

# CSI - Ohio

## The Common Sense Initiative

### Business Impact Analysis

Agency Name: ODPS, Ohio Homeland Security (OHS) Division

Regulation/Package Title: OHS DMA Rules

Rule Number(s): 4501:5-2-01, 4501:5-2-02, 4501:5-2-03, 4501:5-2-04,

4501:5-2-05, 4501:5-2-06

Date: July 1, 2013

**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 Rescinded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.

*The rules in Chapter 4501:5-2 were promulgated in accordance with S.B. 9 (126<sup>th</sup> G.A.). This bill required ODPS to draft rules requiring various state licensees, vendors seeking a contract or grant funding from a governmental entity, or applicants for public employment*

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*to complete a Declaration of Material Assistance/Non-Assistance (DMA) form, answering whether they had provided material assistance to a terrorist organization listed on the U.S. Terrorist Exclusion List (U.S. TEL). S.B. 9 also required ODPS to draft a rule listing chemicals (in addition to those already existing in law) that could be used to manufacture a weapon or explosive device. Other rules detail the required steps to appeal a denial of a license, contract, or employment based on an affirmative answer on the DMA form. Lastly, one rule lists the entities on the U.S. TEL; this list was used as a reference in completing the DMA form.*

*The above rules are now being submitted for rescission as the authorizing statutes were recently rescinded via H.B. 487 (129<sup>th</sup> G.A.).*

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

*R.C. Sections 2909.21, 2909.28, 2909.32, 2909.33, and 2909.34.*

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.*

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 DMA rules are proposed for rescission as the authorizing statutes have been repealed via H.B. 487 (129<sup>th</sup> G.A.) in furtherance of the Common Sense Initiative. It was determined that repealing the laws would reduce obstacles and eliminate ineffective regulations that made it difficult for businesses to operate in Ohio. The DMA process was often confusing, time-consuming, and the online pre-certification was difficult to maneuver, resulting in the potential denial of a government contract. Additionally, the laws and rules had not led to the arrest or identification of any terrorists.*

*Rule 4501:5-02-01 is proposed for rescission as its authorizing statute, R.C. 2909.28, was repealed, in part, via H.B. 487 (129<sup>th</sup> G.A.). The relevant portion of that law had required the Director of the Department of Public Safety to adopt a rule setting forth a list of chemicals (in addition to the ones in R.C. 2909.28), the possession of which would constitute a criminal offense under that law. It does not appear that the resulting rule, however, was ever used to assist in prosecuting any offenses under R.C. 2909.28. Furthermore, the removal of such language from R.C. 2909.28 (and subsequently Rule*

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*4501:5-2-01) will not impact this law as the statute already contains references to “chemical weapon, biological weapon, radiological or nuclear weapon, or explosive device...toxic chemicals...” and these terms are defined elsewhere in the Code (e.g., R.C. 2909.21 “Terrorism definitions”).*

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

*The rescission of the DMA rules will result in a cost savings for small businesses and persons who engage in small businesses. In a one-month period during 2012, DPS received 75 requests for review based on DMA-related denials. This number represents 75 people and/or businesses whose jobs were negatively impacted by the DMA form. All requests for review contained DMA forms with clerical errors (rather than admittance of true material assistance) and all denials were ultimately overturned by DPS. It is expected that the complaints previously received about the DMA form will be eliminated, which means individuals and businesses are more easily receiving licenses, state contracts, and public employment. Furthermore, state and local agencies will also save costs with the rescission of these rules as they will no longer be required to mail the DMA forms, review submissions, answer questions, or process requests for review.*

### **Development of the Regulation**

7. Please list the stakeholders included by the Agency in the development or initial review of the draft regulation.

*ODPS heard from several stakeholders regarding the impractical and inefficient nature of the DMA rules. Most notably were complaints from general aviation pilots (whose registrations are overseen by the Ohio Dept. of Transportation), EMTs and Firefighters (overseen by the Division of EMS), and potential vendors for the Bureau of Workers’ Compensation and the Ohio Dept. of Jobs and Family Services.*

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

*ODPS received many phone calls over the years from individuals who were confused by the language in the form, upset by the principle of having to complete such a form (especially if the applicant was a veteran), and frustrated by the fact that making a clerical error on the form had either resulted in a lost or delayed job, license, or contract. Such calls were from EMTs, Firefighters, vendors, candidates for public employment, pilots in general aviation, the AOPA, and other state agencies. These individuals pointed out the shortfalls of the law (e.g., someone could easily lie on the form), questioned the effectiveness of the form in catching terrorists, and complained that it was a waste of time*

*and money. This input, in conjunction with the CSI, supported ODPS's proposal to repeal the DMA laws and rescind the rules enumerated herein.*

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?

*As a result of the above complaints and in furtherance of the Governor's CSI, ODPS felt that it had the necessary support to repeal the DMA laws (and now rescind the applicable rules). We examined the amount of money ODPS had spent every year for personnel to answer phone calls, e-mails, and/or provide responses regarding the DMA (Ohio Homeland Security alone had spent approximately \$10,000 per year on DMA-related issues). Many other state and local agencies spend countless hours processing the forms and answering questions for vendors and licensees. ODPS also looked at results from the DMA forms to confirm that they were not effective (e.g., they did not aid in catching or identifying any terrorists; the "yes" answers were all due to clerical errors or confusion over the language versus someone admitting to having given money to a terrorist organization; for individuals who did not appeal their denials, their answers were not cross-referenced against other terrorist-related lists).*

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?

*Due to the reasons listed in #9, ODPS decided to repeal the DMA law and is now, in accordance with that repeal, rescinding the applicable DMA rules.*

11. Did the Agency specifically consider a performance-based regulation? Please explain. *ODPS drafted the DMA rules as required under S.B. 9 (126<sup>th</sup> G.A.). When it was determined that the law and rules were not effective, ODPS sought to repeal the law and, now that the DMA laws are no longer in existence, is rescinding the applicable rules.*

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

*There are no similar laws or rules in Ohio regarding the DMA form.*

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.

*Prior to the laws being rescinded on September 10, 2012, ODPS drafted a summary of the DMA repeal to all state agency Chief Legal Counsels, procurement officers, and human resource directors advising them of the upcoming repeal and detailing steps to be taken for*

*the repeal. The Ohio State Highway Patrol also provided a notice for law enforcement regarding the repeal.*

### **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;

*The DMA rules impacted any vendor seeking contracts with and funding from the state, state instrumentalities, and political subdivisions that met a certain dollar amount (e.g., an aggregate amount over \$100,000 during the current fiscal year from one or more contracts). Those vendors would have to properly complete (i.e., answer “no” to every question) a DMA form before they could be awarded a contract.*

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

*The DMA rules impacted businesses in many adverse ways. It took time to understand and complete the form itself, determine who should sign the form on behalf of the business (since the form was written to apply to an individual), and failure to properly complete the form could cost a vendor a large contract (since only those vendors who earned an aggregate amount over \$100,000 during the current fiscal year from one or more contracts were required to complete the form). Once a contract was denied, it was unsure whether the vendor could regain the award of the contract even if ODPS overturned the denial. Rescinding the DMA rules, in furtherance of the September 10, 2012 repeal of the DMA laws, saves those vendors, and potential vendors, countless hours and dollars.*

c. Quantify the expected adverse impact from the regulation.

*Failure to properly complete the form would result in a loss of the contract and prohibition from doing business with the State. The only way to lift the prohibition was to appeal to ODPS and request that DPS review the prohibition. If ODPS overturned the prohibition (a process which usually took a few weeks), the vendor could argue for an award of the contract, but the entity would have most likely awarded the contract to the next lowest bidder.*

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

*There should be no adverse impact to the business community as these rules are being rescinded (following the repeal of the DMA laws).*

### **Regulatory Flexibility**

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

*The rules only required vendors who earned an aggregate amount over \$100,000 during the current fiscal year from one or more contracts to complete the form. There was no exception made to the type of business; only the aggregate amount of state dollars received by the vendor for one or more contracts over the fiscal year.*

**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?**

*Under prior law, it was a mandatory denial of a license, contract, or employment. There was no discretion or authority to issue a fine. This issue is moot now that the DMA rules are being rescinded.*

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

*Small businesses need not comply with the DMA rules as they are being rescinded.*

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Date: March 18, 2013

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