Business Impact Analysis

Agency Name: OHIO DEPARTMENT OF AGING

Package Title: MISCELLANEOUS UPDATES

Rule Numbers: 173-9-10, 173-11-03, 173-39-02.2, 173-39-02.7, 173-39-02.19, 173-39-02.21

Date: Sept. 5, 2018

Rule Types:
- ☑ **5-Year Review** All of the above
- ☑ **Rescinded** 173-39-02.21
- ☑ **New** 173-39-02.21
- ☑ **Amended** All of the above, except 173-39-02.21
- ☐ **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

ODA reviewed each of the rules in this package, as required at least once before each rule's 5-year deadline. ODA now proposes to make non-substantive amendments to each rule.

173-9-10

This rule provides links between the requirements of Chapter 173-9 and other rules or agreements establishing the means by which a responsible party would face consequences for failure to comply with Chapter 173-9. ODA proposes to update the rule's terminology.

173-11-03

This rule regulates the application process for the Senior Facilities Program. ODA proposes to make the following non-substantive updates to the rule's terminology.

173-39-02.2

This rule establishes the requirements for ODA-certified providers of alternative meals. ODA proposes to make the following non-substantive updates to the rule's terminology.

173-39-02.7
This rule establishes the requirements for ODA-certified providers of home medical equipment and supplies. ODA proposes to correct an incorrect cross-reference in the rule. In response to a stakeholder comment,[1] ODA proposes to add a statement to clarify that ongoing assistance is part of a unit of home medical equipment and supplies.

173-39-02.19
This rule regulates the kosher option under OAC § 173.524 for ODA-certified providers of home-delivered meals. When ODA first adopted this rule in 2009, ODA asked the Ohio Jewish Communities (OJC) for their recommendations for distinguishing kosher from non-kosher. OJC recommended language allowing providers to provide home-delivered meals certified as kosher by (1) a recognized kosher certification *or* (2) a kosher establishment under orthodox rabbinic supervision. OJC's recommended language did not require only one type of kosher. This has worked because ODA has no authority to certify/endorse one type of kosher certification/supervision over another. Therefore, ODA proposes to retain this language on this matter. However, ODA proposes to update the rule's terminology in non-substantive ways.

173-39-02.21
This rule establishes scheduling requirements for ODA-certified providers of personal care and choices home care attendant services. ODA proposes to rescind this rule and to adopt a new rule in its place. Compared to the current rule, the proposed new rule contains updated terminology and the following clarified language on agency scheduling:

- Current Rule: "No agency shall accept a referral to furnish the personal care service to a consumer unless it has *the staff capacity* to furnish the number of hours *requested* for each consumer."
- Proposed New Rule: "No agency shall accept a referral to provide personal care to an individual unless it has *adequate staffing levels of PCAs and PCA supervisors* to provide the number of hours *ODA's designee authorized* for each individual."

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

173-9-10: ORC §§ 173.01, 173.02, 173.38, 173.381, 173.391, 173.392.

173-11-03: ORC §§ 173.01, 173.02, 173.11.

173-39-02.2, 173-39-02.7, 173-39-02.19, 173-39-02.21: ORC §§ 173.01, 173.02, 173.391, 173.52, and 173.522.

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.

173-9-10: This rule does not implement federal requirements, but does refer to 42 C.F.R. Part 460, Subpart D.

173-11-03: This rule does not implement federal requirements.

173-39-02.2, 173-39-02.7, 173-39-02.19, 173-39-02.21: In order for the Centers for Medicare and Medicaid Services (CMS) to approve Ohio's application for a Medicaid wavier authorizing the State to launch and maintain the PASSPORT Program, 42 CFR 441.352 requires ODA to assure CMS in the waiver application that ODA established adequate requirements for providers (*i.e.*, adopted these rules) and that ODA monitors the providers to assure they comply with those requirements (*i.e.*, complies with these rules).

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

[1] Please review ODA's response in #8 of this rule, to a comment on 173-39-02.7(B)(2).

The rules exist to comply with the state laws mentioned in ODA's response to #2, which establish the requirements for background checks, the Senior Facilities Program, ODA-certified providers, and the PASSPORT Program.

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)?

173-9-10: This rule provides links between the requirements in Chapter 173-9 and other rules or agreements establishing the means by which ODA (or its designees) may discipline a responsible party for non-compliance with Chapter 173-9. Without this rule, readers of Chapter 173-9 may be unaware that other bodies of law apply to their compliance to this chapter. Additionally, ORC §§ 173.38 and 173.381 require ODA to adopt rules on background checks.

173-11-03: Although the program has been dormant for the past 18 years,[2] ORC § 173.11 continues to establish the program and require ODA to adopt rules for that program. As a result, ODA diligently reviews and updates this rule at least once every 5 years.

173-39-02.2, 173-39-02.7: These rules ensure necessary safeguards are in place to protect the health and safety of individuals receiving services from ODA-certified providers.

173-39-02.19: This rule exists to establish the requirements for ODA-certified providers of home-delivered meals when providing kosher meals. Specifically, since ORC § 173.524 requires ODA to ensure kosher meals individuals request are kosher, this rule establishes the means by which ODA determines if meals are kosher. Please review ODA's response to #1 for details.

173-39-02.21: This rule exists to keep individuals receiving personal care safe from an overworked participant-directed provider who may, without the rule's limits, seek employment from more than 5 individuals (*i.e.*, employers) per week or work for more than 56 hours per week. This rule prohibits participant-directed providers from working more than 40 hours per week for 1 individuals (*i.e.*, employer), unless an emergency exists, which protects the individual from paying for overtime. This rule also prohibits agency providers from accepting referrals to provide personal care if they do not have adequate staffing to do so.

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

173-11-03: NA (The program is dormant.)

173-9-10, 173-39-02.2, 173-39-02.7, 173-39-02.19, 173-39-02.21: ODA and its designees monitor providers to ensure compliance for the continued health and safety of individuals receiving services through ODA-administered programs. The rules are judged as being successful when ODA and its designees find few violations from structural reviews or investigations of alleged incidents.

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.

[2] In 1978, H.B.1084 (112th G.A.) established the Senior Facilities Program and, in 1980 and 1984, H.B. 827 (113th G.A.) and H.B. 660 (115th G.A.) respectively modified the program. However, since 2001, the General Assembly has not funded it. Additionally, no person or organization has awarded a grant or gift to the program. As a result, it has been dormant for the past 18 years. In 2013-2014, ODA worked with the Common-Sense Initiative Office (CSIO) to reduce Chapter 173-11 to the only remaining rule and to require ODA to adopt rules to define terms, eligibility requirements, and post-award requirements for the program if the program receives funding from the General Assembly, a grant, or gift. For more information, please review CSIO's recommendation letter on Nov. 14, 2013.

On Jul. 10, 2018, ODA sent an email to the following stakeholders that included drafts of the rules in this package and an invitation to offer ODA comments on them:

Associations Representing Providers	Other Organizations
1. LeadingAge Ohio 2. Ohio Academy of Senior Health Sciences, Inc. 3. Ohio Assisted Living Assn. 4. Ohio Assn. of Medical Equipment Suppliers. 5. Ohio Assn. of Senior Centers. 6. Ohio Council for Home Care and Hospice. 7. Ohio Health Care Assn. 8. Ohio Jewish Communities.	1. Ohio Assn. of Area Agencies on Aging. 2. Catholic Social Services of the Miami Valley (CSS).

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

To its Jul. 10, 2018 email, ODA only received comments from Kathy Geise on behalf of CSS. The table below lists CSS' comments and ODA's responses to them.

Comments	ODA's Responses
On 173-9-10(D) I suggest to take out the word Whatever	It is appropriate to retain "whatever" in paragraph (D). The word also appears in similar sentences in paragraphs (A), (B), and (C) of this rule.
On 173-9-10 It would be helpful to include the 6 ODA approved codes in the rule.	Fingerprint codes and WebCheck machines are under the jurisdiction of the Ohio Attorney General. They are not required by statutes governing ODA and are not regulated by ODA's rules. Instead, the Ohio Attorney General's Bureau of Criminal Identification and Investigation require entering the codes before scanning fingerprints on their WebCheck machines.
On 173-39-02.2 Is it necessary to keep this rule as I do not see any PASSPORT providers for this?	42 CFR 441.352 requires ODA to assure CMS in the approved waiver application that ODA established adequate requirements for providers and that ODA monitors the providers to assure they comply with those requirements. Because the approved waiver for the PASSPORT Program includes alternative meals as regulated by this rule, ODA must retain this rule even if no provider is currently certified to provide alternative meals.
On 173-39-02.7(B)(2) Verbiage is needed to state that the ongoing assistance is included in the cost of the item purchased.	The PASSPORT Program's payment for an item is an all-inclusive payment. It covers the item, plus any requirements incurred in complying with the rule.
On 173-39-02.7(B)(3) If the replacement is covered under warranty it is not reimbursable at all, correct? Just state not payable.	The paragraph accurately stays what is payable and what is not payable without further revision.

Comments	ODA's Responses
On 173-39-02.7(B)(4)(a) When is states the provider shall document, it would be helpful to the provider and to QA monitoring staff to define how they shall document.	That is up to the provider, so long as their documentation is consistent and compliant with this rule and all requirements in Chapter 173-39.
On 173-39-02.7(B)(5)(a) The verbiage here is confusing and I suggest the verification of the delivery shall include the individual's name, date of delivery and documentation of each activity completed such as installation or education.	The language in the paragraph addresses your concern without any need for revision.
On 173-39-02.7(B)(5)(a) Can we include what is the bill date, is it the date shipped or the date delivered?	(B)(5)(a) requires documenting the date of *delivery*, not the date of *shipping* or *billing*.
On 173-39-02.7(B)(5)(b)(ii) Since the HME rule was revised in May 2018 CSS had a common carrier deliver a package to the apartment buildings as the driver left the package in the lobby of her apartment complex. The individual's aide happened to be in the apartment building providing services at the time of delivery and was able to get the box up to her apartment, as the individual was unable to get the package up to her apartment on her own. The individual had to call UPS to set up delivery to her door and the care manager had to care plan that the delivery must be to the individual's door. This issue was brought up with the ODA provider network staff at the May 2018 training. I know the HME rule was updated to be consistent with other rules, but requiring the signature prevented problems with the items being delivered to a lobby of an apartment building.	(B)(5)(b)(ii) allows for tracking statements in lieu of the individual's signature. There is no need for an amendment.
On 173-39-02.7(B)(5)(d) Is the rule supposed to say SHALL or Is the name of the delivery person required? This person has direct contact with the individual and the name is important to have.	This paragraph pertains to conflict of interest. For example, a delivery person is ineligible to verify the successful completion of a delivery he/she made.

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 obtained data on the volume of providers and the amounts providers charge the PASSPORT Program from its databases. Find them in ODA's response to #14 of this BIA.

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 is statutorily tasked with developing rules establishing the requirements for ODA-certified providers. Additionally, these rules meet the federal requirement to establish adequate requirements for providers to assure the health and safety of individuals enrolled in ODA-administered waiver programs.

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?

The ORC sections listed in #3 only authorizes ODA to develop requirements for (1) background checks for direct-care positions providing services to consumers/individuals through ODA-administered programs, (2) the Senior Facilities Program, and (3) ODA-certified providers of services to individuals enrolled in ODA-administered programs.

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 proposed new rules take effect, ODA will post them on ODA's website. ODA will also send an email to subscribers of our rule-notification service to feature the rule.

Through its regular monitoring activities, ODA and its designees will monitor providers for compliance.

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;

173-9-10: Every responsible party. 173-9-01 defines "responsible party" as follows:

- When hiring an applicant for, or retaining an employee in, a paid direct-care position, "responsible party" means the area agency on aging, PASSPORT administrative agency, provider, or sub-contractor.
- When hiring an applicant for, or retaining an employee in, a paid direct-care position in a participant-direction or self-direction arrangement, "responsible party" means the consumer or individual.
- When considering a self-employed applicant for ODA-certification under section 173.391 of the Revised Code or a self-employed person already ODA-certified section 173.391 of the Revised Code, "responsible party" means the ODA or the PASSPORT administrative agency.
- When considering a self-employed bidder for an AAA-provider agreement under section 173.392 of the Revised Code or a self-employed person already in an AAA-provider agreement under section 173.392 of the Revised Code, "responsible party" means the area agency on aging.

173-11-03: Counties, townships, municipal corporations, existing senior centers, or other local non-profit organizations.

173-39-02.2, 173-39-02.7, 173-39-02.19, 173-39-02.21: As indicated in the table below, so far this year, the following number of providers are certified to provide the services regulated by these rules.

2018 Year to Date		
Rule	Service	# of Certified Providers
173-39-02.2	Alternative Meals	0
173-39-02.7	Home Medical Equipment & Supplies	142
173-39-02.19	Home-Delivered Meals Kosher	9[3]
173-39-02.21	Personal Care	

[3] ODA presently has 99 providers certified to provide home-delivered meals. Only 9 of those providers deliver kosher meals.

	• Agency Providers • Participant-Directed Providers	994 60
173-39-02.21	Choices Home Care Attendant Service	867

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

173-9-10: This rule has no direct adverse impact. Instead, this rule provides links between the requirements in Chapter 173-9 and other rules or agreements establishing the means by which ODA (or its designees) may discipline a responsible party for non-compliance with Chapter 173-9. This rule's indirect adverse impact is the discipline a responsible party would receive under the rules or agreements cited in this rule. However, the only responsible parties to experience the adverse impact would be those who are non-compliant with Chapter 173-9.

173-11-03: If this program becomes funded, counties, townships, municipal corporations, existing senior centers, or other local non-profit organizations who want funds, would need to apply to receive those funds.

173-39-02.2: ORC § 173.391 requires ODA to adopt rules to establish certification requirements. 173-39-02 establishes the requirements for all providers to become, and to remain, certified by ODA. This rule establishes additional requirements for provider of alternative meals to become, and to remain, certified by ODA. These include the following:

- Purchasing kosher certification/supervision services and/or purchasing food from a supplier with kosher certification/supervision services.
- Complying with the requirements for home-delivered meals in 173-39-02.14.
- Complying with the basic requirements for all ODA-certified providers in 173-39-02.

173-39-02.7: ORC § 173.391 requires ODA to adopt rules to establish certification requirements. 173-39-02 establishes the requirements for all providers to become, and to remain, certified by ODA. This rule establishes additional requirements for provider of home medical equipment and supplies to become, and to remain, certified by ODA. These include the following:

- Providing ongoing assistance (*i.e.*, customer service) for equipment provided to individuals.
- Upholding equipment warranties.
- Billing the PASSPORT Program only for portions of bills not covered by another liable insurer or program (*e.g.*, Medicare).
- Verifying the successful completion of deliveries.
- Complying with the basic requirements for all ODA-certified providers in 173-39-02.

173-39-02.19: ORC § 173.391 requires ODA to adopt rules to establish certification requirements. 173-39-02 establishes the requirements for all providers to become, and to remain, certified by ODA. 173-39-02.14 establishes additional requirements for provider of home-delivered meals to become, and to remain, certified by ODA. This rule establishes requirements for ODA-certified providers of home-delivered meals when providing kosher meals. These requirements include the following:

- Purchasing kosher certification/supervision services and/or purchasing food from a supplier with kosher certification/supervision services.
- Complying with the requirements for all providers of home-delivered meals in 173-39-02.14.
- Complying with the basic requirements for all ODA-certified providers in 173-39-02.

173-39-02.21: This rule prohibits agency providers from accepting referrals if they do not have adequate staffing to provide the personal care. This rule also prohibits participant-directed providers, who are employees of the individuals, form providing services to more than 5 individuals per week, from working more than 40 hours per week for any single individual (except in emergencies), and from working more than 56 hours per week for 2-5 individuals.

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.

173-9-10: This rule provides links between the requirements in Chapter 173-9 and other rules or agreements establishing the means by which ODA (or its designees) may discipline a responsible party for non-compliance with Chapter 173-9. Without this rule, readers of Chapter 173-9 may be unaware that other bodies of law apply to their compliance to this chapter. Additionally, ORC §§ 173.38 and 173.381 require ODA to adopt rules on background checks.

Because ODA is only proposing to make non-substantive amendments to this rule, ODA is not proposing to change the adverse impact from previously-approved versions of this rule.

173-11-03: The cost of applying to receive funds cannot be calculated because there is presently no application for such funds. Additionally, the award of funds would offset any costs incurred while applying for those funds.

Because ODA is only proposing to make non-substantive amendments to this rule, ODA is not proposing to change the adverse impact from previously-approved versions of this rule.

173-39-02.2, 173-39-02.7, 173-39-02.19, AND 173-39-02.21: The amount ODA pays providers for services is an all-inclusive rate. It's intended to cover the daily costs incurred in service provision (*e.g.*, delivery verification) plus costs related to the employees (*e.g.*, background checks).

Providers set the prices they bill to the PASSPORT Program, so long as those prices do not exceed the maximum-possible payment of Medicaid funds for each unit of service offered in the PASSPORT Program. ODM establishes these maximum-possible rates in the appendix to 5160-1-06.1. The table below compares the average rate billed to the program to the maximum-possible rates allowed.

2018 YEAR TO DATE				
SERVICE	UNIT DURATION	UNITS PAID	*AVERAGE BILLED PER UNIT*	*MAXIMUM ODM ALLOWS PER UNIT*
Alternative Meals	1 meal	0	$0.00	$31.35
Home Medical Equipment & Supplies Ambulatory (1st item)	1 item	2,253	$343.68	$5,224.93
Home Medical Equipment & Supplies Ambulatory (2nd item)	1 item	47	$100.18	$5,224.93
Home Medical Equipment & Supplies Ambulatory (3rd item)	1 item	25	$189.20	$5,224.93
Home Medical Equipment & Supplies Non-Ambulatory (1st item)	1 item	10,643	$62.82	$5,224.93
Home Medical Equipment & Supplies Non-Ambulatory (2nd item)	1 item	167	$133.41	$5,224.93
Home Medical Equipment & Supplies Non-Ambulatory (3rd item)	1 item	39	$129.43	$5,224.93
Home Medical Equipment & Supplies Hygiene & Disposables (1st item)	1 item	11,671	$40.58	$5,224.93
Home Medical Equipment & Supplies Hygiene & Disposables (2nd item)	1 item	454	$48.30	$5,224.93
Home Medical Equipment & Supplies Hygiene & Disposables (3rd item)	1 item	151	$53.42	$5,224.93
Home Medical Equipment & Supplies Nutritional Supplements & Supplies	1 item	1,140	$110.19	$5,224.93
Home Medical Equipment & Supplies Equipment Repair	1 item	850	$141.22	$5,224.93
Home-Delivered Meals Regular	1 meal	2,339,643	$5.89	$6.60

2018 Year to Date				
Service	Unit Duration	Units Paid	*Average Billed Per Unit*	*Maximum ODM Allows Per Unit*
Home-Delivered Meals Kosher	1 meal	26,964	$8.10	$9.33
Personal Care by Agency Providers	15 mins.	25,894,978	$4.37	$4.49
Personal Care by Participant-Directed Providers	15 mins.	43,850	$3.13	$3.13
Choices Home Care Attendant Service	15 mins.	1,849,227	$3.21	$6.25

Because ODA is only proposing to make non-substantive amendments to these rules, ODA is not proposing to change the adverse impact from previously-approved versions of these rules.

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

173-9-10: Responsible parties only need to conduct background checks if they are considering hiring an applicant or retaining an employee in a paid direct-care position providing services through an ODA-administered program. Responsible parties are not required to provide services through ODA-administered programs, but if they do, they would be paid with funds administered by ODA for those services. Additionally, this rule is part of a chapter of rules. The goal of the chapter is to ensure background checks are done to protect consumers/individuals who are in a condition to require in-home services from having disqualified persons enter their homes to provide those services.

173-11-03: No funds currently exist for this program. If funds become available, counties, townships, municipal corporations, existing senior centers, and local non-profit organizations would not be required to take any action unless they voluntarily decide to apply to ODA to receive funds. Receiving funds through the program would justify any expense involved in applying for those funds.

173-39-02.2, 173-39-02.7, 173-39-02.19, AND 173-39-02.21: Providers voluntarily apply for ODA certification. Certification is not required to engage in providing a service unless a provider wants paid for providing that service by an ODA-administered program requiring certification, such as the PASSPORT Program.

Because agency providers on average bill less than the maximum-possible rate,[4] the adverse impacts of the current rules are being covered by the amount providers are currently being paid by the PASSPORT Program.

Regulatory Flexibility

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

173-11-03: NA

173-9-10, 173-39-02.2, 173-39-02.7, 173-39-02.19, AND 173-39-02.21: Because the primary purpose of these rules is to ensure the health and safety of individuals enrolled in ODA-administered programs, the rules treat all providers the same, regardless of their size.

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 is concerned primarily about protecting the health and safety of individuals receiving services through ODA-administered programs. Whenever possible, ODA or its designees will treat administrative violations that do not involve health and safety as opportunities for improvement through warning notices and solicitation of corrective action.

[4] Please review the table in ODA's response to #14c.

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 rules.

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.