



Ohio Association of  
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## TESTIMONY TO JOINT COMMITTEE ON AGENCY RULE REVIEW AGE RULE 173-2-08 AAAs: COMMERCIAL RELATIONSHIPS

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Good afternoon, Chair Callender, Chair Gavarone, and Members of JCARR. My name is Kelsey Bergfeld and I am the Chief Policy Officer of the Ohio Association of Area Agencies on Aging (o4a). Thank you for the opportunity to testify today.

O4a sincerely appreciates the engagement by JCARR members, JCARR staff, and the Department of Aging (AGE) on proposed rule 173-2-08 AAAs: Commercial Relationships. Though a number of helpful revisions to the rule language have been made, our members continue to have significant concerns regarding the implementation of the rule and the impact the current version would have on AAA's ability to form innovative partnerships with private entities to expand vital services to older Ohioans. As written, the rule would expand bureaucracy, delay partnerships, and discourage innovation that helps older Ohioans access critical services.

### **Adverse Impact on Business**

*The rule has an adverse impact on business because it requires prior authorization to engage in a line of business, requires the report of information as a condition of compliance, and is likely to reduce the revenue and commercial activity of Ohio's Area Agencies on Aging.*

The majority of AAAs are private nonprofit organizations. AAAs form commercial relationships with private entities/businesses in order to expand their service capacity and meet the needs of their communities. In their guidance on this rule, the Administration for Community Living (ACL) states that they, "applaud and encourage the efforts of our aging services network to expand its infrastructure, capacity, and financial sustainability by leveraging resources beyond those provided through the Older Americans Act (OAA). This includes the development of contracts and commercial relationships with health care payers and other funders, which enable the aging services network to provide more older adults with supportive, nutrition, and other services."

If a commercial relationship is not exempt or pre-approved, the rule requires the submission of a copy of the commercial relationship for approval by AGE. Private entities such as health plans and hospitals may take issue with sharing confidential and proprietary information with a state agency that does not have regulatory oversight of the commercial relationship. As shared by the Ohio Association of Health Plans in their testimony on the rule, "This new requirement creates unnecessary administrative burden on AAAs as well as putting current and future partnerships between AAAs and entities such as health plans at risk."

The rule even requires a AAA to provide an exception in any nondisclosure agreement to allow AGE to obtain information and a copy of the commercial relationship on request with trade secret information redacted. This provision ignores the reality of negotiating commercial relationships in which NDAs may be a necessary part of the

process, and requesting such an exception from the entity with which the AAA seeks to contract could essentially inhibit the ability to develop commercial relationships.

Allowing redaction for “trade secrets” is too narrow. Trade secrets are a specific, legally protected type of confidential information that provides a business with an economic advantage because it is not generally known. Confidential information is a broader category of private data that may not meet the legal criteria for a trade secret, such as a fluctuating pricing list or customer contact information. Proprietary information may not fall within the definition of trade secrets but may be information that the entity does not want disclosed. In addition, once submitted to AGE, these commercial relationships would be open to public records requests. This puts future partnerships at risk.

### **Stringent and Burdensome Implementation**

*The rule implements a federal law or rule in a manner that is more stringent and burdensome than the federal rule or law requires.*

AGE’s current approval form requests more information than ACL’s minimum requirements and could conflict with nondisclosure agreements. It contradicts federal guidance that explicitly states, “Although State Units on Aging have the discretion to request to review contract documents if they deem it necessary to determine whether the contract or commercial relationship may be approved, it should not generally be necessary to do so.”

The rule should follow the ACL Guidance and state that AGE may request the underlying contract or agreement documents only if risk screening indicates necessity. Generally, review of contract documents should not be required for approval.

Federal guidance also explicitly warns that state processes must be “streamlined, transparent, and not overly burdensome,” and advises that “too much caution may inhibit the provision of vital services and the sustainable growth of the aging network.”

### **Complete and Accurate Rule Summary and Fiscal Analysis (RSFA)**

*The Rule Summary and Fiscal Analysis is not complete or accurate.*

The RSFA states that the rule “will have no impact on revenues or expenditures” and thus there was not a request for a Common Sense Initiative analysis. Also, it states that the rule does not require specific reporting of expenditures or reporting of information as a condition of compliance. The RSFA fails to acknowledge the adverse business impact on AAAs’ contracting partners. Even if the premise that the AAAs are not “businesses” is accepted, the entities that they contract with (health plans, provider networks, hospitals, physicians, etc.) absolutely are, and will have to accommodate contract disclosure requirements and NDA carve-outs. They may also bear legal and administrative costs to support redaction, legal review, and negotiation around AGE’s access.

The RSFA also understates the administrative and reporting burden. The application form and rule together clearly require reporting of detailed information as a condition of compliance, including:

- Entity identity and type, contract amount and term, service description and link to Area Plan.
- Detailed accounting of OAA resources used, and how program income will be used.
- Completion of a multi-factor risk assessment, with narrative attachments explaining each checked risk.
- Submission of the contract itself, redacted for trade secrets.
- Extensive conflict of interest screenings and assurances, individual and organization, and detailed statutory assurances under 42 USC 3020c and 3026.

## **Incorporation by Reference**

### *Application for Approval of 42 U.S.C. 3020c Agreements*

The agency includes substantive requirements in a form (Application for Approval of 42 U.S.C. 3020c Agreements ) that can change outside the rulemaking process. The RSFA says the rule “refers to an application form that AGE publishes on its website” and treats that as material incorporated by reference. However, the form is substantive, not just clerical. It contains the items noted above, which essentially becomes the standards for approval of the commercial relationship. The material is not just “generally available” background but is a core compliance instrument with statutory assurances and risk criteria that should be in rule if they are mandatory. Any substantive change to the form (e.g. new assurances, new risk flags, new documentation requirements) would change the obligations on AAAs and their partners without JCARR review.

We respectfully request 173-2-08 AAAs: Commercial Relationships be refiled to allow additional time to work on the rule, as well as a CSI review to help work through our concerns on the impact this rule as written will have on our private business practices.

We commit to continuing to collaborate with AGE to develop a balanced, risk-based process consistent with ACL guidance. Together, we can ensure that this rule protects OAA services while advancing the shared goal of improving the lives of older Ohioans.

Thank you again for your time and attention in working through this rule with o4a and our members. We sincerely appreciate your efforts and dedication to this process. I am happy to answer any questions you may have.