CSI - Ohio
The Common Sense Initiative

Business Impact Analysis

Agency Name:	OHIO DEPARTMENT OF AGING
Package Title:	BACKGROUND CHECKS: DATABASE REVIEWS
Rule Numbers:	173-9-03, 173-9-03.1
Date:	September 5, 2018
Rule Types:	☑ **5-Year Review** 173-9-03, 173-9-03.1
	☐ **Rescinded**
	☐ **New**
	☑ **Amended** 173-9-03, 173-9-03.1
	☐ **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.

WHICH RULES?

Chapter 173-9 requires responsible parties to conduct background checks[1] for direct-care positions serving consumers/individuals receiving services through ODA-administered programs, unless exempted by § 173.38, § 173.381, or 173-9-02. ODA proposes to amend 2 rules from this chapter:

- 173-9-03 requires responsible parties to conduct database reviews on applicants and employees in direct-care positions to see if an applicant's or employee's status in any of those databases would prohibit the provider from hiring the applicant or retaining the employee in a direct-care position.
- 173-9-03.1 requires responsible parties to conduct database reviews on self-employed[2] applicants to become/remain certified under ORC § 173.391 or self-employed bidders to win/retain AAA-provider agreements under ORC § 173.392.

As a cost-savings measure, these rules require reviewing these free-to-use databases to see if an applicant/employee is disqualified before paying for a criminal records check to do the same. Thus, if an applicant/employee is disqualified by the database reviews, there is no need to pay for a criminal records check. The state also offers the Automated Registry Check System (ARCS) as a free way to automate the process of reviewing an employee's status in the databases.

[1] *Background checks*, as used in this document, mean both database reviews and criminal record checks.
[2] As used in this document and in Chapter 173-9 of the Administrative Code, "self-employed" means "the state of working for one's self with no employees."

AMENDMENTS TO THOSE RULES

ODA and the Ohio Dept. of Medicaid (ODM) want to ensure that the results of database reviews and criminal records checks conducted according to ODA's rules are identical to the results of any database review or criminal records check conducted under ODM's rules. That way, the results count for both sets of rules at the same time. This is particularly meaningful for a direct-care position serving consumers/individuals in both an ODA-administered program and an ODM-administered program (*i.e.*, a person subject to 2 sets of background checks for the same direct-care position).

To make the database-review portion of background checks the same between ODA and ODM, ODA proposes to amend rules 173-9-03 and 173-9-03.1 to add a 7th database to review that is presently required by ODM, but not ODA. Responsible parties using ARCS will not need to manually review the 7th database because ARCS is slated to automatically review the 7th database.

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

ORC §§ 173.01, 173.02, 173.38, 173.381, 173.391, and 173.392.

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.

The rules exist to comply with the *state* laws ODA listed in its response to BIA question #2.

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

The rules exist to comply with the *state* laws ODA listed in its response to BIA question #2.

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)?

ORC §§ 173.38 and 173.381 authorize ODA to adopt requirements which protect ultimately protect consumers from being served by persons in a paid direct-care position who are disqualified because one or more of the databases list them as disqualified by their status (*e.g.*, as a registered sex offender, as one found guilty of Medicare or Medicaid fraud).

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

- ODA monitors its AAAs for compliance.
- ODA and ODM monitor PAAs for compliance.
- ODA and CMS monitor PACE organizations for compliance.
- ODA and its designees monitor providers for compliance.

Development of the Regulations

7. Please list the stakeholders included by the Agency in the development or initial review of the draft regulations.
If applicable, please include the date and medium by which the stakeholders were initially contacted.

On August 23, 2018, ODA emailed the following 16 Ohio businesses and organizations to solicit their input.

Providers: 1. Alzheimer's and Dementia Care Services of NW Ohio. 2. Home Care by Black Stone. 3. Licking County Aging Program (LCAP). 4. LifeCare Alliance. 5. National Church Residences (NCR). 6. Senior Resource Connection.	**Provider Associations:** 1. LeadingAge Ohio. 2. Ohio Academy of Senior Health Sciences, Inc. 3. Ohio Assisted Living Association. 4. Ohio Association of Medical Equipment Services. 5. Ohio Council for Home Care and Hospice. 6. Ohio Health Care Association. 7. Ohio Jewish Communities.
PAA: Catholic Social Services of the Miami Valley.	**Association Representing 12 AAAs/PAAs:** Ohio Association of Area Agencies on Aging (O4A).
State Long-Term Care Ombudsman	

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

ODA received input from 9 of the 16 stakeholders it emailed on August 23, 2018. ODA lists the input and its responses to any questions, in the table below.

	STAKEHOLDER INPUT + QUESTIONS	ODA's RESPONSES
1.	I don't think we can be too careful these days when screening applicants, especially in today's job market where we are desperate to hire anybody. We are enrolled in ARCS and Rapback so it's definitely no skin off our back. However, for the agencies who are checking the 6 databases individually, I don't see that adding a 7th would cause any hardship. Besides, there is probably quite a bit of overlap among agencies who are both ODA and ODM providers, even if it's only PASSPORT. I would be OK with the change/addition. *Dave Bibler, Executive Director of LCAP*	Thank you.
2.	Yes, these amendments to ODA's background check rules are very appropriate to match the ODM amended rules that went into effect on April 1, 2018. This is in line with the Governor's Office on Health Transformation, the Health and Human Services agencies (Aging, DD, Health & Medicaid) and the LSC language from HB 487 (MBR) bill that passed June 2012 to create uniformity of HCBS background checks. Thank you for giving OCHCH the opportunity to comment. *Beth Foster, Regulatory Affairs Director, Ohio Council for Home Care and Hospice*	Thank you.

	STAKEHOLDER INPUT + QUESTIONS	ODA's RESPONSES
3.	It seems adding an additional on-line background check should not be too much of an issue. Basically, it is one more check. I do have some questions and thoughts about the proposed rule.	Thank you.
	First, I do live in an urban area with high speed internet access so it would be likely an additional 15 minutes for me to do a seventh check. That being said, I do not know if providers in rural areas have feedback about internet speed and if this is a barrier.	We appreciate your concern. Fortunately, since the time ODA first proposed to require database reviews in 2012, no provider—rural or otherwise—has commented on ODA's rules about an inability to access the databases.
	I did look at the exclusion and suspension list on the Medicaid website. It is currently an excel spreadsheet with a little over 1200 individual and provider names listed. I would imagine that this list is being updated on a regular basis and could potentially become unwieldy to review and someone may be easily missed. I wonder if there is an easier way to search this, similar to the other websites where an individual's name is entered and the website conducts the search? There seems to be a potential for some margin of error with this list in the current format.	Providers have flexibility in how to document in the employee's records the date and results of the database review, so long as they comply all applicable requirements of ODA's for record retention. ODM has expressed their plans to update ARCS in the future so that it automatically reviews this 7th database. If this happens, the enrollment in ARCS would be sufficient evidence of reviewing databases.
	I would also want some clarity and guidelines in regards to how this will be interpreted when we have our regular medicaid review. How will a provider document and verify that the provider checked this list prior to hiring someone? Will providers need to go back and review this list for current employees and document this? If so, how should this be done and within what time frame? Please also provider clarity to the individuals who conduct the Medicaid review for providers rather than them relying on their own individual interpretation of the rule.	Responsible parties would need to check any applicants for a direct-care position beginning with the effective date of this rule. For current employees, responsible parties would need to review this database when they would otherwise review all the databases required under this rule. The rules require responsible parties to check these databases before conducing any criminal records check, which means doing so no less often than once every 5 years. [*cf.* 173-9-03(B)(2) and 173-9-03.1(B)(2)]
	For individuals who are self-employed, I am not sure if I am qualified to comment. However, I do wonder if internet access is an issue and if it could be a potential barrier for someone becoming a caregiver for an individual. I spoke recently with a family caregiver who is trying to become a paid provider for a family member as she is carrying for him 24/7 and he lives with her. She noted to me that the application process is quite overwhelming and unclear to her.	Please review ODA's response to your comment on rural internet access.
	Also, from time to time when we have conducted the web checks and then moved to the fingerprinting process for individuals, for individuals who have poor ridge detail for their fingerprints, the process of obtaining a background check has been quite lengthy and cumbersome. It might be worth taking a look to see if there are other means to conduct these checks to avoid delays in the hiring process.	Please review this letter from the Ohio Attorney General's office regarding alternatives for those with illegible fingerprint impressions.
	Again, I hope my feedback is helpful. Please feel free to contact me if you have questions or need clarity.	

	STAKEHOLDER INPUT + QUESTIONS	ODA's RESPONSES
4.	[Ronnell] Comments from my team below… *We are already doing it in SW. It's a database that is checked with ARCS. We do not put an employee in the field without clean prints anyway, so if something shows up on that seventh database it most likely would show up on the fingerprints as well. I do not think this will be an issue at all.* *No real biggie-just adds the MEDICAID provider exclusion/suspension list to the list of 6 we already run* [Mari] Same as we are already doing it as well, also because we provide IO Waiver services, we already have to do Rap back too. *Ronnell Spears and Mari Willis, VPs of Personal Care, Home Care by Black Stone.*	Thanks you.
5.	[Lisa Garvic, Director of Human Resources and Operations,] said she does not see a problem with checking one additional Data Base. *Chuck Komp, President, Senior Resource Connection*	Thank you.
6.	This seems reasonable to us. *Beth Kowalczk, Ohio Association of Area Agencies on Aging*	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 did not develop the rules in this package according to 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. The rules must comply with §§ 173.38 and 173.381. Additionally, to provide employers in community-based long-term care with the same background-check standards in Ohio, ODA continues to maintain the requirements the Ohio Depts. of Aging, Developmental Disabilities, Health, and Medicaid agreed upon for our rules beginning on January 1, 2013.

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.***

From the perspective of applicants/employees: Rules on background checks are inherently performance-based regulations.

From the perspective of responsible parties: It would be inappropriate for ODA to set the standard for determining disqualification (*i.e.*, which databases determine a disqualifying status) and §§ 173.38 and 173.381 clearly authorize ODA to set such standards. However, responsible parties have options on whether to review the databases (1) manually or (2) automatically by enrolling in ARCS. In this sense, ODA does not dictate the process responsible parties must take to successfully review the databases.

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

§§ 173.38, 173.381, 173.391, and 173.392 only authorize ODA (*i.e.*, not any other state agency) to develop these rules.

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 Online Rules Library. ODA also sends an email to subscribers of our rule-notification service to feature the rules.

ODA (and its designees) routinely monitor responsible parties.

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;

Applicants/Employees: Applicants and employees may be disqualified from paid jobs in direct-care positions serving consumers/individuals through ODA-administered programs if their status in any one or more of 7 databases disqualifies them, unless exempted by § 173.38, § 173.381, or 173-9-02.

Responsible Parties: Responsible parties must review the status of applicants, employees, and self-employed providers in 7 databases, unless exempted by § 173.38, § 173.381, or 173-9-02.

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.
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> 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.

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

Cost: The direct adverse impact would be the cost of reviewing the databases.

Jobs: An indirect adverse impact would be disqualification. If 1 or more of the 7 databases lists a person as a sex offender, abuser, defrauder, etc. the responsible party would be prohibited from doing the following: (1) hiring the person into a paid direct-care position, (2) retaining the person in a paid direct-care position, (3) awarding an AAA-provider agreement to the person as a self-employed provider, or (4) certifying the person as a non-agency provider.

Time: Another indirect adverse impact is the time necessary for the responsible party to manually review the 7 databases if the responsible party doesn't use ARCS.

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.

Cost: The direct adverse impact of manually reviewing databases is $0.00, because the databases are free to the public. The direct adverse impact of using ARCS to review databases is $0.00, because the state offers ARCS to responsible parties free of charge. The requirement in the rule to review the databases before conducting a criminal records check saves money. If an applicant/employee is already disqualified by his/her status in a free-to-review database, it would be unreasonable for a responsible party spend money on a criminal records check.

Jobs: Any job not obtained or lost is more the result an applicant/employee disqualifying himself/herself rather than ODA's requirements to check databases to see if the applicant/employee is disqualified. A person would be disqualified by their disqualifying listing in SAM or OIG databases even if not mentioned in ODA's rules. Likewise, a person would be disqualified from a direct-care position to provide services to consumers/individuals through a Medicaid-funded program by their listing in the Medicaid exclusion/suspension list even if not mentioned in ODA's rules. In other cases, these rules determine that a person listed as a sex offender, abuser, etc. are disqualified from a direct-care position serving consumers/individuals through ODA-administered programs even if being listed in those databases would not otherwise disqualify the person apart from ODA's rules.

Time: Because most persons will not appear negatively in the databases, ODA estimates it takes approximately 5 minutes per applicant/employee for a responsible party to manually review all 7 databases. ARCS reviews the 7 databases on a daily basis to see if an employee's status in those databases is ever disqualifying. Therefore, a responsible party using ARCS is effectively free from any ongoing duties to manually review those databases again.

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

§§ 173.38 and 173.381 clearly authorize ODA to adopt these rules.

Ensuring the safety of consumers/individuals receiving services through ODA-administered programs outweighs the time necessary to review databases to determine the status of applicants and employees who would (or already do) provide services to the consumers/individuals.

Additionally, part of ODA's regulatory intent is to alleviate the impact of reviewing databases in the following existing and new ways:

- The state offers ARCS to automate database reviews on employees free of charge.
- These rules require responsible parties to review databases, which are free to access, before paying for a criminal records check. This saves responsible parties money when they are reviewing databases of disqualified applicants/employees. As previously stated, if an applicant/employee is disqualified by a database that is free to check, then a responsible party has no reason to pay for a criminal records check.
- ODA's proposal to require the same database reviews ODM requires will enable both ODA and ODM to deem database reviews properly conducted under the other agency's rules as compliant with their rules without any need to require responsible parties to review additional databases.

Regulatory Flexibility

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

The rules treat 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 this rule are typically small businesses according to § 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,[3] 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.

[3] §119.14 does not override a provider's need to conduct background checks pursuant to §173.38 or §173.381.