PUBLIC-COMMENT PERIOD

PROVIDER CERTIFICATION: ASSISTED LIVING SERVICE

March 15, 2024

ODA reviewed rule 173-39-02.16 of the Administrative Code and now proposes to amend it.

Please feel free to review the proposed amendments to this rule and the business impact analysis that accompanies it, then offer recommendations for improving the rule. Submit recommendations to rules@age.ohio.gov no later than **March 31, 2024** at 11:59PM.

30 E Broad St, 22nd Floor
Columbus, OH 43215-3414

Main: 1-800-266-4346
Fax: 614-466-5741

Aging.Ohio.gov
TTY: Dial 711

Common Sense Initiative

Mike DeWine, *Governor*
Jon Husted, *Lt. Governor*
Joseph Baker, *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

Regulation/Package Title (a general description of the rules' substantive content):
ODA PROVIDER CERTIFICATION: ASSISTED LIVING SERVICE
Chapter 173-39 of the Administrative Code establishes the requirements to become, and to remain, an ODA-certified provider.

Rule Number(s): 173-39-02.16

Date of Submission for CSI Review: March 15, 2024.

Public Comment Period End Date: March 31, 2024 at 11:59PM.

Rule Type/Number of Rules:

☐ **New/** # **rules**
☒ **Amended/** 1 **rules (FYR?** ☒**)**
☐ **No Change/** # **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☐ **Rescinded/** # **rules (FYR?** ☐**)**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?

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 173-39-02.16 of the Administrative Code establishes the specific requirements to become, and to remain, certified by the Ohio Department of Aging (ODA) to provide the assisted living service. ODA proposes to amend this rule to achieve the following:

(1) Use "basic service" and "memory care" throughout the rule.

(2) Reconcile unnecessary differences with, and eliminate unnecessary restatements of, ODH's licensure rules. These amendments include the following:

- Referring to staff members as "staff members" or "staff" throughout this rule to correspond with ODH's use of the same terms in Chapter 3701-16 of the Administrative Code.
- Referring to Chapter 3701-16 of the Administrative Code in the definition of "basic service" instead of restating ODH's rules or using differing terms. The result will simplify much of the definition of into personal care and nursing as ODH's rules define each.
- Not using the term "medication management," which does not appear in ODH's rules.
- Referring to rule 3701-16-06 of the Administrative Code in paragraph (D)(2)(c) of this rule.
- Deleting words from paragraph (C)(3) of this rule that are covered by the staffing requirements in rule 3701-16-05 of the Administrative Code.

(3) Remove the words "stand-alone memory care unit" from paragraph (D)(2)(b) of this rule and explain that a provider may add a single-occupancy resident unit to an existing memory care section even if the resident unit is not next door to the existing memory care section. (See table below.) This will continue to make the "discrete unit" option in uncodified §333.240 of House Bill 33 (135th GA) possible if the provider also has an existing memory care section. Considering such a unit to be part of an existing memory care section may make it easier to meet the staffing requirements for memory care. Each provider may decide if designating a resident unit that is not next door to an existing memory care section is viable for its RCF. If it is viable, it will allow person-centered options like allowing Mr. and Mrs. Smith to continue to share a resident unit in non-memory-care section of the RCF after Mrs. Smith starts to receive memory care. This will prevent Mr. and Mrs. Smith from needing to live in separate resident units and prevent Mr. Smith from needing to move into a resident unit in the memory care section.

CURRENT	PROPOSED
Stand-alone memory care unit	Resident unit in a memory care section of the RCF with flexibility for the RCF to add a single-occupancy resident unit of an existing memory care section even if the resident unit is not next door to the existing section.
Resident unit in a memory care section of the RCF	

Resident unit in an RCF that provides only memory care.	Resident unit in an RCF that provides only memory care.

(4) Give providers flexibility in paragraphs (C)(7) and (D)(3)(a) of this rule to use LPNs who are not under the direction of an RN because the definition of "LPN" in RC §4723.01 allows LPNs to be under the direction of a list of healthcare professionals. The amendment to paragraph (D)(3)(a) of this rule will correspond with a forthcoming refiling of rule 173-39-01 of the Administrative Code to amend the definition of "LPN."

(5) Limit the training for a memory-care staff member on common behavior challenges in paragraph (D)(4)(c) of this rule to training on common behavior challenges that are specific to dementia.

(6) Refer, in paragraph (E)(1)(c) of this rule, to critical access rates in ODM's rule 5160-1-06.5 of the Administrative Code. The reference will say "(if applicable)" to not imply that this rule establishes critical access rates. At the time of the writing of this BIA, Ohio is seeking authority from the Centers for Medicare and Medicaid Services (CMS) to offer critical access rates. Using "(if applicable)" will be important if CMS does not approve the request to offer critical access rates but this rule takes effect with the term "critical access rates" in it. ODA provides references to rates rules at the end of this rule to be helpful. This rule does not establish rates.

(7) Make additional non-substantive changes to this rule.

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.

RC §§ 121.07, 173.01, 173.02, 173.39, 173.391, 173.54, 173.543, 173.547, 173.548.

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 Assisted Living Program, 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.

This rule exists, in part, to comply with 42 CFR 441.352, which requires ODA to establish provider-certification requirements to safeguard the health and welfare of individuals who receive services through the program.

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 rule exists to comply with the state laws mentioned in ODA's response to #3 and the federal rule mentioned in ODA's response to #4. Those state laws require ODA to adopt rules to establish requirements for provider certification and the Assisted Living Program.

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.[1] ODA will judge the proposed amendments to this rule to be a success when ODA and its designees find few violations against it 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 to give input on improving ODA's rules. From this rule's effective date to the date of this BIA, ODA received no email from stakeholders on this rule in that email inbox.

On March 5, 2024, ODA emailed the following stakeholders to request their input on ODA's proposed amendments to this rule:

- LeadingAge Ohio.
- Ohio Assisted Living Association (OALA).
- Ohio Academy of Senior Health Sciences, Inc.
- Ohio Health Care Association (OHCA).

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 March 5, 2024 emails, ODA received 6 comments from 2 provider associations. The table below presents the comments and ODA's responses to those comments.

[1] See rule 173-39-04 of the Administrative Code.

<table>
<tr><th></th><th>Stakeholder Input</th><th>ODA's Response</th></tr>
<tr><td>1</td><td>173-39-02.16(A)(3)
Relating to the definition of Memory Care in section (A)(3), we do not feel that the draft rule meets the requirements outlined in Section 333.240 of House Bill 33:

(C) The Department of Medicaid and the Department of Aging shall adopt rules, effective November 1, 2023, establishing an assisted living memory care service payment rate for residential care facilities participating in the Medicaid-funded component of the assisted living program. This payment rate is based on additional costs that a provider may incur resulting from serving individuals with dementia and, except as provided in division (E) of this section, shall be at least twenty-five dollars per day more than the base payment rate established by rules adopted under division (B) of this section. The per diem for assisted living memory care service will only be available to assisted living providers if both the following conditions are met:

(1) The resident for whom the per diem is paid was assessed by a practitioner and was determined by the practitioner to need the services of a memory care unit.

The current draft mentions no requirement of a practitioner assessing a resident and determined to need services of a memory care unit. Rather, it requires "an individual with a documented diagnosis of any form of dementia." Having a documented form of dementia does not equate to a physician recommendation for memory care services. Dementia is a progressive disease with varying levels of need. Many Dementia rating scales are in existence to document the severity of the disease and relative caregiving needs for an individual. We suggest that (A)(3) be amended to read:

(3) "Memory care" means a service that a provider provides in compliance with paragraph (D) of this rule to an individual with a documented diagnosis of any form of dementia; and was assessed by a practitioner and determined to need services of a memory care unit.
OHCA</td><td>42 CFR 441.352 requires assurance that the state and providers meet the standards established in approved Medicaid waiver applications. The approved Medicaid waiver application for the Assisted Living Program limits service to only those authorized by case managers through the person-centered planning in rule 5160-44-02 of the Administrative Code. These case managers determine the need for services, including the need for memory care.

Certainly, a case manager relies on a physician's determination of a diagnosis of dementia and the subsequent need for memory care in the level-of-care determination process under RC §5165.04 and rule 5160-3-08 of the Administrative Code, plus the periodic assessment process under 42 CFR 441.365, and the person-centered planning process under rule 5160-44-02 of the Administrative Code. However, such assessment requirements would not appear in this rule since this rule establishes requirements for certified providers instead of case managers.</td></tr>
<tr><td>2</td><td>173-39-02.16(A)(3)
Additionally, LeadingAge Ohio supports further aligning the rule with statute by transcribing the language requiring practitioner recommendation from the statute:

(3) The resident for whom the per diem is paid was assessed by a practitioner and was determined by the practitioner to need the services of a memory care unit.

ORC 333.240 is temporary and set to expire, and this important clinical requirement should endure, ensuring payment will only reimburse for those with heightened need for memory care services, and not individuals with early-stage dementia that has yet to significantly impair functioning.
LeadingAge Ohio</td><td>Please see ODA's response to the previous comment.</td></tr>
</table>

3	**173-39-02.16(D)(2)(b)** LeadingAge Ohio has fielded numerous questions from members citing confusing questions from their certifying professionals from the Area Agencies on Aging around several requirements pertaining to the memory care service under the assisted living waiver. We believe this stems from two areas: 1. Incongruencies between the rules and the statute, and 2. Lack of clear, statewide guidance on application of the new memory care standards. LeadingAge Ohio believes that neither the current rules, nor the current drafting shared on March 5, 2024, meet the legislative intent that was outlined in the statute and which was discussed numerous times between stakeholders and Department officials multiple times leading up to and following passage of HB33. HB33 defines an "assisted living memory care unit" as a "discrete unit or section in a residential care facility or an entire residential care facility that meets both of the following criteria: (a) The unit or facility is designated by the facility operator as a memory care unit. (b) The unit or facility is operated in compliance with rules applicable to memory care units adopted by the Department of Health under Chapter 3721 .01 of the Revised Code." In initial comments, LeadingAge Ohio recommended the word "unit" be replaced by a term less clinical and more precise. Unit can be construed as either an individual room or as a space/section of a community. It was clear then—as it is now—that the use of the term "unit" in this instance implies it is a subsection, wing, or otherwise defined area of an assisted living community and not a single room. This is clear because of other portions of the rule which use the term "unit": (1) The resident for whom the per diem is paid was assessed by a practitioner and was determined by the practitioner to need the services of a memory care unit. (2) The memory care unit in which the resident resides has a direct care staff to resident ratio that is at least twenty per cent higher than other units in the residential care facility... In developing the memory care payment, we deliberated the value of offering memory care payment for defined spaces/areas (i.e. "units") of an assisted living community vs. reimbursing for providers who adopt integrated models of memory care, where residents are dispersed throughout a community, receiving higher services but without a geographically defined area. Significant importance was given to staffing levels, the Administration officials insisting that the higher payment should equate to higher levels of services. For this reason, the language requiring a 20 percent higher staffing ratio was included.	We're pleased to see that you find the proposed new language to be far better than the language in the current rule. HB33 referred to a (1) "discreet unit" in an RCF, (2) "section" of an RCF, or (3) "an entire residential care facility." We agree that using "unit" in "memory care unit," "discrete unit," and "resident unit" may confuse readers. To clarify in the rule, the word "unit" will appear only in "resident unit." This corresponds to the Ohio Department of Health's use of "resident unit" in its RCF licensure rules. If a provider is unable to measure staffing levels for resident units that are not contained in a memory care section of the RCF, then provider is under no obligation to designate such a resident unit for memory care.

	Stakeholder Input	ODA's Response
	With current tools available, it is impossible to measure staffing level on a room-by-room basis. Providing memory care reimbursement to dispersed rooms is predicated on the state's willingness to trust providers at their word. Pertaining to the current draft, the revisions offer a far better compromise than the current effective rule. (b) The provider designates ~~the~~ each single-occupancy resident unit in paragraph (C)(2)(c) of this rule ~~to be a stand-alone memory care unit, a memory care unit in a memory care section of the RCF, or a memory care unit in an RCF of a provider that provides only memory care.~~ in which it plans to provide memory care as one of the following: (i) A resident unit in a memory care section of the RCF. The provider may add a single-occupancy resident unit to an existing memory care section even if the resident unit is not next door to the existing section. (ii) A resident unit in an RCF that provides only memory care. By only allowing payment for those organizations that operate dedicated memory care neighborhoods (units), they are ensuring that only those organizations that have already dedicated significant resources to programming, staffing, training and other amenities to support individuals with cognitive challenges will be able to access this higher level of payment. LeadingAge Ohio	
4	173-39-02.16(D)(3)(b) We would also suggest that the Department of Aging issue uniform guidance to each Area Agency on Aging as it relates to providers documenting compliance for the requirements for both the higher staffing ratios in memory care, as described in 173-39-02.16 (D)(3)(b), and the requirements to respond to the resident call light in 10 minutes, as described in 173-39-02.16(D)(2)(e). Since the implementation of the first version of rule 173-39-02.16, our members have reported varying practices amongst each area agency on aging for complying with these requirements. OHCA	There will be future opportunities for providers, provider associations, and PASSPORT administrative agencies participate in the development of guidance.
5	173-39-02.16(D)(3)(b) Finally, we would welcome the opportunity to draft additional guidance documents for aging services organizations and surveying agencies, to ensure compliance is measured consistently across the state. LeadingAge Ohio has begun compiling member recommendations on how to calculate staffing ratios and call light response times set forth in Ohio Administrative Code 173-39. Once developed and shared among the associations, LeadingAge Ohio will provide the guidance documents to the Ohio Department of Aging. LeadingAge Ohio	We would appreciate guidance that you or any other provider association provides to ODA.
6	173-39-02.16 We are open to having conversation about further refining these rules, which may include exceptions for married couples, critical access payments and other topics. LeadingAge Ohio	We are also open to having such conversations.

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? *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 §173.39 prohibits ODA from paying a provider through the Assisted Living Program unless the provider is certified under RC §173.391. RC §173.391 requires ODA to adopt rules to establish requirements for ODA-certified providers. Additionally, 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.

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. In areas where the certification standards and terminology are the same as the licensure standards and terminology, ODA refers to the licensure rules in Chapter 3701-16 of the Administrative Code rather than restate standards in this rule and rather than using alternate terms in this rule with the exception of "memory care," which originates in uncodified §333.240 of House Bill 33 (135th GA).

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 this rule take effect, the public will be able to access the rule in the Register of Ohio. Additionally, ODA will send an email to subscribers of our rule-notification service to feature the rule.

ODA and its designees regularly monitor ODA-certified providers for compliance.[2]

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 of the assisted living service, which is currently 395 residential care facilities (RCFs), 152 of which are certified to provide both memory care and the basic service.[3]

---

[2] See rule 173-39-04 of the Administrative Code.

[3] These figures are from March 6, 2024.

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 unique[4] adverse impacts of this rule:

- **Public Information:** This rule requires the provider to display on its website whether the provider is certified to provide the basic service or both memory care and the basic service and whether the provider is currently accepting individuals who are enrolling in the Assisted Living Program or MyCare Ohio. ODA does not propose to substantively amend this standard.

- **Resident Units:** This rule establishes that a resident unit qualifies for this service only if the unit meets the rule's standards for (1) single occupancy, with an option for the individual to request to share the unit, (2) individual-controlled locks unless a physician determines that the individual's diagnosis indicates that an ability to control the lock to the resident unit is likely to have an adverse effect on the individual's health, (3) a bathroom, and (4) social space. These standards have been in this rule since March 31, 2006, which was before Ohio launched the Assisted Living Program on July 1, 2006. In 2009, ODA limited the individual's ability to request to share the unit by allowing the individual to share only with a person with whom the individual had an existing relationship. ODA does not propose to amend these standards.

- **Common Areas:** This rule requires the provider to provide common areas that are accessible to the individual including a dining area (or areas) and an activity center (or centers) and allows a multi-purpose common area to serve as both a dining area and an activity center. This requirement has been in this rule since March 31, 2006, which was before Ohio launched the Assisted Living Program on July 1, 2006.

- **Minors:** This rule prohibits minors from assisting with medication administration or transporting individuals.[5] This prohibition has been in this rule since March 31, 2006, which was before Ohio launched the Assisted Living Program on July 1, 2006. ODA does not propose to substantively amend this standard.

- **Initial Staff Qualifications:** This rule requires the hours of initial training under rule 3701-16-06 of the Administrative Code to include the topics mentioned in this rule. This should not create any adverse impact greater than ODH's requirements. This requirement has been in this rule since March 31, 2006, which was before Ohio launched the Assisted Living Program on July 1, 2006. ODA does not propose to amend this standard.

- **In-Service Training:** This rule requires the provider to make verification of successful completion of the annual training under rule 3701-16-06 of the Administrative Code available to ODA and its designee upon request. ODA does not propose to substantively amend this standard.

- **Quarterly Assessments:** This rule requires an RN or LPN to assess the individual's satisfaction with the individual's activities plan on a quarterly basis. This requirement has been in this rule since March 31, 2006, which was before Ohio launched the Assisted Living Program on July 1, 2006. A forthcoming amendment to the definition of "LPN" in rule 173-39-01 of the Administrative Code will give providers flexibility to use LPNs who are under the direction of any healthcare professional listed in the definition of "LPN" in RC §4723.01 and not just an RN.

[4] "Unique" means not required by a law or rule other than this rule or 42 CFR 441.352.

[5] This rule also prohibits minors from providing personal care without on-site supervision, but that is a reference to the prohibition in rule 3701-16-06 of the Administrative Code rather than a unique requirement of this rule.

- **Subcontracting:** This rule gives providers flexibility to subcontract for one or more, but not all, service activities. Any adverse impact (e.g., on minors) would apply whether the work was provided through the provider or the provider's subcontractor. ODA does not propose to substantively amend its subcontracting standard.

- **Purpose Statement (only for memory care providers):** This rule requires the provider to display a purpose statement on its website that explains the difference between the provider's basic service and its memory care, or only a memory care purpose statement if that is the exclusive service the provider offers. ODA does not propose to substantively amend this standard.

- **Designating Resident Units (only for memory care providers):** This rule establishes a standard that, to qualify for a resident unit to qualify for memory care, the provider must designate that unit for memory care as a resident unit in a memory care section of the RCF or as a resident unit in an RCF that provides only memory care. Please review ODA's response to question #2 of this BIA for details on ODA's proposed amendments to this standard.

- **Activities (only for memory care providers):** This rule requires providers to arrange for at least 3 therapeutic, social, or recreational activities listed in rule 3701-16-11 of the Administrative Code per day with consideration given to individuals' preferences and designated to meet individuals' needs. ODA proposes to amend this standard by referring to related staff requirements in ODH's licensure rules.

- **Outdoor Spaces (only for memory care providers):** This rule requires providers to ensure safe access to outdoor space for individuals. ODA does not propose to amend this standard.

- **Resident Call System (only for memory care providers):** This rule requires providers to assist each individual who makes a call through the resident call system in person in fewer than 10 minutes after the individual initiates the call. ODA does not propose to amend this standard.

- **Staff Availability (only for memory care providers):**
    - This rule requires providers to have a sufficient number of RNs or LPNs on call or on site at all times for individuals receiving memory care. ODA proposes to give providers flexibility use LPNs who are not under the direction of an RN by amending this rule and by a forthcoming amendment to the definition of "LPN" in rule 173-39-01 of the Administrative Code.
    - This rule requires providers to maintain an appropriate direct-care staff-to-resident ratio. This standard corresponds with uncodified §333.240 of House Bill 33 (135th GA). ODA does not propose to substantively amend the staffing ratio standard.

- **Initial Staff Qualifications and In-Service Training (only for memory care providers):**
    - This rule establishes the initial staff qualifications to provide memory care without in-person supervision. ODA proposes to amend these requirements to require the training in common behavior challenges to be training in common behavior challenges that are specific to dementia.
    - This rule requires the in-service training for memory care staff to include dementia care topics.

The amount the Assisted Living Program pays providers for this service is an all-inclusive rate. It's intended to cover the daily costs incurred in the service plus employee-related costs (e.g., training). The costs incurred as a result of this rule are likely calculated as part of a provider's operational budget—the cost of doing business and clerical duties, such as retaining records.

The Assisted Living Program pays each provider the rates that the Ohio Dept. of Medicaid (ODM) established in the appendix to rule 5160-1-06.5 of the Administrative Code, which is under amendment at the same time as this rule to establish critical access rates.

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).*

Yes, ODA's proposed amendments to paragraph (D)(2)(b) of this rule may make it easier for providers to consider how to staff a single-occupancy resident unit receiving memory care that is not next door to an existing memory care section of the RCF by considering that resident unit to be part of the existing memory care section. However, this rule does not require any provider to designate such a resident unit for memory care.

Additionally, ODA's proposed amendments to paragraph (D)(3)(a) of this rule and ODA's forthcoming related amendment to the definition of "LPN" in rule 173-39-01 of the Administrative Code will give providers flexibility to use LPNs who are under the direction of any healthcare professional listed in the definition of "LPN" in RC §4723.01 and not just an RN.

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

ODA is required to establish rule requirements for ODA-certified providers and to ensure the health and safety of individuals enrolled in ODA-administered programs. There are enhanced requirements for memory care compared to the basic service because an individual with Alzheimer's disease or a related dementia has increased care needs. Additionally, the Assisted Living Program pays more for memory care than for the basic service.

As always, providers voluntarily apply for ODA certification. Certification is not required to provide assisted living—whether basic or memory care—unless a provider wants the Assisted Living Program to pay the provider for the basic service or memory care. Many providers opt to forego certification and accept only individuals who pay with personal funds or long-term care insurance.

Additionally, providers who are certified to provide memory care voluntarily designate resident units for memory care. If a provider is unable to measure memory-care staffing levels for a resident unit that is not contained in, or next door to, an existing memory care section of the RCF, then the provider is under no obligation to designate such a resident unit for memory care.

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'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 this rule.

*** DRAFT - NOT YET FILED ***

173-39-02.16 **ODA provider certification: assisted living service.**

(A) Definitions for this rule:

(1) "Assisted living service" means either a basic service or memory care that promotes aging in an RCF by supporting the individual's independence, choice, and privacy.

~~(1)~~(2) "~~Assisted living~~ Basic service" means all of the following:

~~(a) A service promoting aging in place by supporting the individual's independence, choice, and privacy.~~

~~(b)~~(a) A service that includes the following ~~activities~~:

(i) Personal care under rule 3701-16-09 of the Administrative Code, which includes ~~Hands-on~~ hands-on assistance, supervision, and/or cuing of ADLs, and IADLs~~, and other supportive activities~~.

(ii) Nursing ~~activities~~, including the following:

(a) The initial and subsequent health assessments under rule 3701-16-08 of the Administrative Code.

(b) Other activities included in rules 3701-16-09 and 3701-16-09.1 of the Administrative Code.

~~*(b)* Monitoring the individual according to the standards of practice for the individual's condition.~~

~~*(c)* Medication management according to rule 3701-16-09 of the Administrative Code.~~

~~*(d)* The part-time intermittent skilled nursing care described in rule 3701-16-09.1 of the Administrative Code when not available to the individual through a third-party payer.~~

(iii) Coordinating three meals per day and snacks according to rule 3701-16-10 of the Administrative Code with access to food according to rule 5160-44-01 of the Administrative Code.

(iv) Coordinating the social, recreational, and leisure activities under rule 3701-16-11 of the Administrative Code to promote community participation and integration, including non-medical

*** DRAFT - NOT YET FILED ***

transportation to services and resources in the community.

~~(c)~~(b) A service that does not include the following:

(i) Housing.

(ii) Meals.

(iii) Twenty-four-hour skilled nursing care.

(iv) One-on-one supervision of an individual.

~~(2) "Medication management" includes knowing what medications an individual is self-managing, assistance with self-administration of medication, ordering medication, medication reminders, and medication administration.~~

(3) "Memory care" means a service that a provider provides in compliance with paragraph (D) of this rule to an individual with a documented diagnosis of any form of dementia.

(4) "Resident call system" has the same meaning as in rule 3701-16-01 of the Administrative Code.

(5) "Staff member" and "staff" have the same meanings as in rule 3701-16-01 of the Administrative Code.

(B) Certification types: ODA certifies each provider for either of the ~~basic assisted living service, memory care, or both the basic service and memory care.~~ following:

(1) The basic service.

(2) The basic service and memory care.

(C) Requirements for an ODA-certified provider of the basic ~~assisted living~~ service:

(1) General requirements: The provider is subject to rule 173-39-02 of the Administrative Code.

(2) RCF qualifications:

*** DRAFT - NOT YET FILED ***

(a) Licensure: Only a provider who maintains a current, valid RCF license from ODH and maintains compliance with Chapter 3721. of the Revised Code and Chapters 3701-13 and 3701-16 of the Administrative Code qualifies to provide this service.

(b) Public information: The provider shall display the following on its website:

(i) Whether the provider is currently certified by ODA to provide the basic ~~assisted living~~ service~~, memory care,~~ or both the basic service and memory care.

(ii) Whether the provider is currently accepting individuals who are enrolling in the assisted living program or mycare Ohio.

(c) Resident units: A resident unit qualifies for this service only if the unit meets all the following standards:

(i) Occupancy:

(a) The resident unit is a single-occupancy resident unit designated solely for the individual, except as permitted under paragraph (C)(2)(c)(i)(b) of this rule.

(b) The provider may allow an individual to share a single-occupancy resident unit only if all of the following conditions exist:

(i) The individual requests to share the individual's unit.

(ii) The individual shares the individual's unit with a person with whom the individual has an existing relationship.

(iii) ODA's designee verifies that the conditions of paragraphs (C)(2)(c)(i)(b)(i) and (C)(2)(c)(i)(b)(ii) of this rule are met and authorizes sharing the unit in the individual's person-centered services plan.

(ii) Lock: The resident unit has a lock that allows the individual to control access to the resident unit at all times, unless the

*** DRAFT - NOT YET FILED ***

individual's person-centered services plan indicates otherwise.

(iii) Bathroom: The resident unit includes a bathroom with a toilet, a sink, and a shower or bathtub, all of which are in working order.

(iv) Social space: The resident unit includes identifiable space, separate from the sleeping area, that provides seating for the individual and one or more visitors for socialization.

(d) Common areas: The provider shall provide common areas accessible to the individual, including a dining area (or areas) and an activity center (or centers). A multi-purpose common area may serve as both a dining area and an activity center.

(3) Staff ~~Availability:~~ Availability: The provider shall maintain adequate staffing levels to comply with rule 3701-16-05 of the Administrative Code ~~and to provide hands-on assistance, supervision, and/or cuing of ADLs~~ in a timely manner in response to individual's unpredictable care needs, supervisory needs, emotional needs, and reasonable requests for services through the resident call system twenty-four hours per day.

(4) Minors: No ~~Staff~~ staff ~~members~~ member under eighteen years of age ~~do not qualify~~ qualifies to do any of the following:

(a) Assist with medication ~~management~~ administration.

(b) Provide transportation.

(c) Provide personal care without on-site supervision, in accordance with rule 3701-16-06 of the Administrative Code.

(5) Initial staff qualifications: Only a staff member who successfully completes training in the following subject areas qualifies to provide this service:

(a) Principles and philosophy of assisted living.

(b) The aging process.

(c) Cuing, prompting, and other means of effective communication.

*** DRAFT - NOT YET FILED ***

(d) Common behaviors for cognitively-impaired individuals, behaviorally-impaired individuals, or other individuals and strategies to redirect or de-escalate those behaviors.

(e) Confidentiality.

(f) The person-centered planning process in rule 5160-44-02 of the Administrative Code, which includes supporting individuals' full access to the greater community.

(g) The individual's right to assume responsibility for decisions related to the individual's care.

(6) In-service training: The provider shall ensure that each ~~employee~~ staff member providing this service successfully completes any training requirements in rule 3701-16-06 of the Administrative Code and makes verification of successful completion of those requirements available to ODA or its designee upon request.

(7) Quarterly assessments: The provider's RN or LPN shall contact the individual at least quarterly to assess, and retain a record of, all of the following:

(a) The individual's satisfaction with the individual's activity plan and whether the activity plan continues to meet the individual's needs.

(b) Whether the individual's records demonstrate that the individual is receiving activities as ODA or its designee authorized them in the individual's person-centered service plan.

(c) Whether staff are providing personal care services to the individual in a manner that complies with rule 3701-16-09 of the Administrative Code.

(8) Subcontracting: The provider may subcontract to provide one or more, but not all, of the activities listed under paragraph ~~(A)(1)(b)~~ (A)(2)(b) of this rule that ODA or its designee authorizes for the individual. The provider is responsible to assure that any activity provided by a sub-contractor complies with this chapter.

(D) Requirements for an ODA-certified provider of the basic service and memory care:

*** DRAFT - NOT YET FILED ***

(1) The provider is subject to the standards in ~~paragraphs~~ <u>paragraph</u> (C) of this rule.

(2) The provider qualifies for certification to provide memory care only if the provider meets all of the following standards:

(a) The provider displays a purpose statement on its website that explains the difference between the provider's basic ~~assisted living~~ service and its memory care, or ~~if the provider provides~~ only <u>a</u> memory care~~, a~~ purpose statement ~~on its website that explains the memory care~~ <u>if</u> that <u>is</u> the <u>exclusive service the</u> provider ~~provides~~ <u>offers</u>.

(b) The provider designates ~~the~~ <u>each</u> single-occupancy resident unit in paragraph (C)(2)(c) of this rule ~~to be a stand-alone memory care unit, a memory care unit in a memory care section of the RCF, or a memory care unit in an RCF of a provider that provides only memory care.~~ <u>in which it plans to provide memory care as one of the following:</u>

<u>(i) A resident unit in a memory care section of the RCF. The provider may add a single-occupancy resident unit to an existing memory care section even if the resident unit is not next door to the existing section.</u>

<u>(ii) A resident unit in an RCF that provides only memory care.</u>

(c) ~~The provider~~ <u>A staff member who successfully completed the training requirement in paragraph (D)(3) of rule 3701-16-06 of the Administrative Code</u> provides or arranges for at least three therapeutic, social, or recreational activities listed in rule 3701-16-11 of the Administrative Code per day with consideration given to individuals' preferences and designed to meet individuals' needs.

(d) The provider ensures safe access to outdoor space for individuals.

(e) The provider assists each individual who makes a call through the resident call system in person in fewer than ten minutes after the individual initiates the call.

(3) <u>Staff</u> ~~Availability:~~ <u>availability:</u> The provider qualifies for certification to provide memory care only if the provider meets all of the following standards in addition to the requirements in paragraph (C)(3) of this rule:

(a) The provider has a sufficient number of RNs~~,~~ or LPNs ~~under the direction~~

*** DRAFT - NOT YET FILED ***

~~of an RN,~~ on call or on site at all times for individuals receiving memory care.

(b) The provider maintains the appropriate direct-care staff-to-resident ratio below for its memory care:

(i) If providing ~~both~~ memory care and the basic service at the same time, a ratio for the provider's memory care that is at least twenty per cent higher than the provider's ratio for its basic service.

(ii) If providing only memory care and the average ratio for the basic service provided by a representative sample of providers participating in the medicaid-funded component of the assisted living program is readily available to the provider, then a ratio that is at least twenty per cent higher than that average ratio.

(iii) If providing only memory care and the average ratio for the basic service provided by a representative sample of providers participating in the medicaid-funded component of the assisted living program is not readily available to the provider, then a ratio of at least one direct-care staff member ~~who provides personal care services~~ for every ten individuals receiving memory care with at least one direct-care staff member ~~who provides personal care services~~ on each floor of the RCF if the RCF provides memory care on multiple floors.

(4) Initial staff qualifications: A staff member qualifies to provide memory care without in-person supervision only if the staff member successfully completes training all of the following topics in addition to the topics listed under paragraph (C)(5) of this rule:

(a) Overview of dementia: symptoms, treatment approaches, and progression.

(b) Foundations of effective communication in dementia care.

(c) Common behavior challenges specific to dementia and recommended behavior management techniques.

(d) Current best practices in dementia care.

(e) Missing resident prevention and response.

*** DRAFT - NOT YET FILED ***

(5) In-service training: A staff member continues to qualify to provide memory care only if the staff member successfully completes dementia care training when complying with paragraph (C)(6) of this rule.

(E) Units and rates:

(1) For the assisted living program, the appendix to rule 5160-1-06.5 of the Administrative Code lists the following:

(a) The unit of service as one day.

(b) The maximum-allowable rates for a unit of a unit of the basic ~~assisted living~~ service and a unit of memory care.

(c) Critical access rates (if applicable).

(2) For the assisted living program, rule 5160-33-07 of the Administrative Code establishes the rate-setting methodology for a unit of service.