

**MEMORANDUM**

**TO:** David Miran, Ohio Department of Agriculture

**FROM:** Jacob Ritzenthaler, Regulatory Policy Advocate

**DATE:** November 30, 2017

**RE:** **CSI Review – Retail Sales of Motor Fuel (OAC 901:6-5-01 and 901:6-5-02)**

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On behalf of Lt. Governor Mary Taylor, and pursuant to the authority granted to the Common Sense Initiative (CSI) Office under Ohio Revised Code (ORC) section 107.54, the CSI Office has reviewed the abovementioned administrative rule package and associated Business Impact Analysis (BIA). This memo represents the CSI Office's comments to the Agency as provided for in ORC 107.54.

**Analysis**

This rule package contains one amended rule<sup>1</sup> and one new rule proposed by the Ohio Department of Agriculture (ODA) as part of the statutory five-year rule review requirement. The rule package was submitted to the CSI Office on July 26, 2017 and the public comment period was held open through August 11, 2017. One comment was received during this time.

Ohio Administrative Code (OAC) Chapter 901:6-5 establishes rules regulating the retail sale of motor fuel. OAC 901:6-5-01 is being amended after feedback from members of the natural gas and renewable energy industries to reflect additional types of fuel available for motor vehicles. The proposed rule sets forth definitions for types of motor fuel according to the standards of the National Institute of Standards Technology (NIST), which include definitions for ethanol, hydrogen, biodiesel, natural gas, and various other fuel types. OAC 901:6-5-02 is being proposed to regulate the retail sale of motor fuel. The rule maintains current requirements for motor fuel sale

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<sup>1</sup> OAC 901:6-5-01 is being amended to the extent that the Legislative Service Commission requires the Department to rescind the rule and replace it with a new rule of the same rule number.

and introduces requirements to reflect new types of motor vehicle fuel, including ethanol flex fuel and biodiesel.

During early stakeholder outreach ODA submitted the proposed rules to industry stakeholders for feedback. Stakeholders expressed support for adding definitions to the rules that mirrored the definitions recently released by the NIST, which ODA adopted. Two comments suggested removing mandatory oxygenate and ethanol flex fuel labeling requirements. ODA acknowledged the comments and removed the oxygenate requirements. ODA did not remove ethanol flex fuel labeling requirements from the rule because certain vehicles cannot use ethanol and could lead to consumer confusion unless labeled. Several stakeholders suggested that the sale of compressed natural gas be measured in gallon equivalent units instead of by mass, so that consumers could easily draw comparisons with traditional fuel types. ODA responded that compressed natural gas is dispensed and tested in terms of mass and should be sold in those measurements. Furthermore, ODA notes that the rule allows for gallon equivalent units to be displayed alongside mass measurements, which gives retailers the ability to provide consumer convenience measures if they so choose. Additionally, stakeholders expressed support for changing labeling requirements to conform to Federal Trade Commission (FTC) requirements found in 16 Code of Federal Regulations (CFR) 306.

During the CSI public comment period, ODA received one comment from the American Petroleum Institute (API) Ohio. The comment suggested changes to the language of the rule, including a recommendation that ODA incorporate reference to 40 CFR 80 into OAC 901:6-5-02, which would add the labeling requirements of the US Environmental Protection Agency (US EPA) for ethanol flex fuels. API expressed concern that, although the rule references the FTC standard for fuel labeling, retailers could miss the reference to US EPA standards and incur a significant penalty fine. ODA communicated with the stakeholder and the CSI office to explain that incorporating US EPA labeling standards into the rule would require ODA to regulate fuel quality, which has never been a function of the Department. Additionally, ODA states that FTC standards allow for retailers to display labels that meet the requirements of both the FTC and US EPA. After follow-up conversations and further consideration, CSI has determined that incorporating US EPA standards could put the burden on ODA to test fuel quality, which is not part of their mission or explicit statutory authority. These regulations pertain to advertising and the method of sale for motor fuels, which are consistent with the authority given to the Department.

One comment was received after the CSI public comment period from Ohio Corn & Wheat Growers Association in support of the rules and explicit reference to FTC standards.

ODA states that these rules will impact every business that sells motor fuel at retail. Adverse costs

created by the rules include the cost of time and effort to update fuel pumps to sell compressed natural gas fuel in terms of mass. ODA states in the BIA that selling compressed natural gas by mass is necessary to properly regulate sales and ensure accurate measurement. Additionally, there are costs associated with the labeling requirements and fines for businesses found in violation of the rules, but these are necessary in order to protect consumers and ensure they have the proper information as they purchase motor fuel. After reviewing the proposed rules and the BIA, the CSI Office has determined that the rules satisfactorily meet the standards espoused by the CSI Office, and the purpose of the rule package is justified.

### **Recommendations**

For the reasons described above, the CSI Office has no recommendations on this rule package.

### **Conclusion**

Based on its review of the proposed rule package, the CSI Office recommends the Ohio Department of Agriculture should proceed in filing the proposed rules with the Joint Committee on Agency Rule Review.