

**Business Impact Analysis****Agency Name:** OHIO DEPARTMENT OF AGING**Package Title:** ASSISTED LIVING PROGRAM (MEDICAID-FUNDED COMPONENT)**Rule Number(s):** 173-38-01, 173-38-04, 173-38-05**Date:** October 25, 2017**Rule Types:**  
☒ **5-Year Review**  
☒ **Rescinded** 173-38-04, 173-38-05  
☒ **New** 173-38-04, 173-38-05  
☒ **Amended** 173-38-01  
☐ **No change**

The Common-Sense Initiative was established by Executive Order 2011-01K and placed within the Office of the Lieutenant Governor. Under the CSI Initiative, agencies should balance the critical objectives of all regulations with the costs of compliance by the regulated parties. Agencies should promote transparency, consistency, predictability, and flexibility in regulatory activities. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

**Regulatory Intent****1. Please briefly describe the regulations in plain language.**

*Please include the key provisions of the regulation as well as any proposed amendments.*

**OVERVIEW**

Chapters 173-38 regulates the *Medicaid-funded* component of the Assisted Living Program.

173-38-01 defines terms used in this chapter.

173-38-04 and 173-38-05 are informational (i.e., cross reference) rules. It would be natural for an assisted living provider wanting to become certified to be paid for providing assisted living services to individuals enrolled in the Assisted Living Program to first access either chapter of rules rather than the rules in Chapter 173-39. Their purpose is to direct readers to other rules.

173-38-04 lets readers know what rule to comply with to become a provider for the Assisted Living Program. Without these rules, a person reading the chapter on the Medicaid-funded component of the program (Chapter 173-38) may not know that Chapter 173-39 requires providers to be certified by ODA.

173-38-05 lets readers know what services are covered by the Assisted Living Program. Without the rule, a person reading the chapter on the program may not know what services are covered or know to look in Chapter 173-39 for rules regulating those services.

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After reviewing the rules top-to-bottom,<sup>1</sup> ODA proposes to amend 173-38-01 and to rescind current rules 173-38-04 and 173-38-05 and adopt new rules in their places to comply with the LSC's 50% guideline.<sup>2</sup>

### SPECIFIC AMENDMENTS

ODA's analysis of its website usage shows most people access rules on ODA's website by search engines (e.g., Google). To make finding the appropriate rules easier, ODA proposes to add *Assisted living program (medicaid-funded component)*<sup>3</sup> to the beginning of the titles for 173-38-04 and 173-38-05.

ODA proposes to replace *may* with *shall* in paragraph (A) in 173-38-04. Although providers have an option on whether or not to apply, they do not have an option on the rule regulating the application process for provider certification.

ODA proposes to delete paragraph (B) in 173-38-05 because the language in the paragraph unnecessarily duplicates a requirement for every ODA-certified assisted living provider in paragraph (E)(1)(b) of 173-39-02.

ODA proposes to use standard terminology and format with other recently revised ODA rules. To standardize terminology, ODA proposes to replace *consumer* with *individual*, *furnish* with *provide*, *ODA (or ODA's designee)* with *ODA or its designee*, and *reimburse* with *pay*. To standardize format, ODA proposes to replace multi-paragraph run-on sentences with complete sentences in paragraphs ending in periods.

## 2. Please list the Ohio statute authorizing the Agency to adopt these regulations.

§§ [173.01](#), [173.02](#), [173.54](#).

## 3. Does the regulation implement a federal requirement? Is the proposed regulation being adopted or amended to enable the state to obtain or maintain approval to administer and enforce a federal law or to participate in a federal program?

*If yes, please briefly explain the source and substance of the federal requirement.*

In order for the Centers for Medicare and Medicaid Services (CMS) to approve Ohio's application to for a Medicaid waiver authorizing the State to launch and maintain the Assisted Living Program, 42 CFR 441.352 requires ODA to assure CMS in the waiver application that ODA has established adequate requirements for assisted living providers and that ODA will monitor providers to assure providers are meeting those requirements. Chapter 173-38 regulates the Medicaid-funded component of the Assisted Living Program. While no rule in the chapter directly regulates a provider, it directs providers to rules that directly regulate them which gives ODA greater assurance providers reviewing this chapter of rules can quickly find the rules in Chapter 173-39 regulating them.

## 4. If the regulation includes provisions not specifically required by the federal government, please explain the rationale for exceeding the federal requirement.

ODA is not exceeding any federal requirements by retaining or amending these rules.

## 5. What is the public purpose for this regulation (i.e., why does the Agency feel that there needs to be any regulation in this area at all)?

As ODA mentioned in its response to question #1, the rules are informational rules. Their purpose is to direct readers to other rules.

Without 173-38-04, a person reading the chapter on the Medicaid-funded component of the program (Chapter 173-38) may not know that Chapter 173-39 requires providers to be certified by ODA.

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<sup>1</sup> ORC§106.03 requires each state agency to review each rule before the rule's review deadlines, which JCARR can extend.

<sup>2</sup> OHIO LEGISLATIVE SERVICE COMMISSION, *Rule Drafting Manual*, 4<sup>th</sup> ed., (May, 2006) §4.3.1.

<sup>3</sup> §5.3 of the Legislative Service Commission's *Rule Drafting Manual* prohibits capitalizing most letters, including those in rule titles other than the first letter and the *M* in *Medicaid*.

Without 173-38-05, a person reading the chapter on the program may not know what services are covered or know to look in Chapter 173-39 for rules regulating those services.

**6. How will the Agency measure the success of this regulation in terms of outputs and/or outcomes?**

ODA monitors its designees for compliance.

ODA (and its designees) monitors providers for compliance.

**Development of the Regulation**

**7. Please list the stakeholders included by the Agency in the development or initial review of the draft regulation.**

*If applicable, please include the date and medium by which the stakeholders were initially contacted.*

On September 22, 2017, ODA emailed the following businesses and organizations to inform them of an opportunity to review these rules, then provide ODA with recommendations for improving them:

- 4 Providers:
  - Alzheimer's and Dementia Care Services.
  - Home Care by Black Stone.
  - National Church Residences (NCR).
  - Senior Resource Connection.
- 7 Provider Associations:
  - LeadingAge Ohio.
  - Ohio Academy of Senior Health Sciences, Inc.
  - Ohio Assisted Living Association.
  - Ohio Association of Medical Equipment Services.
  - Ohio Council for Home Care and Hospice.
  - Ohio Health Care Association.
  - Ohio Jewish Communities.
- 1 PASSPORT Administrative Agency: Catholic Social Services of the Miami Valley.
- 1 Association Representing Many PASSPORT Administrative Agencies: Ohio Association of Area Agencies on Aging (O4A).

ODA requested responding before September 30, but later extended the deadline to October 2.

**8. What input was provided by the stakeholders, and how did that input affect the draft regulation being proposed by the Agency?**

In response to ODA's email invitations on September 22, 2017 to review, and comment upon, this and other rules, and ODA received 1 comments from 1 stakeholder. ODA lists the comment, and ODA's response, in the table below.

	COMMENT	ODA'S RESPONSE
1	TERMINOLOGY LeadingAge Ohio agrees with ODA's proposal to include RCF in the definitions of "residential care facilities" thus allowing for the use of the acronym throughout.  LeadingAge Ohio	Thank you.

**9. What scientific data was used to develop the rule or the measurable outcomes of the rule? How does this data support the regulation being proposed?**

ODA is not proposing to amend the rules based upon scientific data.

**10. What alternative regulations (or specific provisions within the regulation) did the Agency consider, and why did it determine that these alternatives were not appropriate? If none, why didn't the Agency consider regulatory alternatives?**

ODA did not consider any alternative regulations. Please review ODA's response to #3.

**11. Did the Agency specifically consider a performance-based regulation? Please explain. *Performance-based regulations define the required outcome, but don't dictate the process the regulated stakeholders must use to achieve compliance.***

ODA did not consider performance-based regulations when considering whether to amend these rules.

**12. What measures did the Agency take to ensure that this regulation does not duplicate an existing Ohio regulation?**

ORC§173.54 authorizes ODA (*i.e.*, not any other state agency) to adopt rules to administer the Medicaid-funded component of the Assisted Living Program.

**13. Please describe the Agency's plan for implementation of the regulation, including any measures to ensure that the regulation is applied consistently and predictably for the regulated community.**

Before the rules would take effect, ODA will post them on ODA's [website](#). ODA also sends an email to subscribers of our rule-notification service to feature the rules.

Through its regular monitoring activities, ODA and its designees will monitor providers for compliance. [173-39-02](#) requires all providers to allow ODA and its designees to monitor.

### **Adverse Impact to Business**

**14. Provide a summary of the estimated cost of compliance with the rule. Specifically, please do the following:**

**a. Identify the scope of the impacted business community;**

Each ODA-certified provider of assisted living services.

**b. Identify the nature of the adverse impact (e.g., license fees, fines, employer time for compliance); and**

Rules comprised of definitions and rules comprised of cross references exist to assist providers when they read the rules. In themselves, they make no requirements upon providers.

The requirement for providers to be certified in 173-38-04 highlights the certification requirements in ORC§173.391. The actual requirements for certified providers are in 173-39-2.16 and 173-39-02.17 and the process for becoming certified is in 173-39-03. These rules reference those rules, but creates no actual requirements.

**c. Quantify the expected adverse impact from the regulation.**

*The adverse impact can be quantified in terms of dollars, hours to comply, or other factors; and may be estimated for the entire regulated population or for a*

*“representative business.” Please include the source for your information/estimated impact.*

There is no adverse impact. Please see ODA's response to #14.b.

**15. Why did the Agency determine that the regulatory intent justifies the adverse impact to the regulated business community?**

There is no adverse impact. Please see ODA's response to #14.b.

**Regulatory Flexibility**

**16. Does the regulation provide any exemptions or alternative means of compliance for small businesses? Please explain.**

The rules treat all providers the same, regardless of their size. ODA does not discriminate between providers based upon the size of their business or organization. Providers regulated by these rules are typically small businesses according to ORC§119.14.

**17. How will the agency apply Ohio Revised Code section 119.14 (waiver of fines and penalties for paperwork violations and first-time offenders) into implementation of the regulation?**

ODA complies with the requirement in §119.14 to exempt small businesses from penalties for first-time paperwork violations if the business timely corrects the violation, but not if the violation is ineligible for such an exemption according to §119.14(C).

**18. What resources are available to assist small businesses with compliance of the regulation?**

ODA (and its designees) are available to help providers of all sizes with their questions. Any person may contact [Tom Simmons](#), ODA's policy development manager, with questions about the rule.

Additionally, ODA maintains an [online rules library](#) to help providers find rules regulating them. Providers may access the online library 24 hours per day, 365 days per year.

173-38-01                    **Assisted living program (medicaid-funded component):  
introduction and definitions.**

(A) Introduction: Chapter 173-38 of the Administrative Code regulates the medicaid-funded component of the assisted living program created under section 173.54 of the Revised Code. (See Chapter 173-51 of the Administrative Code for rules on the state-funded component of the assisted living program.)

(B) Definitions for this chapter:

"Assisted living program" ("program") means the home and community-based medicaid waiver program created under section 173.54 of the Revised Code that provides individuals enrolled in the program with the assisted living service under rule 173-39-02.16 of the Administrative Code and, in some cases, the community transition service under rule 173-39-02.17 of the Administrative Code, if the individuals reside in a residential care facility and would otherwise receive services in a nursing facility if the waiver program was not available.

"Authorized representative" has the same meaning as in rule 5160-1-33 of the Administrative Code.

"Form JFS07200" means "form JFS07200 'Request for Cash, Food, and Medical Assistance.' (rev. 10/2016)" The Ohio department of job and family services publishes the form on <http://www.odjfs.state.oh.us/forms/>." It is available to the general public at no cost.

"Form ODA1115" means "form ODA1115 'Financial Assessment Worksheet.' (rev. 09/2011)" ODA publishes the form on [www.aging.ohio.gov](http://www.aging.ohio.gov). It is available to the general public at no cost.

"Form ODA1116" means "form ODA1116 'Enrollment Agreement.' (rev. 09/2011)" ODA publishes the form on [www.aging.ohio.gov](http://www.aging.ohio.gov). It is available to the general public at no cost.

"Form ODA1117" means "form ODA1117 'Notice of Proposed Action and Opportunity for Hearing' (rev. 04/2012)" ODA publishes the form on [www.aging.ohio.gov](http://www.aging.ohio.gov). It is available to the general public at no cost.

"Form ODM02399" means "form ODM02399 'Request for Medicaid Home and Community-Based Services (HCBS)' (07/2014)." ODM publishes the form on <http://medicaid.ohio.gov/RESOURCES/Publications/MedicaidForms.aspx>. It is available to the general public at no cost.

"ODA" means "the Ohio department of aging.

"ODA's designee" has the same meaning as in rule 173-39-01 of the Administrative Code.

"ODM" means "the Ohio department of medicaid."

"ODM's administrative agency" has the same meaning as "administrative agency" in rule 5160:1-1-01 of the Administrative Code.

"Residential care facility" (RCF) has the same meaning as in section 3721.01 of the Revised Code.

"Service plan" means the written outline of the goods or services that a case manager authorizes a provider to provide to an individual, regardless of the funding source for those goods or services. "Service plan" includes the person-centered planning in rule 5160-44-02 of the Administrative Code.

TO BE RESCINDED

173-38-04

**Provider certification.**

New draft uses *RCF*.

New draft uses *shall*.

(A) A person or entity that seeks to become an ODA-certified assisted living provider may apply to become so under rule 173-39-03 of the Administrative Code.

(B) "Assisted living provider" means a residential care facility that is licensed by the department of health and that ODA certifies to provide services according to rules 173-39-02.16 and 173-39-02.17 of the Administrative Code.

Unnecessary definition.  
Some parts of sentence  
added to previous sentence.

173-38-04

Assisted living program (medicaid-funded): provider certification.

An RCF seeking to become an assisted living provider certified by ODA to provide goods and services according to rules 173-39-02.16 and 173-39-02.17 of the Administrative Code shall apply to become so according to rule 173-39-03 of the Administrative Code.

TO BE RESCINDED

173-38-05

**Covered services.**

(A) A consumer's service plan may authorize no more than these two services:

- (1) The assisted living service under rule 173-39-02.16 of the Administrative Code;  
and,
- (2) The community transition service under rule 173-39-02.17 of the Administrative Code.

(B) While a provider may provide a consumer who is enrolled in the medicaid-funded component of the assisted living program with a service that is not authorized in the consumer's service plan, ODA (or ODA's designee) shall not reimburse a provider for any service that is not explicitly authorized in the consumer's service plan.

This duplicates a requirement in 173-39-02(E)(1)(b). It doesn't appear in the new rule.

173-38-05

**Assisted living program (medicaid-funded): covered services.**

An individual's service plan may authorize no more than the following two services:

(A) The assisted living service under rule 173-39-02.16 of the Administrative Code.

(B) The community transition service under rule 173-39-02.17 of the Administrative Code.