



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

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

MEDICAID-FUNDED COMPONENT OF THE ASSISTED LIVING PROGRAM

Chapter 173-38 of the Administrative Code establishes the requirements for the Medicaid-funded component of the Assisted Living Program.

Rule Number(s): 173-38-04

Date of Submission for CSI Review: March 3, 2023

Public Comment Period End Date: March 19, 2023 at 11:59PM.

Rule Type/Number of Rules:

☐ New/ # rules

☐ No Change/ # rules (FYR? ☐)

☒ Amended/ 1 rules (FYR? ☒)

☐ Rescinded/ # rules (FYR?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 173-38-04 of the Administrative Code refers to the requirement under R.C. §[173.39](#) for the Assisted Living Program to only pay a provider for providing a service to an individual who is enrolled in that program if the provider is certified by ODA under §[173.391](#).

ODA proposes to reduce the use of unnecessary regulatory restrictions (*e.g., shall*) in this rule to comply with R.C. §§ [106.03](#) and [121.951](#).¹ Because ODA's proposal will result in amending approximately more than 50% of the rule, ODA proposes to rescind the rule and to adopt a new rule in its place to comply with the 50% guideline in §4.3.1 of LSC's [Rule Drafting Manual](#).

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](#), and [173.54](#).

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 Medicaid-funded component of the Assisted Living 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 the Medicaid-funded component of the Assisted Living Program.

¹ Senate Bill 9 (134th G.A.).

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)?

This rule exists to refer to the requirement under R.C. §[173.39](#) for the Assisted Living Program to only pay a provider for providing a service if the provider is certified by ODA under §[173.391](#). This enables a provider who reads the chapter of rules on the Medicaid-funded component of the Assisted Living Program (Chapter 173-38 of the Administrative Code) to find a reference to the certification requirement and the rules on certification in Chapter 173-39 of the Administrative Code.

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

The Assisted Living Program does not pay a provider unless ODA certified that provider.

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.
- OhioAging (O4A)
- 4Ohio Assisted Living Association (OALA).
- Ohio Academy of Senior Health Sciences, Inc.
- Ohio Adult Day Healthcare Association (OADHA).
- 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.

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On January 9, 2023 ODA sent an email to the following stakeholders to request their recommendations for improving the current version of the rules in this package:

- Catholic Social Services of the Miami Valley.
- LeadingAge Ohio.
- OhioAging (O4A).
- Ohio Assisted Living Association.
- Ohio Academy of Senior Health Sciences, Inc.
- Ohio Adult Day Healthcare Association (OADHA).
- Ohio Association of Medical Equipment Suppliers.
- Ohio Association of Senior Centers.
- Ohio Council for Home Care and Hospice.
- Ohio Health Care Association.
- 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 rule.

In response to ODA's January 9, 2023 email, ODA received 0 recommendations from stakeholders on this rule.

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's proposal to rescind this rule and to replace it with a substantially-similar rule is not based upon scientific data.

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. [§173.39](#) requires the Assisted Living Program to require providers to be certified. Thus, there is no alternative.

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 ODA-administered programs.

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 this rule take effect, ODA will post a link to the rule on ODA's website. ODA will also send an email to subscribers of our rule-notification service to feature the rule.

Adverse Impact to Business

15. Provide a summary of the estimated cost of compliance with the rule. Specifically, please do the following:

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a. Identify the scope of the impacted business community; and

The impacted business community is every provider who wants to be paid by the Assisted Living Program for providing a service to an individual who is enrolled in the state-funded component of that program.

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.

There is no adverse impact other than what is already established under §173.39.

A provider does not need a certification from ODA to operate in its line of business. Additionally, providers are not required open a new line of business by providing services to individuals who are enrolled in the state-funded component of the Assisted Living Program.

Providers who want to expand their lines of business to receive payments from the Assisted Living Program for providing services to individuals who are enrolled in the state-funded component of that program as subject to the requirement under R.C. §173.39 to obtain certification from ODA under §173.391.

This rule merely refers to a requirement under R.C. §173.39.

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.*)

No.

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 Medicaid-funded component of the PASSPORT Program.

The cost of being certified under §173.391 is the cost of meeting the qualifications to become certified under Chapter 173-39 of the Administrative Code. At this time, ODA does not charge the certification fee under §173.391. Additionally, the Assisted Living Program pays certified providers for providing services, so the provider experiences a return on any investment involved in qualifying for certification

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 this rule is to ensure the health and safety of individuals enrolled in ODA-administered programs, the rule treats 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 this rule.

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