

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Ohio Department of Agriculture

Regulation/Package Title: Retail Sales of Motor Fuel

Rule Number(s): 901:6-5-01 and 901:6-5-02

Date: July 26, 2017

Rule Type:

☒ New

☐ Amended

☒ 5-Year Review

☒ Rescinded

The Common Sense Initiative was established by Executive Order 2011-01K and placed within the Office of the Lieutenant Governor. Under the CSI Initiative, agencies should balance the critical objectives of all regulations with the costs of compliance by the regulated parties. Agencies should promote transparency, consistency, predictability, and flexibility in regulatory activities. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

Regulatory Intent

1. Please briefly describe the draft regulation in plain language.

Please include the key provisions of the regulation as well as any proposed amendments.

The Ohio Department of Agriculture, Division of Weights and Measures (hereinafter "Department") is statutorily tasked with protecting Ohio businesses and consumers by ensuring products are accurately measured and sold. Under current law, the Department

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regulates the method of sale of motor fuel in section 901:6-5-01 of the Ohio Administrative Code by requiring retail fuel metering devices to display the price per gallon/liter, be able to indicate the total amount of fuel being delivered and total price of a single retail transaction.

The Department received requests from members of the natural gas and renewable energy industries to modify the current rule because it does not reflect the advent of new motor vehicle fuel and energy sources. Additionally, there has been a national movement to update these regulations. For those reasons, the Department began the task of creating new rules to regulate these transactions.

OAC 901:6-5-01 is being rescinded pursuant to the Legislative Service Commission's guidelines on rule drafting as the proposed amendments modify over 50% of the existing rule. The proposed version sets out the definitions as used in OAC 901:6-5-02. The definitions set a standard of identity for many motor fuel types. The vast majority of these standards mirror the standards adopted in National Institute of Standards Technology (NIST) Handbook 130 (2016). NIST is a non-regulatory federal agency within the U.S. Department of Commerce whose stated purpose is to achieve, to the maximum extent possible, uniformity in weights and measures laws and regulations among the various states and local jurisdictions in order to facilitate trade between the states, permit fair competition among businesses, and provide uniform and sufficient protection to all consumers in commercial weights and measures practices.

OAC 901:6-5-02 sets forth regulations for the retail sale of fuels in the state. The rule maintains the current requirements on retail motor fuel metering devices as well as adds requirements for the advertisement of these energy sources. Specifically, the rule outlines labeling standards for "flex" fuels including ethanol and biodiesel. In addition, the rule establishes requirements regarding any street advertisement of motor fuels.

2. Please list the Ohio statute authorizing the Agency to adopt this regulation.

O.R.C. 1327.50

3. 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?

No, however a portion of the rules in this package are modeled off of Title 16 of the Code of Federal Regulations. These federal regulations are not required to be adopted by the Department however; federal preemption may come into play. In addition, other portions of the rules in this package are modeled off of the National Institute of Standards Technology (NIST) Handbook 130 (2016). NIST is a non-regulatory federal agency within the U.S. Department of Commerce. However, there is no specific requirement that the Department adopt these regulations.

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

Not applicable.

- 5. 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's Division of Weights and Measures is tasked with protecting Ohio businesses and consumers by ensuring products are accurately measured and sold. These rules establish the methods of sale for vehicle fuel to ensure that vehicle fuel is uniformly measured, sold, and purchased in Ohio.

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

The Department's Division of Weights and Measures works with county and city weights and measures programs to test devices such as fuel meters and ensure consistent measuring standards and compliance. These rules are judged as being successful when inspectors find few violations and receive few complaints from consumers.

Development of the Regulation

- 7. 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 held a meeting at the Department's central office located at 8995 E. Main Street, Reynoldsburg, Ohio, on October 27, 2015 with the following stakeholders:

- Jeff Clarke, Natural Gas Vehicles for America (NGVAmerica)
- Ron Milburn, AFD
- Jennifer Rhoads, Ohio Petroleum Marketers' & Convenience Stores Association
- Adam Ward, Ohio Soybean Association
- Graham Barker, ANGI Energy
- Rob Eshenbaugh, American Petroleum Institute-Ohio
- Jason Phillips, Clean Fuels Ohio
- Sam Spofferth, Clean Fuels Ohio
- Kristy Moore, KMoore Consulting
- Marilyn Herman, Herman and Associates

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Following the meeting held on October 27, 2015, the proposed amended rules were sent to the following stakeholders, including those listed above, on November 13, 2015 *via* email. Stakeholders were given until December 11, 2015 to email their comments to the Department:

- Christine Polesovsky, American Petroleum Institute (API)
- Terry Fleming, Associated Food & Petroleum Dealers
- Jim Creevy, National Electric Manufacturers Association
- Brett Barry, Clean Energy Fuels
- Judd Templin, Ohio Ethanol Producers Association
- Rebecca Richardson, MARC IV Consulting Bio-Diesel
- Graham Barker, Angi Energy
- Nick Blazer, Ice Miller
- Dave Battodetti, Ice Miller
- Jack Irwin, Ohio Corn & Wheat Association

The Department recirculated the amended rules which reflected some of the stakeholders' suggestions on December 29, 2015. The above listed stakeholders were given until January 15, 2016 to email additional comments to the Department.

On March 29, 2016, ODA held a meeting to discuss the proposed rules and stakeholder comments. Those in attendance (some via telephone) were:

- Bill Behrendt, OPMCA
- Rob Eshenbaugh, American Petroleum Institute, Ohio
- Ron Milburn, AFD
- Kristy Moore, KM Consulting
- Dave Mrowzinski, ISG, CNG
- Jason Phillips, Clean Fuels Ohio
- Janice Rayburn, BP
- Rebecca Richardson, MARC IV Consulting, Bio-Diesel
- Adam Ward, Ohio Soybean Council

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On March 21, 2017, the rules were sent a final time to stakeholders. ODA sent the rules to the following stakeholders:

- Graham Baker, ANGI Energy
- Bill Behrendt, OPMCA
- David Biro Sr., Brio Scales
- Andrew Brechbuhler, Brechbuhler Scales
- David Calix, NCR Corporation
- Jeff Clarke, NCVG America
- Tom Coffman, Semco Outdoor
- Timothy Columbus, Steptoe & Johnson LLP
- George Colvin, Ohio Ready-Mix Concrete
- Derek Dalling, Ohio Propane Association
- Leah Dorman, Philbro Animal Health Corp.
- Robert Eshenbaugh, API Ohio
- Tom Fontana, Soybean Council
- Eric Golden, Cardinal Scales
- Fred Gottfried, Ashland Scale
- Chris Guay, Proctor & Gamble
- Georgia Harris, National Institute of Standards & Technology
- Christopher Henney, Ohio Agri Business Association
- Mark Holtgreven, Holtgreven Scale
- Leonard Hubert, Hubert Associates
- Patrick Jacomet, Oh Aggregates & Industrial Minerals
- Gordon Johnson, Gilbarco Inc.
- Henry Kellogg II, Tolt Solutions
- Jenn Klein, OH Chemistry Technology Council
- John Kolenski, Kroger Company
- Robert LaGasse, Mulch & Soil Council

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- Kurt Leib, Capital Advocates
- Frances Lesser, County Auditor's Association
- Jody Licursi, Capitol Strategies group LLC
- Edward Luthy, Schenck Process
- James McGetrick, BP
- Lt. William Menendez, OH State Patrol
- Ron Milburn, AFPD
- Lora Miller , Ohio Council Retail Merchants
- Patrick Moody, All American Scale
- Kristy Moore, KMoore Consulting LLC
- Randy Moses, Wayne Fueling Systems
- Kristin Mullins, Ohio Grocers
- Doug Myers, Wal-Mart Corporation
- Holly Nagle, Ohio Council of Retail Merchants
& Affiliates
- Jack Pangraizo, LTS Scale
- Jason Phillips, Clean Fuels Ohio
- Dan Reinhart, Marathon Petroleum
- Jennifer Rhoads, OPMCA
- Rebecca Richardson, MARC-IV Consulting
- William Rogers, AES Scale
- William Schedel Jr., Marathon Petroleum
- Sanford Simon, The Scotts Company
- Steve Smith , Buckeye Scale
- John Spencer, Mulch Manufacturing
- John Spirtoff, Bob's Meter Testing
- Sam Spofforth, Clean Fuels Ohio
- Lou Straub, Fairbanks Scales
- Virgil Strickler, The Ohio Expo Center
- Richard Suiter, Richard Suiter Consulting

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- Clifford Ursich, Flexible Pavements of Ohio
- Russ Vires, Mettler-Toledo Inc.
- Adam Ward, Soybean Council

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

The Department has gone through several rounds of stakeholder comments for this rule package. The rules were originally presented to stakeholders in late 2015. The Department received a significant amount of comments on the rules proposed at that time. For example, the Ohio Corn & Wheat Growers Association and Ohio Petroleum Marketers & Convenience Store Association commented on the proposed rules on December 9 and 11, 2015, respectively. Both associations opposed the mandatory oxygenate and ethanol flex fuel labeling requirements in section 901:6-5-02. As a result of the associations' comments, the Department removed the oxygenate labeling requirement from the rule.

The Department decided to leave the ethanol flex fuel labeling requirement in section 901:6-5-02(E) because certain vehicles cannot use ethanol. Therefore the Department believes it is important that the label be present for consumers to know the fuel is "For Use in Flexible Fuel Vehicles (FFV) Only."

Further, several stakeholders, including the National Association of Convenience Stores (NACS), Society of Independent Gasoline Marketers of America (SIGMA), and Clean Energy submitted comments opposing the Department's proposed requirement that the sale of compressed natural gas be in terms of mass (pounds or kilograms). The stakeholders argued selling natural gas in mass would confuse consumers. Stakeholders argued that gallon equivalent units would provide for an easy comparison between natural gas and traditional vehicle fuel.

The Department is proposing to require the sale of compressed natural gas and liquefied natural gas to be sold in terms of mass because both natural and liquefied gas are dispensed and tested in terms of mass. The Department tests the dispensers in terms of mass to ensure accuracy. Furthermore, nothing in the rule restricts stakeholders from showing the gasoline or diesel equivalents for consumers. Section 901:6-5-02(F)(1) specifically permits "a statement of gasoline gallon equivalent (GGE), gasoline liter equivalent (GLE), diesel liter equivalent (DLE), and diesel gasoline equivalent (DGE)." Therefore, while natural gas must be sold in terms of mass in order to correspond with the method in which the natural gas is dispensed and tested, stakeholders may still show the gallon or liter equivalent for consumer convenience. The Department took these comments under advisement and made several changes to the rules.

In July 2016, the 101st National Conference of Weights and Measures adopted amendments to Handbook 130 effecting the method of sale and definitions of motor fuel. Many of these changes were requested by the industry and are now included in the rules.

Finally, the rules were sent to stakeholders for the last time in March 2017. The Department received similar comments from a few stakeholders. The stakeholders echoed a general consensus to have the proposed labeling rules mirror the newly adopted Federal Trade Commission requirements found in 16 CFR 306. These requirements were adopted on January 14, 2016 and outlined specific labeling requirements. The Department took these comments under advisement and made the requested changes.

9. 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?

These rules are based primarily off of a combination of NIST Handbook 130 and the Federal Trade Commission's rules on automotive fuel ratings, certification, and posting. These rules are primarily administrative in nature however, some of them are based on years of scientific study and research.

10. 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?

As outlined above, the Department considered a wide range of alternative regulations. After over two years of stakeholder cooperation, the Department believes that the proposed rules are the best option for Ohio.

11. 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.

These rules are performance-based in that they establish the methods in which vehicle fuel must be sold, but these rules do not establish how operators must achieve these required methods of sale. For example, compressed natural gas must be sold in terms of mass. However, the manner in which operators achieve this requirement is up to the individual operator.

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

The Department is given the sole regulatory authority over these fuel devices pursuant to O.R.C. 1327.50.

13. 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.

These rules shall be uniformly applied to businesses and persons selling vehicle fuel without regard to the type of operation. Inspections and investigations are conducted with a focus on accuracy and compliance with industry standards.

Adverse Impact to Business

14. 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;

These rules apply to any business selling vehicle fuel at retail, including gas, ethanol, bio-diesel, natural gas, liquefied natural gas, liquidities petroleum gas, electric energy and diesel exhaust fuel.

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

License fees for sale of vehicle fuel are not required by the Department. Fines do not occur unless a business continually violates the law. Businesses found in violation are given fourteen (14) days to repair the device, or in some circumstances may be asked that the device be removed until repaired. If the violation continues after corrective measures are taken, fines may be implemented.

c. Quantify the expected adverse impact from the regulation.

The natural gas industry may need to add a dual declaration which is currently available on the pumps and make minor software changes to sell the natural gas in terms of mass. Natural gas is currently distributed in terms of mass (pounds or kilograms). However, it is within the stakeholders' discretion whether to show a dual label on its dispensers by showing the gasoline or diesel equivalent of natural gas.

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

The regulatory intent of these rules is to protect consumers and ensure accuracy in business dealings by establishing minimum standards for these businesses. Accordingly, the adverse impact is considered to be justified. These rules will provide equity in the marketplace based on measurable testing methods recognized by the Federal Trade Commission.

Regulatory Flexibility

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

As the primary purpose of these rules is ensuring the accuracy of weights and measures devices in conducting business, exemptions for a smaller operator would not be applicable.

17. 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?

Paperwork violations rarely reach the enforcement stage so long as the operator is willing to correct the violation and has no history of prior violations. First-time offenders are given fourteen (14) days to correct a problem. If a device is still found to be non-compliant then the device is taken out of service. If the issue remains unresolved, violators are routinely offered settlements appropriate to the circumstances of the violation. In almost all cases, violators have their fines waived or settled for small fines.

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

The Department has online resources and has field staff available to provide assistance. Training and seminars are also available. Many practices are already in place however we have no rules to provide guidance.