



## Common Sense Initiative

**Mike DeWine**, Governor  
**Jon Husted**, Lt. Governor

**Sean McCullough**, Director

### 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):**

#### OLDER AMERICANS ACT NUTRITION PROGRAM

These rules establish requirements to include in, or exclude from, AAA-provider agreements (i.e., contracts) that are paid, in whole or in part, with Title III-C Older Americans Act funds.

**Rule Number(s):** 173-4-03, 173-4-04, 173-4-05, 173-4-05.1, 173-4-05.2, 173-4-05.3, 173-4-06, 173-4-07, 173-4-08, 173-4-09, 173-4-10, 173-4-11

**Date of Submission for CSI Review:** August 11, 2022.

**Public Comment Period End Date:** August 24, 2022 at 11:59PM.

#### Rule Type/Number of Rules:

☐ New/ 0 rules

☐ No Change/ 0 rules (FYR? ☐)

☒ Amended/ 12 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☐ Rescinded/ 0 rules (FYR?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?

The rules:

- ☐ a. Require a license, permit, or any other prior authorization to engage in or operate a line of business.

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☐ b. Impose a criminal penalty, a civil penalty, or another sanction, or creates a cause of action for failure to comply with its terms.

☒ c. Require specific expenditures or the report of information as a condition of compliance.

☐ d. Are likely to directly reduce the revenue or increase the expenses of the lines of business to which they will apply.

### **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 in this package establish requirements to include in, or exclude from, AAA<sup>1</sup>-provider agreements (agreements) that are paid, in whole or in part, with Title III-C Older Americans Act funds.

ODA does not propose to create any new adverse impacts for providers in this rule package.

The following list describes the rules in this package and ODA's proposed amendments to those rules:

- Rule 173-4-03 of the Administrative Code establishes requirements for enrolling consumers into the Older Americans Act Nutrition Program. ODA proposes to delete the use of unnecessary regulatory restrictions from this rule without substantively changing the rule's requirements.
- Rule 173-4-04 of the Administrative Code establishes requirements on procuring for person direction. ODA proposes to amend this rule to achieve the following:
  - Delete the use of unnecessary regulatory restrictions from this rule without substantively changing the rule's requirements.
  - Replace *lowest responsive bid* in paragraphs (B)(1)(c) and (B)(2)(c) of this rule with *responsiveness of a bid*.
- Rule 173-4-05 of the Administrative Code establishes requirements applying only to AAA-provider agreements for nutrition projects. ODA proposes to amend this rule to achieve the following:
  - Delete the use of unnecessary regulatory restrictions from this rule without substantively changing the rule's requirements. For example, the restriction in (A)(13)(b) repeats paragraph (B)(9) of rule 173-3-06 of the Administrative Code and is, therefore, unnecessary.
  - Replace *receives* in paragraph (A)(13)(a)(i) of this rule with *successfully completes*.
  - Insert *successfully* before *completes* in paragraph (A)(13)(a)(ii) of this rule.
- Rule 173-4-05.1 of the Administrative Code establishes requirements applying only to AAA-provider agreements for congregate meal projects. ODA proposes to amend this rule to achieve the following:
  - Delete the use of unnecessary regulatory restrictions from this rule without substantively changing the rule's requirements. For example, the restriction in (A)(13)(b) repeats paragraph (B)(9) of rule 173-3-06 of the Administrative Code and is, therefore, unnecessary.
  - Indicate that Title II-C1 funds do not pay for regularly-provided grab-and-go meals.

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<sup>1</sup> "AAA" means "area agency on aging."

- Rule 173-4-05.2 of the Administrative Code establishes requirements applying only to AAA-provider agreements for home-delivered meals projects. ODA proposes to delete the use of unnecessary regulatory restrictions from this rule without substantively changing the rule's requirements.
- Rule 173-4-05.3 of the Administrative Code establishes requirements applying only to AAA-provider agreements for nutrition projects, for congregate dining projects based in restaurants and grocery stores. ODA proposes to amend this rule to achieve the following:
  - Delete the use of unnecessary regulatory restrictions from this rule without substantively changing the rule's requirements.
  - Replace requirements for the consumer to show an identification card to provide an identification card.
- Rule 173-4-06 of the Administrative Code establishes requirements for AAA-provider agreements involving diet orders. ODA proposes to delete the use of unnecessary regulatory restrictions from this rule without substantively changing the rule's requirements.
- Rule 173-4-07 of the Administrative Code establishes requirements applying only to AAA-provider agreements for nutrition counseling. ODA proposes to amend this rule to achieve the following:
  - Delete the use of unnecessary regulatory restrictions from this rule without substantively changing the rule's requirements.
  - Give providers flexibility to verify a unit of service during a state of emergency declared by the governor or a federal public health emergency without collecting the unique identifier of the consumer's caregiver.
- Rule 173-4-08 of the Administrative Code establishes requirements applying only to AAA-provider agreements for nutrition education. ODA proposes to amend this rule to achieve the following:
  - Delete the use of unnecessary regulatory restrictions from this rule without substantively changing the rule's requirements. For example, ODA proposes to delete the requirement in paragraph (B)(4)(b) of this rule because paragraph (B)(9)(b) of rule 173-3-06 already requires retaining records of evaluations.
  - Indicate that 1 of the 3 options for providing nutrition education is providing it *at least two times per year* rather than *two times per year*. This will not require providers to provide an increased amount of nutrition education, but will also not limit providers from doing so.
- Rule 173-4-09 of the Administrative Code establishes requirements applying only to AAA-provider agreements for nutrition health screening. ODA proposes to amend this rule to achieve the following:
  - Delete the use of unnecessary regulatory restrictions from this rule without substantively changing the rule's requirements. For example, ODA proposes to delete the requirement in paragraph (B)(4)(b) of this rule because paragraph (B)(9)(b) of rule 173-3-06 already requires retaining records of evaluations.
  - Change the definition of "nutrition health screening" and similar language in paragraph (B)(4) of this rule to indicate that part of the service involves referring a consumer at high nutritional risk to home and community-based services rather than to providers of home and community-based services. And deleting the prohibition against AAAs adding requirements to AAA-provider agreements to require providers to record the name of providers to whom it refers the consumer, since the rule will no longer require referring to providers.
  - Move the flexibility to conduct screening by telephone, video conference, or in person to a paragraph of its own [(B)(3)], no longer limit that flexibility to an emergency declared by the governor or a federal public health emergency, and to move the encouragement to conduct screening in person to the same paragraph.
- Rule 173-4-10 of the Administrative Code establishes requirements applying only to AAA-provider agreements for grocery shopping assistance. ODA proposes to amend this rule to achieve the following:
  - Delete the use of unnecessary regulatory restrictions from this rule without substantively changing the rule's requirements.
  - Give providers flexibility to verify a unit of service during a state of emergency declared by the governor or a federal public health emergency without collecting the unique identifier of the consumer's caregiver.

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- Rule 173-4-11 of the Administrative Code establishes requirements applying only to AAA-provider agreements for grocery ordering and delivery. ODA proposes to amend this rule to achieve the following:
  - Delete the unnecessary use of regulatory restrictions from this rule without substantively changing the rule's requirements.
  - Give providers flexibility to verify a unit of service during a state of emergency declared by the governor or a federal public health emergency without collecting the unique identifier of the consumer's caregiver.
- Lastly, ODA also proposes to make non-substantive changes in this rule package to comply with LSC's *Rule Drafting Manual* or to improve clarity, punctuation, or grammar.

**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](#), and [173.392](#).

**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.*

[42 U.S.C. 3025](#) says ODA is "primarily responsible" for Older Americans Act policy development in Ohio and [45 C.F.R. 1321.11](#) requires ODA to "develop policies governing all aspects of [Older Americans Act] programs."

**5. 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 implement the state laws ODA listed in its response to #2, which require ODA to establish the standards for AAA-provider agreements, and the federal law and federal regulation ODA listed in its response to #3, which require ODA to develop policies for all aspects of the Older Americans Act programs in Ohio.

**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 (1) comply with the state laws mentioned in ODA's response to #3, which require ODA to establish requirements for AAA-provider agreements, and (2) ensure necessary safeguards are in place to protect the health and safety of consumers receiving services paid with Older Americans Act funds.

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

To ensure compliance fostering the health and safety of consumers receiving services paid with Older Americans Act funds and compliance with monitoring (i.e., auditing) requirements under 45 C.F.R. Part 75, Subpart F: (1) ODA regularly monitors AAAs for compliance with these rules and (2) AAAs regularly monitor providers for their compliance with AAA-provider agreements, the rules are judged as being successful when (1) ODA funds few violations in AAA-provider agreements and (2) AAAs find few violations against AAA-provider agreements.

**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.

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### **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 each rule was adopted.

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).
- Ohio Association of Area Agencies on Aging (OAA).
- 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.

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

In response to its May 17, 2022 emails, ODA received 0 recommendations from stakeholders on this chapter of rules.

**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?**

Consumers of the Older Americans Act Nutrition Program have a higher risk for contracting COVID-19 than the general population. Accordingly, many of ODA's proposals in this rule package are based upon guidelines from the Centers for Disease Control and Prevention (CDC) for reducing on reducing in-person interaction to limit exposure to COVID-19.

**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?**

R.C. §[173.392](#) requires ODA to adopt rules to establish requirements for AAA-provider agreements. Additionally, the federal law and regulation ODA listed in its response to #3 require ODA to develop policies for all aspects of the Older Americans Act programs.

**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.*

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Yes, the proposed amendments to these rules give providers more flexibility.

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

R.C. §[173.392](#) authorizes only ODA to adopt rules to establish requirements for AAA-provider agreements.

**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 take effect, ODA will send an email to subscribers of our rule-notification service to feature the rules. Through regular monitoring (*i.e.*, auditing) requirements under [45 C.F.R. Part 75, Subpart F](#): (1) ODA regularly monitors AAAs for compliance with these rules and (2) AAAs regularly monitor providers for their compliance with AAA-provider agreements.

**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**

Every nutrition provider with an AAA-provider agreement.

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

The adverse impact of these rules is to ensure every AAA-provider agreement complies with the general requirements for AAA-provider agreements in rule 173-3-06 of the Administrative Code plus specific requirements for each service listed in individual rules of this package.

As previously stated, ODA does not propose to create any new adverse impacts for providers in this rule package.

Many of the proposed amendments will simply reduce the unnecessary use of duplicate regulatory restrictions. Other proposed amendments will give providers flexibility to maintain social distancing from consumer’s caregivers during a state of emergency declared by the governor or federal public health emergency.

**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.*

Providers establish the rate they are paid when they respond to a request for proposal (RFP) by submitting their bid to the AAA for how much they will charge per unit (*i.e.*, per job (*e.g.*, grocery shopping assistance), per item (*e.g.*, a meal), or per a period of time (*e.g.*, nutrition counseling)). The amount an AAA pays a provider is an all-inclusive rate. It’s intended to cover all costs incurred in providing the project or service, including administration, training, and reporting. Therefore, the provider’s bid includes all costs anticipated in providing the project or service.

If the provider’s bid wins, the provider is paid what it bid during the open and free competition for the AAA-provider agreement (*cf.*, [45 C.F.R. 75.329](#) and rules [173-3-04](#) and [173-3-05](#) of the Administrative Code).

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

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R.C. §[173.392](#) requires ODA to develop rules establishing standards for AAA-provider agreements (*i.e.*, contracts and grants) and R.C. §[173.01](#) requires ODA to represent the interests older Ohioans. Establishing standards for AAA-provider agreements in the rules of this package ensures the health and safety of the older Ohioans who are consumers of services through Older Americans Act programs, which fulfills both statutes.

There is no requirement for a provider to enter into an AAA-provider agreement in order to provide services in this state. An AAA-provider agreement is not a gateway to doing business in Ohio. Instead, a provider who wants to add the Older Americans Act programs to its lines of business, it must enter into an AAA-provider agreement in order for those Older Americans Act programs to pay the provider for the services it wants to provide to the consumers of those programs.

Additionally, providers voluntarily bid for AAA-provider agreements. A provider is only required to comply with an AAA-provider agreement if (1) the provider bids on providing the service to be paid with Older Americans Act funds, and (2) the provider's bid is a winning bid. Providers may provide the same service without entering into an AAA-provider agreement when paid by private pay, third-party insurers, or other government programs not using Older Americans Act funds.

Lastly, these rules give providers flexibility, as follows:

- Flexibility to verify the provision of services by electronic or manual methods.
- Flexibility to use the following in electronic or manual formats: records, diet orders, educational content, and emergency preparedness plans.
- Flexibility to maintain social distancing during a state of emergency declared by the governor or a federal public health emergency.

### **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 the health and safety of consumers receiving services paid with Older Americans Act funds, 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 protecting the health and safety of consumers receiving services paid with Older Americans Act funds through compliance with these rules. Whenever possible, ODA or AAAs will treat administrative violations that do not involve health and safety 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 AAAs 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 these rules.