



Common Sense Initiative

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Business Impact Analysis

Agency, Board, or Commission Name: Department of Taxation

Rule Contact Name and Contact Information:

Kerrie Ryan

Regulation/Package Title (a general description of the rules' substantive content):

Commercial Activity Tax (CAT) Five-Year Rule Review

Rule Number(s): 5703-29-02 & 5703-29-19

Date of Submission for CSI Review: _____

Public Comment Period End Date: _____

Rule Type/Number of Rules:

New/___ rules

No Change/___ rules (FYR? ___)

Amended/ X rules (FYR? X)

Rescinded/___ rules (FYR?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.

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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.

Ohio Adm. Code 5703-29-02— This rule provides guidance and examples for determining common ownership for purposes of the commercial activity tax (CAT). R.C. 5751.011 and 5751.012 provide for group reporting and payment of the CAT for certain groups of entities that meet specified ownership criteria. The rule describes the general application of the ownership criteria and the application of the ownership criteria for different entity types. Changes are proposed to clarify some of the language in the rule and to provide a standard to be used by the tax commissioner in evaluating whether a taxpayer is eligible for a retroactive consolidated election.

Ohio Adm. Code 5703-29-19— This rule provides guidance on the legal effect that changes in the ownership of entities that are members of a taxpayer group have on the entity or group with respect to the CAT. This rule also provides guidance to taxpayers on how to treat changes in ownership with respect to a binding election available to certain groups of taxpayers pursuant to R.C. 5751.011. Minor changes are proposed to allow the taxpayer to notify the

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commissioner of ownership changes via the Ohio business gateway and to eliminate an outdated reference to the initial semi-annual CAT period that set a deadline for cancelling an election made in 2005.

- 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.**

The rules are authorized by R.C. 5703.05 and both amplify R.C. 5751.011 and 5751.012

- 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.

No.

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

N/A

- 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)?**

The Department provides these rules in an effort to clarify, describe, or define the requirements, procedures, or policies of the Department with respect to its implementation of the tax laws. The rules provide taxpayers with information that promotes compliance with the applicable statutory provisions.

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

The Department evaluates the success of its rules through discussions with taxpayers and practitioners and routine audits of taxpayers' compliance.

- 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

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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.

The Department posted the proposed rules on its website and sent an email seeking comments on the proposed rules to subscribers of the Department's Tax Alert notification system. The rules were posted, and the email was sent on December 20, 2019, and invited comment through January 2, 2020.

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

The Department received only two comments on the rules. The majority of one comment focused on why the Department should seek significant legislative changes to the CAT regarding combined and consolidated filing. The Department must administer the law as it exists, and the rules are based on current law. The rules can be amended if the law changes in the future.

With respect to Ohio Adm. Code 5703-29-02, one comment suggests that the Department is attempting to overturn the Board of Tax Appeals (BTA) decision in *Nissan North America, Inc. v. McClain*, BTA Case No. 2016-1076 (10/9/2019). The BTA's decision was based, at least in part, on the fact that the rule regarding retroactive consolidated elections contained no standard or requirements for the granting of such an election. The amendment to the rule is the Department's attempt at providing a standard for the grant of a retroactive consolidated election that is consistent with the Department's long-standing policy and the decision in *Nissan* that a taxpayer should be able to fix a mistake in its registration.

The Department made significant changes to the first draft of the proposed rule to account for the additional comments provided. The rule was revised to allow a registration mistake to be corrected even if a taxpayer is under an audit, compliance, or criminal investigation program. The revisions also widely expanded the availability of the retroactive election to those taxpayers that come forward under a voluntary disclosure agreement. The latter revision addresses the second comment in its entirety.

With respect to the comments on Ohio Admin. Code 5703-29-02 and 5703-29-19 arguing that the rules contradict the statute, the Department submits that the rule has provided necessary guidance to ensure that discrete taxpayer groups are formed and that taxpayers are not required to be included in multiple groups. While the commenter posits that the rules "clearly conflict with the statute and [are] confusing for ODT employees and provides uncertainty to taxpayers", the Department believes the opposite is true. Since 2006, the rule has provided certainty with respect to the composition of group taxpayers and the reporting of gross receipts of members of those groups. The Ohio Revised Code supports the idea that where sense

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requires it, “and” may be read as “or” and “or” may be read as “and.” The Department insists that this is one of those cases where an “or” should be read as “and.” See R.C. 1.02(F). Further, such a drastic change to this long-standing guidance could have a significant and unknown impact on the administration of the CAT and, with respect to existing taxpayer groups, would replace certainty with ambiguity.

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?

N/A

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?

The Department did not consider alternative regulations. The Department did not consider regulatory alternatives because for guidance from the Department to be binding upon taxpayers, the guidance must be done through regulations. See *Progressive Plastics, Inc. v. Testa*, 113 Ohio St.3d 490, 2012-Ohio-4759, and *Renacci v. Testa*, 148 Ohio St.3d 470, 2016-Ohio-3394.

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.*

No. The rules are not conducive to performance-based measures.

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

A review of the Department's existing rules reveals that the rules do not duplicate any existing rules.

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.

As existing rules, they have already been implemented and applied to taxpayers. However, once the amended rules are approved, a tax alert will be sent to inform the community that the amended rules are effective. A link to the rule will be posted on the Department's website. Additionally, information regarding the CAT, including general information and FAQs, is maintained on the Department's website. The Department will train staff on the rules to ensure the rules are applied consistently and predictably.

Adverse Impact to Business

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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

All persons subject to the CAT.

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

The rules require the report of information as a condition of compliance. Ohio Adm. Code 5703-29-02 requires a taxpayer to report taxable gross receipts of a group member for the period of time the person met the common ownership requirements to qualify as a member of the group. Ohio Adm. Code 5703-29-19 requires a taxpayer to notify the tax commissioner if the ownership structure of the group changes or when a group acquires a new member.

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 existing rules are necessary to administer the commercial activity tax and the adverse impact is minimal. Taxpayers are easily able to notify the commissioner of organizational structure changes and acquisitions electronically through the Ohio Business Gateway or, if preferred by the taxpayer, via paper forms available on the department’s website that can be mailed, faxed, or emailed to the department.

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

Any adverse impact on businesses is outweighed by the benefits provided by these rules. These rules provide guidance on the application of certain CAT statutes. Without the additional clarity provided by these rules, taxpayer confusion, uncertainty, and increased appeals and litigation may result.

Regulatory Flexibility

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

No. Taxes are administered fairly and equitably with respect to all businesses—big or small.

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?

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N/A. The rules do not contain a provision for the imposition of a fine or penalty for non-compliance.

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

Information about the CAT is available on the Department's website. Taxpayers seeking assistance with CAT compliance may contact the Business Tax Division of the Department via telephone by calling 1-844-722-8829 or via email through the Department's website.