



## Common Sense Initiative

Mike DeWine, Governor  
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### Business Impact Analysis

Agency, Board, or Commission Name: **OHIO DEPT. OF AGING**

Rule Contact Name and Contact Information: Tom Simmons [rules@age.ohio.gov](mailto:rules@age.ohio.gov)

Regulation/Package Title (a general description of the rules' substantive content):

#### **LONG-TERM CARE CONSULTATION PROGRAM**

R.C. §173.42 created the Long-Term Care Consultation Program and requires ODA to adopt Chapter 173-43 of the Administrative Code to implement and administer §§ 173.42 to 173.424.

Rule Number(s): 173-43-01, 173-43-02, 173-43-03, 173-43-04, 173-43-05

Date of Submission for CSI Review: September 15, 2020

Public Comment Period End Date: September 28, 2020 at 11:59PM.

**Rule Type/Number of Rules:**

☐ New/ 0 rules

☒ Amended/ 5 rules (FYR? ☒)

☐ No Change/ 0 rule (FYR? ☐)

☐ Rescinded/ 0 rules (FYR? ☐)

The Common Sense Initiative is established in R.C. 107.61 to eliminate excessive and duplicative rules and regulations that stand in the way of job creation. Under the Common Sense Initiative, agencies must balance the critical objectives of regulations that have an adverse impact on business with the costs of compliance by the regulated parties. Agencies should promote transparency, responsiveness, predictability, and flexibility while developing regulations that are fair and easy to follow. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

#### **Reason for Submission**

1. R.C. 106.03 and 106.031 require agencies, when reviewing a rule, to determine whether the rule has an adverse impact on businesses as defined by R.C. 107.52. If the agency determines that it does, it must complete a business impact analysis and submit the rule for CSI review.

Which adverse impact(s) to businesses has the agency determined the rule(s) create?

Please review the next page.

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**The rule(s):**

- ☐ a. Require a license, permit, or any other prior authorization to engage in or operate a line of business.
- ☐ b. Imposes a criminal penalty, a civil penalty, or another sanction, or creates a cause of action for failure to comply with its terms.
- ☒ c. Requires specific expenditures or the report of information as a condition of compliance.
- ☐ d. Is likely to directly reduce the revenue or increase the expenses of the lines of business to which it will apply or applies.

**Regulatory Intent**

**2. Please briefly describe the draft regulation in plain language.**

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

The rules of Chapter 173-43 of the Administrative Code implement the requirements for the Long-Term Care Consultation Program created under R.C. §§ 173.42 to 173.424.

In rule 173-43-01 of the Administrative Code, ODA proposes to amend paragraph (A) of the rule to replace "173.425" with "173.424."

In rule 173-43-02 of the Administrative Code, ODA proposes to amend paragraphs (A)(1) and (A)(2) of the rule to allow program administrators to offer and provide consultations by telephone, video conference, or in person.

In rule 173-43-03 of the Administrative Code, ODA proposes to amend paragraphs (A) and (D) of the rule to allow program administrators to offer and provide consultations by telephone, video conference, or in person.

In rule 173-43-04 of the Administrative Code, ODA proposes to amend paragraph (B)(1) of the rule to allow program administrators to provide consultations according to the time frame for providing a level-of-care determination made by telephone, video conference, or in person instead of according to the time frame for providing a "face-to-face" level-of-care determination.

In rule 173-43-05 of the Administrative Code, ODA proposes to amend paragraph (A)(3) of the rule to restate the qualification so ODA only certifies a person who is either a registered nurse or licensed social worker to provide a long-term care consultation (rather than *an in-person* long-term care consultation) involving an assessment of the individual's functional capabilities.

**3. Please list the Ohio statutes that authorize the agency, board or commission to adopt the rule(s) and the statutes that amplify that authority.**

R.C. §§ [121.07](#), [173.01](#), [173.02](#), [173.42](#), [173.421](#), [173.422](#), [173.424](#).

**4. 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.*

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These rules do not implement federal requirements.

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

These rules exist to comply with the state laws mentioned in ODA's response to #2, which require ODA to adopt rules to implement those state laws to administer the Long-Term Care Consultation Program.

**6. 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 exist to comply with the state laws mentioned in ODA's response to #2, which require ODA to adopt rules to implement those state laws and to administer the Long-Term Care Consultation Program.

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

ODA monitors its designees, the program administrators, for compliance. The program administrators monitor staff who are certified to provide long-term care consultations. ODA will judge the proposed amendments to these rules to be a success when ODA and its designees find few violations against these rules during structural compliance reviews or investigations of alleged incidents.

**8. Are any of the proposed rules contained in this rule package being submitted pursuant to R.C. 101.352, 101.353, 106.032, 121.93, or 121.931?**

*If yes, please specify the rule number(s), the specific R.C. section requiring this submission, and a detailed explanation.*

No.

**Development of the Regulation**

**9. 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.*

ODA's guide [Participating in ODA's Rule Development](#) and the [rules webpages on ODA's website](#) encourage stakeholders and the general public to give input on improving ODA's rules and provide contact information for doing so. From each rule's effective date to the date of this BIA, ODA has received no input from stakeholders or the general public on any rule in this package.

On August 6, 2020, ODA sent an email to the following The Academy of Senior Health Sciences, Ohio Health Care Association, LeadingAge Ohio, and the Ohio Assisted Living Association, and the state long-term care ombudsman to announce that ODA is considering filing amendments to propose the adopting the emergency amendments adopted into rules 173-43-02, 173-43-03, 173-43-04, and 173-43-05 of the Administrative Code on an ongoing basis, to ask for their input on that proposal, and to ask if the stakeholders had any other issues to raise with the rules in Chapter 173-43 of the Administrative Code.

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

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ODA received 1 comment from 1 stakeholder to its August 6, 2020 email. LeadingAge Ohio said that it supported ODA's proposal to adopt the emergency amendments on an ongoing basis. No stakeholder raised any additional issues with Chapter 173-43 of the Administrative Code.

**11. 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.

**12. 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?**

The requirements to adopt rules to implement and administer the Long-Term Care Consultation Program under R.C. §§ [173.42](#)(H), (I)(6), (L), and (N)(1); [173.421](#); [173.422](#); and [173.424](#) are very specific. Those requirements establish the framework for Chapter 173-43 of the Administrative Code. ODA cannot deviate from the statutory requirements.

**13. 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.***

A performance-based regulation is not appropriate for this program.

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

R.C. §§ [173.42](#), [173.421](#), [173.422](#), and [173.424](#) require ODA, and not any other agency, to adopt rules to implement and administer the Long-Term Care Consultation Program.

**15. 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 amendments to these 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 rules.

Through regular monitoring activities, ODA monitors its designees, the program administrators, for compliance. The program administrators monitor staff who are certified to provide long-term care consultations.

**Adverse Impact to Business**

**16. 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; and**

Direct Impact: Chapter 173-43 primarily regulates ODA and its program administrator. Rule 173-43-02 regulates Ohio's nursing home.

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Indirect Impact: Chapter 173-43 has an indirect impact upon Ohio's nursing homes.

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

Direct Impact: 173-43-02 is the only rule in the chapter to directly regulate nursing facilities. It requires nursing facilities to do the following:

- Only admit as a resident an individual who has been offered a consultation, as required by R.C. [§173.42\(K\)](#).
- For individuals who have entered the nursing facility, but who have not yet been admitted as residents, the nursing facility shall determine if the individual is required to be offered a consultation, then, do either of the following:
  - Report information to the program administrator of residents who must be offered a consultation.
  - Retain records when determining a resident is exempt from the requirement to be offered a consultation.
- Allow consultants to enter the nursing facility to provide consultations, as required to do by R.C. [§173.42\(M\)](#).

ODA's proposed amendments to the rules in Chapter 173-43 of the Administrative Code will not increase the direct impact upon nursing facilities.

Indirect Impact: R.C. [§173.42](#) requires the Long-Term Care Consultation Program to provide "individuals or their representatives...with long-term care consultations and receive through these professional consultations information about options available to meet long-term care needs and information about factors to consider in making long-term care decisions." The consultations do not, in themselves, have any adverse impact upon nursing facilities. However, the decision of an informed individual on whether he or she wants to receive care in a home and community-based setting or an institutional setting would have a direct impact upon a nursing facility any time the individual chooses to receive home and community-based care instead of becoming a resident of the facility.

ODA's proposed amendments to the rules in Chapter 173-43 of the Administrative Code will not increase the indirect impact upon nursing facilities.

**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.***

Direct Impact: The adverse impact of rule 173-43-02 of the Administrative Code consists of the administrative time necessary to report information to the program administrator about residents who must be offered consultations and retaining records to show those who are not required to be offered consultations.

Indirect Impact: A potential adverse impact is the loss of a potential resident who may decide that another long-term care option would be better for them than a particular nursing facility.

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

It is in the best interest of Ohioans to be provided with options on long-term care options that will fit their needs or the needs of their loved ones.

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Rule 173-42-02 of the Administrative Code does not ask nursing facilities to provide information to ODA or a program administrator that is unreasonable for ensuring compliance with the rule.

### **Regulatory Flexibility**

#### **18. 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 that Ohioans have an ability to know what long-term care options best fit their long-term care needs or the needs of their loved ones, the rules treat all providers the same, regardless of their size.

#### **19. 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 providing Ohioans with information on long-term care options that best fit their long-term care needs with these rules. Whenever possible, ODA or its designees will treat administrative violations that limit access to education about long term care options of an individual by failing to refer for long term care consultations as opportunities for improvement through warning notices and solicitation of corrective action.

#### **20. 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.