



## Common Sense Initiative

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

#### ODA PROVIDER CERTIFICATION: TRANSPORTATION

Chapter 173-39 of the Administrative Code establishes the requirements to become, and to remain, an ODA-certified provider.

**Rule Number(s):** 173-39-02.13, 173-39-02.18

**Date of Submission for CSI Review:** March 15, 2023

**Public Comment Period End Date:** March 29, 2023 at 11:59PM

**Rule Type/Number of Rules:**

☐ New/ # rules

☐ No Change/ # rules (FYR? ☐)

☒ Amended/ 1 rule (FYR? ☒)

☒ Rescinded/ 1 rules (FYR?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.*

Rule 173-39-02.13 of the Administrative Code establishes the specific requirements to become, and to remain, an ODA-certified provider of non-emergency medical transportation (NEMT).

Rule 173-39-02.18 of the Administrative Code establishes the requirements to become, and to remain, an ODA-certified provider of non-medical transportation.

ODA proposes to rescind rule 173-39-02.13 of the Administrative Code and to amend rule 173-39-02.18 of the Administrative Code, and for the rescission and amendments to take effect on July 1, 2023, which is the anticipated effective date for the renewal application to the Centers for Medicare and Medicaid Services (CMS) for the PASSPORT Program to be a Medicaid-waiver program.

ODA proposes to rescind rule 173-39-02.13 of the Administrative Code because (1) CMS notified Ohio that it will no longer approve of offering NEMT as a service through the PASSPORT Program and (2) the PASSPORT Program is the only ODA-administered program that requires provider certification for NEMT.

CMS will no longer approve of offering NEMT through the PASSPORT Program because (1) [42 CFR 431.53](#) requires every state's Medicaid state plan to *ensure necessary transportation for beneficiaries to and from [medical] providers*; and (2) [42 CFR 441.350](#) limits the services offered through a 65+ Medicaid-waiver-authorized program (e.g., the PASSPORT Program) to services that are not covered under our Medicaid state plan.

Individuals who need NEMT may receive NEMT from the Medicaid state plan rather than from the PASSPORT Program.

The PASSPORT Program will continue to cover non-medical transportation, which CMS allows under [42 CFR 440.180\(b\)](#).

ODA proposes to reduce the use of unnecessary regulatory restrictions (e.g., *shall*) in both rules in this package to comply with R.C. §§ [106.03](#) and [121.951](#).<sup>1</sup> In 2019, ODA reduced the use of unnecessary regulatory restrictions by replacing the requirements in rule 173-39-02.18 of the Administrative Code that were identical to those in rule 173-39-02.13 of the Administrative Code with a requirement to comply with the requirements in the latter rule. Because ODA now proposes to rescind rule 173-39-02.13 of the Administrative Code, ODA proposes to transfer the requirements back to rule 173-39-02.18

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<sup>1</sup> Senate Bill 9 (134<sup>th</sup> G.A.).

of the Administrative Code. In doing so, ODA proposes to not transfer any unnecessary use of regulatory restriction words, resulting in a net reduction in those words without making substantive changes to the requirements for providers.

ODA proposes to make the following additional non-substantive amendments to the requirements that it transfers from rule 173-39-02.13 of the Administrative Code to rule 173-39-02.18 of the Administrative Code:

- Reference R.C. [§4756.02](#) in the definition of *Boards of EMFTS*.
- Refer to ODA-approved inspection forms rather than refer to each form by name, number, and version date. This will allow innovative providers to propose alternative electronic forms (or paper forms) that ODA can consider for approval in addition to the already-approved inspection forms.
- No longer duplicate the requirement in rule 173-39-02 of the Administrative Code (or the regulatory restriction words) to retain records to verify each service, but continue to list the mandatory reporting items for each trip.
- No longer duplicate the statement in rule 173-39-02 of the Administrative Code that gives providers flexibility to use an electronic system to retain records.

ODA also proposes to make other non-substantive improvements to this rule.

**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](#), [173.39](#), [173.391](#), [173.52](#), [173.522](#), [4766.14](#), and [4766.15](#).

**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.*

In order for the Centers for Medicare and Medicaid Services (CMS) to approve Ohio's application for a Medicaid waiver authorizing the state to launch and maintain the PASSPORT Program, [42 C.F.R. 441.352](#) requires ODA to establish provider-certification requirements to safeguard the health and welfare of individuals who receive services through the program.

**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. Those state laws require ODA to adopt rules to establish requirements for provider certification and the PASSPORT 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. Those state laws require ODA to adopt rules to establish requirements for provider certification and the PASSPORT Program.

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

ODA and its designees monitor providers to ensure compliance for the continued health and safety of individuals receiving services from ODA-certified providers. [173-39-04] ODA will judge the proposed amendments to these rules to be a success

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when ODA and its designees find few violations against them 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 [main rules 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. 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 May 17, 2022, ODA emailed 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.

On March 1, 2023, Ohio started a public-comment period on ODM's webpage on the renewal application for the PASSPORT Program. One of ODA's designees filed 2 comments that objected to the end of NEMT as a service in the PASSPORT Program.

**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.

Regarding comments that ODA received in a related public-comment period that began on March 1, 2023, Ohio has no authority to override federal rules or CMS regarding the end of NEMT as a service in the PASSPORT Program.

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**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?**

No.

**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. §[173.391](#) requires ODA to adopt rules to establish requirements for ODA-certified providers. Additionally, federal rules require ODA to establish adequate requirements for providers to assure the health and safety of individuals enrolled in the PASSPORT Program.

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

R.C. §[173.391](#) authorizes only ODA to develop standards for ODA-certified providers of services to individuals enrolled in the PASSPORT Program.

**14. 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 them.

Through regular monitoring activities, ODA and its designees will monitor ODA-certified providers for compliance. [173-39-04]

**Adverse Impact to Business**

**15. 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 ODA-certified provider of NEMT<sup>2</sup> or non-medical transportation.<sup>3</sup>

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

*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.*

The following are the adverse impacts of these rules:

- **Availability:** Possessing a back-up plan for transporting individuals when a driver of vehicle is unavailable.

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<sup>2</sup> At the time of the drafting of this BIA, ODA had 193 certified providers of NEMT.

<sup>3</sup> At the time of the drafting of this BIA, ODA had 184 certified providers of non-medical transportation.

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- **Transferring:** Helping individuals to safely transfer between the vehicle and the pick-up point or destination point.
- **Vehicle Maintenance:** Maintaining vehicles and wheelchair lifts according to manufacturer's standards.
- **Vehicle Inspections:** Provider inspections on each day a vehicle is used and an annual mechanic inspection—with exemptions.
- **Driver Qualifications (with exemptions for drivers of licensed ambulettes, EMTs, first responders, and transit drivers):**
  - The requirements under R.C. [§4766.14](#)(A)(3) and (B).
  - Valid driver's license for at least 2 years.
  - A driver's license endorsement, if necessary to operate the type of vehicle used.
  - The ability to understand written and oral instructions.
  - The ability to help individuals to safely transfer between the vehicle and the pick-up point or destination point.
  - The ability to conduct the daily vehicle inspection.
  - The ability to comply with service verification requirements.
  - Successful completion of a passenger-assistance training course.

The amount the PASSPORT Program pays providers for a trip is an all-inclusive rate. It's intended to cover the all costs incurred in the trip plus employee-related costs. The costs incurred as a result of this rule are likely calculated as part of a provider's operational budget—the cost of doing business and clerical jobs, such as retaining records and updating policies and procedures.

Rule [5160-31-07](#) of the Administrative Code authorizes providers to negotiate the rate of each trip provided through the PASSPORT Program. In turn, the PASSPORT Program pays each provider the negotiated rate, so long as the rate does not exceed the maximum that the Ohio Dept. of Medicaid (ODM) allows per trip in the appendix to rule [5160-1-06.1](#) of the Administrative Code.

The adverse impact upon providers of CMS' decision to no longer approve of offering NEMT through the PASSPORT Program means the following:

- The PASSPORT Program will continue to pay providers for non-medical transportation. Fortunately, 91% of ODA's certified NEMT providers are also certified non-medical transportation providers.<sup>4</sup>
- If the provider does not already provide trips paid by the Medicaid state plan, the provider may need to learn how to work in that program to be paid for NEMT.

**16. Are there any proposed changes to the rules that will reduce a regulatory burden imposed on the business community? Please identify. (*Reductions in regulatory burden may include streamlining reporting processes, simplifying rules to improve readability, eliminating requirements, reducing compliance time or fees, or other related factors.*)**

Yes.

ODA's proposal to use ODA-approved inspection forms rather than specific forms will allow innovative providers to propose alternative electronic forms (or paper forms) that ODA can consider for approval in addition to the already-approved inspection forms.

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<sup>4</sup> That is, 175 out of 193 ODA-certified NEMT providers.

ODA will continue to exempt licensed ambulettes and certain busses from the annual vehicle-inspection requirements because those vehicles are subject to similar government-inspection requirements.

ODA will continue to exempt ambulette drivers, emergency medical technicians, first responders, and transit drivers from many of this rule's qualifications to be a driver.

**17. 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 programs.

Providers voluntarily apply for ODA certification. Certification is not required to provide a service unless a provider wants a government program that requires certification to pay the provider. Compliance with these rules is only required if a provider voluntarily chooses to participate in a program requiring certification, such as the PASSPORT Program.

**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 individuals enrolled in ODA-administered programs, 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's primary concern is the health and safety of individuals receiving services from ODA-certified providers. 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.

**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 these rules.