

Rule Summary and Fiscal Analysis (Part A)**Department of Aging**

Agency Name

Division

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173-4-05.1

Rule Number

NEW

TYPE of rule filing

Rule Title/Tag Line

Methods for determining nutritional adequacy.**RULE SUMMARY**

1. Is the rule being filed consistent with the requirements of the RC 119.032 review? **No**

2. Are you proposing this rule as a result of recent legislation? **No**

3. Statute prescribing the procedure in accordance with the agency is required to adopt the rule: **119.03**

4. Statute(s) authorizing agency to adopt the rule: **173.01; 173.02; 173.392; Section 305 (a)(1)(C) of the Older Americans Act of 1965, 79 Stat. 210, 42 U.S.C. 3001, as amended in 2006; 45 C.F.R. 1321.11**

5. Statute(s) the rule, as filed, amplifies or implements: **173.392; Sections 336 and 339 of the Older Americans Act of 1965, 79 Stat. 210, 42 U.S.C. 3001, as amended in 2006**

6. State the reason(s) for proposing (i.e., why are you filing,) this rule:

The proposed new rule is part of a larger rule package.

In the rule package, ODA proposes to amend its rules for Non-Medicaid Nutrition

Programs and Nutrition-Related Services in Chapter 173-4 of the Administrative Code to implement the new, federal Dietary Guidelines for Americans and to make other changes. Specifically, ODA is proposing to rescind rule 173-4-05 of the Administrative Code, and, in its stead, adopt these five proposed new rules: proposed new rules 173-4-05, 173-4-05.1, 173-4-05.2, 173-4-05.3, and 173-4-05.4 of the Administrative Code. ODA is also proposing to amend rules 173-4-07 and 173-4-08 of the Administrative Code.

Overall, ODA has 4 primary goals:

1. To incorporate guidelines of the Dietary Guidelines for Americans of 2010 into the rules. The U.S. Dept. of Health and Human Services and the U.S. Dept. of Agriculture jointly released the new guidelines on January 31, 2011. The new federal guidelines emphasize these three major goals: (a) balancing calories with physical activity to manage weight; (b) consuming more of certain foods and nutrients, such as fruits, vegetables, whole grains, fat-free and low-fat dairy products, and seafood; and (c) consuming fewer foods with sodium, saturated fats, trans fats, cholesterol, added sugars, and refined grains.
2. To emphasize person-centered (i.e., "self-directed") care in the rules, by requiring providers to (a) provide choices to consumers within the Dietary Guidelines for Americans and (b) help consumers make informed choices regarding meals, alternative meals, and meal types.
3. To comply with Governor Kasich's Executive Order 2011-01K "Implementing Common Sense Business Regulation" and S.B. No. 2 (129th G.A.). In doing so, ODA is (a) proposing to amend this rule after providing interested parties and the general public an opportunity to provide input on the proposed amendments to the rule before filing the rule with the Joint Committee on Agency Rule Review (from November 10, 2011 to November 27, 2011, ODA posted the proposed amended rule on <http://aging.ohio.gov/information/rules/proposed.aspx> for a public-comment period) and (b) making the rules more user-friendly by (i) transforming one large, many-topic rule into five smaller fewer-topic rules and (ii) incorporating more tables into the new rules.
4. To comply with section 119.032 of the Revised Code, which requires each state agency to review each rule on or before the review date listed at the end of the rule.

7. If the rule is an AMENDMENT, then summarize the changes and the content of the proposed rule; If the rule type is RESCISSION, NEW or NO CHANGE, then summarize the content of the rule:

ODA is proposing to rescind the larger, multi-topic rule 173-4-05 of the Administrative Code and simultaneously replace it with five smaller, fewer-topic rules of the Administrative Code numbered "173-4-05," "173-4-05.1," "173-4-05.2," "173-4-05.3," and "173-4-05.4."

Please see the public hearing notice for a detailed crosswalk that shows what information in the current version of rule 173-4-05 of the Administrative Code appears in proposed new rules 173-4-05 to 173-4-05.4 of the Administrative Code and how the rule language may differ from the current version of rule 173-4-05 of the Administrative Code to proposed new rules 173-4-05 to 173-4-05.4 of the Administrative Code.

8. If the rule incorporates a text or other material by reference and the agency claims the incorporation by reference is exempt from compliance with sections 121.71 to 121.74 of the Revised Code because the text or other material is **generally available** to persons who reasonably can be expected to be affected by the rule, provide an explanation of how the text or other material is generally available to those persons:

This response left blank because filer specified online that the rule does not incorporate a text or other material by reference.

9. If the rule incorporates a text or other material by reference, and it was **infeasible** for the agency to file the text or other material electronically, provide an explanation of why filing the text or other material electronically was infeasible:

This response left blank because filer specified online that the rule does not incorporate a text or other material by reference.

10. If the rule is being **rescinded** and incorporates a text or other material by reference, and it was **infeasible** for the agency to file the text or other material, provide an explanation of why filing the text or other material was infeasible:

Not Applicable.

11. If **revising** or **refiling** this rule, identify changes made from the previously filed version of this rule; if none, please state so:

On January 3, 2012, ODA revise-filed the proposed new rule to:

1. Replace the target value for calories in the DRI Nutrient-Value Requirements table from "650 calories" to "700 calories. Replace the compliance range from "600-700 calories" to "600-800 calories." ODA decided to make this revision after considering comments from Wesley Community Services and the Area Office on Aging of Northwestern Ohio, Inc.

2. Replace the target value for sodium in the DRI Nutrient-Value Requirements table from "430 mg" to "500 mg." ODA decided to make this revision after

considering comments submitted by the Ohio Assn. of Area Agencies on Aging and the Area Office on Aging of Northwestern Ohio, Inc.

3. Replace the target value for potassium in the DRI Nutrient-Value Requirements table from "1300 mg" to "1,567 mg." ODA decided to make this revision after considering a comment submitted by the Area Office on Aging of Northwestern Ohio, Inc.

4. Insert "unsweetened" before "fruit juices" in paragraph (B)(3)(b) of the rule.

5. Insert "one-half cup of cranberry juice drink" into paragraph (B)(3)(i) of the rule.

6. Revise this RSFA.

On June 11, 2012, ODA refiled the rule to:

1. Replace the language regarding meal accompaniments under paragraph (B)(8) of the rule for providers who use the menu-pattern method for determining nutritional adequacy. The new language that continues to indicate that a provider who uses the menu-pattern method shall not supply salt shakers to consumers. The new language also prohibits the provider from restricting consumers from using their own salt to season food. This makes it possible for the provider to serve a nutritious meal that complies with the federal dietary reference intakes for sodium, which the Older Americans Act requires the provider to follow if the provider is serving meals using Older Americans Act funds. It also makes it possible for a consumer to use his or her own salt even if doing so increases the sodium content of the meal in excess of the federal dietary reference intakes for sodium. (The Older Americans Act requires providers to serve only meals that comply with federal dietary reference intakes, but does not require a consumer to eat only a meal that complies with reference intakes. Thus, the consumer has the freedom to alter his or her meal after the provider has served it.) [SEE INFORMATION BELOW ON JULY 12, 2012 REFILEING.]

2. Upload a public hearing notice into the Electronic Rule Filing (ERF) system to announce an additional public hearing on the proposed new rule.

3. Revise this RSFA.

On July 6, 2012, ODA refiled the rule to:

1. Create an easier-to-read beginning of the rule by:

a. Moving the table entitled, "DRI Nutrient-Value Requirements," so that it appears before paragraph (A) of the rule. This prevents breaking up the content of paragraph (A) of the rule and its sub-paragraphs with a table. It also prevents having the table divided over pages 1 and 2 of the rule when the rule is viewed in the official .pdf format.

- b. Moving the table entitled, "Menu pattern," so that it appears before paragraph (B) of the rule. This prevents breaking up the content of paragraph (B) of the rule from its sub-paragraphs.
 - c. Inserting "the provider complies with the following" after "if" in paragraph (A) of the rule.
 - d. Adding the sub-title "Software" to the beginning of paragraph (A)(1) of the rule.
 - e. Adding the sub-title "Compliance ranges" to paragraph (A)(2) of the rule.
 - f. Moving the language on compliance ranges from paragraph (A)(2) of the rule into paragraphs (A)(2)(a) and (A)(2)(b) of the rule. This divides the "per meal" requirements from the "menu averaging" exception.
 - g. Moving the content of paragraph (A)(3) of the rule on serving three meals a day to new paragraph (A)(2)(a) of the rule.
2. Insert "and" in paragraph (B)(1) of the rule in between "meat alternate" and "a vegetable in the same meal."
 3. Replace the second occurrence of "entrees" in paragraph (B)(2)(d) of rule with "entrées."
 4. Delete "or entrees" as it occurred in paragraph (B)(2)(d) of the rule in the phrase, "or lentil soups or entrees." This also matches the language in the table entitled, "Serving Sizes for Meat and Meat Alternates."
 5. Replace "they" in paragraph (B)(2)(d) of the rule with "the meals."
 6. Replace ", in particular:" in paragraph (B)(3)(a) of the rule with ", especially".
 7. Replace "The provider shall consider all vegetables (and full-strength vegetable juices) and all fruits (and full-strength, unsweetened fruit juices) to be vegetables and fruits." that was paragraph (B)(3)(b) of the rule with, "The provider shall consider all full-strength vegetable juices and all full-strength, unsweetened fruit juices to be vegetables and fruits." Otherwise, the rule would say that the provider shall consider vegetables...and fruits...to be vegetables and fruits.
 8. Insert "per serving" to the end of paragraph (B)(3)(e) of the rule.
 9. Replace "once per month, or twice a month" in paragraph (B)(3)(g) of the rule with "once per month, or twice per month."
 10. Insert "to be" in paragraph (B)(3)(h) of the rule in between "noodles" and "a vegetable."
 11. Insert "to be" into paragraph (B)(4)(b) of the rule in between "vegetables..." and "a serving of bread."

12. Insert "to be" into paragraph (B)(4)(c) of the rule in between "vegetables" and "a serving of bread."
13. Insert "in" into paragraph (B)(4)(d) of the rule in between "the guidelines" and "the...table to this rule."
14. Insert "than" into paragraph (B)(5)(a) of the rule in between "no more" and "one per cent."
15. Insert "to be" in paragraph (B)(5)(b) of the rule in between "juice" and "both a serving of fruit and a serving of milk."
16. Replace "tofu both a meat and a milk alternate" in paragraph (B)(5)(c) of the rule with "tofu to be both a serving of meat alternate and a serving of milk alternate."
17. Insert "in" into paragraph (B)(6)(e) of the rule in between "the guidelines" and "the...table to this rule."
18. Insert "and the 'Dietary Guidelines for Americans'" after "dietary reference intakes" in paragraph (B)(8)(b)(i) of the rule.
19. Make the following changes regarding salt shakers in response to testimony provided at the June 21, 2012 public hearing by the Beverly Laubert, the State Long-Term Care Ombudsman: [SEE INFORMATION BELOW FOR SUBSEQUENT JULY 12, 2012 REFILING]
 - a. Delete "Therefore, the provider shall not supply any salt shakers to consumers or seasoning meals because this would disable a provider from ensuring that its meals comply with federal law. Yet, no provider shall prevent a consumer from using his or her own salt to season his or her food" from paragraph (B)(8)(b)(i) of the rule.
 - b. Replace paragraph (B)(8)(b)(ii) of the rule, which said, "A provider shall not purchase salt shakers with Older Americans Act funds." The new language says, "A provider shall not seek Older Americans Act funds from the AAA as a reimbursement for any costs it incurs to purchase salt shakers or salt packets for use by a consumer as an accompaniment to a meal. A provider may use other funding sources to supply salt seasonings as an accompaniment to a meal. Consumers may bring their own salt for seasoning their food."
 - c. Replace paragraph (B)(8)(b)(iii) of the rule, which said, "The provider shall prefer to serve herbal or granulated seasonings instead of salt." The new language says, "The provider shall prefer to provide herbal or granulated seasonings, instead of salt, for use by a consumer as an accompaniment to a meal."
20. Upload a new public hearing notice.
21. Revise this RSFA.

On July 12, 2012, ODA refiled the rule to:

1. Delete paragraph (B)(8)(b)(ii) of the rule, which said, "A provider shall not seek Older Americans Act funds from the AAA as a reimbursement for any costs it incurs to purchase salt shakers or salt packets for use by a consumer as an accompaniment to a meal. A provider may use other funding sources to supply salt seasonings as an accompaniment to a meal. Consumers may bring their own salt for seasoning their food."

ODA made this decision on three grounds:

a. After further discussion with the U.S. Administration on Aging (AoA), stakeholders, and ODA staff, ODA determined that the requirements in the Older Americans Act to provide meals that comply with the federal dietary reference intakes and 2010 Dietary Guidelines for Americans pertained to the meal the provider prepared and served, but not to salt shakers or salt packets that a provider may furnish to allow a consumer to salt his or her own food. Because AoA does not consider the furnishing salt for a consumer to use to season his or her food as part of the meal, the restrictions in the Older Americans Act do not ban the use of Older Americans Act funds that ODA administers from being used to purchase salt shakers or salt packets.

b. ODA wants to promote person-centered care and allow consumers to have the freedom to make choices regarding their food that are within what the law allows--even choices that have risks.

c. Salt is inexpensive. Even so, the refiled rule would not require a provider to use its Older Americans Act funds to purchase salt. It would be the provider's option.

2. Delete paragraph (B)(9) of the rule, which said, "Beverages (if provided in meal): Although serving a beverage is optional and may not be purchased with Older Americans Act funds, the provider may serve water, coffee, or tea with meals to maintain proper hydration." The rationale for this was based on ODA's logic regarding salt shakers.

3. Revise this RSFA.

12. 119.032 Rule Review Date:

(If the rule is not exempt and you answered NO to question No. 1, provide the scheduled review date. If you answered YES to No. 1, the review date for this rule is the filing date.)

NOTE: If the rule is not exempt at the time of final filing, two dates are required: the current review date plus a date not to exceed 5 years from the effective date for Amended rules or a date not to exceed 5 years from the review date for No Change rules.

FISCAL ANALYSIS

13. Estimate the total amount by which *this proposed rule* would **increase / decrease** either **revenues / expenditures** for the agency during the current biennium (in dollars): Explain the net impact of the proposed changes to the budget of your agency/department.

This will have no impact on revenues or expenditures.

\$0.00

ODA does not anticipate that the adoption of this proposed new rule, nor the larger rule package, would have any impact upon the biennial budget the Ohio General Assembly established for ODA, because the rule package should not create any expenses for ODA that were unforeseen when the Ohio General Assembly appropriated funds to ODA in H.B. No. 153 (129th G.A.).

14. Identify the appropriation (by line item etc.) that authorizes each expenditure necessitated by the proposed rule:

GRF-490-411 Senior Community Services.

322-490-618 Federal Aging Grants.

3M40-490-612 Federal Independence Services.

15. Provide a summary of the estimated cost of compliance with the rule to all directly affected persons. When appropriate, please include the source for your information/estimated costs, e.g. industry, CFR, internal/agency:

CONSUMERS: Although section 315(b) of the Older Americans Act and rule 173-3-07 of the Administrative Code allow a meal provider to solicit and accept voluntary contributions from meal consumers, a meal consumer is not required to pay for a meal service and, thus, the proposed adoption of this new rule creates no cost of compliance for a meal consumer. This is true for consumers of either congregate meals or home-delivered meals, regardless of alternatives such as therapeutic diets, cultural meals, frozen meals, medical meals, etc.

In FY2011, providers furnished meals to 63,453 persons through congregate meal programs and to another 39,037 persons through home-delivered meal programs that are regulated by Chapter 173-4 of the Administrative Code. Cumulatively, in FY2011, providers furnished meals to almost 0.9% of the total population of Ohio. ODA estimates that the proposed adoption of this rule will not directly affect the volume of meals provided to meal consumers in FY2012 or future fiscal years.

MULTI-YEAR PROVIDER AGREEMENTS IN FORCE SINCE BEFORE FEBRUARY 15, 2009: Regardless of whether a meal provider has entered into a provider agreement with an area agency on aging to operate a meal program or a component of a meal program, such as the meal service, the provider will not experience an increased cost of compliance as a result of the adoption of this proposed rule so long as the provider is operating by the terms of a valid provider agreement already in force. However, pursuant to paragraph (G) of rule 173-3-04 of the Administrative Code, no multi-year contract may remain in effect for more than four years. Nevertheless, as a result of section 339(1)(A)(i) of the Older Americans Act, which requires all meals to comply with the most recent federal Dietary Guidelines for Americans if those meals are paid for in part or in full with Older Americans Act funding, the same providers may experience an increased cost of compliance. Although ODA is not required to report in this rule summary and fiscal analysis an increased cost of compliance that is not caused by this rule, ODA thought it would be helpful to mention this here.

ALL PROVIDER AGREEMENTS IN FORCE, BUT ENTERED INTO AFTER FEBRUARY 15, 2009: Paragraph (A)(23) of rule 173-3-06 of the Administrative Code requires the area agency on aging to require the provider to comply with any new requirements ODA may adopt in this proposed new rule. During ODA's public-comment period for these rules, providers stated that the new federal Dietary Guidelines for Americans dictates the nutrient content information in these rules, which will lead to a greater cost of compliance. ODA is not able to change the federal guidelines. Additionally, providers commented that ODA's restrictions on the menu-pattern method for determining nutritional adequacy would create difficulties for the providers (e.g., regarding limits on processed meats, egg yolks, and sauerkraut). As a result, ODA modified the proposed new rule before filing it with JCARR so that, the restrictions on the menu-option method could allow a provider to remain in compliance with the federal Dietary Guidelines for Americans, but still provide as much flexibility as possible without using nutrient analysis software.

ALL NEW PROVIDER AGREEMENTS: ODA estimates that, if a meal provider anticipates that it will experience an increased gross cost of compliance under the terms of a new provider agreement, the provider may not experience an increased net cost of compliance. This is because a provider determines at what price it is willing to provide meals when it prepares its bid for the competitive-bidding process that 45 C.F.R., Parts 74 and 92 and rule 173-3-04 of the Administrative Code require. Thus, if a provider foresees that the cost of compliance would be greater under the proposed new rules, it may bid a higher price during the next competitive-bidding process.

The competitive-bidding process allows a provider to experience no net cost of compliance under a new provider agreement. This is because rule 173-3-04 of the Administrative Code requires the provider and the area agency on aging to enter into a purchase-of-service provider agreement, which the rule says, "means a

contract or grant through which a provider is paid for only the services the provider actually delivers based upon a pre-determined price per unit of service delivered. The price paid per unit of service encompasses all elements associated with the production of the unit of service." Thus, even if a provider's gross cost of compliance would increase under a new provider agreement, if it bids for a greater price per unit to compensate for the increased gross cost of compliance, it should not experience an increased net cost of compliance.

Additionally, to be more competitive during competitive bidding, a meal provider may opt to not bid for a higher price per unit to compensate itself for an increased gross cost of compliance. In doing so, the provider may still offset a net increase in the cost of compliance if it finds operational savings. Some providers may find operational savings by improving areas of inefficiency (e.g., driving routes, soliciting voluntary contributions, or delivering meals to homes when the consumer is in an adult day center or hospital) or by deploying cost-saving measures (e.g., nutritional analysis software, an electronic-signature system, or GPS monitoring to verify meal deliveries).

16. Does this rule have a fiscal effect on school districts, counties, townships, or municipal corporations? **No**

17. Does this rule deal with environmental protection or contain a component dealing with environmental protection as defined in R. C. 121.39? **No**