



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-ADMINISTERED PROGRAMS DURING THE FEDERAL COVID-19 PUBLIC HEALTH EMERGENCY

This rule will primarily give providers, ODA, AAAs, and PAAs regulatory relief or flexibility through the end of the federal public health emergency.

Rule Number: 173-1-04

Date of Submission for CSI Review: July 6, 2021. *Revised on July 21, 2021.*

Public Comment Period End Date: July 20, 2021 at 11:59PM.

Rule Type/Number of Rules:

☒ New/ 1 rule

☐ No Change/ # rules (FYR? ☐)

☐ Amended/ # 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☐ Rescinded/ # rules (FYR?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 to businesses has the agency determined the rule creates?

Please review the next page.

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The rule:

- ☐ 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.

The proposed new rule will give providers, AAAs, and PAAs regulatory relief or flexibility. It will do so by declaring that any regulatory relief or flexibility in effect during a state of emergency declared by the governor will remain in effect until the end of the federal public health emergency.

This will extend the regulatory relief or flexibility that enables social distancing to limit the spread of COVID-19 to vulnerable older Ohioans who receive long-term care services and supports. It will also ensure that ODA remains in compliance with requirements attached to federal funds.

The proposed new rule will replace emergency rule [173-1-04](#) of the Administrative Code, which was authorized by executive order 2021-09D and will expire on October 17, 2021 (before the projected end of the federal public health emergency).

This proposed new rule will not create any new requirements for providers.

The proposed new rule will extend the regulatory relief and flexibilities in 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](#), [173-4-04](#), [173-4-05](#), [173-4-05.1](#), [173-4-05.2](#), [173-4-05.3](#), [173-4-07](#), [173-4-09](#), [173-4-10](#), [173-4-11](#), [173-39-02.1](#), [173-39-02.7](#), [173-39-02.8](#), [173-39-02.10](#), [173-39-03](#), [173-39-03.3](#), [173-39-03.4](#), [173-40-03](#), and [173-51-03](#) of the Administrative Code.

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](#), [173.392](#), [173.52](#), [173.522](#), [173.54](#), and [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.

To combat the effect of COVID-19, the [Families First Coronavirus Response Act](#) (March 18, 2020) appropriated additional Older Americans Act funds to states without requiring state matches and increased the federal medical assistance percentage (FMAP) for states.

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The [CARES Act](#) (March 27, 2020) appropriated additional Older Americans Act funds to states without requiring state matches to those funds and gave states flexibilities to last for the duration of the federal public health emergency.

On May 14, 2020, CMS [approved](#) Ohio's appendix (K) application for regulatory relief from the requirements under 42 C.F.R. 441.352. The waiver granted under appendix (K) lasted until January 26, 2021. Fortunately, on December 22, 2020, CMS [extended](#) effective periods for each state's approved appendix (K) waiver to last until no later than 6 months after the expiration of the federal public health emergency.

The [American Rescue Plan Act of 2021 \(ARPA\)](#) made additional appropriations of Older Americans Act funds and gave states more flexibility for the use of those funds during the federal public health emergency. ARPA also increased FMAP for states for the home and community-based services *improvement period*, which will remain in effect until March 31, 2022.

At the time ODA drafted this BIA, April 15, 2021 was the most-recent day that HHS issued a [renewal](#) of its determination that a federal public health emergency exists.

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

This proposed new rule will exist to extend regulatory relief or flexibility related to limiting the spread of COVID-19 until the end of the federal public health emergency. The proposed new rule will also ensure ODA is compliant with requirements for federal funds.

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)?

This proposed new rule will exist to extend regulatory relief or flexibility related to limiting the spread of COVID-19 until the end of the federal public health emergency.

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

A continuation of the regulatory relief and flexibilities should result in the continued limitation of the spread of COVID-19 to the vulnerable older Ohioans who receive long-term services and supports through ODA-administered programs.

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.

On June 21, 2021, ODA asked the following stakeholders to for feedback on ODA's proposal to adopt emergency rule 173-1-04 of the Administrative Code through the regular rule-development process for ongoing effect after the emergency rule expires:

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- The Academy of Senior Health Sciences, Inc.
- Catholic Social Services of the Miami Valley.
- LeadingAge Ohio.
- Ohio Assisted Living Association.
- Ohio Association of Area Agencies on Aging.
- Ohio Association of Medical Equipment Services.
- Ohio Association of Senior Centers.
- Ohio Council for Home Care and Hospice.
- 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?

ODA received 4 comments from 4 stakeholders to its June 21, 2021 email.

- LeadingAge Ohio, Ohio Assisted Living Association, and Ohio Council for Home Care and Hospice of which represent providers, supported the proposal to adopt rule 173-1-04 of the Administrative Code to allow flexibilities to remain in place until the end of the public health emergency.
- The State Long-Term Care Ombudsman recommended resuming requirements for in-person assessments, visits, etc. because conducting those activities in person outweighs the risks of protecting older Ohioans now that there is no shortage of personal protective equipment or vaccinations. ODA responded to this recommendation by saying that the proposed new rule will allow providers to conduct in-person activities, but will also continue to give those providers flexibility to conduct those activities by telephone or video conference during the state of emergency declared by the governor, which the rule will extend until the end of the federal public health emergency. This flexibility allows providers to decide what is the most-appropriate course of action for the remainder of the federal public health emergency and allows consideration for vaccination status, staffing shortages, and outbreak status, and community spread, among others.

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.

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?

ODA is unaware of any alternative to providing regulatory relief and flexibility that would fill the gap between the end of emergency rule 173-1-04 of the Administrative Code and the end of the federal public health emergency other than the adoption of rule 173-1-04 of the Administrative Code through the regular rule-development process.

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.*

As ODA stated in its response to question #2, the proposed new rule will primarily give providers, ODA, AAAs, and PAAs regulatory relief or flexibility by declaring that any regulatory relief or flexibility in effect during a state of emergency declared by the governor will remain in effect until the end of the federal public health emergency.

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

R.C. §§ [173.391](#) and [173.392](#) authorize only ODA to adopt the rules from which ODA is proposing to provide regulatory relief and flexibility by adopting its proposed new 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.

Before the proposed new rule takes effect, ODA will (1) post it on ODA's website and (2) email subscribers of ODA's rule-notification service to announce it.

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

Any provider regulated by rule [173-3-06.1](#), [173-3-06.2](#), [173-3-06.3](#), [173-3-06.4](#), [173-3-06.5](#), [173-3-06.6](#), [173-4-04](#), [173-4-05](#), [173-4-05.1](#), [173-4-05.2](#), [173-4-05.3](#), [173-4-07](#), [173-4-09](#), [173-4-10](#), [173-4-11](#), [173-39-02.1](#), [173-39-02.7](#), [173-39-02.8](#), [173-39-02.10](#), [173-39-03](#), [173-39-03.3](#), [173-39-03.4](#), [173-40-03](#), or [173-51-03](#) of the Administrative Code.

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

The proposed new rule will extend regulatory relief or flexibility related to the COVID-19 state of emergency in 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](#), [173-4-04](#), [173-4-05](#), [173-4-05.1](#), [173-4-05.2](#), [173-4-05.3](#), [173-4-07](#), [173-4-09](#), [173-4-10](#), [173-4-11](#), [173-39-02.1](#), [173-39-02.7](#), [173-39-02.8](#), [173-39-02.10](#), [173-39-03](#), [173-39-03.3](#), [173-39-03.4](#), [173-40-03](#), and [173-51-03](#) of the Administrative Code.

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.

The proposed new rule will extend regulatory relief or flexibility related to the COVID-19 state of emergency until the end of the federal public health emergency

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

As ODA stated in its response to question #2, the proposed new rule will primarily give providers, ODA, AAAs, and PAAs regulatory relief or flexibility by declaring that any regulatory relief or flexibility in effect during a state of emergency declared by the governor will remain in effect until the end of the federal public health emergency.

This extension will enable social distancing to limit the spread of COVID-19 to vulnerable older Ohioans who receive long-term care services and supports from providers, ODA, AAAs, and PAAs. It will also ensure that ODA remain in compliance with requirements attached to federal funds.

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Regulatory Flexibility

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

Because the primary purpose of this rule 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. Whenever possible, ODA or its designees will treat administrative violations that do not involve health and safety as opportunities for improvement through 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 this rule.