As Introduced

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Representatives Foley, Letson

Cosponsors: Representatives Yuko, Okey, Stewart, D., Luckie, Hagan, R., Heard, Harwood, Skindell, Brady, Mallory, Domenick, Yates, Fende, Bolon, Dyer

A BILL

To enact sections 5733.60, 5733.61, 5733.62, 5733.63, 5733.64, 5733.65, 5733.66, 5733.67, and 5733.68 of the Revised Code to levy an annual tax on the net income of a petroleum business engaged in, or that is part of a unitary business engaged in, the business of petroleum refining.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

Section 1. That sections 5733.60, 5733.61, 5733.62, 5733.63, 5733.64, 5733.65, 5733.66, 5733.67, and 5733.68 of the Revised Code be enacted to read as follows:

Sec. 5733.60. As used in sections 5733.60 to 5733.68 of the Revised Code:

(A) "Taxable year" means the period prescribed by division (A) of section 5733.031 of the Revised Code.

(B) "Tax year" means the calendar year in and for which the tax imposed by section 5733.61 of the Revised Code is required to be paid.

(C) "Taxpayer" means a corporation subject to the tax imposed by section 5733.61 of the Revised Code.

(D) "Net income" has the same meaning as in division (I) of section 5733.04 of the Revised Code, except that the adjustments prescribed by divisions (I)(1), (I)(1)(a), and (I)(14) to (18) of that section do not apply to the computation of net income for the purpose of the tax levied under section 5733.61 of the Revised Code, and the adjustment prescribed by division (I)(3) of that section shall be modified by substituting "5733.61" for "5733.06" wherever "5733.06" appears in that division.

(E) "Petroleum business" means a corporation engaged, during the tax year, in the exploration, production, refining, manufacturing, processing, transportation, and marketing of oil and gas, or of any commodity, product, or feedstock derived from oil or gas, or a corporation that is a partner in a partnership engaged in those business activities.

(F) "Petroleum refining" means refining crude petroleum into refined petroleum by fractionation, straight distillation of crude oil, cracking, or similar methods.

(G) "Corporation" means any corporation as defined by the laws of this state or organization of any kind treated as a corporation for tax purposes under the laws of this state, wherever located, which if it were doing business in this state would be a taxpayer. The business conducted by a pass-through entity that is directly or indirectly held by a corporation shall be considered the business of the corporation to the extent of the corporation's distributive share of the pass-through entity's income.

(H) "Pass-through entity" has the same meaning as in division (O) of section 5733.04 of the Revised Code.

(I) "Qualifying controlled group" has the same meaning as in section 5733.04 of the Revised Code.

(J) "Unitary business" means a qualifying controlled group, the members of which are sufficiently interdependent, integrated, and interrelated through their activities so as to provide a synergy and mutual benefit that produces a sharing or exchange of value among them and a significant flow of value to the separate parts. Any business conducted by a pass-through entity shall be treated as conducted by its equity owners, whether directly held or indirectly held through a series of pass-through entities, to the extent of the equity owner's distributive share of the pass-through entity's income, regardless of the percentage of the equity owner's interest or distributive or any other share of pass-through entity income. A business conducted directly or indirectly by one corporation is unitary with that portion of a business conducted by another corporation through its direct or indirect interest in a pass-through entity if there is a synergy, exchange, and flow of value between the two parts of the business and the two corporations are members of the same qualifying controlled group.

(K) "United States" means the fifty states of the United States, the District of Columbia, and United States territories and possessions.

(L) "Tax haven" means a jurisdiction for which either of the following is true during the tax year in question:

(1) The jurisdiction is identified by the organization for economic co-operation and development (OECD) as a tax haven or as having a harmful preferential tax regime;

(2) The jurisdiction exhibits both of the following characteristics regardless of whether it is listed by the OECD as an uncooperative tax haven:

(a) The jurisdiction has no or nominal effective tax on the relevant income; and

(b) Any one of the following is true:

(i) The jurisdiction has laws or practices that prevent effective exchange of information for tax purposes with other governments on taxpayers benefiting from the tax regime;

(ii) The jurisdiction has a tax regime that lacks transparency. For this purpose, a tax regime lacks transparency if the details of legislative, legal, or administrative provisions are not open and apparent or are not consistently applied among similarly situated taxpayers, or if the information needed by tax authorities to determine a taxpayer's correct tax liability, such as accounting records and underlying documentation, is not adequately available;

(iii) The jurisdiction facilitates the establishment of foreign-owned entities without the need for a local substantive presence or prohibits foreign-owned entities from having any commercial impact on the local economy;

(iv) The jurisdiction explicitly or implicitly excludes the jurisdiction's resident taxpayers from taking advantage of the tax regime's benefits or prohibits enterprises that benefit from the regime from operating in the jurisdiction's domestic market;

(v) The jurisdiction has created a tax regime that is favorable for tax avoidance based upon an overall assessment of relevant factors, including whether the jurisdiction has a significant untaxed offshore financial or other services sector relative to its overall economy.

Sec. 5733.61. For the purpose of promoting energy-efficient modes of transportation and advanced energy production technology, a tax is levied annually, measured by the net income of each petroleum business doing business in this state, owning or using its capital or property in this state, holding a certificate of compliance with the laws of this state authorizing it to do business in this state, or otherwise having nexus in or with this state under the Constitution of the United States during the calendar year during which the tax is payable. The tax equals eight and one-half per cent multiplied by the amount by which the petroleum business's net income for the petroleum business's taxable year exceeds one million dollars. A petroleum business is not subject to the tax levied by this section if its only business is the ownership or operation of a facility in this state to dispense motor fuel for retail sale, or if neither the petroleum business nor any of the members of its unitary business is engaged in the business of petroleum refining during the five most recently concluded tax years. The tax levied under this section is in addition to any other tax, including the tax levied under Chapter 5751. of the Revised Code.

Sec. 5733.62. No taxpayer may increase the price of its petroleum products to recapture from the customer the amount of tax due under section 5733.61 of the Revised Code. The tax commissioner may audit the books and records of the taxpayer and the members of the taxpayer's unitary business to ensure compliance with this section. Whoever violates this section shall be subject to a civil penalty equal to twice the sum of the penalties that may be charged under section 5733.28 of the Revised Code plus interest at the rate per annum prescribed by section 5703.47 of the Revised Code from the date of the violation until the penalty is paid in full.

Sec. 5733.63. A taxpayer's net income subject to the tax levied by section 5733.61 of the Revised Code equals the sum of the taxpayer's net nonbusiness income allocated and apportioned to this state plus the taxpayer's net business income apportioned to this state, and shall be computed as follows:

(A)(1) The net business income of a taxpayer engaged in a unitary business with one or more other corporations shall be combined with that of all members of its unitary business. Each member's net income shall be determined in the same manner as if the member were a taxpayer. Intercorporate transactions, including dividends or distributions, between members of the unitary business shall be eliminated.

(2) The net business income of the unitary business shall be apportioned to this state pursuant to division (B)(2) of section 5733.05 of the Revised Code. Unless otherwise required by the tax commissioner under division (B) of section 5733.64 of the Revised Code, the factors used in the formulas in division (B)(2) of section 5733.05 of the Revised Code shall be the combined totals of the factors for each member of the unitary business after the elimination of any intercorporate transactions. Permitted exemptions and deductions, if any, shall be taken in the same manner as if each member of the unitary business filed a separate report.

(3) The net business income of the unitary business apportioned to this state shall be prorated to the taxpayer on the basis of the taxpayer's proportionate share of the factors used to apportion the net business income of the unitary business, unless otherwise required by the tax commissioner.

(B) The taxpayer's net nonbusiness income shall be allocated to this state pursuant to section 5733.051 of the Revised Code. Intercorporate transactions shall be eliminated.

Sec. 5733.64. (A) A taxpayer engaged in a unitary business with one or more other corporations shall file a report that combines the net incomes of all members of the unitary business, includes the apportionment factors of each member, and discloses such other information as may be required by the tax commissioner. If the commissioner determines that the reported income or loss of a taxpayer engaged in a unitary business with any person not included pursuant to this division represents an avoidance or evasion of tax by such taxpayer, the commissioner may require all or any part of the income and associated apportionment factors of such person to be included in the taxpayer's report.

(B) The tax commissioner may require the report to include the net income and associated apportionment factors of any person that is not included pursuant to division (A) of this section, but that is a member of a unitary business, in order to reflect proper apportionment of income of entire unitary businesses. The commissioner may require combination of persons that are not, or would not be if doing business in this state, subject to the tax imposed by section 5733.61 of the Revised Code. The commissioner also may require the exclusion or inclusion of any one or more of the apportionment factors or may employ any other method of apportionment to effectuate a proper reflection of the total amount of net income subject to apportionment and an equitable allocation and apportionment of the taxpayer's net income.

Sec. 5733.65. (A) Taxpayer members of a unitary business that meet the requirements of division (B) of this section may elect to combine the income and apportionment factors of only the following members of the unitary business:

(1) A member incorporated in the United States or formed under the laws of any state, the District of Columbia, or any territory or possession of the United States;

(2) A member, regardless of the place incorporated or formed,

if the average of its property, payroll, and sales factors within the United States is twenty per cent or more;

(3) A member that is a domestic international sales corporation as described in sections 991 to 994 of the Internal Revenue Code; a foreign sales corporation as described in sections 921 to 927 of the Internal Revenue Code; or a member that is an export trade corporation as described in sections 970 to 971 of the Internal Revenue Code;

(4) A member not described in divisions (A)(1) to (3) of this section to the extent its income is derived from or attributable to sources within the United States, as determined under the Internal Revenue Code without regard to federal treaties, and the related apportionment factors;

(5) A member that is a "controlled foreign corporation," as defined in section 957 of the Internal Revenue Code, to the extent the member's income that is defined in section 952 of Subpart F of the Internal Revenue Code ("Subpart F income") including lower-tier subsidiaries' distributions of such income that were previously taxed, determined without regard to federal treaties, and the related apportionment factors; any item of income received by a controlled foreign corporation shall be excluded if such income was subject to an effective rate of income tax imposed by a foreign country greater than ninety per cent of the maximum rate of tax specified in section 11 of the Internal Revenue Code;

(6) A member to the extent it receives more than twenty per cent of its income, directly or indirectly, from intangible property or service-related activities that are deductible against the business income of other members of the combined group, and the related apportionment factors;

(7) A member that is doing business in a tax haven, where "doing business in a tax haven" is defined as being engaged in

activity sufficient for that tax haven jurisdiction to impose a tax under United States constitutional standards. If the member's business activity within a tax haven is entirely outside the scope of the laws, provisions, and practices that cause the jurisdiction to meet the criteria established in division (L) of section 5733.60 of the Revised Code, the activity of the member shall be treated as not having been conducted in a tax haven.

(B)(1) An election made under division (A) of this section is effective only if made on a timely filed, original return for a tax year by every member of the unitary business having nexus in or with this state under the Constitution of the United States at any time during the member's taxable year. The tax commissioner shall adopt rules governing the effect, if any, on the scope or application of an election made under division (A) of this section, including termination or deemed election, resulting from a change in the composition of the unitary group, the combined group, the taxpayer members, or any other similar change.

(2) The election constitutes consent to the reasonable production of documents and taking of depositions.

(3) In the discretion of the tax commissioner, an election may be disregarded in part or in whole, and the income and apportionment factors of any member of the taxpayer's unitary business may be included in the combined report without regard to the provisions of this section, if any member of the unitary business fails to comply with any provision of sections 5733.60 to 5733.68 of the Revised Code or any other applicable provision of this chapter.

(4) An election made under division (A) of this section is binding for and applicable to the tax year for which it is made and all tax years thereafter for a period of ten years. The election may be withdrawn or reinstituted after withdrawal before expiration of the ten-year period only upon written request, for

reasonable cause based on extraordinary hardship due to unforeseen changes in state tax law or policy, and only with the written permission of the tax commissioner. If the tax commissioner grants a withdrawal of election, the commissioner shall impose reasonable conditions as necessary to prevent the evasion of tax or to clearly reflect income for the election period before or after the withdrawal. Upon the expiration of the ten-year period, a taxpayer may withdraw from the election. The withdrawal must be made in writing within one year of the expiration of the election, and is binding for a period of ten years, subject to the same conditions as applied to the original election. If a withdrawal is not properly made, the election shall be in effect for an additional ten-year period, subject to the same conditions as applied to the original election.

Sec. 5733.66. Money collected from the tax imposed by section 5733.61 of the Revised Code, shall be credited to the advanced energy fund created in section 4928.61 of the Revised Code and used for the purposes prescribed for money in that fund. The general assembly may appropriate money collected from the tax to the Ohio rail development commission.

Sec. 5733.67. The tax imposed by section 5733.61 of the Revised Code shall be payable and shall be administered and enforced according to the provisions of this chapter.

Sec. 5733.68. References to "this chapter" or "Chapter 5733." in the following sections exclude sections 5733.60 to 5733.68 of the Revised Code: sections 122.152, 145.114, 145.116, 718.01, 742.114, 742.116, 3307.152, 3307.154, 3309.157, 3309.159, 3770.10, 5505.068, 5505.0610, 5725.26, 5733.01, 5733.06, 5733.0610, 5733.0611, 5733.31, 5733.311, 5733.35, 5733.47, and 5747.13 and division (D) of section 5733.11 of the Revised Code.

Section 2. The enactment by this act of sections 5733.60, 5733.61, 5733.62, 5733.63, 5733.64, 5733.65, 5733.66, 5733.67, and 5733.68 of the Revised Code applies to taxable years ending in 2008.

Section 3. This act provides for a tax levy within the meaning of Ohio Constitution, Article II, Section 1d, and therefore, pursuant to that section, this act is not subject to the referendum and goes into immediate effect when this act becomes law.