



# Common Sense Initiative

Mike DeWine, Governor  
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## Business Impact Analysis

Agency, Board, or Commission Name: **OHIO DEPT. OF AGING**

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

### ODA PROVIDER CERTIFICATION: APPLICATION, REVIEW, DISCIPLINE

Chapter 173-39 of the Administrative Code establishes the requirements to become, and to remain, an ODA-certified provider.

Rule Number(s): 173-39-03, 173-39-04, 173-39-05.

Date of Submission for CSI Review: February 16, 2024.

Public Comment Period End Date: February 29, 2024 at 11:59PM.

#### Rule Type/Number of Rules:

☐ New/ 0 rules

☐ No Change/ 0 rules (FYR? ☒)

☒ Amended/ 3 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☐ Rescinded/ 0 rules (FYR?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?

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**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.*

Rule 173-39-03 of the Administrative Code establishes the general application process to become an ODA-certified provider. ODA proposes to amend this rule. ODA proposes to amend this rule to achieve the following:

- 1. Speed up the application process by requiring providers to provide supplemental (i.e., missing) information within 5 business days after the request for that information.
- 2. Allow applicants to withdraw their applications if withdrawn before ODA denies the application or sends the provider's application to ODA's designee for a pre-certification review.
- 3. Delete the option to deem providers certified by the Ohio Dept. of Developmental Disabilities or ODM as ODA-certified. ODA added this option for the COVID-19 public health emergency
- 4. Combine paragraphs (C)(1)(c) and (C)(1)(e) of this rule and remove the reference to providers of ADS and assisted living.
- 5. Clarify that paragraph (D) applies to only adult day service (ADS) providers and assisted living providers.
- 6. No longer require using form ODM10172.
- 7. Implement [Senate Bill 131 \(134<sup>th</sup> G.A.\)](#) by requiring ODA to certify a non-agency or participant-directed provider moving to Ohio from the uniformed services or another state according to [RC Chapter 4796](#), which took effect on December 29, 2023.

Rule 173-39-04 of the Administrative Code establishes the requirements for structural compliance reviews. ODA proposes to amend this rule achieve the following:

- 1. Change to the deadline for ODA's designees (PASSPORT Administrative Agencies) to conduct a review of providers of the following services from the 3-year anniversary of the previous review to the 1-year anniversary of the previous review: (1) enhance community living, (2) choices home care attendant service, (3) home care attendant service, and (4) waiver nursing.
- 2. Require ODA's designee to inform a provider in writing of an upcoming review, unless the review is an unannounced review.

3. Change the range of dates for records over which ODA's designee may review for compliance from "since being certified" and "since the previous review" to 3 months or 6 months depending upon the service the provider is certified to provide.
4. Give providers 10 business days to demonstrate compliance after receiving a notice of non-compliance.

Rule 173-39-05 of the Administrative Code establishes disciplinary action for non-compliant providers. ODA proposes to amend this rule to achieve the following:

1. Combine paragraphs (B)(1)(a) and (B)(1)(b) and give providers 7 business days to respond to a request to show a plan for correcting the non-compliance or showing evidence of compliance.
2. Add paragraph (B)(1)(c) to indicate that ODA's designee may revise person-centered services plans to stop authorizing a non-compliant provider as a provider for an individual.
3. Indicate that ODA's designee may follow-up with the provider to verify compliance, which may include a site visit, requesting supplemental information, or reviewing records.

Lastly, ODA also proposes to make additional non-substantive improvements to the rules in this package.

**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.**

R.C. §§ [121.07](#), [173.01](#), [173.02](#), [173.39](#), [173.391](#), [173.52](#), [173.522](#), [173.54](#), [173.543](#).

**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.*

In order for the Centers for Medicare and Medicaid Services (CMS) to approve Ohio's application for a Medicaid waiver authorizing the state to launch and maintain the Medicaid-funded component of the PASSPORT and Assisted Living Programs, [42 CFR 441.352](#) requires ODA to establish provider-certification requirements to safeguard the health and welfare of individuals who receive services through the program.

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

These rules exist to comply with the state laws mentioned in ODA's response to #2. Those state laws require ODA to adopt rules to establish requirements for provider certification and the PASSPORT and Assisted Living Programs.

**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 comply with the state laws mentioned in ODA's response to #2. Those state laws require ODA to adopt rules to establish requirements for provider certification and the PASSPORT and Assisted Living Programs.

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

ODA and its designees monitor providers to ensure compliance for the continued health and safety of individuals receiving services from ODA-certified providers. [173-39-04] ODA will judge the proposed amendments to these rules to be a success when ODA and its designees find few violations against them during structural compliance reviews or investigations of alleged incidents.

**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 the [main rules webpage](#) on ODA's website encourage stakeholders and the general public to contact ODA's policy-development manager at [rules@age.ohio.gov](mailto:rules@age.ohio.gov) to give input on improving ODA's rules. From each rule's effective date to the date of this BIA, ODA received no email from any stakeholder on these rules in that email inbox.

On May 17, 2022, ODA emailed 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 Academy of Senior Health Sciences, Inc.
- Ohio Adult Day Healthcare Association (OADHA).
- OhioAging (O4A).
- Ohio Assisted Living Association (OALA).
- 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.

On August 18, 2023, ODA emailed the following stakeholders to request their recommendations for improving the current version of many rules in Chapter 173-39 of the Administrative Code, including the rules in this package and for ODA's specific proposals for certain rules in Chapter 173-39 of the Administrative Code, including the rules in this package:

- Catholic Social Services of the Miami Valley (CSS).
- LeadingAge Ohio.
- Ohio Academy of Senior Health Sciences, Inc.
- Ohio Adult Day Healthcare Association (OADHA).
- OhioAging (O4A).

- Ohio Assisted Living Association (OALA).
- 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 (OJC).
- State Long-Term Care Ombudsman.

On August 25, 2023, ODA emailed Addus Homecare the same email sent to other stakeholders on August 18, 2023.

## 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 chapter of rules.

In response to its August 18, 2023 and August 25, 2023 emails, 1 association representing ODA's designees (OhioAging) and 2 associations representing providers provided input. The table below presents their questions, concerns, and recommendations and ODA's responses to them.

Rule	Stakeholder	Question, Concern, or Recommendation	ODA's Response
173-39-03	OhioAging	The deeming process was very beneficial for ODM non-agency personal care providers who serve individuals enrolled in the Ohio Home Care Waiver that transfer to PASSPORT to become participant-directed providers of the choices home care attendant service. PAA2 worked with Ohio Home Care Waiver care managers to transfer individuals with their providers deemed for ODA certification. The timing of the transfer resulted in no service gaps for the individual and eliminated or reduced pay gaps for the provider. I worry that by removing the deeming process, Ohio Home Care Waiver will not be able to "hold" individuals on that waiver long enough for their provider to get certified through the traditional application process for provider certification, resulting in the individual transferring to PASSPORT without an ODA-certified provider. This may result in the individual not receiving services and/or the provider going without pay.	The deeming flexibility is not what allows ODA and ODM to work together on a safe transition of a member from one program to another, including assuring that the provider becomes ODA-certified. Additionally, since July 1, 2023, ODA has made it easier to become certified to be a participant-directed provider. ODA and ODM are committed to explore possible ways to deem in the future.

Rule	Stakeholder	Question, Concern, or Recommendation	ODA's Response
173-39-03	OhioAging	How will the certification process differ for participant-directed providers who are certified in other states?	Beginning on December 29, 2023, <a href="#">RC §173.391(I)</a> will require certifying the provider who is certified in another state according to <a href="#">RC Chapter 4796</a> . R.C. Chapter 4796 would not apply to a provider who is certified by ODA in this state.
173-39-03	OCHCH	OCHCH seeks clarity regarding the proposed amendment to require ODA to certify a non-agency or participant-directed provider from the uniformed services or another state according to R.C. Chapter 4796. Specifically, OCHCH seeks information regarding requirements for certification that will be in place for non-agency or participant-directed providers seeking ODA's certification.	<a href="#">House Bill 131 (134<sup>th</sup> GA)</a> enacted <a href="#">RC Chapter 4796</a> and amended <a href="#">RC §173.391(I)</a> to require certifying a provider certified in another state according to R.C. Chapter 4796.
173-39-04	OhioAging	We are confused that ODA is not proposing to establish a 1-year deadline for all personal care providers. Earlier this week, ODA proposed to establish a 1-year deadline for all personal care providers regardless of whether they have third-party accreditation.	The deadline for personal care providers that have third-party accreditation is proposed for every 3 years. The specific provider categories of CHCAS, participant-directed personal care, and enhanced community living are recommended for annual review due to the need for increased oversight and safety.
173-39-04	OCHCH	OCHCH supports annual compliance reviews with a one-quarter lookback period.	Thankfulness
173-39-04	OHCA	This provider association recommended establishing 1-year or 3-year deadlines depending upon the number of citations issued by a regulating entity. The association said that this would ensure that the additional focus and scrutiny is on the appropriate providers without overwhelming the system with additional and possibly unnecessary reviews. The association cited rule <a href="#">5123-3-06</a> of the Administrative Code as an example.	Rule 5123-3-06 of the Administrative Code pertains to facilities, which have employees that oversee the health and safety of residents. ODA proposes to establish 1-year review deadlines for providers of participants who have limited oversight for their health and safety. A 3-year deadline would increase health and safety risks.

**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 is not proposing to amend the rules in this package due to 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? *Alternative regulations may***

*include performance-based regulations, which define the required outcome, but do not dictate the process the regulated stakeholders must use to comply.*

[RC §173.391](#) requires ODA to adopt rules to establish requirements for ODA-certified providers. Additionally, federal rules require ODA to establish adequate requirements for providers to assure the health and safety of individuals enrolled in ODA-administered programs.

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

[RC §173.391](#) authorizes only ODA to develop standards for ODA-certified providers of services to individuals enrolled in ODA-administered programs.

**14. 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 to these 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.

Through regular monitoring activities, ODA and its designees will monitor ODA-certified providers for compliance. [173-39-04]

**Adverse Impact to Business**

**15. Provide a summary of the estimated cost of compliance with the rule(s). Specifically, please do the following:**

**a. Identify the scope of the impacted business community, and**

Every ODA-certified provider.

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

*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 following are the adverse impacts of these rules:

- The act of applying for certification. [173-39-03]
- Compliance reviews, which involve a review of records and, in some circumstances, a provider's place of business. [173-39-04] Although these requirements are primarily on ODA and its designees, providers must make their records and facilities available for review.
- Disciplinary actions for providers. [173-39-05]

The amount the PASSPORT and Assisted Living Programs pay providers for a service is an all-inclusive rate. It's intended to cover the daily costs incurred in the service plus employee-related costs. The costs incurred as a result of these rules 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.



Providers set the prices they bill to the PASSPORT and Assisted Living Programs. In turn, the PASSPORT and Assisted Living Programs pay each provider the amount the provider bills, so long as the price billed does not exceed the maximum that the Ohio Dept. of Medicaid (ODM) allows per unit. In the appendix to [rule 5160-1-06.1 of the Administrative Code](#), ODM establishes the units of service for the PASSPORT Program and the maximum-allowable payment for each unit. In the appendix to [rule 5160-1-06.5 of the Administrative Code](#), ODM establishes the units of service for the Assisted Living Program and the maximum-allowable payment for each unit. ODM is currently proposing to increase the rates in both rules.

**16. Are there any proposed changes to the rules that will reduce a regulatory burden imposed on the business community? Please identify. (*Reductions in regulatory burden may include streamlining reporting processes, simplifying rules to improve readability, eliminating requirements, reducing compliance time or fees, or other related factors*).**

The following will provide regulatory relief to providers:

1. Clarify that paragraph (D) of rule 173-39-03 of the Administrative Code applies to only ADS and assisted living providers and not to every provider.
2. Implementing Senate Bill 131 into rule 173-39-03 of the Administrative Code allows ODA to certify non-agency providers and participant-directed providers who move to Ohio from another state if the providers met similar qualifications in the other state according to the standards in RC Chapter 4796.
3. ODA will give non-compliant providers 10 business days, rather than the current 5 days, to demonstrate compliance after receiving a notice of non-compliance.(173-39-04)
4. Reviews of providers' records will not involve a broad range of dates because ODA's designee will review only a 3-month window. ODA's designee may review records for other dates if non-compliance is found in the 3-month window. (173-39-04)

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

ODA is required to develop rules establishing requirements for ODA-certified providers and to ensure the health and safety of individuals enrolled in ODA-administered programs.

Providers voluntarily apply for ODA certification. Certification is not required to provide a service unless a provider wants a government program that requires certification to pay the provider. Compliance with these rules is only required if a provider voluntarily chooses to participate in a program requiring certification, such as the PASSPORT and Assisted Living Programs.

**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's primary concern is the health and safety of individuals receiving services from ODA-certified providers. Whenever possible, ODA or its designees 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 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.