CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: **Ohio Department of Taxation**

Regulation/Package Title: **Financial Institutions Tax- new Ohio Admin. Code sections**

Rule Number(s): **5703-33-01, 5703-33-02, 5703-33-03, 5703-33-04, 5703-33-05, 5703-33-06-**

Date: **August 1, 2013**

Rule Type:

XX 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☐ **Rescinded**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.**

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Rule 5703-33-01 provides guidance for the mandatory electronic filing of taxes, and gives procedures for taxpayers who wish to be excused from the electronic filing requirement.

Rule 5703-33-02 provides clarification on the computational test for determining if a taxpayer is a "captive finance company." This is an important computation, because captive finance companies do not pay the financial institutions tax under Chapter 5726 of the revised code.

Rule 5703-33-03 provides for required notification to the tax commissioner when a taxpayer is no longer subject to the financial institutions tax. Also, if a taxpayer is no longer includable in the annual report of a financial institution, the reporting person shall notify the tax commissioner of this change.

Rule 5703-33-04 clarifies how pawn shops and pawnbrokers are handled under the financial institutions tax. The rule provides that pawn shops and pawn brokers are excluded from the financial institutions tax.

Rule 5703-33-05 explains that the FIT tax is based upon a financial institution's "total equity capital". This rule explains how total equity capital is computed for various types of financial institutions, and clarifies how financial institutions compute their tax.

Rule 5703-33-06 is the general situsing provision, and provides guidance on how to situs and calculate various gross receipts for purposes of preparing the apportionment factor. The rule provides further detail to Revised Code section 5726.05 concerning the calculation of the apportionment factor. Calculation of the Ohio apportionment factor is important, because it sets the percentage at which the financial institution's operations are taxed by Ohio.

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

Ohio Revised Code 5703.05 and 5703.14 give the Tax Commissioner express authority to "adopt and promulgate" "all rules of the department". Revised Code section 5726.05(I) requires the Tax Commissioner, with regards to the apportionment factor, to "adopt administrative rules to provide additional guidance for the application of this section."

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? If yes, please briefly explain the source and substance of the federal requirement.

No. The regulation is not related to a federal requirement or a federal program.

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

   Not applicable, as the new rules do not involve any federal requirements.

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 rules were written to provide guidance and clarification of Chapter 5726, the financial institutions tax.

The rules prepared, rather than being an administrative burden, are necessary to help taxpayers determine whether they are subject to the financial institutions tax and help taxpayers compute the financial institutions tax owed, and other topics. Many of the topics covered in the rules were written to address concerns raised by tax representatives and financial institutions that have participated in a review of the financial institutions tax and its revised code sections and rules.

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

The Department of Taxation will measure the success of the new rules by how successfully financial institutions are able to comply with this tax, and how able taxpayers are to file accurate and complete tax reports. The success of the new rules will also be measured by the number of questions and concerns raised by financial institutions and their representatives.

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.

   On May 9, 2013, the Department of Taxation posted the six rules, in draft version, on the front page of its website. On May 10, 2013, the Department emailed the draft rules to subscribers of its Tax Alert email notification system. Based upon feedback from the initial draft of the rules, the Department updated the rules and posted these updated rules to its website on July 12, 2013. Also, the Department sent out a Tax Alert to publicize the fact that the rules had been revised.

   As explained above, the Department maintains the Tax Alert email notification system to keep tax professionals, business owners and other interested parties up to date on Ohio's tax laws. Taxpayers can sign up for Tax Alerts via the Department's website.

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

The Department of Taxation received feedback regarding the draft rules from the following individuals:

Mike Adelman, Chief Operating Officer, Ohio Bankers League

Jeff Quayle, General Counsel, Ohio Bankers League

Al Cliffel, Senior Vice President, Fifth Third Bank, and a member of Ohio Bankers League

Debora McGraw, attorney and partner, Zaino Hall & Farrin law firm

John Petzinger, attorney, Vorys Sater law firm

Dave Thornton, tax professional and partner, Crowe Horwath accounting firm, New York City office

Dave Mangan, accountant, Crowe Horwath accounting firm

Lou Tansky, President, Ohio Pawnbrokers Association

Bob Lambert, lobbyist, Towing and Recovery Association of Central Ohio

Dale Marrison, senior tax manager, PNC Bank

Elizabeth Wilkerson, accountant, Sheldon Reder

Kathy Thayer, tax manager, Petroleum Traders Corporation

Steve Craun, certified public accountant, Craun and Associates

Nick Hanna, Director of Regulatory Affairs, Greater Cleveland Auto Dealers Association

Ted Bernert, attorney and partner, Baker & Hostetler law firm

Tom Zaino, attorney and partner, Zaino Hall & Farrin law firm

The six FIT rules have all been written, reviewed, and revised based upon input from the above-mentioned individuals.

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?

Not applicable. No scientific data was used to develop these rules. However, the rules were developed based upon the Department's experience with other taxes, with an eye toward making the financial institutions tax straightforward to comply with for financial institutions.

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?

For guidance from the Department of Taxation to be binding upon taxpayers, the guidance must be done through regulations. In Progressive Plastics, Inc. v. Testa, 133 Ohio St.3d 490

(2012), the Ohio Supreme Court recently held that the tax commissioner cannot confer the force of law on a requirement or guidance without promulgating it as a rule.

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.**

    No. Performance-based regulations are not appropriate for the financial institutions tax.

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

    Prior to this, there were no rules for the financial institutions tax. The draft rules have been compared to the revised code statutes for the FIT to ensure that the rules support but do not contradict the revised code.

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.**

    January 1, 2014 is the effective start for the start of the financial institutions tax. Having the rules in place before the first return filing season will add predictability to filing, and should make the FIT law more predictable for financial institutions.

    The Department will post notice of the finalized rules on its website. Also, the Department will send a Tax Alert email notice to all persons subscribed to the financial institutions tax subscriber group immediately after the rules are enacted into law.

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;**
       Any organization that is defined as a financial institution pursuant to RC 5726.01 and 5726.02 will be required to file tax returns and pay tax for the FIT. These financial institutions will be responsible for complying with the new rules governing the financial institutions tax. Organizations subject to the FIT are primarily comprised of bank holding companies, small dollar lenders, as well as small and large bank organizations with a connection to Ohio.

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

The Department of Taxation anticipates that businesses will experience minimal adverse impact from these rules. The rules should make compliance with the FIT easier for taxpayers, as the rules clarify many areas of the FIT. It is expected that the rules will guide taxpayers in filing and paying FIT, and as such the rules will help taxpayers navigate this tax and stay in compliance with this tax.

For example, bankers and practitioners have told the Department that situsing of bank revenues and fees to Ohio in the correct proportion was going to be difficult based upon the FIT law in Chapter 5726. In response to this feedback from the banking community, rule 6 was drafted to provide extensive guidance to banks as to how to situs fees and revenues to Ohio, and as such makes a difficult issue for banks more manageable.

Likewise, bankers and practitioners have told the Department that there is ambiguity in how banks should compute equity capital for purposes of the FIT. In response to this, rule 5 provides guidance and clarification for this issue, making it easier for banks to report their total equity capital correctly.

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 Department estimates that the rules will not add any additional time or cost to financial institutions to comply with the FIT. Rather, the clarity and guidance provided by the rules should save taxpayers time in complying with the FIT, and should reduce taxpayer cost in dealing with this new tax.

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

Any adverse impact to the business community was created by the enactment of the new tax, not the enactment of regulations. The new rules make compliance with the FIT much more straightforward, and thus the rules are worthwhile in that they aid taxpayers in complying with the FIT.

Regulatory Flexibility

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

    There are no specific regulatory exemptions for small business.

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?**

    This is not applicable, as the proposed rules do not include any fines or penalties.

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

    Taxpayers will be able to learn about the FIT and the filing requirements of the FIT through the Department of Taxation's website. Further, taxpayers can talk to a taxpayer services agent about the FIT and compliance requirements by calling Taxpayer Services Division at 1-800-405-4039.