



# 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):

### TRANSPORTATION

Chapter 173-3 of the Administrative Code establishes requirements to include in, or exclude from, AAA-provider agreements (i.e., contracts) that are paid, in whole or in part, with Older Americans Act funds.

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

Rule Number(s): 173-3-06.6 and 173-39-02.18

Date of Submission for CSI Review: November 8, 2023

Public Comment Period End Date: November 21, 2023 at 11:59PM.

#### Rule Type/Number of Rules:

☐ New/ # rules

☐ No Change/ # rules (FYR? ☒)

☒ Amended/ 2 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☐ Rescinded/ # rules (FYR?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?

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**The rule(s):**

- a. ☐ Requires 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.*

173-3-06.6: This rule establishes requirements to include in, or exclude from, AAA<sup>1</sup>-provider agreements (i.e., contracts) for transportation that are paid, in whole or in part, with Older Americans Act funds.

173-39-02.18: This rule establishes the specific requirements to become, and to remain, an ODA-certified provider of non-medical transportation.

**Both Rules:** ODA proposes to amend each rule to achieve the following:

- 1. Delete the words in paragraph (B)(3)(d) of each rule that say that ODA deems only certified professionals to meet the qualifications in each rule for drivers.
- 2. Correctly state in paragraph (B)(3)(d) of each rule that ODA deems a list of professionals to meet the qualifications in each rule for drivers—some of whom have certifications.
- 3. Clarify that, in paragraph (B)(3)(d)(ii) of each rule, ODA deems the following to meet the qualifications in each rule for drivers: (A) an EMT or first responder; or (B) A candidate to be an EMT or first responder who has not yet obtained board certification for either profession.
- 4. Make additional non-substantive improvements to each rule.

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

173-3-06.6: R.C. §§ [121.07](#), [173.01](#), [173.02](#), [173.392](#), [4766.14](#), and [4766.15](#).

173-39-02.18: 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.*

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

173-3-06.6: [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."

173-39-02.18: 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 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 implements a federal requirement, but includes provisions not specifically required by the federal government, please explain the rationale for exceeding the federal requirement.**

173-3-06.6: This rule does not exceed any federal requirements. It exists to implement the state laws that ODA listed in its response to #2, which require ODA to establish the qualifications 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.

173-39-02.18: This rule does not exceed any federal requirements. It exists to comply with the state laws that ODA listed in its 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)?**

173-3-06.6: 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.

173-39-02.18: This rule exists 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?**

173-3-06.6: 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 this rule and (2) AAAs regularly monitor providers for their compliance with AAA-provider agreements, the rule is judged as being successful when (1) ODA funds few violations in AAA-provider agreements and (2) AAAs find few violations against AAA-provider agreements.

173-39-02.18: 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 this rule to be a success when ODA and its designees find few violations against it 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 contact ODA's policy-development manager at [rules@age.ohio.gov](mailto:rules@age.ohio.gov) to give input on improving ODA's rules. An AAA consulted with ODA on behalf of a provider that it was evaluating to determine if ambulette drivers are deemed to meet the driver qualifications in each rule, since the current version of each rule implies that such drivers have certifications. The state does not certify ambulette drivers.

### **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 the outreach from the AAA, ODA proposed to amend each rule to correct the conflicting language that implies that each professional that may be deemed to comply with the driver qualifications has a certificate.

### **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?**

Scientific research is not the impetus for amending each rule.

### **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? *Alternative regulations may include performance-based regulations, which define the required outcome, but do not dictate the process the regulated stakeholders must use to comply.***

173-3-06.6: 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.

173-39-02.18: 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?**

173-3-06.6: R.C. [§173.392](#) authorizes only ODA to adopt rules to establish requirements for AAA-provider agreements.

173-39-02.18: R.C. [§173.391](#) authorizes only ODA to develop qualifications 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.**

Both Rules: Before the proposed amendments take effect, ODA will send an email to subscribers of our rule-notification service to feature the rules.

173-3-06.6: 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.

173-39-02.18: 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(s). Specifically, please do the following:**

**a. Identify the scope of the impacted business community, and**

173-3-06.6: Every provider with an AAA-provider agreement for transportation.

173-39-02.18: Every ODA-certified provider of non-medical transportation.

**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.*

Both Rules: The following are the adverse impacts of each rule:

- General requirements to become and to remain an ODA-certified provider. These include compliance with (1) requirements established in either rule 173-3-06 or 173-39-02 of the Administrative Code, (2) requirements on topics (e.g., background checks) that are referenced in rule 173-3-06 or 173-39-02 of the Administrative Code, but established outside of either rule (e.g., R.C. §§ [173.38](#) and [173.381](#)), and (3) requirements on topics (e.g., records retention) that are established in rule 173-3-06 or 173-39-02 of the Administrative Code and also outside of either rule (e.g., [45 C.F.R. 75.361](#)).
- Specific requirements unique to transportation: (1) availability, (2) the degree to which drivers help consumers/individuals to transfer between the vehicle and the pick-up location or drop-off location, (3) vehicle requirements, and (4) driver qualifications.

173-3-06.6: 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 trip. 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).

173-39-02.18: The amount the PASSPORT Program pays providers for a service is an all-inclusive rate. It's intended to cover the daily costs incurred in the service 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. Providers set the prices they bill to the PASSPORT Program. In turn, the PASSPORT Program pays each provider the amount the provider bills, so long as the price billed does not exceed the maximum that the Ohio Dept. of Medicaid (ODM) allows per unit. In the appendix to rule [5160-1-06.1](#) of the Administrative Code, ODM establishes the units of service for the PASSPORT Program..

**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 proposed amendments to each rule will clarify that providers may hire ambulette drivers and candidates to be certified EMTs or first responders because ODA deems these uncertified persons to meet the driver qualifications in each rule. These amendments will clarify to providers that ambulette drivers and others without state-issued certifications are hireable because meet each rule's driver qualifications.

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

173-3-06.6: 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 this rule ensures the health and safety of the older Ohioans who are consumers of transportation 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 transportation 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 may enter into an AAA-provider agreement in order for those Older Americans Act programs to pay the provider for the trips it wants to provide to 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 transportation to be paid with Older Americans Act funds, and (2) the provider's bid is a winning bid. Providers may provide transportation without entering into an AAA-provider agreement when paid by private pay, third-party insurers, or other government programs that do not use Older Americans Act funds.

173-39-02.18: ODA is required to develop rules establishing requirements for ODA-certified providers and to ensure the health and safety of individuals enrolled in programs that require ODA's certification (e.g., the PASSPORT Program). Providers voluntarily apply for ODA certification. Certification is not required to provide non-medical transportation 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 obtain ODA's certification.

**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/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.