

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

Agency Name

Division

Tom Simmons

Contact

**50 West Broad Street 9th floor Columbus OH
43215-3363**

Agency Mailing Address (Plus Zip)

614-728-2548

Phone

Fax

173-39-04

Rule Number

AMENDMENT

TYPE of rule filing

Rule Title/Tag Line

Provider structural compliance review.**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? **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, 5111.89**

5. Statute(s) the rule, as filed, amplifies or implements: **173.403, 173.431, 5111.89**

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

ODA is proposing to amend rules 173-39-01, 173-39-02, 173-39-02.11, 173-39-03, and 173-39-04 of the Administrative Code and to adopt new rule 173-42-06 of the Administrative Code. In doing so, ODA has 5 basic goals:

1. To increase consumer choice by allowing consumers to hire consumer-directed individual providers for the personal care service through the PASSPORT program on a statewide basis. In doing so, the proposed new rules give PASSPORT consumers a new right to choose a method by which to receive their personal care: either from an agency-provider method or a consumer-directed method.

2. To implement a rule on the choices and responsibilities bestowed upon a consumer who directs a consumer-directed individual provider under the PASSPORT program.
3. To comply with section 119.032 of the Revised Code, which requires each state agency to review each rule on or before the rule's designated review date.
4. To comply with Governor Strickland's Executive Order 2008-04S: "Implementing Common Sense Business Regulation," which requires each state agency to write easier-to-read and easier-to-comprehend rules to promote transparency in the agency's regulations. (Because the process of adopting this proposed new rule spans two gubernatorial administrations, it is also ODA's goal to comply with Governor Kasich's new Executive Order 2011-01K "Establishing the Common Sense Initiative.") As a result, ODA's proposed new or amended language:
 - a. Complies 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
 - b. Incorporates recommendations from "Advanced Legal Drafting" by Bryan A. Garner (Dallas: LawProse, Inc. (c) 2007)
 - c. Incorporates recommendations from "Plain English Writing Tips," as found on http://business.ohio.gov/docs/RegReform_PlainEnglishWritingTips.pdf.
5. To format the new language in ODA's rules in the same way, rule after rule, in a manner that corresponds with the cooperative effort of other agencies that participate that also participate in the consolidation exploration team of the Executive Medicaid Management Agency (EMMA), which Governor Strickland created with Executive Order 2007-36S.

In addition to the 5 basic goals stated above, ODA is also proposing to amend the rule in ways detailed in items #7 and #11 of Part A of this 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 provides regulates the provider structural compliance review for each of the four types of ODA-certified long-term care providers: agency providers, non-agency providers, consumer-directed individual providers, and assisted living providers.

In addition to implementing the goals stated in item #6 of Part A of this RSFA as the basic reasons for proposing to amend this rule, ODA's proposed amended rule:

1. Organizes the rule primarily by provider type so that each type of provider sees his, her, or its review requirements in one section. The requirements for agency, non-agency, and assisted living providers now appear under paragraph (A) of the rule while the requirements for consumer-directed individual providers now appear under paragraph (B) of the rule.
 2. Replaces the use of "PAA" with "ODA's designee" throughout paragraph (A) of the rule. Paragraph (B) of the rule only uses "ODA's designee."
 3. Replaces the use of the verbs "provide" and "deliver" (and their inflections) with "furnish" (and its inflections) throughout paragraph (A) of the rule. Paragraph (B) of the rule only uses "furnish" (and its inflections).
 4. Replaces a number of the occurrences of "must" and "will" with "shall" throughout paragraph (A) of the rule. Paragraph (B) of the rule only uses "shall."
 5. Corrects the paragraph citations in paragraph (A) of the rule.
 6. Replaces "173-39-02.17" in paragraph (A)(2)(g) of the rule with "173-39-02.20."
 7. Replaces "If unit of service errors are detected" in paragraph (A)(8) of the rule with ""If a unit of service error is detected."
 8. Replaces "the department" in paragraph (A)(12) of the rule with "ODA."
 9. Replaces "the department" in paragraphs (A)(12)(c)(i) and (A)(12)(c)(ii) of the rule as it appeared in the phrase "the department ODA."
 10. Adds, "except as noted in paragraph (A)(10) of the rule" to paragraph (A)(2)(e) of the rule. Paragraph (A)(10) of the rule states ODA's (and its designee's) right to make unannounced reviews of providers. Adding the language to paragraph (A)(2)(e) of the rule does not add a new requirement to a provider because paragraph (A)(10) of the rule already exists. Yet, it does provide a helpful reference to the paragraph on announced reviews that ODA and its designee may also make unannounced reviews.
 11. Adds "(or ODA's designee)" to the end of paragraph (A)(12)(c) of the rule.
 12. Organizes the requirements for the consumer-directed individual in a somewhat chronological manner with generous use of sub-headings (e.g., "Minimum frequency" and "Exit conference and report"). This makes the new language in the rule as easy to read as possible.
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 February 4, 2011, ODA refiled this rule to:

1. Replace "beginning the third year of that ODA certifies to furnish" in paragraph (A)(2)(b) of the rule with "after the first two years of service, if the provider furnishes...". ODA made this revision in response to comments submitted by Ohio District 5 Area Agency on Aging, Inc. Also, replace "and" with "or" in the same paragraph.
2. Add, "except as noted in paragraph (A)(10) of the rule" to the end of paragraph (A)(2)(e) of the rule.
3. Add "(or ODA's designee)" to the end of paragraph (A)(12)(c) of the rule.
4. Insert "and" or "or," then insert "consumer-directed personal care provider" after each occurrence of "consumer-directed individual provider" in paragraph (B) of the rule.
5. Replace "may" in (B)(1)(b) of the rule with "shall."
6. Delete paragraph (B)(1)(c) of the rule, which said, "If a provider furnishes a service in the geographic region of one of ODA's designees, but the provider resides outside the designee's region (including outside of Ohio), ODA (or its designee in the geographic region where the provider furnishes the service) shall

determine if the designee shall perform a desk review or an on-site review."

7. Replace "has an administrative office located" in paragraph (B)(1)(c) of the rule with "resides." ODA made this revision in response to comments submitted by Ohio District 5 Area Agency on Aging, Inc.

8. Replace paragraph (B)(3) of the rule, which said, "Minimum frequency: (a) During the first two years of service, ODA's designee shall conduct the review of each provider at least annually. (b) After the first two years of service, ODA's designee shall conduct the review of the provider of: (i) A pest-control service under rule 173-39-02.3 of the Administrative Code at least biennially. (ii) An alternative meal service under rule 173-39-02.2 of the Administrative Code, a home-care attendant service under rule 173-39-02.3 of the Administrative Code, and a personal care service under rule 173-39-02.11 of the Administrative Code at least annually," with "Minimum frequency: ODA's designee shall conduct the review of each provider at least annually." Then, insert "a pest-control service" into paragraph (A)(2)(b) of the rule.

9. Replace the first sentence of paragraph (B)(5) of the rule, which said, "Components: In each review, ODA's designee shall evaluate the provider's compliance with rule 173-39-02 of the Administrative Code and rules 173-39-02.2, 173-39-02.3, 173-39-02.4, or 173-39-02.11 of the Administrative Code for any service the provider furnishes that is regulated by one of those rules," with "Components: In each review, ODA's designee shall evaluate the provider's compliance with rule 173-39-02 of the Administrative Code; and rule 173-39-02.4, if the provider furnishes a home care attendant service; or 173-39-02.11 of the Administrative Code if the provider furnishes a personal care service."

10. Replace, "representing at least ten per cent of the units of service the provider performed" in paragraph (B)(6)(a) of the rule with, "for each consumer served."

11. Replace "sample size" in paragraph (B)(6)(b) of the rule with "time period the review covers. "

12. Insert "and the consumer" after "provider" in paragraph (B)(7)(b) of the rule.

13. Replace "consumes" in paragraph (B)(9)(a) of the rule with "consumers." Then delete the words "of the provider's" and "business" in the first sentence of the paragraph. Insert "no" in between "In" and "more than forty-five" at the end of the first sentence of the same paragraph. ODA made this revision in response to comments submitted by Ohio District 5 Area Agency on Aging, Inc. Then, replace "may" with "shall" in the second sentence of the paragraph. Finally, delete "to demonstrate compliance" from the end of the paragraph.

14. Delete what was paragraph (D)(9)(b) of the rule, which said, "If ODA's designee determines that the provider does not comply in an area that places the health or safety of one or more of the provider's consumers at imminent risk, the

provider shall demonstrate compliance to ODA's designee in no more than five business day."

15. Replace paragraph (B)(9)(c) of the rule [formerly paragraph (D)(9)(d) of the rule], which said, "If the provider refuses to supply any records that ODA's designee requests to conduct its review, as paragraph (D)(5)(b) of rule 173-39-02 of the Administrative Code requires it to do, ODA's designee shall not pay the provider for any outstanding services, in accordance with paragraphs (D)(6)(a) and (D)(6)(b) of rule 173-39-02 of the Administrative Code," with "If the provider refuses to supply any records that ODA's designee requests to conduct its review, ODA's designee shall not pay the provider for any outstanding services."

16. Revise this RSFA.

12. 119.032 Rule Review Date: **11/18/2010**

(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

The Ohio General Assembly established ODA's biennial budget. ODA will implement the rule within the fiscal parameters the General Assembly established and will adjust expenditures so that it does not exceed those parameters. Thus, the proposed amended rule is cost-neutral. It has no impact upon the amount of revenue ODA receives or the amount of revenue ODA spends during the biennium.

ODA's proposed new consumer-direction option will allow the PASSPORT program to maintain cost-neutrality. ODA's analysis indicates that, through an agency-provider (the only option today), a PASSPORT consumer receives an average of 60 hours of the personal care service per month at an average rate of

\$16.15 per hour. This results in an average expenditure on personal care of \$969.17 per month per consumer. ODA's proposed new consumer-direction option will give a PASSPORT consumer the option to direct his or her own personal care service at a lower cost. If the PASSPORT consumer using this option receives 60 hours of the personal care service per month at the \$12.72 per hour rate proposed in ODJFS' rule 5101:3-1-06.1 of the Administrative Code, the average expenditure on personal care for that consumer will be \$763.20 per month per consumer, or \$205.97 less per month than if the consumer received the personal care service through an agency provider. ODA will redirect the \$205.97 per month per consumer difference to support the PASSPORT program's administrative expenses, including PASSPORT administrative agency (PAA) expenses, and care for other PASSPORT consumers.

ODA designates PAAs to perform administrative activities, such as monitoring agency providers and consumer-directed individual providers of the Choices Program. After ODA adopts this rule, ODA will also designate the PAAs to perform administrative activities for the consumer-directed personal care providers of the PASSPORT program, such as the monitoring requirements of this rule. If the addition of consumer-directed personal care providers results in an overall increase in the number of providers, the PAAs may see an increase in their administrative expenses. Again, ODA will implement the rule within the fiscal parameters the General Assembly established and will adjust expenditures so that it does not exceed those parameters. Because ODA may use PASSPORT funds for administrative expenses, ODA will maintain this cost neutrality by paying the PAAs with PASSPORT funds.

ODA projects that the initial demand from PASSPORT consumers to choose to direct their own personal care service will be slow: less than 1% of the current PASSPORT consumers for the remainder of this fiscal year and 3.6% of the PASSPORT consumers for the next fiscal year. Therefore, ODA projects a minimal impact to the PASSPORT program's current operations.

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:

once adopted, the proposed amendment of rules 173-39-01, 173-39-02, 173-39-02.11, 173-39-03, and 173-39-04 of the Administrative Code, and the proposed adoption of rule 173-42-06 of the Administrative Code, as well as the Center for Medicare and Medicaid Service's recent approval of Ohio's request to amend the PASSPORT Medicaid waiver, give PASSPORT consumers the option to choose a new method by which to receive the personal care service. Once these rules are adopted, consumers may use the new option to choose the consumer-directed method to receive the service instead of the agency-furnished method.

While this new option does not create a new cost to agency providers who furnish personal care services, it could create a new "cost" in the form of a potential loss of market share. Currently, agency providers furnish 100% of the PASSPORT program's personal care services. After the rules are adopted, ODA estimates that they will lose a small share of the market.

If a consumer who currently receives the personal care service from an agency provider begins to direct his or her own personal care service, the agency provider will no longer spend dollars caring for the consumer, but will also no longer be reimbursed for caring for the consumer. Instead, the PASSPORT program will reimburse the consumer-directed personal care provider.

ODA projects that the initial demand from PASSPORT consumers to choose to direct their own personal care service will be slow: less than 1% of the current PASSPORT consumers for the remainder of this fiscal year and 3.6% of the PASSPORT consumers for the next fiscal year. Therefore, ODA projects that agency providers will see a minimal loss of caseload.

Additionally, because the PASSPORT program is growing as the population of seniors continues to increase, the agency providers may see no loss of consumers whatsoever.

16. Does this rule have a fiscal effect on school districts, counties, townships, or municipal corporations? **Yes**

You must complete Part B of the Rule Summary and Fiscal Analysis in order to comply with Am. Sub. S.B. 33 of the 120th General Assembly.

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

Rule Summary and Fiscal Analysis (Part B)

1. Does the Proposed rule have a fiscal effect on any of the following?

(a) School Districts	(b) Counties	(c) Townships	(d) Municipal Corporations
No	Yes	Yes	Yes

2. Please provide an estimate in dollars of the cost of compliance with the proposed rule for school districts, counties, townships, or municipal corporations. If you are unable to provide an estimate in dollars, please provide a written explanation of why it is not possible to provide such an estimate.

Once adopted, the proposed amendment of rules 173-39-01, 173-39-02, 173-39-02.11, 173-39-03, and 173-39-04 of the Administrative Code, and the proposed adoption of rule 173-42-06 of the Administrative Code, as well as the Center for Medicare and Medicaid Service's recent approval of Ohio's request to amend the PASSPORT Medicaid waiver, give PASSPORT consumers the option to choose a new method by which to receive the personal care service. Once these rules are adopted, consumers may use their new option to choose the proposed consumer-directed method for receiving personal care rather than the agency-furnished method.

While this new option does not create a new cost to government entities who furnish personal care services as an agency provider, it could create a new "cost" in the form of a potential loss of market share. If a consumer who currently receives the personal care service from a government begins to direct his or her own personal care service, the government's agency will no longer spend dollars caring for the consumer, but will also no longer be reimbursed for caring for the consumer.

Instead, the PASSPORT program will reimburse the consumer-directed personal care provider. Currently, agency providers (government-owned and privately-owned together) furnish 100% of the PASSPORT program's personal care services. After the rules are adopted, ODA estimates that they will lose a small share of the market. If a consumer who currently receives the personal care service from a government operating as an agency provider begins to direct his or her own personal care service, the government-owned agency provider will no longer spend dollars caring for the consumer, but will also no longer be reimbursed for caring for the consumer. Instead, the PASSPORT program will reimburse the consumer-directed personal care provider.

ODA projects that the initial demand from PASSPORT consumers to choose to

direct their own personal care service will be slow: less than 1% of the current PASSPORT consumers for the remainder of this fiscal year and 3.6% of the PASSPORT consumers for the next fiscal year. Therefore, ODA projects that government-owned agency providers may see a minimal loss of caseload.

Additionally, because the PASSPORT program is growing as the population of seniors continues to increase, the government-owned agency providers may see no loss of consumers whatsoever.

3. If the proposed rule is the result of a federal requirement, does the proposed rule exceed the scope and intent of the federal requirement? **No**
4. If the proposed rule exceeds the minimum necessary federal requirement, please provide an estimate of, and justification for, the excess costs that exceed the cost of the federal requirement. In particular, please provide an estimate of the excess costs that exceed the cost of the federal requirement for (a) school districts, (b) counties, (c) townships, and (d) municipal corporations.

Not Applicable.

5. Please provide a comprehensive cost estimate for the proposed rule that includes the procedure and method used for calculating the cost of compliance. This comprehensive cost estimate should identify all of the major cost categories including, but not limited to, (a) personnel costs, (b) new equipment or other capital costs, (c) operating costs, and (d) any indirect central service costs.

Although the proposed changes to this rule create no new "costs" for governments, there may be a minimal loss of market share for government-owned agencies that furnish personal care due to competition in the marketplace. (Please see item #2 on Part B of this RSFA.)

(a) Personnel Costs

The proposed changes to this rule create no new personnel costs for governments.

(b) New Equipment or Other Capital Costs

The proposed changes to this rule create no equipment or other capital costs for governments.

(c) Operating Costs

The proposed changes to this rule create no new operating costs for governments.

(d) Any Indirect Central Service Costs

The proposed changes to this rule create no new indirect central service costs for governments.

(e) Other Costs

Although the proposed changes to this rule create no new "costs" for governments, there may be a minimal loss of market share for government-owned agencies that furnish personal care due to competition in the marketplace. (Please see item #2 on Part B of this RSFA.)

6. Please provide a written explanation of the agency's and the local government's ability to pay for the new requirements imposed by the proposed rule.

Although the proposed changes to this rule create no new "costs" for governments, there may be a minimal loss of market share for government-owned agencies that furnish personal care due to competition in the marketplace. (Please see item #2 on Part B of this RSFA.)

7. Please provide a statement on the proposed rule's impact on economic development.

ODA estimates that the adoption of this proposed new rule will have a positive impact upon economic development. The PASSPORT program provides in-home and community-based alternatives to Medicaid payment of nursing facilities. Because participating in the PASSPORT program saves much taxpayer money in comparison to residing in a nursing facility, this lessens the need for entitlement spending, which, in turn, can lead to economic development.

By allowing the PASSPORT program's consumers to direct their personal care services, ODA is providing another option for consumers to choose other than the Medicaid payment of nursing facilities.