



Common Sense Initiative

Mike DeWine, Governor
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Corrected Business Impact Analysis

Agency, Board, or Commission Name: Ohio Department of Administrative Services (DAS)

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

EDGE/MBE/WBE Certification

Rule Number(s): Enacting new rules: 123:2-14-01 through 123:2-14-08 and 123:2-14-10; and rescinding existing rules: 123:2-15-01 and 123:2-16-01 through 123:2-16-07, 123:2-16-09, 123:2-16-14, and 123:2-16-15. (There are additional rules in both the new and the rescinded chapters that provide for state agency reporting of state expenditures, and thus do not have an adverse impact on businesses. The complete chapter of new rules 123:2-14-01 through 123:14-15 is being posted for comment on the agency website at the time of this filing.)

Date of Submission for CSI Review: 3/20/2020 _____

Public Comment Period End Date: 4/20/2020 _____

Rule Type/Number of Rules:

New/ 9 rules Amended/ _____ rules No Change/ _____ rules (FYR? _____)
(FYR? _____) Rescinded/ 11 rules (FYR? Y)

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.

The rule package contains rules for the Minority Business Enterprise (MBE), Encouraging Diversity, Growth and Equity (EDGE), and Women-owned Business Enterprise (WBE) programs. The rules contain many provisions that are already in place in the existing MBE and EDGE rules, and that are part of the current administration of these programs. The rules will also govern the recently enacted WBE program. The rules are listed as “new” because a new chapter has been created to provide one set of regulations that applies to all three programs, and the existing EDGE and MBE rules are being rescinded and replaced by this new chapter, even though many current provisions are being carried forward. The goal in revising the existing rules as well as in creating the rules for the new program has been to have consistency in the regulation of all three programs, as well as to improve the ability to limit the benefits of the programs to businesses that are owned and controlled by eligible individuals and that serve a commercially useful function, and have not simply been created in order to allow non-eligible individuals to receive the economic benefits of the certification. A description of each rule containing regulatory language and requiring submission to CSI follows:

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- 123:2-14-01 (New) – titled “Definitions” The rule sets forth definitions for various terms related to the Minority Business Enterprise (MBE); Encouraging Diversity, Growth and Equity (EDGE); and Women-owned Business Enterprise (WBE) programs.
- 123:2-14-02 (New) – titled “Certification Criteria” The rule outlines the certification process; certification criteria requirements for different business structure types, including factors relevant to establishing ownership and control of the business; certain responsibilities of a certified business; the length of the certification period; information to be submitted with an application; and criteria used when determining control, independence, and ownership for certification into the MBE, EDGE, and WBE program.
- 123:2-14-03 (New) – titled “Recertification” The rule states the process requirements for an MBE, EDGE, or WBE-certified business to seek recertification, including the documents required to be submitted at the time of recertification
- 123:2-14-04 (New) – titled “Expedited Certification” The rule outlines requirements for businesses seeking to certify into the State of Ohio’s MBE, EDGE, and WBE program based on their certification in another entity’s similar program that DAS has approved.
- 123:2-14-05 (New) – titled “Joint Venture” The purpose of the rule is to detail the requirements for two or more businesses joining together to form an MBE, EDGE, or WBE joint venture and the requirements that must be met.
- 123:2-14-06 (New) – titled “Commercially Useful Function” The rule outlines the factors that the State of Ohio considers to determine whether an MBE, EDGE, or WBE-certified business is performing a commercially useful function (CUF). The rule prevents the certification of businesses that are created by non-eligible individuals solely for the purpose of taking advantage of the certification.
- 123:2-14-07 (New) – titled “Revocation” The rule outlines the process for revoking a certification issued to a business and reasons why a certification can be revoked.
- 123:2-14-08 (New) – titled “Adjudication Hearings” The rule provides the processes that will be used in connection with adjudication hearings.
- 123:2-14-10 (New) – titled “Demonstration of Good Faith Effort to include EDGE Business Participation” The rule requires a contractor to use good faith efforts to meet any EDGE participation goal included in a public contract and outlines the process for applying for a waiver from a contract’s goal.

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- 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.**

Statutory Authority: R.C. 123.151, R.C. 123.152, R.C. 123.154.

Rule Amplifies: R.C. 123.151, R.C. 123.152, R.C. 123.154.

- 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.**

Not applicable.

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

Not applicable.

- 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)?**

Ohio Revised Code 123.151, 123.152, and 123.154 require the Director of the Ohio Department of Administrative Services (DAS) to establish business certification programs known as the Minority Business Enterprise; Encouraging Diversity, Growth, and Equity; and Women-owned Business Enterprise programs, and to create rules to administer those programs.

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

DAS will measure the success of the rules in terms of the successful certification of MBE, EDGE, and WBE businesses within the State of Ohio. The success rate will be measured by the following:

- Number of MBE, EDGE, and WBE businesses certified;
- Number of MBE, EDGE, and WBE-certified businesses recertifying;
- Number of MBE, EDGE, and WBE-certified businesses obtaining certification through an expedited process;
- Number of MBE, EDGE, and WBE-certified businesses forming joint ventures;
- Number of MBE, EDGE, and WBE-certified businesses receiving contract awards;
- Compliance with the MBE expenditure requirements set by R.C. 125.081; and
- Reaching the agency procurement goals for the EDGE program that are set in accordance with the rules and R.C. 123.152(B)(2).

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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

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.

Stakeholders including certified MBE and EDGE owners, women-owned business owners, representatives of organizations (Asian American Commerce Group, Greater Cincinnati and Northern Kentucky African American Chamber of Commerce, Columbus Minority Business Assistance Center, Columbus Urban League), private sector individuals, and subject matter experts (DAS Equal Opportunity Division, DAS Office of Procurement, DAS leadership and other staff, Ohio Development Services Agency (DSA)/Minority Business Development Division, and Ohio Facilities Construction Compliance) were convened on five occasions for roundtable discussions about the EOD certification programs during August and September 2019. Individual discussions seeking clarification of input provided during these roundtable sessions continued with participants and stakeholders during the initial rule-drafting process.

Additionally, one-on-one/small group discussions were held with representatives of the following organizations: Cleveland Contractors Assistance Association, Associated General Contractors Association, Ohio Association of EDGE Certified Companies (OAECC), and the Columbus National Association of Women Owned Businesses (NAWBO).

At the time of filing regulatory rules with the Common Sense Initiative (CSI), DAS is posting the proposed rules (combined for MBE, EDGE, WBE) on the agency website at das.ohio.gov/eod. The public is invited to submit comments on the entire rule package by sending an email to das.mbe-edge@das.ohio.gov. Comments received will be sent to CSI. The agency is also sending an email notification of the posting of the proposed rules to all current MBE and EDGE-certified business owners, associations of women-owned businesses, and other stakeholders for comment on the draft rules.

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

During the roundtable discussions and outreach discussions with other representatives of business organizations, suggestions were gathered regarding the challenges faced by business

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owners in seeking certification and in doing business with the State as a certified business. Many points of view and experiences were shared, and these inputs influenced the agency's decisions regarding specific amendments of the rules. The goal of the agency and many program participants included enhancing program integrity, making it difficult for businesses to cheat the system, retaining the intent on small business development in the EDGE program, and making it feasible for businesses to attract successful business leaders to serve on their boards. These discussions led to changes including the removal of several existing rules and the addition of new requirements, including but not limited to the following:

- Removal of the 10-year limit in the current EDGE rules;
- Removal of the existing rule requiring a majority of the board of directors and principal executive officers of corporations to be socially and economically disadvantaged;
- Removal of the requirement that a professional license be held by the owner of the certified business and replaced with a rule allowing review of how the licenses are held in the context of the structure of the business;
- Addition of the requirement in all three programs for the certified business to perform a commercially useful function; and
- Establishment of reciprocal agreements with other states with similar programs for the WBE certification.

Additionally, and because the WBE rules are completely new, the agency consulted with representatives of the National Association of Women Business Owners (NAWBO) who provided comments on the first draft of those rules. Several of their comments and suggestions were incorporated in the proposal.

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?

Not applicable.

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?

These rules are required by R.C. 123.151, 123.152, and 123.154. Accordingly, the agency does not have the option of not having these regulations. And, having an obligation to enact regulations, the agency is proposing those rules that serve to carry out the purposes of the legislation, which is to certify businesses that meet certain criteria and to prevent the certification of those businesses that do not.

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.*

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No. A performance-based regulation would not address those elements of the programs that DAS is required by statute to address in its rules.

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

DAS is the only agency that regulates the certification of MBE, EDGE or WBE programs under these statutes. The rules provide for expedited certification of businesses that have received certification by a local governmental entity or other certifying organization with a similar program approved by the agency to eliminate duplicate effort for the businesses.

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.

DAS will use its website, guidance booklet, and trainings to educate stakeholders on the rules. Staff training is conducted for all new rules to ensure regulations are applied correctly and consistently.

Adverse Impact to Business

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

These rules impact businesses and business owners applying to become an MBE, EDGE, and/or WBE-certified business, or those businesses seeking recertification in these programs. The adverse impact to the businesses is the time needed to apply for certification or recertification. There are no fees for certification or recertification itself.

To apply for certification or re-certification, a business owner completes an application, collects and submits documents, and participates in an on-site interview. The time to complete these processes will vary, primarily depending upon the organization of the business's records. We estimate that the average time to complete an initial application ranges from five to ten hours. This is the average time commitment based on businesses and business owners that have applied for MBE and EDGE certification.

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The rules also adversely impact businesses that are not eligible for the benefits of the program because of their failure to meet program criteria. We do not have a quantifiable estimate of the value of a certification.

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

The adverse impact to businesses is justified due to the need to limit eligibility for the programs in accordance with the criteria set forth in the authorizing statutes. Documentation and eligibility criteria are necessary to ensure that the program benefits only those that the General Assembly intended to receive the benefits of the programs.

Regulatory Flexibility

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

The rules are specifically drafted to apply to small businesses. For example, the EDGE program is available only to businesses that are small in size. DAS is aware that many of the businesses that use any of these programs are/will be small in size. The documentation required is based upon the type of business that is applying, and a business need only provide those documents that are applicable to their business.

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?

This provision is not applicable as these rules do not create administrative fines or civil penalties.

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

The DAS Equal Opportunity Division's website provides comprehensive information about the MBE, EDGE, and WBE programs. The agency's staff personally answer and respond to phone calls, email, and correspondence from stakeholders. The agency also conducts outreach activities including workshops and webinars, mailings, and other activities to provide information to businesses about the programs, how to apply, and about procurement opportunities with the State. Additionally, DSA Minority Business Development Division supports the growth and sustainability of small businesses in Ohio through the assistance of the Minority Business Assistance Centers. These centers provide resources that include technical and professional assistance, access to capital, surety bonding, and connection to business opportunities. DAS and DSA work in partnership to promote awareness of the certification programs and other State resources.

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