



Department of
Aging

John Kasich, Governor
Bonnie K. Burman, Sc.D., Director

PARTICIPATING IN ODA'S RULE DEVELOPMENT

October 14, 2014

50 West Broad Street / 9th Floor
Columbus, OH 43215-3363 U.S.A.
www.aging.ohio.gov

Main: (614) 466-5500
Fax: (614) 466-5741
TTY: Dial 711

INTRODUCTION

Section 119.0311 of the Revised Code requires every state agency to adopt a guide to its rule-making process that explains its mission, structure, rule-making authority, rule-making process, opportunities for the public to participate in that process.

The Ohio Department of Aging (ODA) encourages older Ohioans, caregivers, businesses, advocates, and members of the general public to participate in ODA's rule-development process.

ODA's MISSION

ODA's mission is explained in detail in ODA's annual reports. The excerpt below is from the 2014 report.¹



¹ Ohio Department of Aging. "Annual Report: State Fiscal Year 2014: From Choice to Voice." <http://aging.ohio.gov/information/oda/annualreport.aspx>

ODA's STRUCTURE

ODA is organized into 9 division to serve Ohio's growing and changing aging population in a cost-effective and responsive manner. The divisions are:

1. Executive Division. (This division oversees rule development.)
2. Communications and Government Outreach Division.
3. Division for Community Living.
4. Elder Connections Division.
5. Elder Rights Division.
6. Fiscal Division.
7. Human Resources Division.
8. Information Systems Division.
9. Performance Center Division.
10. Strategic Partnership Division.

ODA does not divide its chapters of rules into different divisions that correspond with different divisions in ODA's structure. Instead, every rule ODA adopts belongs to a unified set of chapters under Agency 173 of the Administrative Code (*i.e.*, the rules begin with the number "173").

For more information about ODA's structure, please visit <http://aging.ohio.gov/information/oda/structure.aspx>.

ODA's RULE-MAKING AUTHORITY

The U.S. Congress, Code of Federal Regulations, and Ohio General Assembly have given ODA authority to adopt rules through the following federal statutes, federal rules, and state statutes:

- §§ 305(a)(1)(C) and 712(a)(5)(D) of the Older Americans Act of 1965, as amended in 2006, and 45 C.F.R. 1321.11 (October 1, 2014 edition) grant ODA, as the state's unit on aging, federal authority to adopt rules.
- Section 121.36 of the Revised Code requires ODA to adopt rules to require providers of home care services to home-care dependent adults to have a system in place that effectively monitors the employees who deliver those services.
- Sections 173.01 and 173.02 grant ODA general authority to regulate programs that ODA administers and providers who conduct business in programs that ODA administers, according to the process under section 119.03 of the Revised Code.
- Section 173.011 of the Revised Code requires ODA to adopt rules to establish the criteria used for designating an area agency on aging and the procedures for withdrawing that designation.
- Section 173.04 of the Revised Code authorizes ODA to adopt rules to govern respite care programs and other supportive services, the distribution of funds, and the purpose for which funds may be used under this section. Section 209.30 of H.B.59 (130th G.A.) limits the funds to use for the Alzheimer's Respite Program. Alzheimer's Respite Program funds are generally used as a state match for federal Older Americans Act funds, which include the National Family Caregiver Support Program.
- Section 173.06 of the Revised Code requires ODA to adopt rules to establish the Golden Buckeye Program.

- Section 173.11 of the Revised Code requires ODA to adopt rules to establish procedures for receiving grants from the Senior Facilities Program.
- Section 173.14 of the Revised Code requires ODA to adopt rules regarding the designation of regional long-term care ombudsman programs.
- Section 173.19 of the Revised Code requires ODA to adopt rules regarding the handling of complaints received by the office of the state long-term care ombudsman.
- Section 173.20 of the Revised Code requires ODA to adopt rules the referral of complaints to other state agencies.
- Section 173.26 of the Revised Code requires ODA to adopt rules to establish deadlines for nursing facilities, residential care facilities, and homes for the aging to pay bed fees to the State Long-Term Care Ombudsman Program.
- Sections 173.27, 173.38, and 173.381 of the Revised Code grant ODA authority to adopt rules to implement the requirements for reviewing databases and checking criminal records for paid ombudsman position and paid direct-care positions.
- Section 173.28 of the Revised Code authorizes ODA to adopt rules to establish fines for nursing facilities or other long-term care providers
- Sections 173.391 and 173.392 of the Revised Code grant ODA general authority to regulate providers who conduct business in programs that ODA administers and to regulate provider agreements (*i.e.*, contracts and grants).
- Sections 173.42 and 173.422 of the Revised Code require ODA to adopt rules to implement the Long-Term Care Consultation Program, including rules that establish a process by which one may become certified to conduct long-term care consultations.
- Section 173.434 authorizes ODA to adopt rules regarding the unified long-term care budget.
- Sections 173.46 and 173.49 of the Revised Code authorize ODA to adopt rules to implement the Ohio Long-Term Care Consumer Guide, including rules that specify the information to be included in the Guide.
- Sections 173.50, 173.52, 173.53, and 173.54 of the Revised Code grant ODA specific authority to adopt rules according to the process under section 1119.03 of the Revised Code for the Medicaid-funded components of the following programs: PACE, PASSPORT, Choices, and Assisted Living Programs.
- Sections 173.522, 173.543, 173.55, and 173.56 of the Revised Code grant ODA specific authority to adopt rules according to the process under section 111.15 of the Revised Cod for the state-funded components of the PASSPORT and Assisted Living Programs.
- Section 173.55 of the Revised Code requires ODA to adopt rules to implement the Unified Long-Term Care Waiting List.
- Section 173.60 of the Revised Code authorizes ODA to adopt rules to implement the Nursing Home Quality Initiative Program.
- Section 1347.15 of the Revised Code requires each state agency, including ODA, to adopt rules regulating access to the confidential personal information that the agency keeps.

- Section 5160.481 of the Revised Code requires ODA to adopt rules that are consistent with sections 5160.45 to 5160.481 of the Revised Code to prevent the publication or disclosure of names, lists, or other information regarding Medicaid recipients.

ODA also has the authority to review certain rules of other state agencies:

- 45 C.F.R. 1321.7(a) (October 1, 2014 edition) says, "The Older Americans Act intends that the State agency on aging shall be the leader relative to all aging issues on behalf of all older persons in the State. This means that the State agency shall proactively carry out a wide range of functions related to advocacy, planning, coordination, interagency linkages, information sharing, brokering, monitoring and evaluation, designed to led to the development or enhancement of comprehensive and coordinated community based systems in, or serving, communities throughout the State. These systems shall be designed to assist older persons in leading independent, meaningful and dignified lives in their own homes and communities as long as possible."
- Section 173.01 of the Revised Code requires state agencies to notify ODA of any rule proposal they file with the Joint Committee on Agency Rule Review (JCARR) that would primarily affect older Ohioans. After the state agency notifies ODA, ODA has 30 days to provide the state agency with written suggestions for improving their proposal. If the state agency does not intend to comply with ODA's suggestions, the state agency must send ODA a written explanation of its non-compliance at least 30 days before it adopts the rule proposal into law.
- Section 3923.50 of the Revised Code requires the Ohio Department of Insurance to consult with ODA on rule proposals that it files with JCARR regarding the Ohio Long-Term Care Insurance Program.
- Section 5162.66 of the Revised Code requires the Ohio Department of Medicaid to consult with ODA on rule proposals that it files with JCARR regarding the Resident Protection Fund.

ODA's RULE-DEVELOPMENT PROCESS & OFFICIAL OPPORTUNITIES TO PARTICIPATE IN THAT PROCESS

STAGE I: THE COMMON SENSE INITIATIVE

Assessment Phase

In this early phase of development, ODA assesses the adverse impact that a rule proposal could have upon the businesses that it would affect.

Section 107.52 of the Revised Code defines a rule that has an adverse impact to include an ODA rule that (1) requires certification or a provider agreement to operate in a line of business, (2) imposes penalties for failure to comply, or (3) requires expenditures or the report of information as a condition of compliance. Ohio's home and community-based service providers are businesses that ODA's rules adversely affect.

To assess the adverse impact of a rule proposal, ODA generally contacts a selection of businesses that a rule proposal would affect to obtain facts that would lead to the calculation of an adverse impact.

Based upon information gathered during the assessment phase, ODA will draft the rule proposal and a business-impact analysis (BIA) of that proposal. Each BIA lists the businesses that ODA contacted, their input, and ODA's responses to their input.

Comment & Review Phase

In this development phase, ODA generally initiates a public-comment period. Under certain circumstances, ODA may not conduct a public-comment period. For example, ODA may need to file the rule on an emergency basis or legislation may require adopting language from a statute verbatim into a rule.

ODA facilitates the comment period by publishing its rule proposals and BIAs on the public-comment page of ODA's Online Rules Library², which appears on ODA's website. After ODA publishes these documents on the public-comment page, ODA will announce the opportunity to comment by sending an email notice to all subscribers³ of its rules listserv. Any person may submit comments through the "submit comments" feature on the public-comments page. ODA generally allows the comment period to last two weeks.

If the rule proposal has an adverse impact, the Common Sense Initiative Office (CSIO) reviews the proposals, BIA, and any comments ODA receives through its website. This occurs simultaneous to the public-comment period. CSIO has a minimum of 16 *business* days to review the statements.

After CSIO reviews the rule proposals, BIA, and public comments, it issues recommendations to ODA. ODA must develop a memorandum of response to explain how ODA implemented or rejected CSIO's recommendations.

After considering the public's comments and CSIO's comments, ODA may revise its rule proposals and BIAs.

STAGE II: THE LEGISLATURE'S RULE-REVIEW PROCESS

Introduction

Not only does the Ohio General Assembly grant ODA its authority to adopt rules, it also retains the right to reject and invalidate ODA's rule proposals as part of its rule-review process. If ODA proposes to amend or rescind a rule, or adopt a new rule, JCARR's jurisdiction over such typical rule proposals lasts 65 days. If ODA proposes to make no changes to a rule as part of a five-year rule review, JCARR's jurisdiction over the rule proposal lasts 90 days.

Initial Review Phase

On the legislative review page of ODA's online Rules Library, ODA publishes links to every rule that it has filed with JCARR. The links lead to the Register of Ohio⁴, which is an electronic depository of all rule proposals under JCARR's jurisdiction.

In the register, ODA must also upload rules proposals, public-hearing notices, BIAs, CSIO's recommendations, ODA's memorandums of response to CSIO's recommendations, and rule summaries and fiscal analyses (RSFAs).

² <http://aging.ohio.gov/information/rules/>

³ For subscription information, please see the section of this document entitled, "Notices of Official Opportunities to Participate."

⁴ <http://www.registerofohio.state.oh.us/>

During the first 35 days of JCARR's jurisdiction over typical rule proposals: (1) the public may review the rule documents in the Register of Ohio and (2) ODA may revise the rules.

Public Hearing Phase

ODA will conduct a public hearing on a rule proposal any time it files a rule proposal according to section 119.03 of the Revised Code. Section 119.03 requires ODA to do so during the 31st to the 40th day of JCARR's jurisdiction over the rules.

In three situations, ODA may not conduct a public hearing:

- If the Ohio General Assembly allows ODA to file a rule proposal according to section 111.15 of the Revised Code, ODA is not required to conduct a public hearing on the proposal.
- If ODA's rule proposal is to make no changes to a rule, ODA is not required to conduct a public hearing on the proposal.
- If the Governor issues an executive order authorizing ODA to file the rules on an emergency basis, the rules ODA files will immediately take effect. ODA does not conduct a public hearing for emergency rules. However, these emergency rules are temporary rules that only remain in effect for 90 days. If durable rules are necessary, before the emergency rules sunset, ODA will file a rule proposal to replace the emergency rules through the normal rule-filing process, which includes a public hearing.

Any person may attend the public hearing to testify on the rule proposal. After considering the testimonies received during a public hearing, ODA compiles the testimonies that it received into a hearing summary report (HSR). ODA files the HSR with JCARR after the hearing.

JCARR Meeting Phase

During the 41st to the 65th day of JCARR's jurisdiction, JCARR will place ODA's rule proposal on its meeting agenda to give legislators an opportunity to question the rule proposal and to give the public another opportunity to comment on the proposal. At a JCARR meeting, however, the members of JCARR will only consider comments on a rule proposal as it relates to six criteria, commonly called "the 6 prongs of JCARR":

1. Does ODA have the authority to adopt the new rule or to amend or rescind the current rule?
2. Does the rule conflict with other rules?
3. Does the rule conflict with the intent of relevant legislation?
4. Does ODA's rule proposal include a complete and accurate RSFA?
5. Does the proposed rule reference other material that is not readily available (e.g., free of charge on the internet) to the general public?
6. Does ODA demonstrate through a BIA, recommendations from CSIO, and the memorandum of response, that the regulatory intent of the rule proposal justifies any adverse impact upon Ohio businesses?

If ODA does not include a complete and accurate RSFA, JCARR may issue an order and finding and order to complete the RSFA.

If JCARR disagrees with ODA's assessment of the adverse impact, JCARR can reject the rule filing and require ODA to return to the Common-Sense Initiative state of development.

If a rule does not meet any one of the 6 criteria, JCARR may vote to recommend that the Ohio General Assembly vote to invalidate the rule proposal. If the majority of the legislators vote to invalidate the rule, ODA may not adopt the rule proposal.

Final Filing Phase

If JCARR doesn't reject a rule proposal, and if the Ohio General Assembly doesn't invalidate the proposal, ODA may make the final filing to adopt the rule into law. The final filing action occurs no earlier than the day after JCARR's 65th day of jurisdiction over a typical proposal or 90th day of jurisdiction over a no-change proposal.

During the final filing, ODA establishes the rule's new effective date which may occur no sooner than 10 days into the future.

ODA posts all final-filed rules in the rules-in-effect page of ODA's Online Rules Library.

NOTICES OF OFFICIAL OPPORTUNITIES TO PARTICIPATE

ODA offers a service to those who want electronic notifications of opportunities to participate in ODA's rule development. By subscribing to receive emails on rule proposals, a person has a reasonable opportunity to participate in public-comment periods and public hearings. Additionally, the email notifications will alert the public to final-filed rules that are soon to take effect.

On average, ODA emails subscribers less often than once per week.

To subscribe, click the subscription icon in ODA's Online Rules Library.⁵

One may additionally subscribe to JCARR's Rule Watch Ohio service.⁶

ANYTIME OPPORTUNITIES TO PARTICIPATE

The opportunity to participate in ODA's rule development doesn't need to wait until ODA makes a rule proposal. The public may also initiate a proposal to amend or rescind a rule or adopt a new rule at any time through one or both of the following avenues:

- Any person (*i.e.*, an older Ohioan, caregiver, business, advocate, or member of the general public) may contact ODA any time he or she believes ODA needs to adopt a new rule, amend a current rule, or rescind a current rule. Even if ODA is not currently proposing a new rule or proposing to amend or rescind an existing rule, any person may comment on a rule by sending an email to Tom Simmons, ODA's policy manager, at rules@age.ohio.gov.
- Any Ohio business that believes ODA's rules have an adverse impact upon their business may, at any time, send comments about the adverse impact of ODA's rules directly to CSIO through CSIO's website.⁷

⁵ Or, visit <http://aging.ohio.gov/subscribe/>

⁶ <https://www.rulewatchohio.gov/>. Rule Watch Ohio does not notify subscribers to public-comment periods.

CONTACT INFORMATION

For any questions or comments regarding the rule-development process or regarding a specific rule, please email Tom Simmons, ODA's policy manager, at rules@age.ohio.gov.

⁷ <http://www.governor.ohio.gov/PrioritiesandInitiatives/CommonSenseInitiative.aspx>