# Business Impact Analysis

**Agency Name:** OHIO DEPARTMENT OF AGING

**Package Title:** ODA PROVIDER CERTIFICATION
APPLYING TO BECOME CERTIFIED

**Rule Numbers:** 173-39-03, 173-39-03.1, 173-39-03.2, 173-39-03.3, 173-39-03.4

**Date:** October 19, 2018

**Rule Types:**

| | |
|---|---|
| ☑ **5-Year Review** | 173-39-03 |
| ☑ **Rescinded** | 173-39-03 |
| ☑ **New** | 173-39-03, 173-39-03.1, 13-39-03.2, 173-39-03.3, 173-39-03.4 |
| ☐ **Amended** | |
| ☐ **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

ORC § 173.39 generally prohibits ODA-administered programs from paying providers for services unless ODA certifies them and § 173.391 requires ODA to adopt rules to establish the requirements for certification. ODA adopted 173-39-03 to establish requirements for three processes: (1) applying to become certified, (2) obtaining certification to provide additional services, and (3) obtaining certification in additional regions. ODA proposes to rescind 173-39-03 and adopt five new single-topic rules in its place. The proposed new rules are itemized below.

### 173-39-03

Compared to the current rule, ODA's proposed new rule will do the following:

- Require providers to complete an online application instead of a paper application.
- Prohibit ODA from processing applications that are initiated, but not completed, in 90 days. This allows ODA to "time out" an application rather than deny a provider certification. ODA won't accept an application from a denied provider for one year. This "time out" process allows a provider who did not complete an application in a timely manner to immediately start over.

ODA's proposed new rule no longer regulates applying for certification to provide additional services or certification in additional regions. Those topics now appear in the following single-topic rules: 173-39-03.3 and 173-39-03.4.

173-39-03.1
ODA proposes to adopt this new rule because the U.S. Dept. of Health and Human Services (HHS) adopted federal "heightened scrutiny" process in 42 CFR 441.301(c)(5)(v) whereby HHS determines if ODA may pay providers for their *home and community-based* services (HCBS) if provided in business sites with *institutional* characteristics.

173-39-03.2
HHS adopted 42 CFR 455.434 and 455.436 to require states to conduct background checks on owners of providers of HCBS.

When a provider's ownership interest changes, the IRS also changes the provider's federal tax identification number. If this happens, ODA must know the identity of the new owners and the provider's new federal tax identification number before ODA can continue to make payments to the provider after the change in ownership interest. The process involves ending certification under the current ownership and granting new certification after the completion of the background checks. ODA's proposed new rule establishes this process.

This proposed new rule also establishes the process for notifying ODA of changes in chief administrators which does not involve a change in federal tax ID. This would be the scenario for a non-profit organization, which has no "owners."

173-39-03.3
ODA proposes to adopt this new rule to regulate the process for ODA-certified providers when applying to be certified for additional services.

173-39-03.4
ODA proposes to adopt this new rule to regulate the process for ODA-certified providers when applying to be certified in additional regions.

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

ORC §§ 173.01, 173.02, 173.391, 173.52, 173.522, 173.54, and 173.543.

**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 for a Medicaid wavier authorizing the State to launch and maintain the PASSPORT and Assisted Living Programs, ODA's rules must address the following:

- 42 CFR 441.352 requires ODA to assure CMS in the waiver applications that ODA has established adequate requirements for providers and that ODA monitors the providers to ensure they comply with those requirements.
- 42 CFR 441.301(c)(5)(v) prohibits ODA from paying providers for their *home and community-based* services (HCBS) if provided in business sites with *institutional* characteristics

**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 mentioned in ODA's response to #2, which establish the requirements for ODA-certified providers.

**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)?**

These rules protect the health and safety of individuals receiving services from ODA-certified providers by establishing the processes for determining if providers meet the requirements to be certified.

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

To protect the health and safety of individuals receiving services through ODA-administered programs, ODA and its designees review providers' applications to become certified by ODA to ensure the providers comply with the requirements in Chapter 173-39. The rules are judged as being successful when structural compliance reviews and investigations of alleged incidents show ODA-certified providers to be in compliance with the chapter's requirements.

## 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 Sept. 22, 2017, ODA sent an email to the stakeholders in the table below requesting feedback on ODA's proposals and additional recommendations for improving the current version of 173-39-03.

| PROVIDERS | PROVIDER ASSOCIATIONS | OTHER ASSOCIATIONS |
|---|---|---|
| 1. Alzheimer's and Dementia Care Services<br>2. Home Care by Black Stone<br>3. National Church Residences (NCR).<br>4. Senior Resource Connection | 5. LeadingAge Ohio<br>6. Ohio Assisted Living Assn. (OALA).<br>7. Ohio Assn. of Medical Equipment Services (OAMES).<br>8. Ohio Health Care Assn. (OHCA)<br>9. Ohio Council for Home Care and Hospice (OCHCH).<br>10. Ohio Jewish Communities (OJC). | 11. Catholic Social Services of the Miami Valley (a PAA not represented by O4A)<br>12. The Ohio Association of Area Agencies on Aging (O4A). |

Throughout 2018, ODA conducted two rounds of meetings with each of the following provider association to discuss how to best develop rules on heightened scrutiny (173-39-03.1) and and change of ownership interest (173-39-03.2):

| PROVIDER ASSOCIATIONS |
|---|
| 1. LeadingAge Ohio<br>2. Ohio Assisted Living Assn. (OALA).<br>3. Ohio Health Care Assn. (OHCA)<br>4. Ohio Council for Home Care and Hospice (OCHCH). |

**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 Sept. 22, 2017 email, ODA received 16 comments from 4 stakeholders.

- Two stakeholders commented that they supported ODA's decision for the rule to require providers to complete an online application process.
- Two stakeholders offered 14 comments on the application process for participant-directed providers, which are summarized below:

- Multiple comments from both stakeholders said the application process is confusing to individuals, so participant-directed providers need to complete the online application just like any other type of provider. *ODA's response:* The proposed new rule will require this very thing.

- Multiple comments from both stakeholders asked ODA to update its terminology regarding participant-directed providers. *ODA's response:* The proposed new rule will use updated terminology.

- Both stakeholders commented on the deadline to complete pre-certification reviews for participant-directed providers in 10 business days instead of the 20 business days allowed for all other provider types. *ODA's response:* The proposed new rule requires ODA's designee to complete pre-certification reviews in 45 days (not *business* days) regardless of the provider type.

In response to ODA's two rounds of meetings with provider associations, ODA received comments and marked-up rule drafts from the provider associations which helped ODA to develop the proposed new rules.

**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 this rule based upon 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?**

ORC § 173.391 authorizes, but does not require, ODA to charge providers fees for certification, but ODA has determined to not incorporate fees into these proposed new rules at this time.

**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.***

These rules are not performance-based regulations.

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

ORC § 173.391 only authorizes ODA to develop requirements for 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 takes 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 rules.

ODA also hosts webinars and in-person meetings with its designees to train them on implementing new rules.

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;**

- Providers who want to become certified by ODA.
- ODA-certified providers who undergo a change in ownership interest or organizational structure.
- ODA-certified providers who want to become certified to provide additional services.
- ODA-certified providers who want to become certified in additional regions.

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

173-39-03, 173-39-03.3, 173-39-03.4
The adverse impact of these rules is the act of applying for certification.

173-39-03.1
If a provider applies for certification and its business site has institutional characteristics, this rule may require the provider to make remediations, as requested by ODA, in order to not be disqualified by HHS for those institutional characteristics.

173-39-03.2
This rule will require providers to notify ODA of changes in ownership interest or organizational structure.

**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.***

173-39-03, 173-39-03.3, 173-39-03.4
ODA estimates that, if a provider has supporting documentation readily available, it will take the provider less than one hour to complete the application and upload supporting documentation.

173-39-03.1
The quantification of completing ODA's requested remediation to show its business site is a HCBS setting, is the cost to remediate, then provide ODA with evidence of compliance. For example, if a provider operates a RCF (*i.e.*, an assisted-living facility) adjacent to a nursing home and requires assisted-living residents to use the provider's transportation and places restrictions on when the resident may have guests in their living units, ODA may ask the provider to revise its resident policies to clearly indicate that residents in the RCF have free choice of transportation providers and freedom to have guests visit their living units. The cost is the effort to change the resident policies and to provide ODA with evidence of compliance.

173-39-03.2
This rule will require providers to notify ODA of changes in ownership interest or organizational structure.

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

ODA is required to develop rules establishing requirements for ODA-certified providers and to ensure the health and safety of individuals enrolled in ODA-administered waiver programs. These rules establish the processes by which providers apply

to become certified and by which ODA and its designees determine if providers meet the requirements (in other rules) to become certified.

Providers voluntarily apply for ODA certification. Certification is not required to engage in providing a service unless a provider wants paid for providing services to individuals enrolled in the PASSPORT or Assisted Living Programs, for which ORC § 173.39 requires providers to be certified. Therefore, compliance with these regulations is only required if a provider voluntarily chooses to participate in these programs.

## Regulatory Flexibility

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

Because the primary purpose of these rules is to ensure the health and safety of individuals enrolled in ODA-administered waiver 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 from ODA-certified providers through compliance with these rules. 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.

### 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.