

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

Agency Name

Division

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173-39-02.14

Rule Number

NEW

TYPE of rule filing

Rule Title/Tag Line

Home-delivered meal service.**RULE SUMMARY**

1. Is the rule being filed consistent with the requirements of the RC 119.032 review? **No**

2. Are you proposing this rule as a result of recent legislation? **No**

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: **173.02, 173.391, 173.40, 173.402**

5. Statute(s) the rule, as filed, amplifies or implements: **173.39, 173.391, 173.402**

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

ODA is proposing to replace rule 173-39-02.14 of the Administrative Code with a new rule 173-39-02.14 of the Administrative Code. In doing so, ODA has three goals:

GOAL 1: To comply with the five-year review required under section 119.032 of the Revised Code.

GOAL 2: To adopt rule on the home-delivered meal service that is substantially similar to the requirements for providing a home-delivered meal service under the

rules of Department of Job and Family Services (JFS) and the Department of Developmental Disabilities (DoDD). (JFS adopted the comparable rule 5101:3-46-04 of the Administrative Code on October 25, 2010.)

a. This should provide consistent requirements for providers among the three agencies' Medicaid waiver programs. The rule content was developed by a consolidation exploration team of the Executive Medicaid Management Agency (EMMA), which Governor Strickland created with Executive Order 2007-36S. ODA, JFS, and DoDD were part of that team.

b. Certainly, there are differences in the rules each agency will propose, but the content is substantially similar. An exception is that ODA allows providers to deliver milk, bread, and butter at once to a consumer to whom it delivers meals throughout the week if the consumer's service plan authorizes the milk, bread, or butter. This will enable case managers to help consumers with arthritis by authorizing the delivery of a pint or half-gallon of milk that the arthritic consumer can open, but not the single-serving milk carton that they cannot or a stick of butter that the arthritic consumer can use, but not the single-serving butter packet that they cannot open.

c. One noticeable, but insubstantial, difference is that ODA's regulations on the service appear in a rule that regulates just one service and follows the format of other rules that ODA has proposed since Executive Order 2008-04S (see goal #3 below), while JFS' regulations on the service appear in a rule that regulates several services and follows the format of other JFS rules. (See paragraph (D) of JFS' newly-adopted rule 5101:3-46-04 of the Administrative Code.)

GOAL 3: To comply with Governor Strickland's Executive Order 2008-04S: "Implementing Common Sense Business Regulation," which requires all state agencies to write easier-to-read and easier-to-comprehend rules to promote transparency in state regulations.

a. ODA complies with the executive order by:

i. Complying with Chapter 5 of the Legislative Service Commission's "Rule Drafting Manual," as found on http://www.lsc.state.oh.us/rules/rdm06_06.pdf

ii. Incorporating recommendations from "Advanced Legal Drafting" by Bryan A. Garner (Dallas: LawProse, Inc. (c) 2007)

iii. Incorporating recommendations from "Plain English Writing Tips," as found on http://business.ohio.gov/docs/RegReform_PlainEnglishWritingTips.pdf.

b. The result is language that:

i. Generously uses descriptive sub-headings (e.g., "Hot meals"/"Non-hot meals," "Planning," "Preparation and safety," "Delivery," "Units and rates," etc.) and

divides topics in rules to fit under those sub-headings in order to enable readers to thumb through the rule

ii. Begins with general material in a, somewhat, chronological order (e.g., planning; preparation and safety; and delivery) and ends with specific material that appeals to fewer readers (e.g., provider qualifications, units of service)

iii. Uses the active voice in the present tense, not the passive voice (e.g., "shall be") and not the future tense (e.g., "will")

iv. Uses the singular, unless the plural is necessary

v. Replaces legalese with plain-English words

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:

The proposed new rule regulates the delivery of home-delivered meals for the PASSPORT Program, including the regulation of planning, preparation and safety, delivery, service limitations, provider qualifications, service verification, and units and rates.

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:

This response left blank because filer specified online that the rule does not incorporate a text or other material by reference.

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:

This response left blank because filer specified online that the rule does not incorporate a text or other material by reference.

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:

On August 27, 2010, ODA refiled this proposed new rule to:

1. Replace paragraph (B)(1)(a) of the rule, which said, "Dietitian: The provider shall only utilize a menu that has received the written approval of a licensed dietitian who is currently registered with the commission on dietetic registration," with "Dietitian: The provider shall only utilize a menu that has received the written approval of a dietitian who is currently registered with the commission on dietetic registration and who is also a licensed dietitian, if the state in which the provider is located licenses dietitians."

2. Insert ", as much as possible, " in between "options that" and "considers each consumer's medical restrictions..." in paragraph (B)(1)(d) of the rule.

3. Replace the word "marked" in paragraph (B)(2)(a)(i) of the rule with "identified."

4. Replace the last sentence of paragraph (B)(2)(a)(ii) of the rule, which said, "The provider shall label any other meal with the month, day, and year on which the consumer shall consume or discard the meal and shall list the date immediately following the term 'use before.'" with "The provider shall identify any other meal (e.g., a vacuum-packed meal); by labeling the perishable items (e.g., meats) in that meal with the month, day, and year, and shall list the date immediately following the term 'use before.'"

5. Insert "range of" in between "routine delivery date and" and "time" in paragraph (B)(3)(d) of the rule.

6. Replace the citation "(B)(4)(c)(i)" in paragraph (B)(4)(d)(ii) of the rule with "(B)(4)(d)(i)."

7. Revise this RSFA.

8. Upload a revised public hearing notice into the Register of Ohio to announce a subsequent public hearing.

After ODA obtained feedback on the proposed new rule as part of the second public hearing ODA conducted on the proposed new rule on September 2, 2010, ODA refiled this proposed new rule on November 15, 2010 to:

1. Reorganize paragraphs (B)(2)(a)(i) and (B)(2)(a)(ii) of the rule. Beforehand, paragraph (B)(2)(a)(i) of the proposed new rule focused on packaging of "hot" and "non-hot" meals and paragraph (B)(2)(a)(ii) of the rule focused on labeling of "hot"

and "non-hot" meals. Now, paragraph (B)(2)(a)(i) of the proposed new rule focuses on packaging and labeling of "hot" meals and paragraph (B)(2)(a)(ii) of the rule focuses on packaging and labeling of "non-hot" meals.

2. Add the sub-heading "Hot meals" to paragraph (B)(2)(a)(i) of the rule and the sub-heading "Non-hot meals" to paragraph (B)(2)(a)(ii) of the rule.

3. Clarify in paragraph (B)(2)(a)(ii) of the rule that frozen meals, modified-atmosphere-packed meals, and shelf-stable meals are valid examples of "non-hot" meals. Before ODA refiled the proposed new rule, paragraph (B)(2)(a) of the rule only cited a vacuum-packed meal as a valid example of a "non-hot" meal.

4. Clarify in paragraph (B)(2)(a)(ii) of the rule that the provider is required to place a "use before" date on each individual package that comprises a "non-hot" meal. Beforehand, paragraph (B)(2)(a)(ii) of the proposed new rule required the provider to place a "use before" date on each "perishable item." Now, ODA is clarifying that the provider is required to place a "use before" date on each individual package. ODA believes that having a "use before" date on each individual package of food is in the best interest of the consumer.

5. Clarify that an "individual package" does not include a whole fruit that is not packaged, which means that the provider is not required to place a "use before" date on a piece of fruit (e.g., a fresh apple or banana).

6. Revise this RSFA.

For quick reference:

Before ODA refiled the proposed new rule on November 15, 2010, paragraph (B)(2)(a) said, "(a) (i) The provider shall individually package each ready-to-eat, temperature-controlled, home-delivered meal. The provider may individually package each component of any other home-delivered meal (e.g., a vacuum packed meal), so long as the components are clearly identified as components of one complete meal. (ii) The provider shall label each ready-to-eat, temperature-controlled home-delivered meal with the month, day, and year that it prepared the meal and shall list the date immediately following the terms 'packing' or 'pack date.' The provider shall identify any other meal (e.g., a vacuum-packed meal); by labeling the perishable items (e.g., meats) in that meal with the month, day, and year, and shall list the date immediately following the term 'use before.'"

After ODA refiled the proposed new rule on November 15, 2010, paragraph (B)(2)(a) of the rule said, "(a) Packaging: (i) Hot meals: The provider shall individually package each ready-to-eat, temperature-controlled, home-delivered meal. The provider shall label the meal with the month, day, and year that it prepared the meal and shall list the date immediately following the term 'packing date' or 'pack date.' (ii) Non-hot meals: The provider may individually package each component of a home-delivered meal that is a frozen meal, a vacuum-packed meal,

a modified-atmosphere-packed meal, or a shelf-stable meal if the provider labels each individual package with the month, day, and year before which the consumer should consume the individual package, and shall list the date immediately following the term 'use before.' As used in this paragraph, 'individual package' does not include a whole fruit (e.g., a fresh apple or banana) that is not packaged."

For perspective, please note that the current rule implies that the only meal option is a "hot meal" served in one package. It requires the provider to label each meal with a production date. ODA adopted the current rule's language out of concern that a consumer may eat a spoiled meal package. By comparison, the proposed new rule continues to address ODA's concern that a consumer may eat a spoiled meal package. Both before and after ODA refiled the proposed new rule on November 15, 2010, the rule has clearly indicated that ODA approves of both "hot" and "non-hot" meal options. Because the components of a "non-hot" meal option are individually packaged, the proposed new rule has required the provider to label each individual package in a "non-hot" meal with a "use before" date.

12. 119.032 Rule Review Date:

(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 does not anticipate that the proposed adoption of this rule will have any impact upon the biennial budget that the Ohio General Assembly established for ODA.

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

GRF-490-423 Long-Term Care Budget - State.

3C40-490-623 Long-Term Care Budget.

4J40-490-610 PASSPORT/Residential State Supplement.

4U90-490-602 PASSPORT Fund.

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 providers who fully comply with the requirements of the current rule could, but are unlikely to, see new costs of compliance. However, providers who fully comply with the requirements of the current rule are more likely to see a reduced cost-of-compliance if ODA adopts this proposed new rule.

Concerning dietitians: Both the current rule and the proposed new rule requires the provider to only use menus that have received the approval of a licensed dietitian. However, the proposed new rule also requires the dietitian to be registered with the commission on dietetic registration. We understand that almost every licensed dietitian is also a registered dietitian, so this is not likely to produce a new cost-of-compliance for most providers. (Also, the August 27, 2010 revision of the rule does not require the dietitian to be licensed if the provider is located in a state that does not license dietitians.)

Concerning nutritional adequacy: The proposed new rule requires each meal to be nutritionally adequate, but does not prescribe the means for achieving the federally-established dietary reference intakes. The proposed new rule complies with Executive Order 2008-04S because it focuses on the outcomes and not the process to achieve those outcomes. This allows a provider to choose the most-efficient methods, thereby lowering the costs the provider will incur if it complies with the proposed new rule. Specifically, we no longer prescribe menu patterns or nutrient-analysis software. We no longer require that each meal has 2 ounces of this or that either.

Concerning therapeutic diets: The proposed new rule no longer allows a provider to provide home-delivered meals with a therapeutic diet thirty days in advance of a physician's order for the therapeutic diet. Most providers should receive a diet order before they develop the therapeutic diet. Otherwise, they are providing a consumer with a diet that is not nutritionally adequate under the assumption that a physician has ordered the diet. If, for some reason, a provider is aware that a physician has ordered such a diet, but has not received the order from the physician, there might be an increased cost of compliance in contacting the physician to ask for the order.

Concerning consumer choice: The proposed new rule, like the current rule, requires the provider to offer a menu of meal options, but no longer details how the provider should do so. The proposed new rule complies with Executive Order 2008-04S because it focuses on the outcomes and not the process to achieve those outcomes. This allows a provider to choose the most-efficient methods, thereby lowering the costs the provider will incur if it complies with the proposed new rule.

Concerning "non-hot" meals: Because of the advent of non-hot meals--especially vacuum-packed meals--and the consumers' desire for those meals, the rule contains new options for packaging, delivery times, how many meals a provider may deliver at once, and concerning what inspection citations to submit to ODA and the PAA. This new flexibility creates no new costs to providers who do not provide vacuum-packed meals, but does allow provide the flexibility necessary in the rules to allow a provider to efficiently provide vacuum-packed meals. The proposed new rule complies with Executive Order 2008-04S because it focuses on the outcomes and not the process to achieve those outcomes. This allows a provider to choose the most-efficient methods, thereby lowering the costs the provider will incur if it complies with the proposed new rule.

Concerning local health department inspections: A provider who receives no citations from a local health department will see no new cost of compliance. However, if the local health department does cite a provider at the end of the workweek, the provider now has only 48 hours, not 2 business days, to notify ODA and the PAA of the citation and its plan of correction.

Concerning verification of meal delivery: The proposed new rule now allows flexibility that is not present under our current rule. The proposed new rule now allows providers to verify that they have performed the service by documenting the name of the consumer, the date of delivery, the number of meals,...in any manner that is reportable to the PASSPORT Administrative Agency. We no longer require the information to be in the form of a route log. Additionally, the proposed new rule allows providers to verify that they have performed the service by obtaining alternative forms of a consumer's signature. (e.g., UPS-style signature pads, swipe cards, call-in verification,...) The proposed new rule also give a provider flexibility on when to collect a consumer's signature, which means the provider may collect the signature at the same time it delivers the meal, or at another time. ODA's goal is simply to verify the delivery of the meals, so, in line with Executive Order 2008-04S, the proposed new rule focuses on the outcomes (i.e., verification) and not the process to achieve those outcomes (e.g., route logs, pen-and-ink signatures). This allows a provider to choose the most-efficient methods, thereby lowering the costs the provider will incur if it complies with the proposed new rule.

Concerning bulk ingredients: Although both the current rule and the proposed new rule say that a home-delivered meal is a complete meal, the proposed new rule does make an exception for three bulk ingredients. It makes sense for a provider to

delivery a half-gallon of milk, a loaf of bread, or a stick of butter for cost reasons and because aged consumers who suffer from arthritis have difficulty opening some small packages. The only requirement is that the food is labeled in such a way that a consumer will know that the bulk food is for consumption as part of a meal and not an ingredient for the consumer to use to prepare a meal. The proposed new rule complies with Executive Order 2008-04S because it focuses on the outcomes and not the process to achieve those outcomes. This allows a provider to choose the most-efficient methods, thereby lowering the costs the provider will incur if it complies with the proposed new rule.

ODA estimates that a consumer of a home-delivered meal under the proposed new rule would see no new cost of compliance if ODA adopted the rule because a consumer in the PASSPORT program does not pay for any service that he or she receives through the program.

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**