

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

Agency Name

Division

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173-4-05

Rule Number

NEW

TYPE of rule filing

Rule Title/Tag Line

Meal service.**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. Insert after "The provider" in the second sentence of paragraph (B)(4)(e) of the rule, "of congregate meals who chooses this option."

2. Update this RSFA.

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

1. Create noun-verb agreement in paragraph (A) and to rid paragraph of redundant

language. In doing so, "'Meal service' means a service through which a congregate nutrition program, a home-delivered nutrition program, or a restaurant and grocery meal service provides a safe and nutritious meal to consumers to help sustain health through a congregate nutrition program, home-delivered nutrition program, or restaurant and grocery meal service" became "'Meal service' means a service through which a congregate nutrition program, a home-delivered nutrition program, or a restaurant and grocery meal service provides safe and nutritious meals to consumers to help sustain health."

2. Replace paragraph (B) of the rule. The paragraph formerly said, "Minimum requirements for a meal service in addition to the mandatory clauses under rule 173-3-06 of the Administrative Code:" The paragraph now says, "In addition to complying with the mandatory clauses for provider agreements described in rule 173-3-06 of the Administrative Code, a meal service provider shall comply with the following requirements:"

3. Move the summary of the Dietary Guidelines for Americans that were listed under paragraph (B)(1)(a) of the rule to an appendix to the rule.

4. Insert "a minimum" before "one-third" in paragraph (B)(1)(b) of the rule. This brings the paragraph into compliance with the wording in section 339 of the Older Americans Act.

5. Replace "(DRIs), which are a comprehensive set..." in paragraph (B)(1)(b) of the rule with "(DRIs). DRI's are a comprehensive set...." ODA made this change for the sake of clarity.

6. Replace "determine nutritional adequacy" at the end of paragraph (B)(1)(c) of the rule with "determine the nutritional adequacy of the meals for which it seeks reimbursement from the AAA."

7. Switch paragraph (B)(2) of the rule with paragraph (B)(3) of the rule so that the topic of ingredients appears before menu planning.

8. Replace paragraph (B)(3) [now (B)(2)]. Previously, paragraph (B)(3) said, "Ingredient information: The provider shall offer information on the ingredient content of meals served through a system that is approved by the AAA." Now paragraph (B)(2) says, "Ingredient information: The provider shall offer information on the ingredient content of meals that it serves. The provider shall obtain the AAA's approval of their method for offering the ingredient information before the provider implements the method."

9. Replace paragraph (B)(2)(b) [now (B)(3)(b)] of the rule. The former paragraph said, "The provider shall assure that consumers have opportunities for input about the food items it offers as part of self-directed care." The paragraph now says, "To promote self-directed care, the provider shall assure that consumers have opportunities for feedback on menus that have been served and input on upcoming

menus." ODA made this change for the sake of clarity. Firstly, ODA wanted to clarify that seeking feedback and input was not just for food offered as part of self-directed care. Instead, ODA wants providers to solicit feedback and input to promote self-directed care for all consumers that they serve. Secondly, ODA wanted to clarify that the feedback and input was for the purpose of menu planning to differentiate it from the consumer's choices about meals under paragraph (B)(4) of the rule.

10. Replace paragraph (B)(4)(a) of the rule. The former paragraph said, "At a minimum, allow each consumer to choose from two of the following:" The new paragraph says, "Allow consumers to choose between two or more food items within at least two of the following categories:" ODA made this change for the sake of clarity. The former paragraph did not clearly indicate what the choice was: between two food categories or choices within two food categories.

11. Insert "at the congregate meal site" after "two meals per day" in paragraph (B)(4)(d)(v) of the rule.

12. Delete paragraph (B)(4)(e) of the rule. The former paragraph said, "Allow consumers of congregate meal sites to make an informed choice regarding the menu, food alternates, and portion sizes, based on the availability of food items. The provider of congregate meals who chooses this option shall retain records to show that it informs consumers of the benefits and risks of dietary choices, so long as the AAA approves of the method for recording this information." ODA removed this item because much of it was redundant of other consumer choice options. Regarding portion sizes, the Older Americans Act requires meals to be nutritious, but does not require the consumer to consume the entirety of the nutritious meal. Additionally, ODA does not expect a deliverer of a meal or a server in a congregate meal site to provide health advice to a consumer who may refuse to eat the entirety of each portion of a meal.

13. Replace "The AAA shall not allow dietary supplements" in paragraph (D)(8) of the rule with "The AAA shall not allow a provider to serve multi-vitamin or mineral supplements."

14. Delete the second sentence of paragraph (D)(8) of the rule. The former sentence said, "Under the 'Dietary Supplement Health and Education Act of 1994,' 21 U.S.C. 321, dietary supplements are intended for ingestion in pill, capsule, tablet, or liquid form."

15. Replace "under" in paragraph (C)(1), (C)(2), and (C)(3) of the rule with "in compliance with."

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

17. 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 expense for ODA that was unforeseen when the Ohio General Assembly appropriated state and federal 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 the requirement to provide consumers with choices created an increased cost of compliance. As a result, ODA created more options for providing consumer choice and modified the menu-options option so that providers who provide menu options are only required to provide two options, not three, which is the current requirement.

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**