

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Ohio Department of Medicaid

Regulation/Package Title: Medicaid: Authorized representatives.

Rule Number(s): 5160-1-33 (new and rescinded)

5160-1-32 (new and rescinded for information only)

Date: 7/15/2016

Rule Type:

☒ New

☐ Amended

☐ 5-Year Review

☐ Rescinded

The Common Sense Initiative was established by Executive Order 2011-01K and placed within the Office of the Lieutenant Governor. Under the CSI Initiative, agencies should balance the critical objectives of all regulations with the costs of compliance by the regulated parties. Agencies should promote transparency, consistency, predictability, and flexibility in regulatory activities. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

Regulatory Intent

1. Please briefly describe the draft regulation in plain language.

Please include the key provisions of the regulation as well as any proposed amendments.

Rule 5160-1-33, entitled "Medicaid: authorized representatives," is a new rule which will replace existing OAC rule 5160:1-1-55.1 of the same title that is being proposed for rescission. As Ohio Medicaid streamlines operations, the department determined that moving the rule to be included under general Medicaid provisions was necessary as it applies broadly in the Medicaid program.

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This rule describes criteria for becoming an authorized representative, roles and responsibilities of an authorized representative and the administrative agency responsibilities in recognizing and communicating with a Medicaid applicant or Medicaid recipient's authorized representative. The rule describes how an authorized representative is appointed and how an authorized representative ceases being an authorized representative. Finally, this rule describes what assistance from others who are not authorized representatives may be provided.

This new rule uses the existing language in the OAC rule 5160:1-1-55.1 proposed for rescission but removes unnecessary language, reorganizes provisions for better clarity, updates Administrative Code and C.F.R. references, and updates effective dates for C.F.R. references. The new rule includes confidentiality and conflict of interest provisions and describes situations in which the administrative agency may choose not to contact an authorized representative. It also adds the authority under state law as a criteria to become an authorized representative and describes when and how the authority of an authorized representative ceases.

2. Please list the Ohio statute authorizing the Agency to adopt this regulation.

5162.03, 5163.02

3. 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

Although this rule references the Code of Federal Regulations (C.F.R.), this rule does not implement a specific federal requirement.

4. If the regulation includes provisions not specifically required by the federal government, please explain the rationale for exceeding the federal requirement.

This rule does not exceed any federal requirements.

5. 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 clearly defines the roles and responsibilities of designated authorized representatives and the administrative agency in recognizing authorized representatives. It also defines what type of assistance can be provided by an individual or organization who is not an authorized representative.

The public purpose for this rule is to provide protection for individuals who have an authorized representative acting on their behalf in the application, verification, or redetermination process for Medicaid benefits. The rule defines responsibilities of the authorized representative including maintaining confidentiality of information, and adhering to all state and federal laws.

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

The success of this regulation is difficult to quantify as it does not produce measurable outputs or outcomes.

Development of the Regulation

7. 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.

Internal stakeholders including legal and policy staff were included in the development and initial review of the draft rule.

Existing OAC rule 5160:1-1-55.1 that is being proposed for rescission was posted for public comment on the Ohio Medicaid website. No feedback was received on the rule from external stakeholders therefore no external feedback was incorporated into the new rule.

8. What input was provided by the stakeholders, and how did that input affect the draft regulation being proposed by the Agency?

No comments were received from external stakeholders. Internal stakeholders provided input regarding irrelevant language and outdated references to the Code of Federal Regulations. This input has been incorporated into the new rule being proposed by ODM.

9. 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?

Not applicable.

10. 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?

The content of this rule uses existing language found in OAC rule 5160:1-1-55.1 which has been in effect since at least 10/1/2013 and is now being proposed for rescission. The new rule removes unnecessary language, reorganizes provisions for better clarity, updates Administrative Code and C.F.R. references, and updates effective dates for C.F.R. references. The new rule includes confidentiality and conflict of interest provisions and describes situations in which the administrative agency may choose not to contact an authorized representative. It also adds authority under state law as a criteria to become an authorized representative and describes when and how the authority of an authorized representative ceases. ODM did not consider any regulatory alternatives because provisions in the new rule were in effect under the existing rule and continue to be applicable broadly across the Medicaid program. The changes made in the new rule are intended to provide additional safeguards for Medicaid recipients who have an authorized representative.

11. Did the Agency specifically consider a performance-based regulation? Please explain. *Performance-based regulations define the required outcome, but don't dictate the process the regulated stakeholders must use to achieve compliance.*

The rule does not have required outcomes therefore a performance-based regulation was not considered. The rule outlines responsibilities of an authorized representative should an individual choose to be represented by another entity or person.

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

This rule has been reviewed by internal legal staff to ensure it does not duplicate an existing Ohio regulation.

13. 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.

ODM plans to implement the regulation as it does today and will provide a notice of changes to providers, interested parties, and the County Department of Job and Family Services (CDJFS) offices across Ohio. Currently, the administrative agency collects the appropriate documentation designating an authorized representative and includes it in the case file of the individual. The administrative agency will continue to operate as it does today as the rule does not alter this process.

Adverse Impact to Business

14. 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;

An individual or organization who chooses to be an authorized representative for another individual who is applying for or receiving Medicaid services may be impacted by this rule.

b. Identify the nature of the adverse impact (e.g., license fees, fines, employer time for compliance); and

An individual or organization who chooses to be an authorized representative may be adversely impacted by administrative and documentation requirements required in this rule.

c. Quantify the expected adverse impact from the regulation.

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.

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The expected adverse impact will be minimal and in the form of time or administrative costs that may be incurred as a result of complying with this rule. An authorized representative is expected to stand in place of the Medicaid recipient and provide information as needed to the administrative agency on behalf of the Medicaid recipient. The authorized representative must provide documentation to the administrative agency if he/she no longer wishes to act as the authorized representative. Additionally, if the authorized representative is a provider, staff member, or volunteer of an organization, they must affirm they will adhere to specific regulations in the Code of Federal Regulations and other relevant state and federal laws concerning conflicts of interest and confidentiality of information.

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

ODM determined the regulatory intent justifies the adverse impact to the regulated business community because it is expected to be very minimal. Individuals or organizations acting as authorized representatives are currently subject to this rule and they will continue to operate as they do today under the new rule. ODM determined the regulatory intent of protecting individuals served by authorized representatives outweighed the minimal impact it would have on the business community.

Regulatory Flexibility

16. Does the regulation provide any exemptions or alternative means of compliance for small businesses? Please explain.

The regulation does not provide any exemptions or alternative means of compliance for small businesses because the requirements set forth in this rule are minimal and in the form of administrative costs such as time spent on gathering and submitting documentation. The proposed rule does not disproportionately impact small businesses as the rule would apply consistently to businesses of all sizes.

17. 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?

Not applicable. This rule does not impose administrative fines or civil penalties.

18. What resources are available to assist small businesses with compliance of the regulation?

Small businesses may access the ODM website, www.medicaid.ohio.gov for resources to assist with compliance of this rule. They may also contact the provider hotline at 1-800-686-1516 for help with specific questions they may have.

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5160-1-33 Medicaid: authorized representatives.

(A) Designation of an authorized representative.

- (1)) An individual may designate any person or organization to serve as that individual's authorized representative. Any person serving as an authorized representative must be at least 18 years or older.
- (2) Authority for a person or organization to act on behalf of the individual accorded under state law, including but not limited to, a court order establishing legal guardianship, must be treated as a written designation by the individual of authorized representation.
- (3) The designation of an authorized representative must be in writing, and must identify what duties the individual is authorizing the representative to perform.
- (4) If the designated authorized representative is unwilling or unable to accept the responsibility of being an authorized representative, the authorized representative must inform the administrative agency and the individual of the refusal or withdrawal.

(B) The authorized representative:

- (1) Must present proper identification, if requested by the administrative agency, prior to the disclosure of medicaid information to the authorized representative.
- (2) Must agree to maintain or be legally bound to maintain the confidentiality of any information regarding the individual provided by the administrative agency.
- (3) Will receive copies of notices and correspondence sent to the individual by the administrative agency.
- (4) Stands in the place of the individual. Any responsibility of the individual is a responsibility of the authorized representative. Any action taken by the authorized representative or failure to act will be accepted as the action or lack of action of the individual.
- (5) Shares all responsibilities set out in rule 5160:1-2-08 of the Administrative Code.

(C) The administrative agency may contact the individual to clarify or verify information provided by an authorized representative if the authorized representative provides information that seems contradictory, unclear, or unrealistic.

(D) The administrative agency may choose not to contact the authorized representative if the administrative agency believes that the authorized representative might endanger the individual in a situation of domestic violence, abuse, or neglect in accordance with 45 C.F.R. 164.502(g)(5) (as in effect October 1, 2015).

(E) If the authorized representative is a provider or staff member or volunteer of an organization, the authorized representative must affirm that he or she will adhere to the regulations in 42 C.F.R. Part 431 Subpart F (as in effect October 1, 2015), 42 C.F.R. 447.10 (as in effect October 1, 2015), 45 C.F.R. 155.260(f) (as in effect October 1, 2015), as well as other relevant state and federal laws concerning conflicts of interest and confidentiality of information.

(F) The power to act as authorized representative is valid until the individual notifies the administrative agency that the authorized representative is no longer authorized to act on his or her behalf, or the authorized representative informs the administrative agency the he or she no longer is acting in such capacity, or there

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is a change in the legal authority upon which the authorized representative's authority was based. Such notice should include the applicant or authorized representative's signature as appropriate.

(G) Assistance from persons or organizations who are not authorized representatives.

- (1) A person or organization may accompany and assist an individual with portions of the application, verification, or redetermination process without being an individual's authorized representative.
- (2) The administrative agency must not reveal confidential information or send notices or correspondence to a person or organization who is assisting an individual, unless the person or organization is designated as an authorized representative.
- (3) A person or organization who is assisting an individual must provide accurate information to the administrative agency, to the best of his or her knowledge, regardless of whether the person or organization is an authorized representative.

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TO BE RESCINDED

5160:1-1-55.1 **Medicaid: authorized representative responsibilities.**

- (A) This rule describes the responsibilities of an authorized representative who is appointed in writing by the individual to stand in the place of the individual and act with authority on behalf of the individual. These responsibilities do not apply to people or organizations who merely help or assist an individual with portions of the application, verification, or redetermination process, unless the individual or organization is granted authority to act on behalf of the individual.
- (B) Assistance from individuals who are not authorized representatives. A person may accompany and assist an individual without being an individual's authorized representative.
- (1) The administrative agency must not reveal safeguarded information, as described in rule 5101:1-37-51.1 of the Administrative Code, or send notices or correspondence to a person who is assisting an individual, unless the person is designated in writing as an authorized representative.
 - (2) A person who is assisting an individual must provide accurate information, to the best of his or her knowledge, regardless of whether the person is an authorized representative.
- (C) Appointment of an authorized representative.
- (1) Any person at least eighteen years old, or a business or other legal entity, may be appointed an authorized representative by an individual.
 - (2) An authorized representative must be appointed by an individual in order to act on the individual's behalf or have access to the individual's medicaid information. The document appointing an authorized representative must identify what duties the individual is authorizing the representative to perform.
 - (3) If the appointed authorized representative is unwilling or unable to accept the responsibility of being an authorized representative, the authorized representative must inform the administrative agency and the individual of the refusal or withdrawal.
- (D) Responsibilities of an authorized representative. If a person or organization is

designated as an individual's authorized representative, the authorized representative:

- (1) Must present proper identification, if requested by the administrative agency, prior to representation of the individual by or disclosure of medicaid information to the authorized representative.
 - (2) Will receive copies of notices and correspondence sent to the individual by the administrative agency.
 - (3) Stands in the place of the individual. Any responsibility of the individual is a responsibility of the authorized representative. Any action taken by the authorized representative or failure to act will be accepted as the action or lack of action of the individual.
 - (4) Shares all responsibilities set out in rule 5101:1-37-55 of the Administrative Code.
- (E) The administrative agency may contact the individual to clarify or verify information provided by an authorized representative if the authorized representative provides information that seems contradictory, unclear, or unrealistic.

Effective:

Five Year Review (FYR) Dates:

Certification

Date

Promulgated Under:	111.15
Statutory Authority:	5162.03, 5163.02
Rule Amplifies:	5162.03, 5163.02, 2913.401, 3501.01, 3503.10, 5101.58, 329.051
Prior Effective Dates:	.

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5160-1-32 Medicaid: safeguarding and releasing information.

(A) "Safeguarded information" includes but is not limited to the following types of information:

- (1) Names and addresses; and
- (2) Social security numbers; and
- (3) Medical services provided; and
- (4) Social and economic conditions or circumstances; and
- (5) Agency evaluation of personal information; and
- (6) Medical data, including diagnosis and past history of disease or disability; and
- (7) Any information received in connection with the identification of third party coverage; and
- (8) Any information received for verifying income eligibility and amount of medical assistance payments. Income information received from the social security administration (SSA) or the internal revenue service (IRS) must be safeguarded according to the requirements of the agency that furnished the data.

(B) For the purpose of this rule, "administrative agency" means the Ohio department of medicaid (ODM) and/or an agent of ODM authorized to determine eligibility or maintain records for a medical assistance program. The administrative agency must:

- (1) Implement administrative, physical and technical safeguards in accordance with 45 C.F.R. 164.308, 45 C.F.R. 164.310, and 45 C.F.R. 164.312 (as in effect on October 1, 2015).
- (2) Follow the safeguarding guidelines for protecting federal tax information (FTI) described in the most current version of IRS publication 1075 (rev. 10/2014).
- (3) Safeguard information received or maintained about an individual connected with the administration of the medicaid program in accordance with section 1902(a)(7) of the Social Security Act (as in effect on July 1, 2016).
- (4) Publicize provisions governing the confidential nature of information about individuals, including the legal sanctions imposed for improper disclosure and use, in accordance with 42 C.F.R. 431.304 (as in effect October 1, 2015).
- (5) Provide copies of the publicized provisions to individuals and to other persons and agencies to whom information is disclosed, in accordance with 42 C.F.R. 431.304 (as in effect October 1, 2015).
- (6) Protect the types of safeguarded information required by 42 C.F.R. 431.305 (as in effect October 1, 2015).
- (7) Maintain confidentiality and safeguard psychiatric hospitalization records, mental health or addiction treatment records, rehabilitation and correction records, or other sensitive records in accordance with section 5122.31 of the Revised Code.
- (8) Not publish names of individuals in accordance with 42 C.F.R. 431.306(c) (as in effect October 1, 2015).

(C) Release of information. The administrative agency must:

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- (1) Obtain permission from an individual or authorized representative before releasing information, unless that information is used to verify income or eligibility, in accordance with 42 C.F.R. 431.306(d) (as in effect on October 1, 2015).
- (2) Apply policies to all requests for information from outside sources, including governmental bodies, courts of law, or law enforcement officials, except as provided in sections 5160.45 to 5160.48 of the Revised Code.
- (3) Establish criteria specifying the conditions for release and use of information about individuals. The information must be restricted to persons or agency representatives who are subject to standards of confidentiality that are comparable to those of the agency in accordance with 42 C.F.R. 431.306(a) and (b) (as in effect on October 1, 2015).
- (4) Limit disclosures of protected health information (PHI) for individuals applying for, or participating in, a medical assistance program to purposes related to payment, treatment, or health care operations. For any other purposes, disclosures of information about the health care of an individual, health care provided to an individual, or payment for the provision of health care for an individual require an authorization compliant with the Health Insurance Portability and Accountability Act of 1996 (HIPAA) in accordance with 45 C.F.R. 164.508 (as in effect October 1, 2015).
- (5) Release information as permitted by and in accordance with section 5160.45 of the Revised Code.

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TO BE RESCINDED

5160:1-1-51.1 **Medicaid: safeguarding and releasing information.**

- (A) This rule describes the administrative agency's responsibilities regarding disclosing information, maintaining confidentiality and safeguarding information for an individual applying for or participating in a medical assistance program.
- (B) "Safeguarded information" includes but is not limited to the following types of information:
- (1) Names and addresses; and
 - (2) Medical services provided; and
 - (3) Social and economic conditions or circumstances; and
 - (4) Agency evaluation of personal information; and
 - (5) Medical data, including diagnosis and past history of disease or disability; and
 - (6) Any information received in connection with the identification of third party coverage; and
 - (7) Any information received for verifying income eligibility and amount of medical assistance payments. Income information received from the social security administration (SSA) or the internal revenue service (IRS) must be safeguarded according to the requirements of the agency that furnished the data.
- (C) Administrative agency safeguarding responsibilities. The administrative agency must:
- (1) Implement administrative, physical and technical safeguards in accordance with 45 CFR 164.308, 45 CFR 164.310, and 45 CFR 164.312 (as in effect on April 1, 2013).
 - (2) Follow the safeguarding guidelines for protecting federal tax information (FTI) described in the most current version of IRS publication 1075 (rev. 6/2010).

- (3) Safeguard information received or maintained about an individual connected with the administration of the medicaid program in accordance with 42 C.F.R. 431.302 (as in effect on March 1, 2013).
- (4) Publicize provisions governing the confidential nature of information about individuals, including the legal sanctions imposed for improper disclosure and use, in accordance with 42 C.F.R. 431.304 (as in effect March 1, 2013).
- (5) Provide copies of the publicized provisions to individuals and to other persons and agencies to whom information is disclosed, in accordance with 42 C.F.R. 431.304 (as in effect March 1, 2013).
- (6) Protect the types of safeguarded information required by 42 C.F.R. 431.305 (as in effect March 1, 2013).
- (7) Not release medical, psychiatric or psychological information to an individual or authorized representative if the administrative agency has reason to believe that the release may have an adverse effect on the individual, as provided in section 5122.31 of the Revised Code.
- (8) Not publish names of individuals in accordance with 42 C.F.R. 431.306(c) (as in effect March 1, 2013).

(D) Release of information. The administrative agency must:

- (1) Obtain permission from an individual or authorized representative before releasing information, unless that information is used to verify income or eligibility, in accordance with 42 C.F.R. 431.306(d) (as in effect on March 1, 2013).
- (2) Apply policies to all requests for information from outside sources, including governmental bodies, courts of law, or law enforcement officials, except as provided in sections 5101.26 to 5101.30 of the Revised Code.
- (3) Establish criteria specifying the conditions for release and use of information about individuals. The information must be restricted to persons or agency representatives who are subject to standards of confidentiality that are comparable to those of the agency in accordance with 42 C.F.R. 431.306(a) and (b) (as in effect on March 1, 2013).
- (4) Limit disclosures of protected health information (PHI) for individuals applying

for, or participating in, a medical assistance program to purposes related to payment, treatment, or health care operations. For any other purposes, disclosures of information about the health care of an individual, health care provided to an individual, or payment for the provision of health care for an individual require an authorization compliant with the Health Insurance Portability and Accountability Act of 1996 (HIPAA) in accordance with 45 CFR 164.508 (as in effect April 1, 2013).

- (5) Release information as permitted by and in accordance with sections 5101.27 and 5101.271 of the Revised Code.

Effective:

Five Year Review (FYR) Dates:

Certification

Date

Promulgated Under:	111.15
Statutory Authority:	5162.03, 5163.02
Rule Amplifies:	307.981, 329.01, 1347, 3503.10, 5160.4, 5162.03, 5163.02, 5122.31, 5703.211
Prior Effective Dates:	.