



Department of  
Aging

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# PARTICIPATING IN ODA'S RULE DEVELOPMENT

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## INTRODUCTION

ORC§119.0311 requires every state agency to adopt a guide to its rule-making process that explains its mission, structure, rule-making authority, rule-making process, and 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.

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## ODA's MISSION

*Our Mission: Ohio is on the leading edge of innovation and is responsive to the growing and changing aging population.*

*Our Vision: Elders are respected as vital members of society who continue to grow, thrive and contribute.*

In its annual reports, ODA explains its mission in detail. The excerpt below is from ODA's [annual report](#) for 2016:

### VUJÀ DÉ AND INNOVATION

"Vujà dé" is a popular strategy in the field of innovation and problem solving. Simply put, if déjà vu is an odd sense of familiarity you get in unfamiliar circumstances (that feeling that you've been here before), vujà dé can best be described as the opposite: experiencing familiar situations as if you haven't been there before – looking at ongoing challenges with a fresh, untried and unjaded perspective.

Historically, we have tracked inputs and outputs as measures of our success. These metrics are still crucial, but more important still are measures of the outcomes of what we do and, ultimately, the impact our work and our services are having on the lives of all Ohioans. In other words, data and information, when used properly, allow us to gain the knowledge to recognize opportunities and the wisdom to bravely step in a more productive direction.

It is through the practice of vujà dé and proven approaches to innovation that we are expanding and transforming our network of partners to touch every part of Ohio and our communities. By engaging both traditional and non-traditional partners, we are able to tap creative wellsprings, resource pipelines and funding sources in very innovative ways. We've based this work on innovation and improvement approaches founded on IHI Science of Improvement ([www.ihl.org](http://www.ihl.org)) and Rogers' Theory of Innovation (*Everett Rogers, Diffusion of Innovations, Fifth Edition 2003, Free Press, NY*) to ensure that we collaborate to:

1. Set aims that are time-specific, measurable and well defined;
2. Establish quantitative measures of input, output, outcomes and impact;
3. Select innovations from available and new solutions that best fits the situation; and
4. Assess the innovations.

Five characteristics largely determine an innovation's chance of adoption and success. **They are:**

- **Relative advantage** – The real and perceived value to the entity adopting the innovation;
- **Simplicity** – The level of complexity of the innovation;
- **Compatibility** – How well the innovation fits with existing values and practices;
- **Trialability** – How well and easily the innovation can be tried; and
- **Observability** – How well the outcomes and impact of the innovation can be seen.

## ODA'S STRUCTURE



ODA is organized into 9 divisions to serve Ohio's growing and changing aging population in a cost-effective and responsive manner. For information on the role of each division, please visit [this webpage](#).

ODA's Executive Division is primarily responsible for rule development.

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" instead of "173:1" or "173:2.").

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## 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 Reauthorization Act of 2016,<sup>1</sup> 45CFR1321.11, 45CFR1324.11(e), and 45CFR1324.15(b) authorize ODA, as Ohio's state unit on aging, to adopt rules to govern the aging network,<sup>2</sup> reporting, and administering Older Americans Act programs in Ohio. The programs include the following:

<b>TITLE III-B</b>	Supportive Services <sup>3</sup>
<b>TITLE III-C</b>	Older Americans Act Nutrition Program
<b>TITLE III-D</b>	Evidence-Based Disease Prevention and Health Promotion Services Program
<b>TITLE III-E</b>	Caregiver Support
<b>TITLE IV</b>	Activities for Health, Independence, and Longevity
<b>TITLE V</b>	Community Service Senior Opportunities Act
<b>TITLE VII</b>	Elder Rights

- ORC§121.36 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.
- ORC§§ 173.01 and 173.02 authorize ODA to regulate programs that ODA administers and providers who conduct business in programs that ODA administers.
- ORC§173.011 requires ODA to adopt rules to establish the requirements for designating an area agency on aging and the procedures for withdrawing that designation.
- ORC§173.04 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. §209.30 of HB59 (130<sup>th</sup> 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.
- ORC§173.06 requires ODA to adopt rules to establish the Golden Buckeye Program.
- ORC§173.11 requires ODA to adopt rules to establish procedures for receiving grants from the Senior Facilities Program.<sup>4</sup>

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<sup>1</sup> 42 U.S.C. 3025 and 3058g.

<sup>2</sup> This includes designating Ohio's planning and service areas (PSAs) and designating an area agency on aging for each PSA.

<sup>3</sup> Adult day services, chore, homemaker, personal care, and transportation are examples of supportive services.

<sup>4</sup> The program is also called the "Multi-Purpose Senior Center Program." In 1978, HB1084 (112<sup>th</sup> GA) established the Senior Facilities Program and, in 1980 and 1984, HB827 (113<sup>th</sup> GA) and HB660 (115<sup>th</sup> GA) respectively modified the program. However, since 2001, the program has been dormant due to a lack of adequate funding. The General Assembly discontinued funding the program and no person or organization has awarded a grant or gift to the program. Although the program is dormant, ORC§173.11 continues to establish the program, which leaves the potential for an adequate funding source to resuscitate it. Part of the requirement in ORC§173.11 is for ODA to adopt rules under which counties, townships, municipal

- ORC§173.14 requires ODA to adopt rules regarding the designation of regional long-term care ombudsman programs.
- ORC§173.19 requires ODA to adopt rules regarding the handling of complaints received by the office of the state long-term care ombudsman.
- ORC§173.20 requires ODA to adopt rules regarding the referral of complaints to other state agencies.
- ORC§173.26 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.
- ORC§173.27 authorizes ODA to adopt rules to implement the requirements for reviewing databases and checking criminal records for paid ombudsman positions.
- ORC§173.28 authorizes ODA to adopt rules to establish fines for nursing facilities or other long-term care providers
- ORC§§ 173.38 and 173.381 authorize ODA to adopt rules to implement the requirements for reviewing databases and checking criminal records for paid direct-care positions.
- ORC§173.391 requires ODA to adopt rules to regulate certified providers of community-based long-term care services.
- ORC§173.392 requires ODA to adopt rules to govern contracts and grant agreements between area agencies on aging (AAAs) and providers<sup>5</sup> and to govern the payment for community-based long-term care services paid through those contracts and grant agreements.
- ORC§§173.42 and 173.422 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.
- ORC§173.434 authorizes ODA to adopt rules regarding the unified long-term care budget.
- ORC§§173.46 and 173.49 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.
- ORC§§173.50, 173.52, 173.53, and 173.54 authorize ODA to adopt rules for the Medicaid-funded components of the following programs: PACE, PASSPORT, Choices,<sup>6</sup> and Assisted Living Programs.
- ORC§§173.522, 173.543, 173.55, and 173.56 authorize ODA to adopt rules for the state-funded components of the PASSPORT and Assisted Living Programs.

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corporations, or local non-profit organizations may apply to ODA to participate in the program if future funding resuscitates the program from its dormancy. ODA has adopted a rule that applies if future funding resuscitates the program from its dormancy.

<sup>5</sup> The term used in rules is "AAA-provider agreements."

<sup>6</sup> HB59 (130th G.A.) authorized ODA and ODM to "collaborate to determine whether the Choices Program should continue to operate as a separate Medicaid waiver component or be terminated." The result was that the program was terminated and all individuals who were enrolled in the program were transferred to the PASSPORT Program, effective June 30, 2014.

- ORC§173.548 requires ODA to adopt rules to establish a process for choosing multiple-occupancy rooms over single-occupancy rooms in an assisted living facility that that participates in the Medicaid-funded component of the Assisted Living Program.
- ORC§173.55 requires ODA to adopt rules to implement the Unified Long-Term Care Waiting List.
- ORC§173.60 authorizes ODA to adopt rules to implement the Nursing Home Quality Initiative Program.
- ORC§1347.15 requires each state agency, including ODA, to adopt rules regulating access to the confidential personal information that ODA keeps.
- ORC§4766.14 requires ODA to administer and enforce the driver qualifications for ambulette providers working in an ODA-administered program, which appear in ORC§§ 4766.14 and 4766.15.
- ORC§5160.481 requires ODA to adopt rules that are consistent with ORC§§5160.45 to 5160.481 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:

- 45CFR1321.7(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."
- ORC§173.01 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.
- ORC§3923.50 requires the Ohio Department of Insurance to consult with ODA on rule proposals for the Ohio Long-Term Care Insurance Program.
- ORC§5162.66 requires the Ohio Department of Medicaid to consult with ODA on rule proposals for the Resident Protection Fund.

## ODA'S RULE DEVELOPMENT PROCESS + OFFICIAL OPPORTUNITIES TO PARTICIPATE

### 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 it would affect.

ORC§107.52 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 to evaluate possible adverse impacts.

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

ODA facilitates the online public-comment period by publishing its rule proposals and BIAs on the public-comment page of ODA's [Online Rules Library](#), which appears on ODA's website. After ODA publishes these documents on the public-comment page, ODA announces the opportunity to comment by sending an email notice to all subscribers<sup>7</sup> 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 (MoR) 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.

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<sup>7</sup> For subscription information, please see the section of this document entitled, "Notices of Official Opportunities to Participate."



## 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 Ohio](#), 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 MoR to CSIO's recommendations, and rule summaries and fiscal analyses (RSFAs).

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*

Any time ODA files a rule proposal according to ORC§119.03, that section requires ODA to conduct a public hearing on ODA's rule proposal during the 31<sup>st</sup> to the 40<sup>th</sup> 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 ORC§111.15, 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 expire, 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 a 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 41<sup>st</sup> to the 65<sup>th</sup> 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 a 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 stage of development.

If a rule does not meet any one of the 6 criteria, JCARR may 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 does not reject a rule proposal, and if the Ohio General Assembly does not 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 65<sup>th</sup> day of jurisdiction over a typical proposal or 90<sup>th</sup> 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 than once per week.

To subscribe, click the [subscription icon](#) in ODA's Online Rules Library.

One may additionally subscribe to JCARR's [Rule Watch Ohio](#) service.<sup>8</sup>

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<sup>8</sup> Rule Watch Ohio does not notify subscribers of online public-comment periods.

## ANYTIME OPPORTUNITIES TO PARTICIPATE

The opportunity to participate in ODA's rule development does not 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 development manager, at [rules@age.ohio.gov](mailto:rules@age.ohio.gov).
- Ohio businesses that believe ODA's rules have an adverse impact upon business may, at any time, send comments about the adverse impact of ODA's rules directly to CSIO through [CSIO's website](#).

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## CONTACT INFORMATION

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