



## 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](mailto:rules@age.ohio.gov)

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

#### OLDER AMERICANS ACT NUTRITION PROGRAM

These rules establish requirements for AAA-provider agreements for the Older Americans Act Nutrition Program. 173-4-05 establishes general requirement for AAA-provider agreements for nutrition projects. 173-4-10 establishes requirements applying to only grocery shopping assistance. 173-4-11 establishes requirements applying to only grocery ordering and delivery.

**Rule Number(s):** 173-4-05, 173-4-10, 173-4-11

**Date of Submission for CSI Review:** July 10, 2020

**Public Comment Period End Date:** July 23, 2020 at 11:59PM.

**Rule Type/Number of Rules:**

☐ New/ 0 rules

☒ Amended/ 3 rules (FYR? ☒)

☐ No Change/ 0 rules (FYR? ☐)

☐ Rescinded/ 0 rules (FYR?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.*

Providers voluntarily bid, through open and free competition, for AAA-provider agreements, which are agreements between area agencies on aging (AAAs), which are ODA's designees, and providers of home and community-based services when paid, in whole or in part, by Older Americans Act (OAA) funds. 173-4-05 establishes general requirements for AAA-provider agreements for nutrition projects. 173-4-10 establishes requirements applying to only grocery shopping assistance. 173-4-11 establishes requirements applying to only grocery ordering and delivery.

On March 25, 2020, President Trump signed the Supporting Older Americans Act of 2020 into law. The new law amended the nutritional-adequacy requirements for meals paid, in whole or in part, with OAA funds. Specifically, it amended the language that required providers to adjust the nutrient content of meals to meet consumer's "special dietary needs" to include meals adjusted for "cultural considerations and preferences and medically tailored meals." Therefore, ODA proposes to amend the nutritional-adequacy requirements in 173-4-05 to incorporate the change made by the Supporting Older Americans Act of 2020.

Additionally, ODA proposes to amend 173-4-10 and 173-4-11. Currently, both rules require paying providers for grocery shopping assistance and grocery ordering and delivery with OAA Title III-B funds. However, because the OAA allows Title III-E (National Family Caregiver Support Program) funds to also pay for these services, ODA proposes to include Title III-E as an allowed source of funds. ODA also proposes to clarify that these services help consumers shop for "consumable supplies or material aide to meet basic needs, including groceries" rather than simply "groceries." Additionally, ODA proposes to replace a mistaken occurrence of "grocery ordering and delivery" in 173-4-10 with "grocery shopping assistance."

**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](#), and [193.392](#).

**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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[42 USC 3025](#) says ODA is “primarily responsible” for Older Americans Act policy development in Ohio and [45 CFR 1321.11](#) requires ODA to “develop policies governing all aspects of [Older Americans Act] programs.”

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

The rules exist to implement the state laws ODA listed in its response to #2, which require ODA to establish the standards 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.

**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)?**

These rules ensure necessary safeguards are in place to protect the health and safety of consumers receiving services paid with Older Americans Act funds.

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

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 CFR 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, the rules are judged as being successful when (1) ODA funds few violations in AAA-provider agreements and (2) AAAs find few violations against AAA-provider agreements.

**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 [this 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. In the months in 2020 leading up to stakeholder outreach, ODA received no input from stakeholders or the general public on any rule in this package.

On June 25, 2020, ODA sent an email to the following stakeholders to request their input on ODA's proposed amendments rules 173-4-05, 173-4-10, and 173-4-11 and input on any needs to make additional improvements to those rules:

1. Community First.
2. Guernsey County Senior Citizens Center, Inc.
3. Licking County Aging Program (LCAP).
4. LifeCare Alliance (LCA).
5. Meals on Wheels of SW Ohio and N Kentucky (fka, Wesley Community Services)
6. Ohio Assn. of Area Agencies on Aging (O4A).
7. Senior Resource Connection.
8. Vantage Aging.

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9. Wood County Committee on Aging (WCCOA).

**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 ODA's June 25, 2000 emails, ODA received comments on the rules from 3 stakeholders.

**173-4-05:** ODA said its members raised no concerns with ODA's proposed amendments to this rule. LCAP recommended not allowing a consumer's preferences to be as a reason for adjusting a meal's nutrition. In a July 6, 2020 email, ODA explained that the new flexibility is required by an amendment to the Older Americans Act made by the Supporting Older Americans Act of 2020. ODA's rule cannot conflict with the Older Americans Act. LCA recommended eliminating the requirement to conduct nutrition screenings annually. ODA's email response on July 2, 2020 said ODA is not considering a revision to the requirement for annual screenings because reducing malnutrition is one of the three purposes the Older Americans Act establishes for the program and malnutrition is the leading cause of morbidity and mortality among older adults.

**173-4-10 and 173-4-11:** LCAP supported ODA's proposals for these rules and ODA said its members raised no concerns with them. LifeCare Alliance recommended making language on payment sources the same in both rules. On July 2, 2020, ODA emailed LifeCare Alliance to explain that ODA proposes to make the payment-source language in both rules the same.

**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 amend 173-4-05 is based upon an amendment to [42 U.S.C. 3030g-21](#) made by the Supporting Older Americans Act of 2020. ODA's proposal is not based upon scientific data.

ODA's proposal to amend 173-4-10 and 173-4-11 is to correct an error in one rule and add clarity to both. ODA's proposal 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. [§173.392](#) 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.

**13. 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.*

Before the proposed new rules take effect, ODA will post them on ODA's website. ODA will also send an email to subscribers of our rule-notification service to feature the rules. Through its regular monitoring activities, ODA and its designees will monitor providers for compliance.

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

R.C. [§173.392](#) authorizes only ODA to develop standards for AAA-provider agreements.

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**15. 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 new rules take effect, ODA will post them on ODA's website. ODA will also send an email to subscribers of ODA's rule-notification service to feature the rule. Through regular monitoring (*i.e.*, auditing) requirements under 45 CFR 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.

**Adverse Impact to Business**

**16. 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; and**

These rules directly regulate Ohio's 12 AAAs, which are ODA's designees. The AAA-provider agreements directly regulate providers.

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

The adverse impact of 173-4-05 is to ensure every AAA-provider agreement for a nutrition project complies with the requirements to train employees, the general requirements for AAA-provider agreements in 173-3-06, and federal requirements for nutrition projects, including the nutritional-adequacy requirements in [42 U.S.C. 3030g-21](#). As mentioned in ODA's response to #1, the Supporting Older Americans Act of 2020 amended the language in 42 U.S.C. 3030g-21 that required providers to adjust the nutrient content of meals to meet consumer's "special dietary needs" to now include meals adjusted for "cultural considerations and preferences and medically tailored meals."

The adverse impact of 173-4-10 is to ensure every AAA-provider agreement for grocery shopping assistance complies with the general requirements for AAA-provider agreements in 173-3-06 and the requirements to provide information packets to consumers and verify assistance was provided.

The adverse impact of 173-4-11 is to ensure every AAA-provider agreement for grocery ordering and delivery complies with the general requirements for AAA-provider agreements in 173-3-06 and the requirements to deliver groceries safely and to verify deliveries were successful.

**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.*

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. 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 unit. 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.*, 173-3-04 and 173-3-05)

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

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To ensure the health and safety of consumers receiving services paid with Older Americans Act funds ODA is required to develop rules establishing requirements for AAA-provider agreements. 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 the service to be paid with Older Americans Act funds, and (2) the provider's bid is the winning bid. Providers may provide the same service without entering into an AAA-provider agreement when paid by third-party insurers, private pay, or other government programs not using Older Americans Act funds.

ODA's proposed amendment to 173-4-05 incorporates a change enacted by the Supporting Older Americans Act of 2020 to establish that meals adjusted for "special dietary needs" includes meals adjusted for "cultural considerations and preferences and medically tailored meals." ODA's rule cannot conflict with the new law. If the new requirement will increase the cost of providing meals, providers may make higher bids when next bidding on an AAA-provider agreement.

ODA's proposed amendments to 173-4-10 and 173-4-11 would not create any adverse impact upon providers. In fact, mentioning that OAA Title III-E funds are available may reduce the adverse impact upon providers who were unaware that Title III-E funds could pay for these services.

### **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 receiving services paid with Older Americans Act funds, 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 is concerned primarily about protecting the health and safety of consumers receiving services paid with Older Americans Act funds through compliance with these rules. Whenever possible, ODA or AAAs 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 AAAs 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 the rules.

Additionally, ODA publishes all rules currently in effect on its website. Providers may access the [currently-effective rules](#) 24 hours per day, 365 days per year.

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173-4-05

**Older Americans Act nutrition program: nutrition projects.**

(A) In every AAA-provider agreement for a nutrition project paid, in whole or in part, with Older Americans Act funds, the AAA shall include the following requirements:

(1) General requirements: In the AAA-provider agreement, the AAA shall include the requirements in rule 173-3-06 of the Administrative Code for every AAA-provider agreement paid, in whole or in part, with Older Americans Act funds.

(2) Project types:

(a) If the AAA-provider agreement is for a congregate dining project, the AAA shall include the requirements in rule 173-4-05.1 of the Administrative Code in the AAA-provider agreement.

(b) If the AAA-provider agreement is for a home-delivered meals project, the AAA shall include the requirements in rule 173-4-05.2 of the Administrative Code in the AAA-provider agreement.

(c) If the AAA-provider agreement is for a congregate dining project based in restaurants and grocery stores, the AAA shall include the requirements in 173-4-05.3 in the AAA-provider agreement.

(3) Separate project components: If the AAA procured for components of a nutrition project separately, the AAA shall identify in each provider's AAA-provider agreement, which requirements in Chapters 173-3 and 173-4 of the Administrative Code each provider is required to provide.

(4) Nutrition services in addition to providing meals:

(a) The provider shall offer nutrition health screening to consumers at least annually.

(b) In the AAA-provider agreement, the AAA shall indicate if the provider shall offer nutrition counseling or nutrition education to consumers.

(c) In the AAA-provider agreement, the AAA shall indicate if the provider shall offer grocery shopping assistance or grocery ordering and delivery to consumers.

- (5) Eligibility verification: The provider shall determine the eligibility of each consumer before paying for their meals, in whole or in part, with Older Americans Act funds.
- (6) Consumer contributions: The provider shall comply with rule 173-3-07 of the Administrative Code.
- (7) Person direction:
  - (a) In the AAA-provider agreement, the AAA shall require the provider to implement the person direction the provider pledged to provide when the provider bid for the AAA-provider agreement.
  - (b) The provider shall offer consumers opportunities to give feedback on current and future menus.
- (8) Menus:
  - (a) Dietitians: The provider shall only offer menus approved by a dietitian.
  - (b) Ingredients: In the AAA-provider agreement, the AAA shall indicate the method by which the provider shall offer ingredient information on the meals provided to consumers.
  - (c) Serving sizes: The provider shall list the serving size for each food item on each production menu.
- (9) Nutritional adequacy:
  - (a) For each mealtime, the provider shall offer meals that satisfy at least one-third of the dietary reference intakes (DRIs). The provider shall target nutrient levels based on the predominant population and health characteristics of the consumers in the PSA. The federal government makes the DRIs available to the general public free of charge on <http://fnic.nal.usda.gov/>.
  - (b) For each mealtime, the provider shall offer meals that follow the "2015-2020 Dietary Guidelines for Americans." The federal government publishes the guidelines for the general public free of charge on <http://www.health.gov/dietaryguidelines>.



- (c) For each meal time, the provider shall offer meals that, to the maximum extent practicable, are adjusted to meet any special dietary needs of consumers, including meals adjusted for cultural considerations, preferences, and medically-tailored meals.
- ~~(e) In the AAA-provider agreement, the AAA shall not prohibit the provider from adjusting the nutritional adequacy requirements for meals in paragraphs (A)(9)(a) and (A)(9)(b) of this rule, to the maximum extent practicable, to meet any special dietary needs of consumers.~~
- (d) In the AAA-provider agreement, the AAA shall not limit the provider's flexibility in designing meals that are appealing to consumers.
- (e) In the AAA-provider agreement, the AAA shall not prohibit the provider from using either nutrient analysis or menu patterns to determine nutritional adequacy.
- (10) Diet orders: If the AAA-provider agreement requires the provider to offer consumers therapeutic diets, medical food, or food for special dietary use, the provider shall comply with the additional requirements in rule 173-4-06 of the Administrative Code.
- (11) Dietary supplements: The provider shall not pay for multi-vitamins or mineral supplements, in whole or in part, with Older Americans Act funds.
- (12) Food safety:
- (a) In the AAA-provider agreement, the AAA shall indicate whether the United States department of agriculture, Ohio department of agriculture, another state's department of agriculture, or a local health district has jurisdiction to monitor the provider's compliance with food-safety laws, including sanitation, food temperatures, thermometers, food-borne illnesses, packaging, and dating meals.
- (b) In the AAA-provider agreement, the AAA shall indicate that it is responsible for reporting any reasonable cause to believe a provider is out of compliance with food-safety laws to the government authority identified in the AAA-provider agreement to comply with paragraph (A)(12)(a) of this rule.
- (13) Training:

- (a) The provider shall develop a training plan that includes orientation and annual continuing education.
  - (i) Orientation: The provider shall assure that each employee, including each volunteer, who participates in meal preparation, handling, or delivery receives orientation on topics relevant to the employee's job duties before the employee performs those duties.
  - (ii) Continuing education: The provider shall assure that each employee, including a volunteer, who participates in meal preparation, handling, or delivery completes continuing education each year on topics relevant to the employee's job duties.
- (b) The provider shall make, and retain, a written record of each employee's completion of orientation and continuing education. The record shall include the topics covered during the orientation and continuing education.

(B) Units:

- (1) Congregate dining project: A unit equals one meal provided in compliance with this rule and rule 173-4-05.1 of the Administrative Code.
- (2) Home-delivered meals project: A unit equals one meal provided in compliance with this rule and rule 173-4-05.2 of the Administrative Code.
- (3) Congregate dining project based in restaurants or grocery stores: A unit equals one meal provided in compliance with this rule and rule 173-4-05.3 of the Administrative Code.

173-4-10

**Older Americans Act nutrition program: grocery shopping assistance.**

(A) "Grocery shopping assistance" means a service that assists consumers with the act of grocery shopping.

(B) In every AAA-provider agreement for grocery shopping assistance paid, in whole or in part, with Older Americans Act funds, the AAA shall include the following requirements:

(1) General requirements: In the AAA-provider agreement, the AAA shall include the requirements in rule 173-3-06 of the Administrative Code for every AAA-provider agreement paid, in whole or in part, with Older Americans Act funds.

(2) Introductory information: The provider to provide a consumer with a packet of introductory information that explains how grocery shopping assistance works upon the consumer's enrollment into a grocery shopping assistance service.

(3) Transferring groceries: In the AAA-provider agreement, the AAA shall indicate the extent to which the provider shall transfer the groceries the consumer purchases, whether from the grocery store to the vehicle, from the shopping cart to the vehicle, from the vehicle to the consumer's home, or a combination of the three.

(4) Payment:

(a) No Older Americans Act funds, other than funds from Title III-B or III-E of the Older Americans Act, shall pay for grocery ~~ordering and delivery~~ shopping assistance.

(b) No Older Americans Act funds, other than funds from Title III-B or III-E of the Older Americans Act, shall pay for consumable supplies or material aid to meet basic needs, such as groceries. Providers may accept other funds (e.g., private pay, SNAP) for consumable supplies or material aid to meet basic needs.

(5) Service verification:

(a) For each episode of assistance, the provider shall retain a record of the consumer's name; service date; pick-up time and location; drop-off time and location; service units; provider's signature; and consumer's

signature.

(b) In the AAA-provider agreement, the AAA shall not prohibit the provider from using an electronic system to collect and retain the items in paragraph (B)(5)(a) of this rule.

(C) Units: One unit of grocery shopping assistance equals one-way transportation to or from a grocery store.

173-4-11

**Older Americans Act nutrition program: grocery ordering and delivery.**

- (A) "Grocery ordering and delivery" means a service for a consumer who needs assistance shopping for groceries that allows consumers to order groceries, then delivers the ordered groceries to the consumer's home or vehicle (e.g., at a drive-thru pick-up window).
- (B) In every AAA-provider agreement for grocery ordering and delivery paid, in whole or in part, with Older Americans Act funds, the AAA shall include the following requirements:
- (1) General requirements: In the AAA-provider agreement, the AAA shall include the requirements in rule 173-3-06 of the Administrative Code for every AAA-provider agreement paid, in whole or in part, with Older Americans Act funds.
  - (2) Procedures: The provider to develop and implement procedures for the safe delivery of groceries.
  - (3) Payment:
    - (a) No Older Americans Act funds, other than funds from Title III-B or III-E of the Older Americans Act, shall pay for grocery ordering and delivery.
    - (b) No Older Americans Act funds, other than funds from Title III-B or III-E of the Older Americans Act, shall pay for consumable supplies or material aid to meet basic needs, such as groceries. Providers may accept other funds ~~for groceries~~ (e.g., private pay, SNAP) for consumable supplies or material aid to meet basic needs.
  - (4) Service verification:
    - (a) For each episode of service, the provider to retain a record of the consumer's name; service date; provider's signature; and consumer's signature.
    - (b) In the AAA-provider agreement, the AAA shall not prohibit the provider from using a technology-based system to collect and retain the items in paragraph (B)(4)(a) of this rule.
- (C) Units: One unit of grocery ordering and delivery equals one episode of grocery

ordering and delivery.