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NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 150
DEPARTMENT OF REVENUE

FILED
05/28/2020 3:54 PM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Corporate Activity Tax: Sourcing Financial Institutions; Wholesale Sales Grocers; Property Sold outside Oregon; Agricultural Cooperatives.

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 06/23/2020 5:00 PM

The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.

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Salem, OR 97301

Filed By:
Katie McCann
Rules Coordinator

HEARING(S)

Auxiliary aids for persons with disabilities are available upon advance request. Notify the contact listed above.

DATE: 06/23/2020

TIME: 9:00 AM - 11:00 AM

OFFICER: Assigned Staff

ADDRESS: Remote Hearing -
Conference Call

955 Center St NE
Salem, OR 97301

SPECIAL INSTRUCTIONS:

Conference call line 541-465-2805;
PIN 234470

NEED FOR THE RULE(S):

150-317-1050 Provides guidance to assist taxpayers in determining the sourcing of commercial activity for financial institutions under ORS 317A.100 and 317A.128.

150-317-1140 Provides guidance to assist taxpayers in determining whether receipts from wholesale sales of food items are excludable under ORS 317A.100(1)(b)(EE).

150-317-1160 Provides guidance to taxpayers regarding the exclusion for a farmer's sales to agricultural cooperatives under ORS 317A.100(1)(b)(TT).

150-317-1400 Provides guidance to sellers and wholesalers regarding the exclusion from commercial activity for

property purchased for resale out of state, as provided by ORS 317A.100(1)(b)(DD).

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

Oregon Revised Statutes: 317A.100 – 317A.161, available online through Legislative Counsel.

FISCAL AND ECONOMIC IMPACT:

Approximately 40,000 businesses will be subject to the Corporate Activity Tax, based on Legislative Counsel's estimate during the 2019 legislative session.

COST OF COMPLIANCE:

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

1. There is no impact on state agencies or units of local government. As to taxpayers, administrative compliance activities, including professional service costs, generally are a result of statutory requirements. It is anticipated that guidance provided in the rules will clarify reporting and recordkeeping burdens, reduce or lead to more focused questions from taxpayers and tax professionals, and reduce or clarify potential issues in audits or litigation.

2. The extent of additional costs attributable specifically to a particular rule rather than statutory requirements cannot be readily quantified. OAR 150-317-1140 requires a wholesale seller to retain documentation related to their wholesale sales of groceries. The rule doesn't require a specific form and allows for any documentation to serve as verification if it contains the required information. Under both federal and state law, taxpayers must keep documentation to substantiate inventory, deductions and credits, so record-keeping requirements generally are already required. Additionally, because we are not requiring a specific form of documentation, we have attempted to mitigate any cost of compliance with the statute.

a. All entity types with more than \$1 million in gross receipts are required to file a CAT return. Based on our records in the 2018 Wage Extract file, we estimate Oregon has approximately 11,500 small businesses with fewer than 50 employees who are subject to these rules. However, there are specific rules outlined below that will apply to certain industries.

OAR 150-317-1140 Wholesale Sale of Groceries Exclusion. This rule requires a wholesale seller to retain documentation related to their wholesale sales of groceries. Out of the estimated 11,500 small businesses that are subject to CAT and based on our records in the 2018 Wage Extract file, we estimate 30 wholesaler businesses with over \$1 million gross receipts will need to provide verification under this rule.

b. The extent of additional costs attributable specifically to a particular rule rather than statutory requirements cannot be quantified.

c. None known.

DESCRIBE HOW SMALL BUSINESSES WERE INVOLVED IN THE DEVELOPMENT OF THESE RULE(S):

The department conducted several outreach meetings around the state and held one meeting over the phone with out-of-state stakeholders in order to gather initial stakeholder feedback prior to drafting temporary rules OAR 150-317-1140 and OAR-150-317-1400. After drafting the temporary rules, the department conducted a second set of outreach meetings to review and explain the context of the temporary rules including OAR 150-317-1140 and OAR 150-317-1400. Attendees had the opportunity to ask specific questions about the application of the temporary rules to their individual businesses and otherwise provide input. In addition, the department invited stakeholders to provide feedback regarding the temporary rules despite no legal requirement to do so.

In addition, the department met with small business liaison groups such as the Oregon Farm Bureau, Oregon Business and Industry, Council on State Taxation, and Northwest Grocery Association, as well as business owners and tax professionals to hear about concerns and issues that needed to be addressed prior to drafting these administrative rules.

OAR 150-317-1140 is based on a previously adopted temporary rule. The permanent rule introduces a new example not previously included in the temporary rule as well as other minor modifications to section 2(c) and examples one and four. These changes were based on stakeholder input.

OAR 150-317-1400 is based on a previously adopted temporary rule. The only change from the temporary rule is to update the statutes which were previously referenced as chapter 122 and chapter 579.

OAR 150-317-1050 and 150-317-1160 are new permanent rules drafted after the department received comments and inquiries from stakeholders.

Drafts of the temporary and permanent rules were posted on the Department of Revenue's Corporate Activity Tax webpage in order to allow all members of the public, including small businesses, tax professionals who serve small businesses, and other stakeholders the opportunity to provide feedback prior to filing the rules with the Secretary of State. An email box was established specifically for stakeholders to provide their feedback on draft rules. The department has a list of interested parties which was used to notify stakeholders when the draft rules were posted to our website.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? NO IF NOT, WHY NOT?

The Department of Revenue did not use a formal Advisory Committee for these rules; however, we did seek and receive input from groups of industry representatives. No Administrative Rule Advisory Committee was consulted because the above groups were contacted, and they have the interest and expertise necessary to provide adequate feedback on the proposed rules; therefore, a committee is unlikely to provide further benefit.

RULES PROPOSED:

150-317-1050, 150-317-1140, 150-317-1160, 150-317-1400

ADOPT: 150-317-1050

RULE SUMMARY: Provides guidance to assist taxpayers in determining the sourcing of commercial activity for financial

institutions under ORS 317A.100 and 317A.128.

CHANGES TO RULE:

150-317-1050

Sourcing of Commercial Activity for Financial Institutions in This State

(1) General Rule. Commercial activity for financial institutions is sourced to this state if it is from business conducted in this state. Commercial activity for financial institutions is the items of income as reported on the form required under ORS 317A.100(1)(a)(B)(i)-(iii). The provisions in this rule establish uniform rules for determining whether the items of income as reported on the appropriate form filed by a financial institution are sourced to this state. ¶

(2) A taxpayer may request an alternative method, and the Department of Revenue may require or permit an alternative method under ORS 317A.128(2)-(3). ¶

(3) Definitions as used in this rule, unless context otherwise requires: ¶

(a) "Billing address" means the location indicated in the books and records of the taxpayer on first day of the taxable year (or such later dates in the taxable year when the customer relationship began) as the address where any notice, statement, or bill relating to a customer account is mailed. ¶

(b) A borrower "located in this state" means: ¶

(A) A borrower that is engaged in a trade or business that maintains its commercial domicile in this state; or ¶

(B) A borrower that is not engaged in trade or business whose billing address is in this state. ¶

(c) "Card issuers reimburse fee" means the fee a taxpayer receives from a merchant's bank because one of the persons to whom the taxpayer has issued a credit, debit, or similar type of card has charged merchandise or services to the card. ¶

(d) "Credit card" means a card, or other means of providing information, that entitles the holder to charge the cost of purchase, or a cash advance, against a line of credit. ¶

(e) "Debit card" means a card, or other means of providing information, that enables the holder to charge the cost of purchases, or a cash withdrawal, against the holder's bank account or a remaining balance on the card. ¶

(f) "Financial institutions" means a person, corporation or other business entity under ORS 314.610, excluding credit unions. ¶

(g) "Form" means forms FR Y-9 filed by a holding company or a call report filed by a bank organization. ¶

(h) "Items of income" means the individual items reported on the form filed by a holding company or bank organization or items reported by a nonbank financial organization in accordance with generally accepted accounting principles under ORS 314.605. If such individual items are net for the purposes of the form, those individual items are net for the purpose of this tax under ORS 317A.100(1)(a)(B)(i)-(iii). ¶

(i) "Loan" means any extension of credit resulting from direct negotiations between the taxpayer and its customer, or the purchase, in whole or in part, of such extension of credit from another. Loans include participations, syndications, and leases treated as loans for federal income tax purposes. Loans do not include: loans representing property acquired in lieu of or pursuant to a foreclosure under IRC section 595; futures or forward contracts; options; notional principal contracts such as swaps; credit card receivables, including purchased credit card relationships; noninterest bearing balances due from other depository institutions; cash items in the process of collection; federal funds sold; securities purchased under agreements to resell; assets held in a trading account; securities; interests in a REMIC, or other mortgage-backed or asset-backed security; and other similar items. ¶

(j) "Loan secured by real property" means that 50 percent or more of the aggregate value of the collateral used to secure a loan or other obligation, when valued at fair market value as of the time the original loan or obligation was incurred, was real property. ¶

(k) "Merchant discount" means the fee (or negotiated discount) charged to a merchant by the taxpayer for the privilege of participating in a program whereby a credit, debit, or similar type of card is accepted in payment for merchandise or services sold to the card holder, net of any cardholder charge-back and unreduced by any interchange transaction or issuer reimbursement fee paid to another for charges or purchases made its cardholder. ¶

(l) "Participation" means an extension of credit in which an undivided ownership interest is held on a pro rata basis in a single loan or pool of loans and related collateral. In a loan participation, the credit originator initially makes the loan and then subsequently resells all or a portion of it to other lenders. The participation may or may not be known to the borrower.¶¶

(m) "Person" means an individual, estate, trust, partnership, corporation, and any other business entity.¶¶

(n) "Principal base of operations" with respect to transportation property means the place of more or less permanent nature from which said property is regularly directed or controlled. With respect to an employee, the "principal base of operations" means the place of more or less permanent nature from which the employee regularly:¶¶

(A) Starts his or her work and to which the employee customarily returns in order to receive instructions from the employer, or¶¶

(B) Communicates with customers or other persons, or¶¶

(C) Performs any other functions necessary to the exercise of the employee's trade or profession at some other point or points.¶¶

(o) "Real property owned" and "tangible personal property owned" means real and tangible personal property, respectively.¶¶

(A) On which the taxpayer may claim depreciation for federal income tax purposes; or¶¶

(B) Property to which the taxpayer holds legal title and on which no other person may claim depreciation for federal income tax purposes (or could claim depreciation if subject to federal income tax). Real and tangible personal property do not include coin, currency, or property acquired in lieu of or pursuant to a foreclosure.¶¶

(p) "Regular place of business" means an office at which the taxpayer conducts business in a regular and systematic manner and that is continuously maintained, occupied, and used by employees of the taxpayer.¶¶

(q) "State" is defined in ORS 314.610(8).¶¶

(r) "Syndication" means an extension of credit in which two or more persons fund and each person is at risk only up to a specified percentage of the total extension of credit or up to a specified dollar amount.¶¶

(s) "Transportation property" means vehicles and vessels capable of moving under their own power, such as aircraft, trains, water vessels, and motor vehicles, as well as any equipment or containers attached to such property, such as rolling stock, barges, trailers, or the like.¶¶

(4) Sourcing. ¶¶

(a) In general. Except as provided elsewhere in OAR 150-317-1050, commercial activity for financial institutions is sourced to this state as indicated below. ¶¶

(b) Receipts from the sale, rental, lease, or license of real property. Receipts from the sales, rental, lease, or license of real property owned by the taxpayer are sourced to this state if and to the extent the property is in this state or receipts from the sublease of real property if the property is in this state.¶¶

(c) Receipts from the lease of tangible personal property.¶¶

(A) Except as described in paragraph (B) of this subsection, receipts from the lease or rental of tangible personal property owned by the taxpayer are sourced to this state if the property is located within this state when it is first placed in service by the lessee.¶¶

(B) Receipts from the lease or rental of transportation property owned by the taxpayer are sourced to this state to the extent that the property is used in this state. The extent an aircraft is deemed to be used in this state is determined by multiplying the receipts from the lease or rental of the aircraft by a fraction, the numerator of which is the number of landings of the aircraft in this state and the denominator of which is the total number of landings of the aircraft. If the extent of the use of any transportation property within this state cannot be determined, then the property is deemed to be used wholly in the state in which the property has its principal base of operations. A motor vehicle is deemed to be used wholly in the state in which it is registered.¶¶

(d) Interest, fees, and penalties imposed in connection with loans secured by real property.¶¶

(A) Interest, fees, and penalties imposed in connection with loans secured by real property are sourced to this state if the property is located within this state. If the property is located both within this state and one or more other states, the receipts described in this subsection are sourced to this state if more than 50 percent of the fair

market value of the real property is located within this state. If more than 50 percent of the fair market value of the real property is not located within any one state, then the receipts described in this subsection must be sourced to this state if the borrower is located in this state.¶

(B) The determination of whether the real property securing a loan is located within this state is made as of the time the original agreement was made, and any and all subsequent substitutions of collateral are disregarded.¶

(e) Interest, fees, and penalties imposed in connection with loans not secured by real property. Interest, fees, and penalties imposed in connection with loans not secured by real property are sourced to this state if the borrower is located in this state.¶

(f) Net gains from the sale of loans. Net gains from the sale of loans are sourced to this state as below. Net gains from the sale of loans includes income recorded under the coupon stripping rules of IRC section 1286.¶

(A) The amount of net gains (but not less than zero) from the sale of loans secured by real property is sourced to this state by multiplying such net gains by a fraction, the numerator of which is the amount sourced to this state pursuant to subsection (d) of this section and the denominator of which is the total amount of interest, fees, and penalties imposed in connection with loans secured by real property. ¶

(B) The amount of net gains (but not less than zero) from the sale of loans not secured by real property is sourced to this state by multiplying such net gains by a fraction, the numerator of which is the amount sourced to this state pursuant to subsection (e) of this section and the denominator of which is the total amount of interest, fees, and penalties imposed in connection with loans not secured by real property.¶

(g) Receipts from fees, interest, and penalties charged to card holders. Fees, interest, and penalties charged to credit, debit, or similar card holders; including but not limited to, annual fees and overdraft fees, are sourced to this state if the billing address of the card holder is in this state.¶

(h) Net gains from the sale of credit card receivables. All net gains (but not less than zero) from the sale of credit card receivables are sourced to this state by multiplying such net gains by a fraction, the numerator of which is the amount sourced to this state pursuant to subsection (g) of this section and the denominator of which is the taxpayer's total amount of interest and fees or penalties in the nature of interest from credit card receivables and fees charged to card holders.¶

(i) Card issuer's reimbursement fees. ¶

(A) All credit card issuer's reimbursement fees, interest, and penalties charged to credit card holders are sourced to this state by multiplying such fees, interest and penalties by a fraction, the numerator of which is the amount sourced to this state pursuant to subsection (g) of this section and the denominator of which is the taxpayer's total amount of fees, interest, and penalties charged to credit card holders.¶

(B) All debit card issuer's reimbursement fees, interest, and penalties charged to debit card holders are sourced to this state by multiplying such fees, interest and penalties by a fraction, the numerator of which is the amount sourced to this state pursuant to subsection (g) of this section and the denominator of which is the taxpayer's total amount of fees, interest, and penalties charged to debit card holders.¶

(C) All other card issuer's reimbursement fees, interest, and penalties charged to all other card holders are sourced to this state by multiplying such fees, interest and penalties by a fraction, the numerator of which is the amount sourced to this state pursuant to subsection (g) of this section and the denominator of which is the taxpayer's total amount of fees, interest, and penalties charged to all other card holders.¶

(j) Receipts from merchant discount.¶

(A) If the taxpayer can readily determine the location of the merchant, receipts from merchant discount are sourced to this state if the merchant is in this state.¶

(B) If the taxpayer cannot readily determine the location of the merchant, such receipts from the merchant discount are sourced to this state as follows:¶

(i) In the case of a merchant discount related to the use of a credit card, such receipts multiplied by a fraction the numerator of which is the amount of fees, interest, and penalties charged to credit card holders that is sourced to this state pursuant to subsection (g) of this section and the denominator of which is the taxpayer's total amount of fees, interest, and penalties charged to credit card holders, and¶

(ii) In the case of a merchant discount related to the use of a debit card, such receipts multiplied by a fraction the

numerator of which is the amount of fees, interest, and penalties charged to debit card holders that is sourced to this state pursuant to subsection (g) of this section and the denominator of which is the taxpayer's total amount of fees, interest, and penalties charged to debit card holders.[¶]

(iii) In the case of a merchant discount related to the use of all other types of cards, such receipts multiplied by a fraction the numerator of which is the amount of fees, interest, and penalties charged to all other card holders that is sourced to this state pursuant to subsection (g) of this section and the denominator of which is the taxpayer's total amount of fees, interest, and penalties charged to all other card holders.[¶]

(k) Receipts from ATM fees. All ATM fees that are not forwarded directly to another bank are sourced to this state if the billing address of the card holder is in this state.[¶]

(A) All fees charged to a cardholder for the use at an ATM of a card issued by the taxpayer are sourced to this state if the cardholder's billing address is in this state.[¶]

(B) All fees charged to a cardholder, other than the taxpayer's cardholder, for the use of such card at an ATM owned or rented by the taxpayer are sourced to this state if the ATM is in this state.[¶]

(l) Loan servicing fees.[¶]

(A) Loan servicing fees derived from loans secured by real property are sourced to this state by multiplying such fees by a fraction, the numerator of which is the amount sourced to this state pursuant to subsection (d) of this section and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans secured by real property.[¶]

(B) Loan servicing fees derived from loans not secured by real property are sourced to this state by multiplying such fees by a fraction, the numerator of which is the amount sourced to this state pursuant to subsection (e) of this section and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans not secured by real property.[¶]

(C) In circumstances in which the taxpayer receives loan servicing fees for servicing either the secured or the unsecured loans of another, such fees are sourced to this state if the borrower is located in this state.[¶]

(m) Receipts from services not otherwise sourced under this rule. Receipts from the sale of a service not otherwise sourced under this rule are sourced to this state, if and to the extent the service is delivered to a customer at a location in this state.[¶]

(A) Services Delivered to Individual Customers. In any instance in which the taxpayer's customer is an individual customer, the state or states in which the service is delivered must be reasonably approximated as follows: the taxpayer must assign the receipts from a sale to the customer's state of primary residence, or, if the taxpayer cannot reasonably identify the customer's state of primary residence, to the state of the customer's billing address; provided, however, in any instance in which the taxpayer derives more than five percent of its receipts from sales of all services from an individual customer, the taxpayer must identify the customer's state of primary residence and assign the receipts from the service or services provided to that customer to that state.[¶]

(B) Services Delivered to Business Customers. In any instance in which the taxpayer's customer is a business customer, the state or states in which the service is delivered must be reasonably approximated as follows: unless the taxpayer may use the safe harbor in paragraph (C) of this subsection, the taxpayer must assign the receipts from the sale as follows: (1) by assigning the receipts to the state where the contract of sale is principally managed by the customer; (2) if the place of customer management is not reasonably determinable, to the customer's place of order; and (3) if the customer place of order is not reasonably determinable, to the customer's billing address; provided, however, in any instance in which the taxpayer derives more than five percent of its receipts from sales of all services from a customer, the taxpayer is required to identify the state in which the contract of sale is principally managed by the customer.[¶]

(C) Safe Harbor; Large Volume of Transactions. Notwithstanding the rules set forth in paragraphs (A) and (B) of this subsection, a taxpayer may source its receipts from sales to a particular customer based on the customer's billing address in any taxable year in which the taxpayer (1) engages in substantially similar service transactions with more than 250 customers, whether individual or business, and (2) does not derive more than five percent of its receipts from sales of all services from that customer.[¶]

(D) Related Party Transactions. In any instance in which the professional service is sold to a related party, rather

than applying the rule for professional services delivered to business customers in paragraph (B) of this subsection, the items sourced to this state which the service is assigned is the place of receipt by the related party as reasonably approximated using the following hierarchy: (1) if the service primarily relates to specific operations or activities of a related party conducted in one or more locations, then those operations or activities are conducted in proportion to the related party's payroll at the locations to which the service relates in this state; or (2) if the service does not relate primarily to operations or activities of a related party conducted in particular locations, but instead relates to the operations of the related party generally, to this state in which the related party has employees.. The taxpayer may use the safe harbor provided by paragraph (C) of this subsection provided that the department may aggregate the receipts from sales to related parties in applying the five percent rule if necessary or appropriate to avoid distortion.¶

(n) Receipts from the financial institution's investment assets and activities and trading assets and activities.¶

(A) Interest, dividends, net gains (but not less than zero), and other income from investment assets and activities and from trading assets and activities that are reported on the taxpayer's financial statements, call reports, or similar reports are sourced to this state if it is from business conducted in this state. Investment assets and activities and trading assets and activities include but are not limited to: investment securities, trading account assets, federal funds; securities purchased and sold under agreements to resell or repurchase, options, future contracts, forward contracts, notional principal contracts such as swaps, equities, and foreign currency transactions. ¶

(B) Interest, net gains (but not less than zero), and other income from investment assets and activities and from trading assets and activities described in paragraph (A) are sourced to this state to the extent that they are attributable to this state.¶

(i) The amount of interest, net gains (but not less than zero) and other income from investment assets and activities in the investment account to be attributed to this state is determined by multiplying all such income from such assets and activities by a fraction, the numerator of which is the average value of such assets that are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the average value of all such assets.¶

(ii) The amount of interest from federal funds sold and purchased and from securities purchased under resale agreements and securities sold under repurchase agreements attributable to this state is determined by multiplying the amount described in subparagraph (i) of paragraph (A) from such funds and such securities by a fraction, the numerator of which is the average value of federal funds sold and securities purchased under agreements to resell that are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the average value of all such funds and such securities.¶

(iii) The amount of interest, gains, and other income from trading assets and activities, including but not limited to assets and activities in the matched book, in the arbitrage book, and foreign currency transactions, (but excluding amounts described in subparagraphs (i) and (ii) of this paragraph), attributable to this state is determined by multiplying the amount described in subparagraph (ii) of paragraph (A) by a fraction, the numerator of which is the average value of such trading assets that are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the average value of all such assets.¶

(iv) For purposes of this paragraph, average value is determined using the rules for determining the average value of tangible personal property set forth in OAR 150-314-0088(5)(c) and (d).¶

(C) In lieu of using the method set forth in paragraph (B) of this subsection, the taxpayer may elect, or the department may require in order to fairly represent the business activity of the taxpayer in this state, the use of the method set forth in this paragraph.¶

(i) The amount of interest, net gains (but not less than zero), and other income from investment assets and activities in the investment account to be attributed to this state is determined by multiplying all such income from such assets and activities by a fraction, the numerator of which is the gross income from such assets and activities that are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the gross income from all such assets and activities.¶

(ii) The amount of interest from federal funds sold and purchased and from securities purchased under resale

agreements and securities sold under repurchase agreements attributable to this state is determined by multiplying the amount described in subparagraph (i) of paragraph (A) from such funds and such securities by a fraction, the numerator of which is the gross income from such funds and such securities that are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the gross income from all such funds and such securities.¶

(iii) The amount of interest, gains, and other income from trading assets and activities, including but not limited to assets and activities in the matched book, in the arbitrage book, and foreign currency transactions (but excluding amounts described in subparagraphs (i) and (ii) of this paragraph) attributable to this state and included in the numerator is determined by multiplying the amount described in subparagraph (ii) of paragraph (A) by a fraction, the numerator of which is the gross income from such trading assets and activities that are properly assigned to a regular place of business of the taxpayer within this state and the denominator of which is the gross income from all such assets and activities.¶

(D) If the taxpayer elects or is required by the department to use the method set forth in paragraph (C) of this subsection, it must use this method on all subsequent returns unless the taxpayer receives prior written permission from the department, or the department requires the use of a different method.¶

(E) The taxpayer has the burden of proving that an investment asset or activity or trading asset or activity was properly assigned to a regular place of business outside of this state by demonstrating that the day-to-day decisions regarding the asset or activity occurred at a regular place of business outside this state. Where the day-to-day decisions regarding an investment asset or activity or trading asset or activity occur at more than one regular place of business, and one such regular place of business is in this state and one such regular place of business is outside this state, such asset or activity is considered to be located at the regular place of business of the taxpayer where the investment or trading policies or guidelines with respect to the asset or activity are established.¶

(o) All other receipts. All other receipts described in (1) and not sourced above are sourced as set forth below.¶

(A) Receipts derived from property, transactions, and activities having a connection to Oregon are sourced to this state. Receipts derived from the sale of tangible personal property have a connection to Oregon if the tangible personal property is delivered in Oregon. Receipts derived from intangible personal property have a connection to Oregon if the intangible property is used or held for use in Oregon.¶

(B) A taxpayer must attach a statement to their return that describes each receipt and the property, transaction, or activity from which it is derived for any receipts to be considered "other receipts."¶

[Publications: Contact the Oregon Department of Revenue for information about how to obtain a copy of the publication referred to or incorporated by reference in this rule pursuant to ORS 183.360(2) and ORS 183.355(1)(b).]

Statutory/Other Authority: ORS 305.100, 317.143

Statutes/Other Implemented: ORS 317A.100, 317A.128

ADOPT: 150-317-1140

RULE SUMMARY: Provides guidance to assist taxpayers in determining whether receipts from wholesale sales of food items are excludable under ORS 317A.100(1)(b)(EE).

CHANGES TO RULE:

150-317-1140

Wholesale Sale of Groceries Exclusion

(1) Definitions ¶

(a) "Processing" means transforming or changing the physical characteristics of an item, including incorporation or consumption of an item as an ingredient or component in the production or manufacture of another item.

"Processing" includes activities such as (but not limited to): baking, canning, churning, cooking, concentrating, cutting, dehydrating, drying, extracting, freezing, heating, grinding, mixing, pasteurizing, preserving, or otherwise altering, manufacturing, or producing an item. For purposes of this rule, "processing" does not include activities conducted by a retail store in assembling, cleaning, preparing, storing, handling or displaying groceries for retail sale to the final consumer for home consumption. Retail store activities such as preparing filleted or gutted fish, produce trimming, and processed meat and cheese slicing, are not processing as defined in this rule, provided that such activities are conducted by a retail store as part of the services they offer to their customers.¶

(b) "Store" for purposes of this rule, refers to the location from which a taxpayer sells goods at retail to the final consumer for home consumption. "Store" includes both physical locations and online storefronts.¶

(c) "Wholesale sale" is the sale of goods to a purchaser for the purpose of resale without further processing in the regular course of the purchaser's trade or business. A wholesale sale of groceries, for purposes of the exclusion in ORS 317A.100(1)(b)(EE), may be determined by using factors such as (but not limited to):¶

(A) The sale is of grocery items in a quantity usable for resale, or materially in excess of the total quantity of goods that are, on average, purchased by a member of the consuming public.¶

(B) The items are sold at a discounted price from the fair market value of the items if sold at retail.¶

(C) The sale is made to another business entity.¶

(2) The list of factors in sections (1)(c)(A) through (1)(c)(C) are nonexclusive. The factors will be considered based on facts and circumstances and only to the extent that they are relevant. The department may consider any other relevant factors and circumstances. ¶

(3) Excludable Receipts from Wholesale Sales. A person may exclude receipts realized from the wholesale sale of groceries, as that term is defined in ORS 317A.100(8), provided that the sales transaction meets the following requirements:¶

(a) The transaction is a wholesale sale;¶

(b) The items sold in the transaction are food or food products that meet the definition of groceries, in a form that may be resold to the final consumer for home consumption without processing; ¶

(c) The sale is made for the purpose of reselling the groceries to the final consumer for home consumption; and ¶

(d) The wholesale seller obtains written verification from the purchaser that the purchased groceries will be resold without processing, by a store that typically sells groceries to the final consumer for home consumption. ¶

(4) Documentation Required for Verification. A wholesale seller must retain sufficient documentation to demonstrate the requirements in section (3) have been met. Any document may serve as verification, provided that it contains the following information:¶

(a) The purchaser's name and address; ¶

(b) The date of the purchase, the item(s) purchased, and the amount purchased; and ¶

(c) Verification from the purchaser of the amount of the purchase that will be resold, without processing, to the final consumer for home consumption.¶

(5) Safe Harbor for Wholesale Sales to Stores Authorized as Retail Food Stores, or Qualifying as Retail Food Stores for purposes of the Supplemental Nutrition Assistance Program (SNAP). A wholesale seller is not required to obtain separate verification from the purchaser if the purchaser is a qualified SNAP retailer with a current permit to accept SNAP benefits issued by the U.S. Department of Agriculture, and the purchase was made for the purpose

of resale of groceries at a store authorized as a retail food store under 7 U.S.C. 2012(o). The wholesale seller must retain sufficient documentation to demonstrate that the sale was made to an authorized retail food store under 7 U.S.C. 2012(o).¶

(6) Examples.¶

Example 1: Braddock Wholesale LLC purchases prepackaged frozen vegetables and meals and sells the items, without processing the purchased items in any way, to their customers. One of Braddock's customers, Harris Grocery, has six stores located throughout the state. All six Harris stores are authorized as retail food stores under 7 U.S.C. 2012(o). Braddock sells prepackaged frozen vegetables and frozen meals to Harris Grocery. Under the terms of the sales agreement, Braddock delivers 1,000 frozen meals and 5,000 10-ounce packages of frozen broccoli directly to each Harris store. Braddock retains records of the sales contracts documenting that the items sold were groceries in a form that may be resold to consumers for home consumption without further processing, and that Braddock delivered the purchased groceries directly to a store that is authorized as a retail food store under 7 U.S.C. 2012(o). The sales contract, with the information specified above, is sufficient to verify that the receipts from the wholesale sales transaction are excludable under ORS 317A.100(1)(b)(EE). ¶

Example 2: Assume the same facts in Example 1, except that Braddock's customer is Columbia Cupboards LLC (Columbia). Columbia has three stores located across the state. None of Columbia's stores are authorized as retail food stores under 7 U.S.C. 2012(o). As such, Braddock must obtain verification from Columbia that the frozen meals are purchased for the purpose of resale, without processing, and that the meals are typically sold to the ultimate final consumer for consumption at home. Under the terms of the sales agreement between Braddock Wholesale and Columbia Cupboards LLC, Braddock delivers 100 frozen meals to each of Columbia's three stores. The sales agreement specifically states that the purchaser (Columbia) is purchasing the frozen meals for resale without any further processing, and the meals will be sold by three Columbia Cupboard stores, all of which typically sell groceries to the final consumer for home consumption. The sales agreement, with the information specified above, verifies that the receipts from the wholesale sales transaction are excludable under ORS 317A.100(1)(b)(EE). ¶

Example 3: Assume the same facts as Example 1, except that Braddock's customer is Foxtrot Airlines. Foxtrot Airlines purchases 5,000 frozen meals from Braddock. The meals will be heated and served to the airline's customers during flights. Because Foxtrot Airlines will process (heat) the frozen meals before the meals are served to its passengers, and because Foxtrot Airlines does not typically sell directly to the final consumer for home consumption, Braddock cannot exclude the receipts from the transaction as a wholesale sale of groceries. Braddock will include the receipts from the sale to Foxtrot Airlines as commercial activity. ¶

Example 4: Assume the same facts as Example 1, except that Braddock's customer is Farragut Corporation. Farragut Corporation operates 144 grocery stores across the state, under the name Good Grocery. All Good Grocery stores are authorized as retail food stores under 7 U.S.C. 2012(o). In addition, Farragut Corporation has fifty separately located restaurants operating under the name Greenbelt Diner. Farragut Corporation purchases 400,000 10-ounce packages of frozen broccoli and 100,000 5.5 pound packages of frozen broccoli from Braddock. Under the terms of the sales agreement, all of the items are delivered to a centralized warehouse owned by Farragut Corporation. Farragut will then distribute the prepackaged broccoli as needed to their grocery stores and restaurants. The prepackaged frozen broccoli is in a form that may be resold to the final consumer for home consumption without further processing. However, Braddock cannot reasonably determine whether the prepackaged frozen broccoli, after being delivered, will be sold at Farragut's Good Grocery stores which typically sell groceries to consumers for home consumption, or used by Farragut's Greenbelt Diners, where the broccoli will be cooked and incorporated as an ingredient in hot meals served to patrons. Braddock obtains written verification from Farragut Corporation, who certifies that of the 500,000 packages of frozen broccoli purchased, the 400,000 10-ounce packages will be sold in Farragut's Good Grocery stores, which are authorized as retail food stores under 7 U.S.C. 2012(o), and the 100,000 5.5 pound packages will be used by Farragut's Greenbelt Diners. Braddock may exclude from commercial activity the receipts from the sale of 400,000 packages of frozen broccoli as receipts from the wholesale sale of groceries excluded under ORS 317A.100(1)(b)(EE). Braddock must include in commercial activity its receipts from the sale of 100,000 5.5 pound packages of frozen broccoli that will be used

by Farragut's Greenbelt Diners.¶

Example 5: Largo Cereals LLC manufactures cold, ready-to-eat breakfast cereal. Largo markets their cereals directly to the home consumer through targeted advertising campaigns, and packages their cereal in branded, 30-ounce boxes. Largo sells the ready-to-eat packaged cereal to retailers, distributors, and wholesalers, including Braddock Wholesale. Under the terms of the sales agreement, Largo sells 10,000 branded 30-ounce boxes of breakfast cereal to Braddock Wholesale. The sales agreement specifically states that the purchaser (Braddock) will resell the 30-ounce boxes of cereal, without further processing. Based on the circumstances of the sale and the condition of the item, Largo and Braddock reasonably expect that the cereal will ultimately be sold to the final consumer for home consumption. The sales agreement, with the information specified above, verifies that the receipts from the wholesale sales transaction are excludable under ORS 317A.100(1)(b)(EE).

Statutory/Other Authority: ORS 305.100, 317A.143

Statutes/Other Implemented: ORS 317A.100(1)(b)(EE), 317A.100(8)

ADOPT: 150-317-1160

RULE SUMMARY: Provides guidance to taxpayers regarding the exclusion for a farmer's sales to agricultural cooperatives under ORS 317A.100(1)(b)(TT).

CHANGES TO RULE:

150-317-1160

Farmers Sales to Agricultural Cooperatives

(1) For purposes of the exclusion provided under ORS 317A.100(1)(b)(TT), "farmer's sales" means a taxpayer's receipts from the sale of agricultural commodities, livestock, poultry, dairy products, and similar products or by-products produced through agricultural activity, to an agricultural cooperative in Oregon, provided it is a cooperative organization described in section 1381(a)(1) of the Internal Revenue Code. ¶

(2) "Farmer's sales" does not include ¶

(a) receipts of a taxpayer who is not in the trade or business of growing or raising agricultural commodities, livestock, poultry, dairy products, and similar products or by-products produced through agricultural activity; or ¶

(b) receipts from the sale of any items that were not produced through activities described in section (1) of this rule ¶

(3) Examples. ¶

Example 1: Bravo Farms is in the business of growing and harvesting blackberries, blueberries, and strawberries. Bravo sells 300 bushels of blackberries to PNW Cooperative in Oregon. PNW is an agricultural cooperative organization described in section 1381(a)(1) of the Internal Revenue Code. Bravo Farms will exclude receipts from the sale of blackberries to PNW Cooperative from Bravo's commercial activity. ¶

Example 2: Tony Lawncare LLC is a multi-national business that sells a variety of consumer lawncare products. Tony Lawncare packages and sells products such as pesticide, fertilizer and grass seed for home lawns, but is not involved in growing or harvesting the grass seed or other products that it sells. Tony Lawncare sells four hundred 12-lb bags of Bermuda grass seed to Cal-Or Supply Cooperative in Oregon. Cal-Or Supply is an agricultural cooperative organization described in section 1381(a)(1) of the Internal Revenue Code. However, as Tony Lawncare is not in the trade or business of growing or raising agricultural commodities, Tony Lawncare's receipts from the sale of grass seed to Cal-Or Supply Cooperative are not excludable under ORS 317A.100(1)(b)(TT). Tony Lawncare must include receipts from the sale of grass seed in their commercial activity.

Statutory/Other Authority: ORS 305.100, 317A.143

Statutes/Other Implemented: ORS 317A.100(1)(b)(TT)

RULE SUMMARY: Provides guidance to sellers and wholesalers regarding the exclusion from commercial activity for property purchased for resale out of state, as provided by ORS 317A.100(1)(b)(DD).

CHANGES TO RULE:

150-317-1400

Determining Property Resold Out of State, and Methods of Determining

(1) Out-of-State Resale Certificate. A wholesaler purchasing property for the purpose of resale may, at the time the purchase is made, provide the seller of the property with an out-of-state resale certificate, declaring the amount of purchased property that the wholesaler will resell out of Oregon. The out-of-state resale certificate qualifies as the certification required under ORS 317A.100(1)(b)(DD). Any document provided by the wholesaler to the seller at the time of the sale may serve as an out-of-state resale certificate provided that the document contains: ¶

(a) The wholesaler's legal name and Oregon address; ¶

(b) The wholesaler's federal tax identification number; ¶

(c) The date of the purchase; ¶

(d) The total amount of purchased property; ¶

(e) The purchase price paid by the wholesaler; ¶

(f) The dollar amount of purchased property that the wholesaler will resell outside of Oregon; and ¶

(g) The signature of the wholesaler, their authorized representative, or employee, certifying that the person is a wholesaler as that term is defined in ORS 317A.100(20). ¶

(2) Reasonable Methods to Determine the Amount of Purchased Property Sold Out of State. The wholesaler must determine the amount of purchased property that will be sold out of Oregon based on the facts available at the time the wholesaler purchases the property from the seller. If, at the time of purchase, the wholesaler is unable to determine the amount of the purchased property that the wholesaler will resell out of Oregon, the wholesaler may use the approximation ratio prescribed in section (3) of this rule to estimate the amount of purchased property that will be sold in Oregon and out of state. ¶

(3) Approximation Ratio to Estimate Out-of-State Sales. The approximation ratio is a fraction. The numerator is the amount of commercial activity the wholesaler realized from sales to Oregon customers in the prior year. The denominator is the amount of commercial activity the wholesaler realized from all sales during the prior year. Wholesalers located in multiple states may only include in the numerator and denominator their commercial activity realized from property delivered from their Oregon locations. Sales of property delivered from the wholesaler's locations outside of Oregon are not included in the ratio. ¶

Example 1: Alpha Corp. is a wholesaler with one location in Klamath Falls, Oregon. Alpha generally purchases widgets for resale to out-of-state customers. In March 2020, Alpha purchases 5,000 widgets from Indigo LLC, paying a total of \$500,000 for the purchased widgets. At the time of the purchase, Alpha is unable to determine the exact number of widgets that will be sold out-of-state, and, therefore, must approximate using the ratio in section (3). In 2019, Alpha realized a total of \$2 million dollars of commercial activity from the sale of widgets delivered from their Klamath Falls location to customers everywhere, including \$100,000 to Oregon customers delivered from Alpha's Klamath Falls location. Alpha calculates their approximation ratio by dividing Oregon commercial activity by everywhere commercial activity ($\$100,000 / \$2,000,000$), resulting in an approximation ratio of 0.05. Alpha applies the approximation ratio of 0.05 to the purchase price ($\$500,000 \times 0.05 = \$25,000$). Of the total \$500,000 widget purchase, Alpha approximates that \$25,000 will be resold in Oregon, and \$475,000 will be resold out of Oregon. Alpha provides Indigo LLC with an out-of-state resale certificate documenting that \$475,000 worth of the purchased widgets will be sold out of Oregon. While Indigo LLC realized \$500,000 of commercial activity from the sale to Alpha, only \$25,000 of receipts from the sale will be included in Indigo's commercial activity; Indigo will exclude \$475,000 of receipts. ¶

(4) Alternative Methods of Determining Out-of-State Sales. (a) If the wholesaler knows or reasonably should have known at the time of the wholesaler's purchase that the approximation ratio in section (3) does not fairly and

accurately approximate the wholesaler's in-state and out-of-state sales, the wholesaler may not use the ratio in section (3) but may use a reasonable alternative method of approximation. The wholesaler must document the method used, including a complete explanation of the alternative method, how the method was determined, and why the approximation ratio method prescribed in section (3) of this rule is not a fair approximation of the wholesaler's sales. Once an alternative method has been used, the wholesaler must continue to use the same method, unless the alternative method is no longer a fair and accurate approximation of the in-state and out-of-state sales. All changes to the alternative method must be documented and retained in the wholesaler's records. ¶

Example 2: The facts are the same as Example 1, except that Alpha knows in March 2020 that it expects to sell half its widget inventory from the Klamath Falls location to Oregon customers during 2020. Alpha may not use the approximation ratio in section (3), but may use an alternative method to reasonably approximate the ratio of in-state and out-of-state sales. Of the total \$500,000 widget purchase, Alpha approximates that \$250,000 will be resold to Oregon customers. Alpha provides Indigo with an out-of-state resale certificate documenting that \$250,000 of the purchased widgets will be resold out of Oregon. Indigo may exclude \$250,000 of receipts from its sale to Alpha from Indigo's commercial activity. ¶

(5) If the department, upon audit, determines that the wholesaler's approximation ratio under section (3) or alternative method of approximation under section (4) does not fairly and accurately reflect the wholesaler's in-state and out-of-state sales, the wholesaler must immediately discontinue use of the ratio or alternative method.

Statutory/Other Authority: ORS 305.100, 317A.143

Statutes/Other Implemented: ORS 317A.100(1)(b)(DD)