

# CSI - Ohio

The Common Sense Initiative

## Business Impact Analysis

Agency Name: Ohio Department of Aging (ODA)

Regulation/Package Title: Updating References and Cleaning-Up Language

Rule Number(s): Rules 173-3-06, 173-13-04, 173-14-01, 173-43-01, 173-43-02, 173-43-03, 173-43-04, 173-43-05, 173-44-04, 173-45-01, 173-45-08, and 173-50-01 of the Administrative Code

Date: August 15, 2013 (Revised October 1, 2013)

**Rule Type:**

☐ New

☒ Amended

☐ 5-Year Review

☐ Rescinded

The Common Sense Initiative was established by Executive Order 2011-01K and placed within the Office of the Lieutenant Governor. Under the CSI Initiative, agencies should balance the critical objectives of all regulations with the costs of compliance by the regulated parties. Agencies should promote transparency, consistency, predictability, and flexibility in regulatory activities. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

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## Regulatory Intent

### **1. Please briefly describe the draft regulation in plain language.**

*Please include the key provisions of the regulation as well as any proposed amendments.*

ODA is proposing to amend the rules listed above to make five types of updates:

1. H.B.59 renumbered many sections of the Ohio Revised Code. The changes took effect on September 30. Therefore, ODA is proposing to amend rules of to make corresponding updates to the Ohio Administrative Code.
2. H.B.59 transformed the Dept. of Job and Family Services' Office of Medicaid into the Ohio Dept. of Medicaid. On October 1, the Legislative Service Commission assigned new rule numbers to the related Medicaid rules. As a result, ODA must make corresponding amendments to use the new rule numbers, as follows:
  - a. In paragraph (B)(2) of rule 173-43-01 of the Administrative Code, paragraph (A)(8)(a) of rule 173-43-02 of the Administrative Code, and paragraph (B)(6) of rule 173-43-03 of the Administrative Code, ODA must replace the reference to rule 5101:3-3-15 of the Administrative Code with a reference to rule 5160-3-14 of the Administrative Code.
  - b. In paragraph (B)(6) of rule 173-43-01 of the Administrative Code, paragraphs (A)(3) and (A)(8)(b) of rule 173-43-02 of the Administrative Code, and paragraph (A)(2) of rule 173-43-03 of the Administrative Code, ODA must replace references to rules 5101:3-3-15.1 and 5101:3-3-15.2 of the Administrative Code with references to rules 5160-3-15.1 and 5160-3-15.2 of the Administrative Code.
  - c. In paragraph (A)(7) of rule 173-43-02 of the Administrative Code, ODA must replace the reference to rule 5101:3-3-43.1 of the Administrative Code with a reference to rule 5160-3-43.1 of the Administrative Code.
  - d. In rule 173-44-04 of the Administrative Code, ODA must replace all references to rules 5101:3-32-03 and 5101:3-32-06 of the Administrative Code with references to rules 5160-32-03 and 5160-32-06 of the Administrative Code.
  - e. In rule 173-44-04 of the Administrative Code, ODA must replace all references to rules 5101:3-33-03 and 5101:3-33-04 of the Administrative Code with references to rules 5160-33-03 and 5160-33-04 of the Administrative Code.
  - f. In rule 173-44-04 of the Administrative Code, replace all references to rules 5101:3-31-03 and 5101:3-31-04 of the Administrative Code with references to rules 5160-31-03 and 5160-31-04 of the Administrative Code.

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- g. In rule 173-50-01 of the Administrative Code, ODA must replace the reference to rule 5101:3-36-01 of the Administrative Code with a reference to rule 5160-36-01 of the Administrative Code.
3. Section 121.72 of the Revised Code requires ODA to indicate the edition of any C.F.R. that we cite in a rule and the latest date of any amendment to a federal act that we cite in a rule. Therefore, ODA is proposing to amend the rules to add edition and amendment dates.
4. Beginning on October 1, new rule 173-3-07 of the Administrative Code no longer refers to consumer cost-sharing policies. Instead the rule speaks of voluntary contributions and cost sharing apart from such policies. Therefore, ODA is proposing to update paragraphs (A)(10) and (C) in rule 173-3-06 of the Administrative Code to merely require providers to comply with rule 173-3-07 of the Administrative Code.
5. ODA is also proposing to clean up the rules, including [A] naming the programs that are regulated by the rule 173-3-06 of the Administrative Code; [B] starting the list under paragraph (A)(2) of rule 173-43-05 of the Administrative Code with “the following *four* criteria” and ending the paragraphs under paragraph (A)(2) of the rule with periods; [C] eliminating a defining clause in paragraph (A)(3) of rule 173-43-03 that is redundant of a definition in rule 173-43-01 of the Administrative Code; and [D] explaining that any person that ODA wants to certify to give Long-Term Care Consultations is subject to the criminal records check rules; [E] replace the pre-H.B. 153 (129<sup>th</sup> G.A.) language for “Assisted Living, Choices, and PASSPORT Medicaid-funded waiver programs” with “Medicaid-Funded Components of the Assisted Living, Choices and PASSPORT programs”; and [F] replace “he/she” in paragraph (A)(14) of rule 173-3-06 of the Administrative Code with “he or she.”

Because these updates to ODA’s rules would not create an adverse impact upon Ohio’s businesses, ODA will not develop a business impact analysis for the entirety of these rules. Instead, ODA will develop a business impact analysis the next time ODA proposes a substantive amendment to any of the rules or the next time any of the rules is due for a review under section 119.032 of the Revised Code, whichever comes first.

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### 2. Please list the Ohio statute authorizing the Agency to adopt this regulation.

The following state laws require/authorize ODA to adopt rules for specific purposes:

- Division (J) of section 173.01 of the Revised Code requires ODA to adopt rules “to govern investigations conducted under section 3721.17 of the Revised Code” such as rule 173-14-01 of the Administrative Code.
- Section 173.04 of the Revised Code authorizes ODA adopt rules for the Alzheimer’s Respite Program, such as 173-3-06 of the Administrative Code.
- Section 173.392 of the Revised Code requires ODA to adopt rules governing “contracts and grant agreements between [ODA] and persons and providers.”<sup>1</sup> ODA did this by adopting rule 173-50-01 of the Administrative Code to govern contracts between ODA and PACE organizations.
- Section 173.42 of the Revised Code requires ODA to adopt rules regarding the Long-Term Care Consultation Program, such as rules 173-43-01, 173-43-02, 173-43-03, 173-43-04, and 173-43-05 of the Administrative Code.
- Section 173.49 of the Revised Code requires ODA to adopt rules to “implement and administer” the Long-Term Care Consumer Guide, such as rules 173-45-01 and 173-45-08 of the Administrative Code.
- Section 173.50 of the Revised Code authorizes ODA to adopt rules regarding PACE such as rule 173-50-01 of the Administrative Code.
- Section 173.55<sup>2</sup> of the Revised Code requires ODA to establish a Unified Long-Term Care Waiting List as ODA did in rule 173-44-04 of the Administrative Code.
- Section 1347.15 of the Revised Code requires ODA to adopt rules “regulating access to the confidential personal information the agency keeps.” ODA does this, in part, by adopting rule 173-13-04 of the Administrative Code.

The following state laws require/authorize ODA to adopt rules in general:

- Division (K) of section 173.01 of the Revised Code requires ODA to adopt rules “to govern the operation of services and facilities for the elderly that are provided, operated, contracted for, or supported by the department and determine that those services and facilities are operated in conformity with the rules.

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<sup>1</sup> This language reflects the amendments made by H.B.59 (130<sup>th</sup> G.A.), which take place on September 30, 2013. Before September 30, division (B)(1) of the section says, “Contracts and grant agreements between [ODA] and persons and government entities regarding community-based long-term care services provided under a program [ODA] administers.”

<sup>2</sup> §173.55 is “§173.404” until the statutory changes enacted by H.B.59 (130<sup>th</sup> G.A.) take place on September 30, 2013.

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- Section 173.02 of the Revised Code requires ODA to adopt rules to “Carry out the provisions of Chapter 173. Of the Revised Code.”

**3. Do the regulations implement a federal requirement? Are the proposed regulations being 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.*

The following federal laws and rules authorize ODA to adopt rules:

- For rule 173-3-06 of the Administrative Code: Section 305(a)(1)(C) of the Older Americans Act of 1965, 79 Stat. 210, 42 U.S.C. 3001, as amended in 2006.
- For rule 173-14-01 of the Administrative Code: Section 712(a)(5)(D) of the Older Americans Act of 1965, 79 Stat. 210, 42 U.S.C. 3001, as amended in 2006.
- For rules 173-3-06 and 173-14-01 of the Administrative Code: 45 C.F.R. 1321.11 (10-01-2012 edition) requires ODA to adopt policies governing all aspects of the Older Americans Act Programs.

**4. If the regulations include provisions not specifically required by the federal government, please explain the rationale for exceeding federal requirements.**

ODA’s proposed amendments do not involve exceeding federal requirements.

**5. What is the public purpose for the regulations (i.e., why does the Agency feel that there needs to be any regulations in these areas at all)?**

The rules of this package fulfill the following purposes:

1. They bring ODA into compliance with the state laws that ODA listed under question #2.
2. They bring ODA into compliance with the federal laws and rules that ODA listed under question #3.

**6. How will the Agency measure the success of the regulations in terms of outputs and/or outcomes?**

ODA will monitor for compliance (1) its programs, (2) its designees<sup>3</sup>, and (3) (with the help of ODA’s designees) providers who furnish services to the consumers who are enrolled in its programs.

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<sup>3</sup> E.g., Area Agencies on Aging, PASSPORT Administrative Agencies, and Regional Long-Term Care Ombudsman Offices.

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## Development of the Regulation

7. Please list the stakeholders included by the Agency in the development or initial review of the draft regulations.

*If applicable, please include the date and medium by which the stakeholders were initially contacted.*

On August 12, 2013, ODA wrote the following email to the Ohio Association of Area Agencies on Aging, the Ohio Council for Home Care and Hospice, Midwest Care Alliance, Senior Health Sciences, Southwest Ohio Area Network (SWOAN), Ohio Association of Senior Centers, Ohio Assisted Living Association, and Leading Age Ohio:

Dear Interested Parties:

As you may know, H.B.59 assigned new ... numbers to many sections that regulate long-term care programs. ODA plans to amend our rules to make corresponding changes in two ways: (1) through a rule package that updates references in rules and (2) through rule packages that achieve other goals. For (2), updating references would be a secondary goal.

This email concerns (1). Please see the attached document. Please let ODA know if you agree/disagree with these updates, see other updates that ODA must make, or see an adverse impact that would be the result of more the result of a policy change than a reference change.

ODA hopes to file these rules with the CSI Office this week. If you would like to be part of providing early input, please try to send your comments to us by the close of business on Wednesday.

Thank you for any time you can devote to reviewing these rules.

While AAAs generally enter into provider agreements with traditional providers who perform long-term care AAAs generally perform the long-term care consultations and, when they do, they are the direct-care providers. Therefore, on August 12, 2013, ODA also asked the following of the Ohio Association of Area Agencies on Aging:

All direct-care positions engaged in furnishing a service to a consumer who is enrolled in an ODA-administered program is subject to the criminal records check statutes under sections 173.394 of the Revised Code, which is soon to be renumbered as "173.38 of the Revised Code." ODA's analysis is that consultants that ODA certifies under rule [173-43-05](#) of the Administrative Code to perform long-term care consultations must undergo criminal records checks. ODA believes that this has been the practice of AAAs/PAAAs all along.

Does ODA agree with this assessment? Do AAAs/PAAAs require criminal records checks for the consultants regardless of whether the consultant works for the AAA/PAA or for another entity?

Thanks for looking into this.

Additionally, from August 15, 2013 to September 1, 2013, ODA posted the rule proposals on its website to seek public comments. On August 14, 2013, ODA distributed an email to announce that ODA had placed the rules and the business impact analysis on our website to seek public comments. ODA distributed the email

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to the 1,419 subscribers<sup>4</sup> of ODA's email notification service who indicated they wanted notices about rules.

**8. What input was provided by the stakeholders, and how did that input affect the draft regulations being proposed by the Agency?**

On August 13, 2013, the Ohio Council for Home Care and Hospice said, "Thank you very much for the update. OCHCH has no comments on these rules."

On August 13, 2013, the Ohio Association of Area Agencies on Aging said, "I will find out. I think they do but need to confirm." Later the same day, the association said, "I have heard from all but three AAAs/PAAAs and they all said they require criminal background checks. I will let you know what I hear from the last three." [ODA did not receive a subsequent response, but also did not need one.]

On August 15, 2013, the Ohio Assisted Living Association said, "I've had a chance to review the rules and we do not have any issues with the changes."

At the time of the submission of this BIA on August 15, 2013, ODA had not heard from other organizations nor heard more from the above organizations.

During the public-comment period mentioned in item #7 of this BIA, ODA received zero comments from providers or any other members of the public.

**9. What scientific data was used to develop the rule or the measurable outcomes of the rules? How does this data support the regulations being proposed?**

ODA did not consult any scientific data to make the reference changes that ODA is proposing to make to the rules.

**10. What alternative regulations (or specific provisions within the regulations) 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?**

The alternative to updating an outdated reference is to let the reference remain out of date, which is unacceptable.

**11. Did the Agency specifically consider performance-based regulations? Please explain.**

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

Because ODA is only considering amending the rules in the package to update references and to clean-up language, ODA did not consider performance-based regulations.

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<sup>4</sup> Counted on August 9, 2013.

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**12. What measures did the Agency take to ensure that the regulations do not duplicate existing Ohio regulations?**

ODA reviewed the Ohio Administrative Code. The rules of this package do not duplicate existing Ohio regulations.

**13. Please describe the Agency's plan for implementation of the regulations, including any measures to ensure that the regulations are applied consistently and predictably for the regulated community.**

ODA posts all proposed and currently-effective rules on its website. (<http://aging.ohio.gov/information/rules/default.aspx>) Before a rule takes effect, ODA posts it on its website and sends an email to any subscriber of our rule notification service.

ODA will work with its designees to ensure that the regulations are applied uniformly.

ODA and its designees will also monitor the providers for compliance. Rule 173-39-02 of the Administrative Code states that a condition of being an ODA-certified provider is allowing ODA or the PASSPORT administrative agency to monitor the provider.

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## Adverse Impact to Business

**14. 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;**

- For rule 173-3-06 of the Administrative Code: Any business that enters into a contract with ODA or an area agency on aging to provide services to consumers who receive services from an ODA-administered program.
- For rule 173-13-04 of the Administrative Code: Employees of ODA.
- For rule 173-14-01 of the Administrative Code: Any person helped, or nursing facility investigated, by the State Long-Term Care Ombudsman Program.
- For rules 173-43-01, 173-43-02, 173-43-03, 173-43-04, and 173-43-05 of the Administrative Code: The nursing facilities that may see fewer admittances for any long-term care consultation that may inform a consumer that he or she may enroll in ODA's home and community-based long-term care programs as an alternative to institutional long-term care. As noted in ODA's response to item #8 of this BIA, the AAAs indicated to ODA that they have already been requiring criminal records checks on the consultants who perform the long-term care consultations. Therefore, clearly mentioning in the rule that section 173.38 of the Revised Code requires criminal records checks does not create a new adverse impact. It only highlights what statute already requires.<sup>5</sup>
- For rule 173-44-04 of the Administrative Code: No businesses have an adverse impact.
- For rules 173-45-01 and 173-45-08 of the Administrative Code: Assisted Living Facilities (RCFs) and nursing facilities that have information about them published in the Long-Term Care Consumer Guide that the rules regulate.
- For rule 173-50-01 of the Administrative Code: The two PACE organizations in Ohio.

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<sup>5</sup> Before the enactment of Section 173.38 of the Revised Code on September 29, 2013, Section 173.394 of the Revised Code required consultants who performed long-term care consultations to undergo criminal records checks, too. That is because the consultant is an employee in a direct-care position.

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

None of the updates that ODA is proposing to make to the rules of this package have an adverse impact.

- 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.*

None of the updates that ODA is proposing to make to the rules of this package have an adverse impact.

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

None of the updates that ODA is proposing to make to the rules of this package have an adverse impact.

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## Regulatory Flexibility

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

Sections 173.391 and 173.392 of the Revised Code, as well as rules 173-3-06.1 and 173-39-02.1 of the Administrative Code, do not prescribe alternate means for compliance depending on the size of the business. Additionally, almost all providers would be small businesses.

**17. 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?**

Section 119.14 of the Revised Code establishes the exemption from penalties for first-time paperwork violations. Disciplinary actions by ODA (or its designees) resulting from non-compliance that is not a pattern of non-compliance is subject to section 119.14 of the Revised Code.

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

The staff at Area Agencies on Aging (AAAs), PASSPORT administrative agencies (PAAs), and ODA are available to help direct-care providers of any size with their questions about the statutes and rules. Providers may address their questions to the AAAs, PAAs, or ODA (including ODA's regulatory ombudsman).