



## Common Sense Initiative

**Mike DeWine**, Governor  
**Jon Husted**, Lt. Governor

**Sean McCullough**, Director

### 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 PROGRAMS

These rules establish requirements to include in, or exclude from, AAA-provider agreements (i.e., contracts) that are paid, in whole or in part, with Older Americans Act funds.

**Rule Number(s):** 173-3-01, 173-3-04, 173-3-05, 173-3-05.1, 173-3-06, 173-3-06.1, 173-3-06.2, 173-3-06.3, 173-3-06.4, 173-3-06.5, 173-3-06.6, 173-3-09

**Date of Submission for CSI Review:** August 4, 2021

**Public Comment Period End Date:** August 17, 2021 at 11:59PM.

**Rule Type/Number of Rules:**

☐ New/ 0 rules

☐ No Change/ 0 rules (FYR? ☐)

☒ Amended/ 12 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☐ Rescinded/ 0 rules (FYR?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?**

**The rules:**

- ☐ a. Require a license, permit, or any other prior authorization to engage in or operate a line of business.

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☐ b. Impose a criminal penalty, a civil penalty, or another sanction, or creates a cause of action for failure to comply with its terms.

☒ c. Require specific expenditures or the report of information as a condition of compliance.

☐ d. Are likely to directly reduce the revenue or increase the expenses of the lines of business to which they will apply.

### **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.***

The rules in this package establish requirements to include in, or exclude from, AAA<sup>1</sup>-provider agreements (*i.e.*, contracts) that are paid, in whole or in part, with Older Americans Act funds.

The following list describes the rules in this package and ODA's proposed amendments to those rules:

- Rule 173-3-01 of the Administrative Code introduces Chapter 173-3 of the Administrative Code and defines terms used in Chapters 173-3 and 173-4 of the Administrative Code. ODA proposes to amend the rule to do the following:
  - Replace references to Chapter 173-3 of the Administrative Code with "this chapter" to comply with the Legislative Service Commission's *Rule Drafting Manual*.
  - Delete the definitions of the following terms: (1) "consumer's signature" and (2) "service plan."
  - Define "case management service."
  - Define "legal holiday," which will make it possible to delete cross-references throughout the chapter that point to a definition of the term in section 1.14 of the Revised Code.
  - Add a new definition for "licensed healthcare professional" and amend the definitions of "registered nurse" and "licensed practical nurse" to implement Senate Bills 3, 5, 6, and 7 and House Bill 252 (134<sup>th</sup> General Assembly).
  - Revise the definition of "unique identifier" to include the unique identifier of a driver under rule 173-3-06.6 of the Administrative Code.
  - [For more information on ODA's proposed amendments to this rule, please review the notes on outdated codes below.]
- Rule 173-3-04 of the Administrative Code lists the general requirements for AAA-provider agreements. For more information on ODA's proposed amendments to this rule, please review the notes on outdated codes below.
- Rules 173-3-05, 173-3-05.1, 173-3-06 of the Administrative Code lists the procurement standards for services paid with Older Americans Act funds. In these rules, lists the procurement standards for renewable and multi-year AAA-provider agreements, the requirements to include in every AAA-provider agreement (respectively). In these rules, ODA proposes to replace occurrences of "goods and services" with "services."
- In rule 173-3-05 of the Administrative Code, ODA also proposes to reorganize paragraph (A) of this rule. For more information on ODA's proposed amendments to this rule, please review the notes on outdated codes below.

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

- In rule 173-3-06 of the Administrative Code, ODA also proposes to do the following:
  - Reorganize paragraph (A) of this rule.
  - Include subparts C and D of 45 C.F.R. Part 1321 among the list of applicable federal requirements. (This also enables ODA to delete references to 45 C.F.R. 1321.65 in other rules of this chapter.)
  - No longer reference a single requirement of the Older Americans Act under paragraph (A) of this rule since the entire Older Americans Act applies.
  - Replace “additional state requirements” with “state requirements.”
  - Replace references to Chapter 173-3 of the Administrative Code with “this chapter” to comply with the Legislative Service Commission’s *Rule Drafting Manual*.
  - Revise the terminology used to describe a consumer who is enrolled in a case management service.
  - Remove references to section 1.14 of the Revised Code since ODA is simultaneously proposing to define “legal holiday” in rule 173-3-01 of the Administrative Code.
  - Delete a reference to section 5101.61 of the Revised Code, which has sunset.
  - Replace “Terminating” with “Discontinuing.”
  - Delete unnecessary reference to division (B)(1) of section 109.572 of the Revised Code.
  - Reword the paragraph on subcontracting in the positive.
  - Add clarification on how long a provider must retain different types of records and a requirement to participate in monitoring (of those records).
  - For more information on ODA’s proposed amendments to this rule, please review the notes on outdated codes below.
- Rules 173-3-06.1, 173-3-06.2, 173-3-06.3, 173-3-06.4, 173-3-06.5, and 173-3-06.6 of the Administrative Code establish requirements applying only to AAA-provider agreements for the adult day service, home maintenance and chores, home modification, the homemaker service, personal care, and transportation (respectively). On June 11, 2020, Governor DeWine issued executive order [2020-23D](#) which authorized ODA to adopt emergency amendments to these rules. The emergency amendments gave providers flexibility to conduct certain responsibilities by telephone, video conference, or in person. On December 31, 2020, ODA adopted amendments to this rule that gave providers flexibility to do the same during a state of emergency declared by the governor. On June 18, 2021, Governor DeWine declared an end to the state of emergency, but also issued executive order 2021-09D to authorize ODA to adopt emergency rule [173-1-04](#) of the Administrative Code, which declares that providers have the same flexibility until the end of the federal public health emergency. Through this rule package, ODA proposes to give providers these flexibilities until the end of federal public health emergency or on an ongoing basis, whether a state or federal emergency exists or does not exist (as in the case for adult protective services provided in a consumer’s home).
- In rule 173-3-06.1 of the Administrative Code, ODA also proposes to do the following:
  - Delete requirements related to fire safety. The state fire marshal established fire-safety requirements in the Ohio Fire Code (Chapter [1301:7-7](#) of the Administrative Code) and the Board of Building Standards established the building standards in the Ohio Building Code (Agency [4101:1](#) of the Administrative Code). Adult day centers are classified in those codes as “institutional group I-4.”

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- Create a new avenue for a person to qualify to be an activity director in an adult day center by allowing the person to qualify if the person meets the requirements to be an activity director for a residential care facility under rule 3701-16-06 of the Administrative Code.
- Deem that any successfully-completed continuing education or in-service training completed to maintain a professional license, certification, or registration counts toward the requirements for continuing education or in-service training in this rule if complete during the same calendar year.
- In rule 173-3-06.5 of the Administrative Code, ODA also proposes to indicate that a person who is listed in the nurse aide registry as “expired” is a person who meets the qualifications to be a PCA.
- In rule 173-3-09 of the Administrative Code, ODA establishes the process for administrative hearings for adversely-affected providers. In this rule, ODA proposes to do the following:
  - Replace references to “Chapter. 119 of the Revised Code” with “Chapter 119 of the Revised Code” to comply with the Legislative Service Commission’s new *Rule Drafting Manual*.
  - Move the requirement in the first sentence of paragraph (C)(5) of this rule to a new paragraph (C)(4)(c) of this rule.
  - Replace one of the reasons that a hearing officer may limit or terminate testimony at a hearing from “the provider or the AAA negotiate a written agreement that resolves the adverse action(s) that prompted the hearing” to “The provider and the AAA entered into a settlement that resolved the adverse action(s) that prompted the hearing.”
  - Replace the requirement for the hearing officer to record the hearing or for ODA to pay for a court reporter to a requirement for the hearing officer to record the hearing unless ODA pays for a court reporter.
  - For more information on ODA’s proposed amendments to this rule, please review the notes on outdated modes below.
- Additionally, ODA proposes to make the following amendments to reduce requirements in rules for outdated modes of communication or unnecessary in-person interaction:
  - Throughout this rule package, ODA proposes to either (1) eliminate the unnecessary use of words that imply requirements for paperwork (e.g., “writing,” “written,” “document,” and “documentation,” and “copy”) or (2) if verbal compliance is not an option, indicate that provider may also comply electronically or by email.
  - In rule 173-3-01 of the Administrative Code, ODA also proposes to replace “written testing” in the definition of “competency evaluation” with “standardized testing” and to define “electronic record,” “electronic signature,” and “health care record.”
  - In rule 173-3-04 of the Administrative Code, ODA proposes to replace “written permission” and “written permission (hard copy or electronic)” with “authorization” and to replace “submit evidence to verify” with “provide evidence to the AAA to verify.”
  - In rule 173-3-05 of the Administrative Code, ODA also proposes to: (1) replace “If an AAA submits a written request to ODA” with “To request authorization from ODA,” (2) remove requirements for the request to be written, (3) replace “submits its written request” with “make its request,” (4) replace “written request” with “request,” (5) replace “submit” with “provide,” and (6) replace “document its efforts” with “retain records of its efforts.”
  - In 173-3-06.1 of the Administrative Code, ODA also proposes to (1) replace signature requirements with requirements to provide a “unique identifier,” which is a term defined in rule 173-3-01 of the Administrative Code and (2) allow providers to post monthly planned activities through various media instead of just posters.
  - In rule 173-3-06.6 of the Administrative Code, ODA also proposes to replace “driver’s signature” with “unique identifier of the driver.” (See the definition of “unique identifier” in rule 173-3-01 of the Administrative Code.)

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- Lastly, ODA also proposes to make non-substantive changes in this rule package to comply with LSC's *Rule Drafting Manual* or to improve titles, terminology, clarity, punctuation, capitalization, spelling, or grammar.

**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 [173.392](#).

**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.*

[42 U.S.C. 3025](#) says ODA is "primarily responsible" for Older Americans Act policy development in Ohio and [45 C.F.R. 1321.11](#) requires ODA to "develop policies governing all aspects of [Older Americans Act] programs."

**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 exist to (1) comply with the state laws mentioned in ODA's response to #3, which require ODA to establish requirements for AAA-provider agreements, and (2) ensure necessary safeguards are in place to protect the health and safety of consumers receiving services paid with Older Americans Act funds.

**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 C.F.R. Part 75, Subpart F: (1) ODA regularly monitors AAAs for compliance with these rules and (2) AAAs regularly monitor providers for their compliance with AAA-provider agreements, 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.*

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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. As of the date of this BIA, ODA's policy development manager has received no requests to amend the rules in this package since the last time each rule was adopted other than the emails mentioned below.

On July 12, 2021, ODA sent an email to the following stakeholders to request their recommendations for improving the current version of the rules in this package, including their recommendations for removing any requirements for outdated modes of communication:

- Catholic Social Services of the Miami Valley.
- LeadingAge Ohio.
- Ohio Assisted Living Association.
- Ohio Academy of Senior Health Sciences, Inc.
- Ohio Association of Area Agencies on Aging (OAA).
- Ohio Association of Medical Equipment Suppliers.
- Ohio Association of Senior Centers.
- Ohio Council for Home Care and Hospice.
- Ohio Health Care Association.
- Ohio Jewish Communities.
- State Long-Term Care Ombudsman.

## **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 its July 12, 2021 emails, ODA received 5 recommendations from a provider association, a member of a provider association (a provider), and OAA. The following bullet points summarize the recommendations and ODA's responses:

**In General:** One provider recommended not requiring all electronic communications since some providers may operate in broadband deserts. On August 3, 2021, ODA called the provider to explain that the goal of the project on outdated modes is to give providers, ODA, and AAAs *flexibility* to use electronic records and to communicate through email, not to *require* using electronic records and email.

**173-3-05:** OAA recommended giving AAAs flexibility to make electronic requests to ODA to conduct non-competitive procurement. On July 30, 2021, ODA emailed the provider to explain that it proposes to give AAAs flexibility to provide either a written or email request to ODA.

**173-3-06.5:** A provider association recommended requiring PCA supervisor visits less often than once every 60 days. The association contended that that requiring the PCA supervisor to be a nurse when the service is not a medical service is unnecessary—especially every 60 days. On July 19, 2021, ODA emailed the provider to explain that it proposes to thank them for their feedback.

**173-3-09:** OAA recommended giving AAAs flexibility to electronically (e.g., on its website) maintain a process for providers to appeal adverse actions. On July 30, 2021, ODA emailed the provider to explain that it proposes to allow each AAA to publish its process for administrative hearings either on its website or in a document that is readily accessible to providers.

**173-3-09:** OAA recommended giving AAAs and ODA flexibility to accept electronically requests for hearings from providers and to electronically notify providers of final decisions. On July 30, 2021, ODA emailed the provider to explain that it proposes to allow providers to request hearings either in writing or email.

## **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?**

Consumers of Older Americans Act programs have a higher risk for contracting COVID-19 than the general population. Accordingly, many of ODA's proposals in this rule package are based upon guidelines from the Centers for Disease Control and Prevention (CDC) for reducing on reducing in-person interaction to limit exposure to COVID-19.

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**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.*

Yes, the proposed amendments to these rules give providers more flexibility.

**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 adopt rules to establish requirements for AAA-provider agreements.

**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 amendments take effect, ODA will send an email to subscribers of our rule-notification service to feature the rules. Through regular monitoring (*i.e.*, auditing) requirements under [45 C.F.R. Part 75, Subpart F](#): (1) ODA regularly monitors AAAs for compliance with these rules and (2) AAAs regularly monitor providers for their compliance with AAA-provider agreements.

**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**

Every provider with an AAA-provider agreement.

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

The adverse impact of these rules is to ensure every AAA-provider agreement complies with the general requirements for AAA-provider agreements in rule 173-3-06 of the Administrative Code plus specific requirements for each service listed in individual rules of this package.

ODA's proposed amendments to the rules in this package will not increase the adverse impact upon providers. Many of the proposed amendments will give providers flexibility to maintain social distancing during a state of emergency declared by the governor or federal public health emergency.

**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.*

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 (*i.e.*, per job (*e.g.*, home modification), per item (*e.g.*, a meal), or per a period of time (*e.g.*, personal care)). The amount an AAA pays a provider is an all-inclusive rate. It's intended to cover all costs incurred in providing the project or service, including administration, training, and reporting. Therefore, the provider's bid includes all costs anticipated in providing the project or service.

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If the provider's bid wins, the provider is paid what it bid during the open and free competition for the AAA-provider agreement (*cf.*, [45 C.F.R. 75.329](#) and rules [173-3-04](#) and [173-3-05](#) of the Administrative Code).

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

R.C. [§173.392](#) requires ODA to develop rules establishing standards for AAA-provider agreements (*i.e.*, contracts and grants) and R.C. [§173.01](#) requires ODA to represent the interests older Ohioans. Establishing standards for AAA-provider agreements in the rules of this package ensures the health and safety of the older Ohioans who are consumers of services through Older Americans Act programs, which fulfills both statutes.

There is no requirement for a provider to enter into an AAA-provider agreement in order to provide services in this state. An AAA-provider agreement is not a gateway to doing business in Ohio. Instead, a provider who wants to add the Older Americans Act programs to its lines of business must enter into an AAA-provider agreement in order for those Older Americans Act programs to pay the provider for the services it wants to provide to the consumers of those programs.

Additionally, providers voluntarily bid for AAA-provider agreements. A provider is only required to comply with an AAA-provider agreement if (1) the provider bids on providing the service to be paid with Older Americans Act funds, and (2) the provider's bid is a winning bid. Providers may provide the same service without entering into an AAA-provider agreement when paid by private pay, third-party insurers, or other government programs not using Older Americans Act funds.

Lastly, ODA proposes to give providers regulatory relief and flexibility, as follows:

- ODA's proposed amendments to these rules will give providers flexibility to maintain social distancing during a state of emergency declared by the governor or a federal public health emergency.
- ODA's proposed amendments to these rules will give providers flexibility to use electronic records, diet orders, educational content, and emergency preparedness plans.
- ODA's proposed amendments to these rules will continue to allow verification of services without obtaining a unique identifier of the consumer for the remainder of the federal public health emergency and allow verification of grocery shopping assistance and grocery ordering and delivery without obtaining the signature of the provider.

**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 these rules.

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