



## Common Sense Initiative

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

**Sean McCullough**, Director

### Business Impact Analysis

**Agency, Board, or Commission Name:** Ohio Department of Medicaid

**Rule Contact Name and Contact Information:**

Tommi Potter, Ohio Department of Medicaid, Rules@medicaid.ohio.gov

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

BLTSS Assisted Living Waiver FYR

**Rule Number(s):** 5160-33-05

**Included for Informational Purposes Only:** 5160-33-02 and 5160-33-06

**Date of Submission for CSI Review:** 5/4/2022

**Public Comment Period End Date:** 5/11/2022

**Rule Type/Number of Rules:**

New/\_\_\_ rules

No Change/\_\_\_ rules (FYR? \_\_\_)

Amended/\_\_\_1\_\_\_ rules (FYR? \_\_\_1\_\_\_)

Rescinded/\_\_\_ rules (FYR?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.

77 SOUTH HIGH STREET | 30TH FLOOR | COLUMBUS, OHIO 43215-6117

[CSIPublicComments@governor.ohio.gov](mailto:CSIPublicComments@governor.ohio.gov)

### **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 rule(s):**

- a. ☒ **Requires 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.***

**OAC 5160-33-05**, entitled “Provider conditions of participation for the assisted living home and community based services (HCBS) waiver program,” is the rule that sets forth the conditions under which providers are able to participate in the assisted living home and community based services waiver program. This rule will be proposed for amendment pursuant to five-year rule review including modification to the title of the rule, sentence structures changes, update to reference to an administrative code, and update to effective dates for statutory citations. Also Am. Sub. H. B. 166 (133rd G. A.) lists six terms that cause a rule to be deemed to contain regulatory restrictions: 'shall', 'shall not', 'must', 'may not', forms of 'require', and forms of 'prohibit'. All of these terms have been removed and the passages in which they appeared have been recast.

3. **Please list the Ohio statute(s) that authorize the agency, board or commission to adopt the rule(s) and the statute(s) that amplify that authority.**

5166.02

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.***

**OAC 5160-33-05**

**77 SOUTH HIGH STREET | 30TH FLOOR | COLUMBUS, OHIO 43215-6117**

**CSIPublicComments@governor.ohio.gov**

The proposed regulation will be adopted to enable the state to maintain federal approval to administer the waiver. In order for CMS to approve a 1915(c) home and community-based services waiver, a state must meet certain assurances concerning the operation of the waiver. These assurances are spelled out in 42 C.F.R 441.302, and include:

(a) “Health and Welfare - Assurance that necessary safeguards have been taken to protect the health and welfare of the beneficiaries of the services. Those safeguards must include—  
(1) Adequate standards for all types of providers that provide services under the waiver;  
(2) Assurance that the standards of any State licensure or certification requirements are met for services or for individuals furnishing services that are provided under the waiver;....”

The ODA certification process ensures that assisted living waiver providers who obtain a medicaid provider agreement have demonstrated compliance with the established standards prior to furnishing services to individuals enrolled on the waiver.

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

**OAC 5160-33-05**

This rule does not exceed the provisions specifically required by the federally approved assisted living waiver program.

**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)?**

**OAC 5160-33-05**

The public purpose of this regulation is to ensure the health and safety of individuals enrolled in the assisted living waiver by verifying that businesses have capacity to furnish the assisted living waiver service in accordance with OAC 173-39-02 and 173-39-02.16.

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

**OAC 5160-33-05**

Each business seeking to furnish the assisted living waiver services must first apply directly through the Ohio Department of Aging (ODA). After ODA has completed their review and certified the provider, they approve an initial review and notify ODM that the provider is ready for Medicaid enrollment. Consequently, due to the process that has been created, success of this regulation is 100%.

**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.*

**OAC 5160-33-05**

77 SOUTH HIGH STREET | 30TH FLOOR | COLUMBUS, OHIO 43215-6117

[CSIPublicComments@governor.ohio.gov](mailto:CSIPublicComments@governor.ohio.gov)

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.*

On March 18<sup>th</sup>, 2022, the following stakeholders were asked to review and provide feedback on the draft OAC Rules:

Catholic Social Services of the Miami Valley, LeadingAge Ohio, Ohio Academy of Senior Health Sciences, Inc., Ohio Assisted Living Association, Ohio Association of Area Agencies on Aging (O4A), Ohio Health Care Association (OHCA), Ohio Jewish Communities, and 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?**

One stakeholder recommended that the addition of waiver services be added for Assisted Living waiver recipients in OAC 5160-33-06. The recommendation would require a change to the waiver design and have significant impact on all elements of the waiver's operations. The cost for additional waiver services are not reflected in ODM's current budget. In addition, ODM would need to gather and evaluate additional stakeholder feedback before implementing new services. Ultimately the requested changes may or may not end up being approved by CMS. No changes were made as a result of stakeholder feedback.

**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?**

No scientific data was used to develop any of the rules or the measurable outcomes of the rules.

**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?**

**OAC 5160-33-05**

No alternative regulations or specific provisions within the regulation were considered. The ODA-certification process is the primary strategy employed to demonstrate that the assisted living provider network is equipped to furnish waiver services in accordance with the federally approved 1915(c) waiver and in a manner that provides the necessary safeguards to protect the health and welfare of the individuals receiving the services.

**13. Did the Agency specifically consider a performance-based regulation? Please explain.**

77 SOUTH HIGH STREET | 30TH FLOOR | COLUMBUS, OHIO 43215-6117

[CSIPublicComments@governor.ohio.gov](mailto:CSIPublicComments@governor.ohio.gov)

*Performance-based regulations define the required outcome, but don't dictate the process the regulated stakeholders must use to achieve compliance.*

**OAC 5160-33-05**

The Agency did not specifically consider a performance-based regulation. The rule is intended to inform providers that ODA-certification is required in order to obtain a medicaid provider agreement.

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

**OAC 5160-33-05**

This rule is the only regulation that requires ODA-certification for ODA-operated Medicaid waivers. There are no other regulations in this rule.

**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.**

**OAC 5160-33-05**

Initial notification of rule promulgation will occur using standard communication methods, including email distribution to ODM-administered waiver stakeholder groups and state agency partners.

As the operating agency for the Assisted Living waiver, the Ohio Department of Aging will provide guidance to businesses on the process of obtaining a medicaid provider agreement to furnish the assisted living service.

**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**

**OAC 5160-33-05**

The business communities most likely to be impacted by the rule are residential care facilities licensed by the Ohio Department of Health (ODH) that are seeking Medicaid reimbursement for services furnished to individuals enrolled on the Assisted Living Medicaid waiver.

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

**OAC 5160-33-05**

Each business is required to obtain ODA-certification as an assisted living provider before obtaining the medicaid provider agreement. In order to obtain ODA certification,

**77 SOUTH HIGH STREET | 30TH FLOOR | COLUMBUS, OHIO 43215-6117**

**CSIPublicComments@governor.ohio.gov**

the business must submit an application and required supporting documentation in the Medicaid Information Technology System (MITS), prepare for the on-site pre-certification visit conducted by ODA's designee, participate in the onsite pre-certification visit, educate staff on the assisted living waiver program rules, review the contract with ODA's designee, and pay the medicaid provider enrollment fee.

**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.*

**OAC 5160-33-05**

The costs incurred as a result of this rule are likely calculated as part of a provider's operational budget—the cost of doing business and clerical jobs, such as retaining records and updating policies and procedures. Due to the varying operational models of the providers the costs to the providers will differ.

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

**OAC 5160-33-05**

The Agency determined the impact on the regulated business community is justified for the following reasons:

Transparency: The ODA certification process provides information regarding the scope of responsibility of an assisted living waiver provider, including the differences between the ODH licensure and ODA waiver requirements. This transparency allows the business to make an informed decision regarding participation in the Assisted Living waiver program;

Quality Outcomes for Individuals: The ODA certification process ensures the business is equipped to furnish the assisted living waiver service in accordance with the waiver requirements; and

Accountability: The ODA certification process educates the business on the ongoing monitoring processes to ensure the health and safety of individuals is maintained and ensure compliance with the federally approved waiver. certification process educates the business on the ongoing monitoring processes to ensure the health and safety of individuals is maintained and ensure compliance with the federally approved waiver.

**Regulatory Flexibility**

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

77 SOUTH HIGH STREET | 30TH FLOOR | COLUMBUS, OHIO 43215-6117

[CSIPublicComments@governor.ohio.gov](mailto:CSIPublicComments@governor.ohio.gov)

In order to ensure uniform and consistent treatment of Medicaid providers, the rule does not provide any exemptions or alternative means of compliance and no exception can be made specifically for small businesses.

**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?**

There are no fines or penalties for paperwork violations associated with these regulations.

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

The Agency has a designated web page tailored to provider enrollment and support where many resources can be found to assist all providers, including small businesses.

<https://medicaid.ohio.gov/resources-for-providers/enrollment-and-support/provider-enrollment>. Businesses seeking technical assistance can contact the Medicaid Provider Hotline (1-800- 686-1576) or the Ohio Department of Aging (1-800- 266-4346). The Ohio Department of Aging (ODA) maintains a dedicated webpage about certification. <https://aging.ohio.gov/agencies-and-service-providers>.