



## 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):**

#### STATE-FUNDED COMPONENT OF THE PASSPORT PROGRAM

Rule 173-40-04 of the Administrative Code refers to the requirement under R.C. §[173.39](#) for the PASSPORT Program to only pay a provider for providing a service to an individual who is enrolled in that program if the provider is certified by ODA under §[173.391](#).

Rule 173-40-05 of the Administrative Code establishes that the covered services for the state-funded component of the PASSPORT Program are the same as the covered services for the Medicaid-funded component of the PASSPORT Program. The rule also indicates that the PASSPORT Program does not pay for any non-covered/unauthorized service.

**Rule Numbers:** 173-40-04 (rescind + new), 173-40-05 (rescind + new).

**Date of Submission for CSI Review:** October 13, 2022.

**Public Comment Period End Date:** October 26, 2022 at 11:59PM.

**Rule Type/Number of Rules:**

☐ New/ # rules

☐ No Change/ # rules (FYR? ☐)

☒ Amended/ 2 rules (FYR? ☒)

☐ Rescinded/ # rules (FYR?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.

#### **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?

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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.**

There is no adverse impact other than what is already established under [§173.39](#).

Rule 173-40-04 of the Administrative Code refers to the requirement under R.C. §173.39 for the PASSPORT Program to only pay a provider for providing a service to an individual who is enrolled in that program if the provider is certified by ODA under [§173.391](#). A provider does not need a certification from ODA to operate in its line of business, but the aforementioned program may pay the provider (*i.e.*, become a new line of business for the provider) only if the provider voluntarily chooses and qualifies to become an ODA-certified provider.

- ☐ **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.***

Rule 173-51-04 of the Administrative Code refers to the requirement under R.C. [§173.39](#) for the PASSPORT Program to only pay a provider for providing a service to an individual who is enrolled in that program if the provider is certified by ODA under [§173.391](#).

Rule 173-40-05 of the Administrative Code establishes that the covered services for the state-funded component of the PASSPORT Program are the same as the covered services for the Medicaid-funded component of the PASSPORT Program. The rule also indicates that the PASSPORT Program does not pay for any service that is not authorized in the person-centered services plan of an individual who is enrolled in the program. The actual requirements for person-centered services plans are found in rule [5160-44-02](#) of the Administrative Code.

To implement the requirement under Senate Bill 9 (134<sup>th</sup> G.A.) to reduce regulatory restrictions in ODA's rules, ODA proposes to rescind these rules and to replace them with substantially-similar new rules. The proposed new version of rule 173-40-04 of the Administrative Code will refer to the requirement for provider certification under R.C. [§173.39](#) rather than duplicating the requirement under that section with a regulatory restriction (*e.g.*, *shall*). The proposed new rule will not directly regulate the provider. Instead, the proposed new rule will merely refer to the requirement under R.C. §173.39.

**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](#), [173.391](#), and [173.522](#).

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- 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.*

Rule 173-40-04 of the Administrative Code exists to refer to the requirement under R.C. §173.39 for the PASSPORT Program to only pay a provider for providing a service if the provider is certified by ODA under §173.391. This reference enables a provider who reads the chapter of rules on the state-funded component of the PASSPORT Program (Chapter 173-40 of the Administrative Code) to find the certification requirement.

Rule 173-40-05 of the Administrative Code exists to establish that the services covered under the state-funded component of the PASSPORT Program are the same as the services covered under the Medicaid-funded component of the same program.

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

Federal law does not govern the state-funded component of the PASSPORT Program. These rules exist to comply with the state laws mentioned in ODA's response to #2 and to refer to the requirement for certification under R.C. §173.39.

- 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)?**

Rule 173-40-04 of the Administrative Code exists to refer to the requirement under R.C. §173.39 for the PASSPORT Program to only pay a provider for providing a service if the provider is certified by ODA under §173.391. This enables a provider who reads the chapter of rules on the state-funded component of the PASSPORT Program (Chapter 173-40 of the Administrative Code) to find references to the certification requirement and the rules on certification in Chapter 173-39 of the Administrative Code.

Rule 173-40-05 of the Administrative Code exists to establish that the services covered under the state-funded component of the PASSPORT Program are the same as the services covered under the Medicaid-funded component of the same program.

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

The PASSPORT Program does not pay a provider unless ODA certified that provider.

The PASSPORT Program does not pay a provider for providing non-covered/unauthorized services.

- 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 the [main rules 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. From this rule's effective date to the date of this BIA, ODA has received no input from stakeholders or the general public on this rule.

On May 17, 2022, ODA sent an email to the following stakeholders to explain how artificial intelligence has added a new dimension to interpreting rules, define *regulatory restrictions*, declare the need to reduce regulatory restrictions, explain how ODA can reduce regulatory restrictions by eliminating duplicate uses of regulatory restrictions, provide stakeholders with an opportunity to make recommendations on ODA's plan, and provide stakeholders with an opportunity to make recommendations on eliminating any regulatory restriction in any chapter of ODA's rules:

- Catholic Social Services of the Miami Valley.
- LeadingAge Ohio.
- Ohio Assisted Living Association (OALA).
- Ohio Academy of Senior Health Sciences, Inc.
- Ohio Adult Day Healthcare Association (OADHA).
- Ohio Association of Area Agencies on Aging (OAA).
- Ohio Association of Medical Equipment Suppliers (OAMES).
- Ohio Association of Senior Centers (OASC).
- Ohio Council for Home Care and Hospice (OCHCH).
- Ohio Health Care Association (OHCA).
- 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 May 17, 2022 emails, ODA received 0 recommendations from stakeholders on this rule.

**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 rescind this rule and to replace it with a substantially-similar rule 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. [§173.39](#) requires the PASSPORT Program to only pay ODA-certified providers. Thus, there is no alternative.

**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.***

The requirement under R.C. [§173.39](#) for the PASSPORT Program to only pay ODA-certified providers is not a performance-based requirement.

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

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R.C. §173.52 authorizes only ODA to adopt rules for the state-funded component of the PASSPORT Program.

**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 our rule-notification service to feature them.

**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**

The impacted business community is every provider who wants to be paid by the PASSPORT Program for providing a service to an individual who is enrolled in the state-funded component of that program.

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

Rule 173-40-04 of the Administrative Code

There is no adverse impact other than what is already established under §173.39.

A provider does not need a certification from ODA to operate in its line of business. Additionally, providers are not required to open a new line of business by providing services to individuals who are enrolled in the state-funded component of the PASSPORT Program.

Providers who want to expand their lines of business to receive payments from the PASSPORT Program for providing services to individuals who are enrolled in the state-funded component of that program as subject to the requirement under R.C. §173.39 to obtain certification from ODA under §173.391.

This rule merely refers to a requirement under R.C. §173.39.

Rule 173-40-05 of the Administrative Code

There is no adverse impact other than to indicate that the PASSPORT Program does not pay a provider for providing non-covered/unauthorized services to an individual who is enrolled in the state-funded component of that program.

**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.***

Rule 173-40-04 of the Administrative Code

There is no adverse impact other than what is already established under §173.39.

The cost of being certified under §173.391 is the cost of meeting the qualifications to become certified under Chapter 173-39 of the Administrative Code. At this time, ODA does not charge the certification fee under §173.391. Additionally, the PASSPORT Program pays certified providers for providing services, so the provider experiences a return on any investment involved in qualifying for certification.

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Rule 173-40-05 of the Administrative Code

There is no adverse impact other than to indicate that the PASSPORT Program does not pay a provider for providing non-covered/unauthorized services to an individual who is enrolled in the state-funded component of that program.

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

Rule 173-40-04 of the Administrative Code

There is no adverse impact other than what is already established under R.C. §173.39.

Rule 173-40-05 of the Administrative Code

It is normal to expect a program to not pay for non-covered/unauthorized 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 individuals enrolled in ODA-administered programs, 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 individuals receiving services from ODA-certified providers through compliance with this rule. R.C. §173.39 does not allow the program to pay a provider who is not certified.

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

ODA and its designees 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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