



# Common Sense Initiative

**Mike DeWine**, Governor  
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## Business Impact Analysis

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

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**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 R.C. §§ 173.42 to 173.424.

**Rule Number(s):** 173-43-01 (amend), 173-43-02 (rescind + new), 173-43-03 (rescind + new), 173-43-04 (rescind + new), 173-43-05 (rescind + new).

**Date of Submission for CSI Review:** September 27, 2022.

**Public Comment Period End Date:** October 11, 2022 at 11:59PM.

#### Rule Type/Number of Rules:

☐ New/ 0 rules

☐ No Change/ 0 rules (FYR? ☐)

☒ Amended/ 5 rules (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☐ Rescinded/ 0 rules (FYR?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?**

Rule 173-43-02 of the Administrative Code is the only rule in Chapter 173-43 of the Administrative Code to create an adverse impact.

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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.*

Chapter 173-43 of the Administrative Code implements the requirements for the Long-Term Care Consultation Program created under R.C. §§ [173.42](#) to [173.424](#).

Rule 173-43-01 of the Administrative Code introduces the chapter and defines terms used in the chapter. ODA proposes to amend the rule to achieve the following:

- Reword paragraph (A), which includes replacing "...that sections 173.42 to 173.424 of the Revised Code established" with "...in accordance with section 173.42 of the Revised Code."
- Modify the definition of "long-term care consultation" so that it also defines "consultation." The result will more closely resemble R.C. §[173.42](#) and enable ODA to use "consultation" throughout the chapter of rules.

Rule 173-43-02 of the Administrative Code establishes the general standards for providing consultations. ODA proposes to rescind this rule and to adopt a new rule of the same number in its place to achieve the following:

- Implement Senate Bill 160 (134<sup>th</sup> G.A.) by requiring each consultation to a veteran or the spouse, surviving spouse, or representative of the veteran to include both of the following:
  - The availability of health care or financial benefits through the United States Department of Veterans Affairs.
  - Information about congressionally-chartered veterans service organizations or the county veterans service office that can assist with investigating and applying for benefits through the United States Department of Veterans Affairs.
- Remove unnecessary regulatory restrictions from this rule to comply with Senate Bill 9 (134<sup>th</sup> G.A.).
- Replace unnecessary occurrences of words that imply requirements for outdated modes of communication (e.g., paperwork).
- Reorder the following paragraphs:

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- (B)(2) → (C)(4).
  - (B)(3) → (C)(6).
  - (A)(9) → Part of (F).
- Remove outdated text on a “time-limited convalescent exemption.”
  - Simplify the paragraphs on concurrent assessments.

Rule 173-43-03 of the Administrative Code implements divisions (I) and (L)(4) of R.C. §[173.42](#) by delineating when the program administrator is required, or not required, to provide a consultation to an individual. ODA proposes to rescind this rule and to adopt a new rule of the same number in its place to achieve the following:

- Remove unnecessary regulatory restrictions from this rule to comply with Senate Bill 9 (134<sup>th</sup> G.A.).
- No longer repeat in paragraph (A) of this rule that a program administrator may provide a consultation by telephone, video conference, or in person since that topic is already covered in rule 173-43-02 of the Administrative Code.
- No longer state that the source of payment is not a factor in paragraph (A)(1) of this rule since the topic is covered in paragraph (C) of this rule.
- Remove outdated text on a “time-limited convalescent exemption” from paragraph (A)(2) of this rule.
- Replace “a convalescent exemption from the pre-admission screening and resident review defined in rule 5122-21-03 or 5123-14-01” in paragraph (B)(9) of this rule with “a categorical determination or hospital discharge exemption defined in rule 5160-3-15.”
- Combine the list of exemptions under paragraphs (C) of this rule to the list of exemptions under paragraph (B) of this rule.
- Replace “ninety” with “thirty” in paragraph (C)(1) [proposed to be (B)(7)] of this rule to align with the 30-day hospital discharge exemption in rule 5160-3-15.1 of the Administrative Code.

Rule 173-43-04 of the Administrative Code implements divisions (H) and (L)(10) of R.C. §[173.42](#) by establishing deadlines for the program administrator to complete a consultation. ODA proposes to rescind this rule and to adopt a new rule of the same number in its place to achieve the following:

- Remove an unnecessary regulatory restriction from this rule to comply with Senate Bill 9 (134<sup>th</sup> G.A.).
- Allow any deadline falling on a Saturday, Sunday, or legal holiday to be extended to the next day that is not a Saturday, Sunday, or legal holiday. For more information, please see ODA’s response to question #10 on this BIA.
- Require, for oversight purposes, the program administrator to retain a record on why any consultation was not provided before the deadline.

Rule 173-43-05 of the Administrative Code implements R.C. §[173.422](#) by establishing the qualifications for ODA’s certification to provide consultations. ODA proposes to rescind this rule and to adopt a new rule of the same number in its place to achieve the following:

- Implement Senate Bill 160 (134<sup>th</sup> G.A.) by requiring certified consultants to have training on the availability of health care or financial benefits through the U.S. Dept. of Veterans’ Affairs and training on referring individuals to a congressionally-chartered veterans service organization or the county veterans service office.

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- Implement Senate Bill 3 (134<sup>th</sup> G.A.) by indicating that, beginning on January 1, 2023, "registered nurse" also includes a registered nurse with a "multistate license" from another state with "multistate licensure privilege," as those terms are defined in section 4723.11 of the Revised Code.
- Implement Senate Bill 204 (134<sup>th</sup> G.A.) by indicating that a person may qualify for ODA's certification to provide consultations if the person is an LISW or LSW with an unencumbered license in another state that entered into the counseling compact with Ohio under section 4757.50 of the Revised Code.
- No longer allow licensed professional counselors to qualify for certification to provide consultations. Currently, no LPCs are certified. Additionally, no licensed professional clinical counselors (LPCCs) are certified.
- No longer require 15 hours of professional development every 2 years for the following licensed professionals, since those professionals already have continuing education requirements to maintain their licenses:
  - An RN, including an RN with a multistate license from another state with multistate privilege.
  - An LISW, LSW, or LISW or LSW with an unencumbered license in another state that entered into the counseling compact with Ohio.
- Remove unnecessary regulatory restrictions from this rule to comply with Senate Bill 9 (134<sup>th</sup> G.A.).
- Reorganize the list of ways that a person may qualify for certification to provide consultations.
- Delete paragraph (A)(3) [as numbered in the current rule] of the rule because only nurses and social workers can conduct the reviews described in that paragraph and paragraphs (B)(2)(a) and (B)(2)(b) [as numbered in the new rule] already cover nurses and social workers.

**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](#), and [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.*

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.

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**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 the staff certified to provide long-term care consultations.

**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 [this webpage](#) 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. As of the date of this BIA, ODA's policy development manager has received no requests to amend the rules in this package since the last time ODA amended each rule, with the exception of responses to the emails listed below.

On May 17, 2022, ODA sent an email to the following stakeholders to explain how artificial intelligence has added a new dimension to interpreting rules, define *regulatory restrictions*, declare the need to reduce regulatory restrictions, explain how ODA can reduce regulatory restrictions by eliminating duplicate uses of regulatory restrictions, provide stakeholders with an opportunity to make recommendations on ODA's plan, and provide stakeholders with an opportunity to make recommendations on eliminating any regulatory restriction in any chapter of ODA's rules:

- Catholic Social Services of the Miami Valley.
- LeadingAge Ohio.
- Ohio Assisted Living Association (OALA).
- Ohio Academy of Senior Health Sciences, Inc.
- Ohio Adult Day Healthcare Association (OADHA).
- OhioAging.
- Ohio Association of Medical Equipment Suppliers (OAMES).
- Ohio Association of Senior Centers (OASC).
- Ohio Council for Home Care and Hospice (OCHCH).
- Ohio Health Care Association (OHCA).
- Ohio Jewish Communities.
- State Long-Term Care Ombudsman.

On May 23, 2022, ODA emailed each program administrator to request a breakdown of how each certified consultant on their staff qualified for certification to ensure that no such staff member would lose their job due to any amendments to rule 173-43-05 of the Administrative Code. ODA also requested any comments or questions about rule 173-43-05 of the Administrative Code.

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On May 25, 2022, ODA emailed the Counseling Social Work and Marriage and Family Therapist (CSWMFT) Board for their thoughts on amending rule 174-43-05 of the Administrative Code to allow LISWs to qualify for certification to provide consultations.

On May 25, 2022, ODA emailed the following stakeholder associations to announce ODA's proposal to implement Senate Bills 3, 160, and 204 into rule 173-43-05 of the Administrative Code and to provide an opportunity to make recommendations on the proposal or to make recommendations on any other matters on Chapter 173-43 of the Administrative Code:

- LeadingAge Ohio.
- The Ohio Academy of Senior Health Sciences, Inc.
- OhioAging.
- Ohio Assisted Living Association (OALA).
- Ohio Health Care Association (OHCA).

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

ODA received no recommendations for improving the rules in response to its May 17, 2022 email.

Twelve of the 13 program administrators responded to the May 23 email. The program administrators reported an aggregate total of 134 certified consultants. The graph below shows whether consultants qualify for their certifications because they are an RN, LISW, LSW, licensed professional counselor (LPC), licensed professional clinical counselor (LPCC), or has a bachelor's degree with one year of qualifying experience.

| RN | LISW           | LSW | LPCC | LPC | Degree + Experience |
|----|----------------|-----|------|-----|---------------------|
| 56 | 1 <sup>1</sup> | 75  | 0    | 0   | 2 <sup>2</sup>      |

Additionally, one program administrator recommended continuing to allow unlicensed persons to qualify for certification to provide consultations. ODA is not proposing to remove the opportunity to qualify for certification without having a license.

In response to the May 25 email, the executive director of the CSWMFT Board saw no issues with the proposed amendment since the scope of practice of an LISW encompasses that of an LSW. Additionally, the CSWMFT Board has 16,228 actively-licensed LSWs and 9,873 actively-licensed LISWs. The amendment would provide another job opportunity for the 9,873 LISWs.

OhioAging was the only association to respond to the May 25 email to stakeholder associations. One of its members requested replacing the 5-*calendar*-day deadline in rule 173-43-04 of the Administrative Code with a 5-*business*-day deadline. On July 19, 2022, ODA emailed OhioAging to indicate that it proposes to extend any deadline that falls on a Saturday, Sunday, or legal holiday to the next day that is not a Saturday, Sunday, or legal holiday.

## 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 is not proposing to amend these rules based upon scientific data.

<sup>1</sup> Although this is not yet an option under rule 173-43-05 of the Administrative Code, one certified consultant is an LISW.

<sup>2</sup> In addition to having bachelor's degrees and qualifying experience, these 2 consultants were also certified by the [Ohio Senior Health Insurance Information Program](#) (OSHIIP), which is not required under rule 173-43-05 of the Administrative Code.

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**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.*

ODA did not consider performance-based regulation for these rules. 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. Additionally, ODA's search of the Administrative Code found that no other state agency had adopted a rule regulating the Guide.

**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 new rules take effect, ODA will send an email to subscribers of our rule-notification service to feature the rule.

Through its regular monitoring activities, ODA will monitor program administrators for compliance and program administrators will monitor staff who 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.

**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).

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- 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.

Rule 173-43-02 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.**

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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 is available to help facilities of all sizes with their questions. Any person may contact [Tom Simmons](#), ODA's policy development manager, with questions about the rules.