by means of payment, and whether another person was or is entitled to the bed.

(B) In a hearing concerning right of return, the only questions raised shall be whether full payment is or was available for the period of hospital stay and whether there was authority under OAR 411-088-0050(2) for another person to be given the bed.

(C) In a hearing concerning involuntary transfer under OAR 411-088-0020(1)(f) as a result of termination of nursing facility operations, the only question raised shall be whether the proposed transition plan meets the requirements described in OAR 411-085-0025(2)(d).

(fg) The licensee shall have has the burden of establishing that the transfer, or denial of return or readmission, is permitted by law.

(gh) The Hearings Officer shall, in determining the appropriateness and timeliness of an involuntary transfer, or a refusal of return or readmission, consider factors including but not limited to the factors listed in OAR 411-088-0030. The Hearings Officer shall may not approve a transfer:

(A) For medical or welfare reasons (under OAR 411-088-0020(1)(a) through (d)) if the risks of physical or emotional
trauma significantly outweighs the risk to the resident and/or to other residents if no transfer were to occur; or

(B) For any other reason if the transfer presents a substantial risk of morbidity or mortality to the resident.

(i) Selecting a location for the person resident to be placed consistent with his/her the resident's need for care and as consistent as possible with his/her the resident's ties, if any, with friends and family, if any:

(ii) Soliciting and encouraging participation of the resident's friends and family in preparing the resident for transfer;

(iii) Visits by the resident to the proposed site of relocation prior to the actual transfer, accompanied by a person with whom the resident is familiar and comfortable, unless the resident is already familiar with the proposed site;

(iv) Arranging at the proposed site of relocation for continuation (as much as possible) of activities and routines with which the resident has become familiar; and

(v) Ensuring that the resident is afforded continuity in the arrangement of an access to personal items significant to the resident.
(C) Ordering the licensee to retain the resident, or to readmit the former resident if he or she has been transferred, or to provide the former resident with the right of return or readmission; or

(D) Ordering the licensee to retain the resident and establishing standards of behavior for family members or other visitors necessary for the welfare of residents; or

(E) Making such further provisions as are reasonably necessary to give full force and effect to any order that a licensee retain or readmit the resident or provide the resident the right of return or readmission.

(i) If the Division Department approves a transfer subject to one or more conditions pursuant to this rule, the transfer shall not occur until the licensee has notified the person(s) requesting the hearing and certified to the Division Department in writing that all of such conditions have been complied with and the Division Department has acknowledged to the licensee in writing the receipt and sufficiency of such certification. The Division Department may, upon request, allow verbal certification and give verbal acknowledgement subject to subsequent certification and acknowledgement in writing.

(5) Exceptions

(a) A person-resident who is to be involuntarily transferred, or refused the right of return or readmission, as a result of governmental action pursuant to OAR 411-088-0020(1)(b) or (e) shall is not be entitled to a hearing prior to transfer.

(b) A resident who is to be involuntarily transferred as a result of termination of nursing facility operations pursuant to OAR 411-088-0020(1)(f) is entitled to an informal conference and hearing regarding the resident's proposed transition plan but not regarding transfer from the facility that is terminating operations.

Stat. Auth.: ORS 410.070 & ORS and 441.055
Stats. Implemented: ORS 441.055, ORS 441.600, & ORS and 441.615
411-089-0030 Civil Penalties

(1) CONSIDERATIONS. In determining the amount of a civil penalty the Division shall consider:

(a) Any prior violations of statute or rule by the facility or licensee that relates to operation of a nursing facility;

(b) The financial benefits, if any, realized by the facility as a result of the violation, such as costs avoided as a result of not having obtained sufficient staffing, equipment, or supplies;

(c) The gravity of the violation, including the actual and potential threat to health, safety, and well-being of residents, the duration of the threat or number or times the threat occurred, and the number of residents threatened;

(d) The severity of the actual or potential harm caused by the violation, including whether the actual or potential harm included loss of life or serious physical or emotional injury;

(e) The facility's history of correcting violations and preventing recurrence of violations; and

(f) Exhibit 89-1, Civil Penalty Chart, which is incorporated by reference and is a part of this rule.

(2) SINGLE VIOLATION CIVIL PENALTIES. Violations of any requirement within any part of the following statutes, rules, or sections of the following
rules are a violation that may result in a civil penalty after a single occurrence.

(a) Violations involving direct resident care, feeding, or sanitation involving direct resident care, including any violation of:

(A) OAR 411-085-0060 (Specialty Nursing Facilities);

(B) OAR 411-085-0200(2) (Facility Employees);

(C) OAR 411-085-0210 to 411-085-0220 (Facility Policies, Quality Assurance);

(D) OAR 411-085-0360 (Abuse);

(E) OAR 411-086-0010 to 411-086-0020 (Administrator, Director of Nursing Services);

(F) OAR 411-086-0040 (except section (3)) (Admission of Residents);

(G) OAR 411-086-0050 to 411-086-0060 (Day Care, Assessment, and Care Plan);

(H) OAR 411-086-0110 to 411-086-0150 (Nursing Services);

(I) OAR 411-086-0200 to 411-086-0260 (Physician, Dental, Rehabilitative, Activity, Social, Dietary, and Pharmaceutical Services);

(J) OAR 411-086-0300 (except section (6)) (Clinical Records);

(K) OAR 411-086-0310 to 411-086-0360 (Employee Orientation and Training, Disaster Preparation, Infection Control, Smoking, Furnishings, and Equipment);

(L) OAR 411-087-0100(1)(a) and (c) (Repair and Cleanliness); or

(M) OAR 411-087-0440 (Alarm and Nurse Call Systems).
(b) Violation involving failure to provide staff-to-resident ratio, including any violation of:

(A) OAR 411-086-0030 (except section (1)) (RN Care Manager); or

(B) OAR 411-086-0100 (Nursing Staffing).

(c) Violation of any rule adopted pursuant to ORS 441.610, including:

(A) OAR 411-085-0300 to 411-085-0350 (Resident Rights);

(B) OAR 411-086-0040(3) (Advance Directives);

(C) OAR 411-086-0300(6) (Record Retention); or

(D) OAR chapter 411, division 088 (Rights Regarding Transfers).

(d) Violation of ORS 441.605 (Resident Rights) or any general or final order of the Division.

(3) CIVIL PENALTIES REQUIRING REPEAT VIOLATIONS. Violation of any Division rule not listed in section (2) of this rule is subject to a civil penalty under the following circumstances:

(a) Such violation is determined to exist on two consecutive surveys, inspections, or visits; and

(b) The Division prescribed a reasonable time for elimination of the violation at the time of, or subsequent to, the first citation.

(4) AMOUNT OF CIVIL PENALTY.

(a) Violation of any requirement or order listed in section (2) of this rule is subject to a civil penalty of not more than $500 for each day the violation occurs, unless otherwise provided by this section;
(b) Violation of any requirement listed in section (3) of this rule is subject to a civil penalty of not more than $500 per violation, unless otherwise provided by this section;

(c) Violation involving resident abuse that resulted in serious injury or death is subject to a civil penalty of not less than $500 nor more than $1,000, or as otherwise required by federal law (ORS 441.995(3) and ORS 441.715(1)(c));

(d) The Division shall impose a civil penalty of not less than $2,500 for each occurrence of substantiated abuse that resulted in the death, serious injury, rape, or sexual abuse of a resident. The civil penalty may not exceed $15,000 in any 90-day period.

(A) To impose this civil penalty, the Division shall establish that:

(i) The abuse arose from deliberate or other than accidental action or inaction;

(ii) The conduct resulting in the abuse was likely to cause death, serious injury, rape, or sexual abuse of a resident; and

(iii) The person substantiated for the abuse had a duty of care toward the resident.

(B) For the purposes of this civil penalty, the following definitions apply:

(i) "Serious injury" means a physical injury that creates a substantial risk of death or that causes serious disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ.

(ii) "Rape" means rape in the first, second, or third degree as described in ORS 163.355, 163.365, and 163.375.
(iii) "Sexual abuse" means any form of nonconsensual sexual contact, including but not limited to unwanted or inappropriate touching, sodomy, sexual coercion, sexually explicit photographing, or sexual harassment. The sexual contact must be in the form of any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the actor for the purpose of arousing or gratifying the sexual desire of either party.

(iv) "Other than accidental" means failure on the part of the licensee, or licensee's employees, agents, or volunteers for whose conduct licensee is responsible, to comply with applicable Oregon Administrative Rules.

(5) ADMINISTRATOR SANCTIONS - NURSING FACILITY CLOSURES. Any individual who is or was the administrator of a facility and fails or failed to comply with the requirements at OAR 411-085-0025(2)(d)(e)(f)(h), OAR 411-085-0025(3)(a), or OAR 411-088-0070(1)(g), (3)(d), or (4):

(a) Are subject to a civil monetary penalty as follows:

(A) A minimum of $500 for the first offense;

(B) A minimum of $1,500 for the second offense; and

(C) A minimum of $3,000 for the third and subsequent offenses;

(b) May be subject to exclusion from participation in any Federal health care program as defined in section 1128B(f) of the Patient Protection and Affordable Care Act; and

(c) Are subject to any other penalties that may be prescribed by law.

(56) PAYMENT TO BE CONSIDERED ADMISSION OF VIOLATION. Unless the Division Department agrees otherwise, for purposes of history of the facility, any payment of a civil penalty shall be treated by the Division Department as a violation of the statutes or rules alleged in the civil penalty notice for which the civil penalty was paid for.
All penalties recovered shall be deposited in the Quality Care Fund.

NOTICE. The Division's Department's notice of its intent to impose a civil penalty shall include the statements set out in OAR 411-089-0040(3)(a)-(f), and shall also include a statement that if the licensee fails to request a hearing within 10 days of the date the notice was mailed, the licensee shall have waived the right to a hearing.

HEARING REQUEST.

(a) If the Division Department issues a notice of intent to impose a civil penalty, the licensee shall be entitled to a hearing in accordance with ORS chapter 183.

(b) A request for a hearing must be in writing and must be received by the Division Department within 10 days of the date the notice of intent to impose a civil penalty was mailed to the licensee. The hearing request must include an admission or denial of each factual matter alleged in the notice and affirmatively allege a short plain statement of each relevant affirmative defense the licensee may have. The Division Department may extend the time allowed for submission of the admission or denial and affirmative defenses for up to 30 calendar days.

DEFAULT ORDER. If a hearing is not timely requested, or if the licensee withdraws a hearing request or fails to appear at a scheduled hearing, the Division Department may enter a final order by default imposing the civil penalty. In the event of a default, the Division Department's file on the subject of the civil penalty automatically becomes a part of the record for purposes of proving the Division Department's prima facie case.
EXHIBIT 89-1 Civil Penalty Chart (OAR 411-089-0030)

I. RANGE OF CIVIL PENALTIES

<table>
<thead>
<tr>
<th>Category</th>
<th>Range</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Abuse: ORS 441.715(1)(c)</td>
<td>$2,500 - $15,000</td>
</tr>
<tr>
<td>B. Abuse: ORS 441.995(3)</td>
<td>$500 - $1,000</td>
</tr>
<tr>
<td>C. Injury, Serious</td>
<td>$500 - $1,000</td>
</tr>
<tr>
<td>D. Injury, Moderate</td>
<td>$300 - $500</td>
</tr>
<tr>
<td>E. Injury, Minor</td>
<td>$100 - $300</td>
</tr>
<tr>
<td>F. Injury, Potential</td>
<td>$100 - $300</td>
</tr>
<tr>
<td>G. Other</td>
<td>$100 - $500</td>
</tr>
</tbody>
</table>

   a. Involuntary seclusion
   b. Corporal punishment
   c. Verbal abuse
   d. Financial abuse (consider amount taken/expended)
   e. Emotional abuse
   f. Loss of dignity

II. MODIFIERS (The history for the 24 months prior to the incident will be  is used to determine whether penalty is assessed at the upper or lower penalty ranges listed above)

<table>
<thead>
<tr>
<th>Modifier</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Citation of “related problem” through survey, complaint investigation, or letter (increases penalty).</td>
<td></td>
</tr>
<tr>
<td>B. Civil penalty issues for “related problem” (increases penalty).</td>
<td></td>
</tr>
<tr>
<td>C. Facility history of preventing, correcting other violations. (If SPD-the Department determines the licensee took significant action to correct “related problem,” SPD-the Department may waive part of all of the modifier (IIA &amp; IIB).</td>
<td></td>
</tr>
<tr>
<td>D. Facility history relating to current violation. (SPD-The Department may increase the penalty if the facility fails to correct the threat after being made aware of the situation or incident. Decrease or suspend penalty after evaluating facility response to incident and efforts to eliminate recurrence).</td>
<td></td>
</tr>
<tr>
<td>E. Extended duration. (If SPD-the Department determines the licensee or facility staff had opportunity to correct the deficiency after it first occurred, but action was delayed, SPD-the Department may either increase the civil penalty by up to 100%, or issue the civil penalty on a “per day” basis).</td>
<td></td>
</tr>
<tr>
<td>F. Facility Financial Benefit. (SPD-The Department may increase the base civil penalty, or the modifier, based upon SPD’s estimate of the cost savings to the facility).</td>
<td></td>
</tr>
<tr>
<td>G. Complaint is self-reported (reduces penalty).</td>
<td></td>
</tr>
<tr>
<td>H. Multiple residents: Potential or actual injury (increases penalty).</td>
<td></td>
</tr>
</tbody>
</table>

1 Serious injury means permanent physical injury that creates a substantial risk of death or that causes serious and protracted disfigurement, protracted impairment of health, or protracted loss or impairment of the function of any bodily organ.

2 Moderate Injury means an injury, which would ordinarily be temporary loss of functioning in a typical person and/or illness or pain lasting more than 24 hours, even if controlled by medication.

3 Minor injury means an injury resulting in temporary discomfort or pain, treated in-house, including medication or treatment, or bed rest for short duration, ordinarily not more than 24-48 hours.

4 Related problem means the same staff or resident(s) involved, or the same rule, same harm, or same underlying cause.