

Rule Summary and Fiscal Analysis (Part A)**Department of Aging**

Agency Name

Division

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173-38-03

Rule Number

AMENDMENT

TYPE of rule filing

Rule Title/Tag Line

Enrollment process for the medicaid-funded assisted living program.**RULE SUMMARY**

1. Is the rule being filed consistent with the requirements of the RC 119.032 review? **Yes**

2. Are you proposing this rule as a result of recent legislation? **Yes**

Bill Number: **HB59**General Assembly: **130**Sponsor: **Amstutz**

3. Statute prescribing the procedure in accordance with the agency is required to adopt the rule: **119.03**

4. Statute(s) authorizing agency to adopt the rule: **173.01, 173.02, 173.54**

5. Statute(s) the rule, as filed, amplifies or implements: **173.54, 173.542, 173.55**

6. State the reason(s) for proposing (i.e., why are you filing,) this rule:

In accordance with section 119.032 of the Revised Code, this rule project amends items in the rule as part of the Ohio Dept. of Aging's (ODA's) periodic review of the rule, which may not occur any less often than once every five years, and must occur before the review date assigned to the rule.

Some of ODA's November 29, 2013 amendments relate to Amended Substitute House Bill 59 of the 130th General Assembly (HB59). ODA itemizes these amendments in #7 of the RSFA.

On January 6, 2014, Centers for Medicare and Medicaid Services (CMS) approved an application to amend the Medicaid waiver that authorizes the Assisted Living Program. As a result, ODA refiled the rule with proposed amendments to implement the approved language from the application. ODA refiled the rule on January 10, 15, and 17 of 2014. ODA itemized the amendments in #11 of the RSFA.

7. If the rule is an AMENDMENT, then summarize the changes and the content of the proposed rule; if the rule type is RESCISSION, NEW or NO CHANGE, then summarize the content of the rule:

This rule that ODA proposed to amend regulates the enrollment process for individuals who seek to enroll in the Medicaid-funded component of the Assisted Living Program.

On November 29, 2013, ODA original filed the rule to propose the following amendments:

1. ODA proposed to update references the rule's "authorized by" and "rule amplifies" sections to reflect the HB59's reorganization of sections of the Ohio Revised Code.
2. ODA proposed to update the citations of forms in the rule with the latest revision dates of those forms. ODA also proposed to state where the public may readily find those forms online.
3. ODA proposed to add "that" to a few sentences that lacked it. ODA's refiled version on January 10, 2014 would render the addition of "that" moot. It is no longer part of ODA's proposed amendments for the rule. The January 15, 2014 refiled version reversed this matter of grammar and reinserted "that."
4. ODA proposed to replace references to rules from the Ohio Dept. of Job and Family Services (ODJFS) with references to corresponding rules from the Ohio Dept. of Medicaid (ODM). This is because HB59 transformed the Medicaid operations inside of ODJFS into ODM, which is now a cabinet-level state agency.
5. ODA proposed to amend the rule's title to add the name of the program to the beginning of the title.

8. If the rule incorporates a text or other material by reference and the agency claims the incorporation by reference is exempt from compliance with sections

121.71 to 121.74 of the Revised Code because the text or other material is **generally available** to persons who reasonably can be expected to be affected by the rule, provide an explanation of how the text or other material is generally available to those persons:

As ODA mentioned in #7 of this RSFA, ODA is proposing to update citations of forms in the rule with the latest revision dates of those forms. ODA is also proposing to state that the forms are generally available to the public on a state website, and to provide an URL for that website.

As ODA mentioned in #11 of this RSFA, the paragraphs under paragraph (C)(1) of the rule are styled after the language that ODA and ODM submitted to CMS in its application to amend the Medicaid waiver that authorizes the Assisted Living Program. ODA is not proposing to cite its own language that sought approval to amend the program in a way that would incorporate the application to amend the program as being incorporated into the rule by reference. However, for the purposes of this rule filing, ODA has uploaded pg., 5 of the application as an attachment to this RSFA.

Additionally, CMS should soon make the application generally available to the public on

<http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/Waivers.html>
CMS files such documents under the link entitled "approval documents."

9. If the rule incorporates a text or other material by reference, and it was **infeasible** for the agency to file the text or other material electronically, provide an explanation of why filing the text or other material electronically was infeasible:

ODA did not electronically attach any forms to the proposed amendment of this rule because the forms are generally available to the public on a state website.

Although ODA is not citing its own language in an application it made to CMS, it is helpful to know that CMS makes such applications generally available to the public on a federal website.

10. If the rule is being **rescinded** and incorporates a text or other material by reference, and it was **infeasible** for the agency to file the text or other material, provide an explanation of why filing the text or other material was infeasible:

Not Applicable.

11. If **revising** or **refiling** this rule, identify changes made from the previously filed version of this rule; if none, please state so. If applicable, indicate each

specific paragraph of the rule that has been modified:

On November 29, 2013, ODA revised the rule to explain in this RSFA that it did not attach the forms cited in the rule because the forms are readily available to the public on a state website.

On January 10, 2014, ODA refiled the rule to propose the following:

1. ODA proposed to reorganize the content of paragraph (A)(2) of the rule that appears after the words "ODA's designee" as paragraph (A)(2)(a) of the rule. Then, ODA is proposing to adopt a new paragraph (A)(2)(b) of the rule that would say the following: "Once ODA (or ODA's designee) receives the individual's application for the medicaid-funded component of the assisted living program, ODA (or ODA's designee) shall notify the applicant of the existence of the state-funded component of the assisted living program in Chapter 173-51 of the Administrative Code and offer the individual an opportunity to apply for the enrollment in the state-funded component of the program."

2. On January 6, 2014, CMS approved an application to amend the Medicaid waiver that authorizes the Assisted Living Program. As a result, ODA is now proposing to implement the amendment language into paragraph (C)(1)(a) of the rule. The amendment language restates Ohio's existing Medicaid policy around the entrance of individuals into the Medicaid-funded component of the Assisted Living Program.

This proposal involves replacing the language ODA originally proposed on November 29, 2013. The original proposal said the following: "[C)(1)](a) ODA's designee shall establish the medicaid waiver program enrollment date as the latter of the following dates: (i) The date that ODA's designee determined that the applicant met all non-financial eligibility criteria under rule 5160-33-03 of the Administrative Code; (ii) The date that the applicant becomes a resident of a residential care facility that is licensed by the department of health and certified by ODA as an assisted living provider; or, (iii) The date that the CDJFS determined that the individual met all medicaid financial eligibility criteria required under rules 5160:1-2-01.6 and 5160:1-2-01.8 of the Administrative Code."

ODA's proposed language for January 10, 2014 would say the following: "[C)(1)](a) The individual's medicaid waiver program enrollment begins on the date that the individual meets all the following criteria: (i) The individual's basic medicaid eligibility has been established (i.e., the individual has a medicaid effective date); (ii) The individual meets the level of care requirements to participate in the medicaid waiver program; (iii) The individual meets all medicaid waiver program requirements listed in rule 5160-33-03 of the Administrative Code; (iv) The individual has an approved service plan that includes at least one medicaid waiver service; and, (v) The individual resides in an ODA-certified residential care facility in an ODA-approved living unit."

One can find the language on page 5 of Appendix B to the approved application to amend the Medicaid waiver that authorizes the Assisted Living Program. Specifically, the amendment language is located under the sub-title "Selection of Entrants to the Waiver" in §B-3-f of the application.

Because ODA and ODM drafted the application to amend the program, ODA doesn't cite the application as being incorporated into the rule by reference. Instead, ODA styled its amendment language after the language that ODA and ODM submitted to CMS for approval. However, for the purposes of this RSFA, ODA attached page 5 of the application to this RSFA. CMS generally makes such applications available to the public on <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/Waivers.html>. On that website, CMS files such applications under the link entitled "approval documents."

Also, part of this proposal involves moving language about service planning from paragraph (C)(1)(b) of the rule to paragraph (C)(1)(a)(iv) of the rule.

3. ODA proposed to define "basic Medicaid eligibility," which is a term used in proposed amendment (2) above.

4. ODA proposed to delete the unnecessary clause in paragraph (C)(1)(b) of the rule that refers to rule 173-39-02 of the Administrative Code.

5. ODA proposed to restate the same point in the paragraph by using different language. ODA would delete all words after "differ from the" and the comma with the following: "date that basic Medicaid eligibility begins." The reference to rules that establish eligibility criteria would appear in the definition for "basic Medicaid eligibility."

6. ODA voluntarily proposed to conduct a second public hearing because CMS' approval of the application to amend the Medicaid waiver that authorizes the Assisted Living Program and ODA's resulting refiling of the rule with proposed amendments that relate to the amendments that ODA and ODM proposed in the application occurred after the original public hearing.

7. ODA updated this RSFA.

On January 15, 2014, ODA refiled the rule to propose the following amendments, most of which amend the amendments ODA proposed on January 10, 2014.

1. For simpler reviewing of the amended language, ODA proposed to replace paragraph (C)(1) of the rule with a new paragraph of the same number.

2. Under the new paragraph, ODA proposed to correct a structural issue. Paragraph (C)(1)(a) pertains to establishing the Medicaid waiver program enrollment date; however, paragraph (C)(1) also contained language to that effect. Although

paragraphs (C)(1)(b) and (C)(2)(c) pertain to the Medicaid waiver program enrollment date, they don't pertain to establishing the date. Only paragraph (C)(1)(a) pertains to that topic. Additionally, the language regarding the authority of ODA's designee to establish the date is connected to rule 5160:1-2-01.6 [5101:1-38-01.6] of the Administrative Code, but that rule does not say how ODA's designee establishes the date. Therefore, ODA proposes to reduce paragraph (C)(1) of the rule to the sub-title "Medicaid waiver program enrollment date." ODA, also proposes to create a new paragraph(C)(1)(a) of the rule language that refers to paragraph (D)(1)(c) of rule 5160:1-2-01.6 and to create a new paragraph (C)(1)(b) of the rule that says the following: "ODA's designee shall establish the individual's Medicaid waiver program enrollment date as the date the latter of the following:"

3. ODA proposed to replace the proposed language in the rule that referred to "basic Medicaid eligibility" with "basic Medicaid effective date." This would occur in paragraph (C)(1)(b)(i), (C)(1)(d), and (E)(1) of the rule.

4. For consistency with the rest of Chapter 173-38 of the Administrative Code, ODA proposed to replace "assisted living waiver program" in paragraph (C)(1)(c) of the rule with "Medicaid-funded component of the assisted living program."

5. ODA also updated this RSFA. (The notice of a 2nd public hearing remains the same.)

On January 15, 2014, ODA refiled the rule a second time to upload a revised notice for the second public hearing. It announces that the second public hearing will be on January 17.

On January 17, 2014, ODA refilled the rule to replace the following language from the January 15 amendment to paragraph (C)(1)(b) of the rule: "...as the latter of the following dates: (i)...; (ii)...; (iii)...; (iv)...; or, (iv)...." ODA is proposing to replace it with the following: "...as the latest date that all the following conditions are met: (i)...; (ii)...; (iii)...; (iv)...; and, (iv)...." ODA also updated this RSFA accordingly.

12. 119.032 Rule Review Date: **11/29/2013**

(If the rule is not exempt and you answered NO to question No. 1, provide the scheduled review date. If you answered YES to No. 1, the review date for this rule is the filing date.)

NOTE: If the rule is not exempt at the time of final filing, two dates are required: the current review date plus a date not to exceed 5 years from the effective date for Amended rules or a date not to exceed 5 years from the review date for No Change rules.

FISCAL ANALYSIS

13. Estimate the total amount by which *this proposed rule* would **increase / decrease** either **revenues / expenditures** for the agency during the current biennium (in dollars): Explain the net impact of the proposed changes to the budget of your agency/department.

This will have no impact on revenues or expenditures.

\$0.00

ODA anticipates that the amendments ODA proposed for this rule on November 29, 2013 and January 10, 2014 would have no effect upon the biennial budget that the Ohio General Assembly established for ODA in HB59.

14. Identify the appropriation (by line item etc.) that authorizes each expenditure necessitated by the proposed rule:

GRF-651-525 Medicaid/Health Care Services.

15. Provide a summary of the estimated cost of compliance with the rule to all directly affected persons. When appropriate, please include the source for your information/estimated costs, e.g. industry, CFR, internal/agency:

ODA estimates that there is no cost of compliance to any directly-affected person that would result from ODA's proposed amendments to this rule.

16. Does this rule have a fiscal effect on school districts, counties, townships, or municipal corporations? **No**

17. Does this rule deal with environmental protection or contain a component dealing with environmental protection as defined in R. C. 121.39? **No**

S.B. 2 (129th General Assembly) Questions

18. Has this rule been filed with the Common Sense Initiative Office pursuant to R.C. 121.82? **No**

19. Specific to this rule, answer the following:

A.) Does this rule require a license, permit, or any other prior authorization to engage in or operate a line of business? **No**

This rule that ODA is proposing to amend does not require any Ohio business to

have a license, permit, or any other authorization to engage in, or operate, a line of business. Instead, it is a rule that establishes the enrollment process for individuals who desire to enroll into the program to become potential beneficiaries of the program.

B.) Does this rule impose a criminal penalty, a civil penalty, or another sanction, or create a cause of action, for failure to comply with its terms? **No**

This rule that ODA is proposing to amend does not impose a criminal penalty, civil penalty, or other penalty; or create a cause of action for an Ohio business that fails to comply with its terms. In fact, the rule does not make any requirements of Ohio businesses.

C.) Does this rule require specific expenditures or the report of information as a condition of compliance? **No**

This rule that ODA is proposing to amend does not require any Ohio business to spend money in order to comply with the rule.

ACTION: Refiled

DATE: 01/17/2014 12:56 PM

Appendix B: Participant Access and Eligibility**B-3: Number of Individuals Served (3 of 4)**

- d. **Scheduled Phase-In or Phase-Out.** Within a waiver year, the State may make the number of participants who are served subject to a phase-in or phase-out schedule (*select one*):
- The waiver is not subject to a phase-in or a phase-out schedule.
 - The waiver is subject to a phase-in or phase-out schedule that is included in Attachment #1 to Appendix B-3. This schedule constitutes an intra-year limitation on the number of participants who are served in the waiver.
- e. **Allocation of Waiver Capacity.**

Select one:

- Waiver capacity is allocated/managed on a statewide basis.
- Waiver capacity is allocated to local/regional non-state entities.

Specify: (a) the entities to which waiver capacity is allocated; (b) the methodology that is used to allocate capacity and how often the methodology is reevaluated; and, (c) policies for the reallocation of unused capacity among local/regional non-state entities:

- f. **Selection of Entrants to the Waiver.** Specify the policies that apply to the selection of individuals for entrance to the waiver:

Individuals seeking to enroll in the Assisted Living waiver may enroll in the waiver and receive waiver services no earlier than the date the individual meets all of the following criteria:

1. Basic Medicaid eligibility has been established (Medicaid effective date);
2. Meets the level of care requirements to participate in the waiver;
3. Meets special waiver requirements (e.g. the individual is determined to be included in the target group and has been found to meet other requirements of eligibility specified in the approved waiver including documentation from the individual that he or she chooses to receive waiver services); and
4. Has an approved service plan developed that includes at least one waiver service.

The process for enrollment in the Assisted Living waiver is outlined in the following Ohio Administrative Code rules: 5160-33-03 (Eligibility); 5160-33-04 (Enrollment), and 173-38-03 (Enrollment). In accordance with these rules, entry to the waiver is offered to individuals based on the date of application for waiver services. Entry to the waiver is not prioritized based on the imminent need for services or place of residence at the time of application.

Appendix B: Participant Access and Eligibility**B-3: Number of Individuals Served - Attachment #1 (4 of 4)**

Answers provided in Appendix B-3-d indicate that you do not need to complete this section.

Appendix B: Participant Access and Eligibility**B-4: Eligibility Groups Served in the Waiver**

- a.
1. **State Classification.** The State is a (*select one*):
 - §1634 State