Ohio | Common Sense Initiative

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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):
OLDER AMERICANS ACT SUPPORTIVE SERVICES
OLDER AMERICANS ACT NUTRITION PROGRAM
The rules below establish requirements for AAA-provider agreements for services/meals paid by Older Americans Act funds.

Rule Number(s):

- 173-3-01, 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
- 173-4-03, 173-4-04, 173-4-05.1, 173-4-05.2, 173-4-05.3, 173-3-07, 173-3-09

Date of Submission for CSI Review: September 14, 2020

Public Comment Period End Date: September 27, 2020 at 11:59PM.

Rule Type/Number of Rules:
☐ **No Change/** 0 **rules (FYR? ☐)**
☐ **New/** 0 **rules**
☐ **Rescinded/** 0 **rules (FYR? ☐)**
☑ **Amended/** 15 **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 rule(s):

☐ **a. Require 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.

Providers voluntarily bid, through open and free competition, for AAA-provider agreements, which are agreements between area agencies on aging (AAAs), which are ODA's designees, and providers of home and community-based services when paid, in whole or in part, by Older Americans Act (OAA) funds.

- 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 define "unique identifier."

- Rule 173-3-06 of the Administrative Code establishes general requirements for AAA-provider agreements. On June 11, 2020, ODA adopted an emergency amendment that Through this rule package, required providers entering AAA-provider agreements to subscribe to ODA's service for notifying providers of proposed rule changes, opportunities to comment upon rules, and adopted rule changes. ODA proposes to adopt this amendment on an ongoing basis. This is the only new requirement that ODA proposes for providers in this rule package.

- Rules 173-3-06.1, 173-3-06.2, 173-3-06.3, 173-3-06.4, 173-3-06.5, 173-3-06.6, 173-4-05.1, 173-4-05.2, 173-4-05.3, 173-4-07, and 173-4-09 of the Administrative Code establish requirements applying only to AAA-provider agreements for an adult day service (ADS), home maintenance and chores, home modification, homemaker service, personal care, transportation, congregate dining project, home-delivered meals project, congregate dining project based in restaurants and grocery stores, nutrition counseling, and nutrition health screening (respectively). On June 11, 2020, ODA adopted one or more emergency amendment(s) into each of these rules to allow providers to decide whether, during the state of emergency, to collect a unique identifier of the consumer (*e.g.*, a handwritten signature) to verify that an activity or unit of service was provided. This allows the provider and consumer to maintain social distancing. Through this rule package ODA proposes to allow providers to decide whether, during any state of emergency declared by the governor, to collect a unique identifier of the consumer to verify that an activity or unit of service was provided.

- Rule 173-3-06.1 of the Administrative Code establishes requirements applying only to AAA-provider agreements for an adult day service (ADS). On June 11, 2020, ODA adopted an emergency amendment to the definition of "adult day service." The amendment gave ADS providers temporary flexibility to provide ADS activities in consumer's homes. Through this rule package, ODA proposes to adopt this amendment on an ongoing basis, but limit its effectiveness to states of emergency declared by the governor.

In the same rule, ODA also proposes to move language that defines "adult day service" under paragraph (B)(2) of the rule, plus Table 1 to the rule, to the definition under paragraph (A) of the rule and to replace occurrences of "components" in the definition with "activities," and to delete all uses of "shall" in the definition since defining a term does not require a regulatory restriction.

In the same rule, ODA proposes to replace a reference to section 102 of the Older Americans Act with a reference to 42 U.S.C. 3002, which is the codified version of section 102. This will help readers who want to follow the cross reference because the federal government publishes the United States Code, but does not publish an amended version of the act.

In the same rule, ODA proposes to replace reference to "the meals service requirements of rule 173-4-05 of the Administrative Code" with "paragraphs (A)(7) to (A)(12) of rule 173-4-05 of the Administrative Code and paragraph (E) of rule 173-4-05.1 of the Administrative Code."

In the same rule, ODA proposes to replace "personal care staff member" with "PCA."

In the same rule, ODA proposes to replace "present" regarding nurse staffing to "available."

- Rules 173-3-06.4, 173-3-06.5, 173-4-03, 173-4-07, and 173-4-09 of the Administrative Code establishes requirements applying only to AAA-provider agreements for a homemaker service, personal care, eligibility verification, nutrition counseling, and nutrition health screening (respectively). On June 11, 2020, ODA adopted one or more emergency amendment(s) into each of these rules to give providers flexibility to conduct supervisory visits, eligibility verification, nutrition counseling, and nutrition health screening by telephone, video conference, or in person, rather than only in person. This allows providers and consumers to maintain social distancing. Through this rule package, ODA proposes to adopt these amendments on an ongoing basis but limit its effectiveness to states of emergency declared by the governor.

- In rule 173-3-06.5 of the Administrative Code, ODA also proposes to replace "the" with "The" in 5 paragraphs.

- In rule 173-3-06.6 of the Administrative Code, on June 11, 2020, ODA adopted an emergency amendment requiring drivers to provide their signatures as an attestation that they provided the trips for which they claimed to provide. Through this rule package, ODA proposes to require providers to collect driver's signatures (instead of collecting a unique identifier of the consumer) to attest to the completion of a trip during states of emergency declared by the governor.

- Rule 173-4-04 of the Administrative Code establishes requirements for AAAs to incorporate person direction into procurement for nutrition projects. On June 11, 2020, ODA adopted an emergency amendment that limited the requirement for AAAs to incorporate certain aspects of person direction into procurement for nutrition projects during the state of emergency. Through this rule package, ODA proposes to adopt this amendment on an ongoing basis, but limit its effectiveness to states of emergency declared by the governor.

- In rule 173-4-05.1 of the Administrative Code, on June 11, 2020, ODA adopted an emergency amendment that deleted a requirement for providers to keep at least one congregate dining location in its nutrition project open for business to provide meals for at least one mealtime (*i.e.*, breakfast, lunch, or dinner) per day to consumers on five or more days per week. Through this rule package, ODA proposes to adopt this amendment on an ongoing basis, but limit its effectiveness to states of emergency declared by the governor.

  In the same rule, on June 11, 2020, ODA adopted an emergency amendment to pay for occasional carry-out meals during a state of emergency. Through this rule package, ODA proposes to adopt this amendment on an ongoing basis.

In the same rule, on June 11, 2020, ODA adopted an amendment limiting the requirement for providers to give consumers reasonable notice before the closure of a dining location to that which is practicable during a state of emergency. In this rule package, ODA proposes to adopt this amendment on an ongoing basis.

- In rule 173-4-05.2 of the Administrative Code, on June 11, 2020, ODA adopted an emergency amendment that added states of emergency to the list of reasons that a provider should develop and implement written contingency procedures for emergency closings. Through this rule package, ODA proposes to adopt this amendment on an ongoing basis.

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 USC 3025 says ODA is "primarily responsible" for Older Americans Act policy development in Ohio and 45 CFR 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 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 CFR 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.*

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. Since ODA adopted the emergency amendments to the rules now in this package on June 11, 2020, ODA's policy development manager has received no input from stakeholders or the general public on those amendments.

On August 21, 2020, ODA presented its 4th webinar to providers, area agencies on aging (AAAs), and others concerning matters relating to the COVID-19 state of emergency. During the meeting, ODA announced that was considering adopting many of the emergency amendments on an ongoing basis. ODA, then fielded questions from providers, AAAs, *et al.*

10. What input was provided by the stakeholders, and how did that input affect the draft regulation being proposed by the Agency?

During the August 21, 2020 webinar, ODA received questions on whether ODA would propose to adopt all, or only some, of the emergency amendments on an ongoing basis. ODA explained that it only planned to adopt some and was open to input. ODA did not receive any such input during the question and answer portion of the webinar and has not since received any such input.

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?

Many of ODA's proposals in this rule package are based upon CDC guidelines for social distancing to reduce exposure to COVID-19, especially for consumers of the Older Americans Act Nutrition program which may be at a higher risk for contracting COVID-19.

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.*

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 the rules. Through its regular monitoring activities, ODA and its designees will monitor providers for compliance.

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 develop standards 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 new rules take effect, ODA will post them on ODA's website. ODA will also send an email to subscribers of ODA's rule-notification service to feature the rule. Through regular monitoring (*i.e.*, auditing) requirements under 45 CFR 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. Additionally, ODA will add information to on-going frequently asked questions and guidance regarding operating OAA services during COVID-19.

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

These rules directly regulate Ohio's 12 AAAs, which are ODA's designees. The AAA-provider agreements directly regulate any provider that enters such agreements.

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. In general, the prosed amendments will give providers flexibility to maintain social distancing during a state of emergency declared by the governor. Please review ODA's response to question #17 for more information.

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.*, a home modification), per unit (*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.

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.*, 173-3-04 and 173-3-05)

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.

Most of ODA's proposed amendments in this package will give providers flexibility to maintain social distancing during a state of emergency. Specifically, during a state of emergency declared by the governor, these amendments will allow providers to (1) conduct eligibility determinations, supervisory visits (for personal care and homemaker), nutrition counseling, and nutrition health screening by telephone or video conference instead of only in person, and (2) verify that they provided services without making unnecessary physical contact with the consumer (*e.g.*, to collect a unique identifier, such as a handwritten signature, from the consumer).

The only proposed amendment that may be considered to create a new requirement for providers entering AAA-provider agreements will be ODA's proposal to require providers subscribe to ODA's service for notifying providers of proposed rule changes, opportunities to comment upon rules, and adopted rule changes. ODA believes that a requirement to subscribe to a free service that keeps providers informed of updates to the Administrative Code and opportunities to participate in the rule-development process will be an asset—not an adverse impact—to providers.

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. Thus, an AAA-provider agreement is a gateway to being paid for services a provider wants to provide to consumers through 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 third-party insurers, private pay, or other government programs not using Older Americans Act funds.

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 the rules.

Additionally, ODA publishes all rules currently in effect on its website. Providers may access the currently-effective rules 24 hours per day, 365 days per year.