



WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 06-113

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated January 2005.]

2. Form, Style and Placement in Administrative Code

a. The use of the term “Agency” in s. Comm 104.12 (5) to refer to the Bureau of Minority Business Development in the Department of Commerce conflicts with the definition of that term set forth in s. Comm 104.12 (4). Why not use the term “bureau-verified”?

b. The term “certification” does not appear to be used consistently in the manner that it is defined in s. Comm 104.12 (16). Specifically, it is used in several provisions in the rule to refer to a status granted to a business, rather than a “process,” as it is defined. In addition, it appears that it is unnecessary to provide a definition for this term.

c. It appears that defining the term “operational control,” in s. Comm 104.12 (37), is unnecessary and confusing, since the text of the rule uses the term “control,” not “operational control.” For example, see ss. Comm 104.12 (60), 104.28 (1), and 104.29 (1) and (2). Also, the second sentence of the definition should be placed in a note to the rule.

d. In s. Comm 104.12 (38), who makes the “determination” to which the definition refers? In addition, the definition provided for “ownership” appears to be meaningless and unworkable when applied to the use of the term “ownership” in the rule. It appears that providing a definition of the term is confusing and unnecessary.

e. It appears to be inappropriate to define “renewal,” in s. Comm 104.12 (45), as the review of a WBE to determine whether certification will continue. “Renewal” is a possible outcome of a review, it is not the review itself.

f. In s. Comm 104.20, the use of the term “shall” in the eligibility standards is improper. In drafting, “shall” is used to denote a mandatory or absolute duty or directive. The eligibility standards are not directives, rather they describe attributes that, if possessed by a business, make it eligible for certification as a WBE. For example, s. Comm 104.20 (2) should be written in the following format:

(2) If the business is a sole proprietorship, a woman owns 100% of the company’s assets.

This format should also be used in ss. Comm 104.24 and 104.32 (1).

g. How does the “evidence” required under s. Comm 104.22 (2) (a) and (b) establish a business’s ownership and control by an applicant, as is stated in the s. Comm 104.22 (1)? The items listed as evidence do not appear to have any bearing on whether the applicant owns or controls a business, but rather relate to an applicant’s citizenship and tribal status. It appears that the title of s. Comm 104.22 does not accurately identify the material contained in the section. In addition, s. Comm 104.22 (2) (intro.) states that this “evidence” must be provided “when available.” What if the evidence is not available?

h. In s. Comm 104.22 (4) (intro.), the phrase “all of” should precede the phrase “the following.” Also, the paragraphs following the introduction all should begin with a capital letter.

i. The format of the material in s. Comm 104.24 (4) (b) does not match the format of the introductory material in sub. (4) (intro.). Section Comm 104.24 (4) (b) should be rewritten as follows:

(b) Assets that are held in a revocable living trust if a woman is the sole grantor and a woman is the beneficiary and trustee.

In addition, in s. Comm 104.24 (4) (intro.), “are” should be changed to “may be.”

j. The entire rule should be reviewed and revised as needed to ensure consistent use of terminology. Only one term should be used in the rule to refer to a certain concept or entity. For example, it appears that throughout the rule, the terms “women principal,” “woman,” “owner,” and “woman owner” are all used to refer to the same person, and the terms “applicant,” “woman-principal business,” “business,” and “individual” are all used to refer to an applicant.

k. In s. Comm 104.25 (3) (a), the phrase “In those instances when an ownership interest arises” is vague and should be replaced with a more specific description of the circumstances when a marital property waiver form or affidavit may be requested. Also, in sub. (3) (b) 1., it appears that the phrase “community property” should be replaced by the phrase “marital property.”

l. In s. Comm 104.28 (2) (intro.), the term “control” rather than “independence” should be used unless the rule is expanded to explain precisely the significance of “independence” or how “independence” differs from “control.”

m. What is meant by the phrase “or similarly obtained from” in s. Comm 104.28 (2) (g)?

- n. What “male-owned business” is referred to in s. Comm 104.28 (2) (h)?
- o. The items listed in s. Comm 104.28 (2) (a) to (j) as “test criteria” are not all written in a way that conveys how they are to be considered as “test criteria.” In addition, s. Comm 104.28 (2) (i) is written as a requirement, not a criterion, and s. Comm 104.28 (2) (j) is a statement, not a criterion.
- p. The introductory language in s. Comm 104.29 (2) (intro.) does not correspond logically or grammatically with the material contained in the subsequent subunits. Specifically, the introductory material states that the department may consider “the following or other areas of routine business activity?”. Therefore, the material in the subsequent subunits should be a listing of “areas of routine business activity” that may be considered by the department.
- q. Section Comm 104.29 should be rewritten to clearly specify what an applicant must document. As written, that section uses a variety of terms and therefore does not set a clear standard for what an applicant must demonstrate. In addition, some of the terms used appear to apply to the “active management” requirement of ss. Comm 104.32 and 104.33 rather than the “control” requirement of s. Comm 104.29. Specifically, although the title to s. Comm 104.29 refers to documentation of “control,” s. Comm 104.29 (1) (b) 1. requires documentation of “experience,” s. Comm 104.29 (2) (intro.) refers to “the demonstrated ability to make independent and unilateral business decisions necessary to guide the future and destiny of the business,” s. Comm 104.29 (2) (intro.) refers to “managerial control,” and s. Comm 104.29 (2) (b) refers to the “owner’s power to manage the company.”
- r. Section Comm 104.29 (1) (intro.) states that “The department shall require evidence....” That provision should be rewritten to require an applicant to provide the evidence, rather than requiring the department to require it.
- s. In s. Comm 104.29 (2) (b), the phrase “in its sole administrative discretion” is unnecessary and should be deleted.
- t. Section Comm 104.32 (1) (b) refers to “operational-control assessments.” Why does that provision refer to operational control, when the title of the section within which the provision is located is “Determination of active management”? The previous section, s. Comm 104.29, relates to “control.” In addition, the statement that “assessments will rest upon the peculiarities of the industry...” is vague and should be rewritten.
- u. In s. Comm 104.32 (1) (b) 2. b., the phrase “shall have the responsibility for the supervision of” should be replaced by the word “shall supervise.”
- v. Section Comm. 104.32 (2) refers to the woman “operational management” requirement. The rule does not establish such a requirement. The rule establishes “operational control” and “active management” requirements. One of those terms should be used in place of “operational management.”

w. Who is the “manager” referred to in s. Comm 104.32 (2)? Is it the same person who is referred to a “non-woman principal” in the same sentence? If so, consistent terminology should be used. If not, the rule should specify who the “manager” is.

x. The subunits in s. Comm 104.40 should be rewritten to constitute “circumstances,” since they are identified as such in the introductory material. For example, sub. (1) should read as follows: “The business was formed within one year prior to an application for certification.”

y. The appendix to the rule should be divided into several appendices which should be numbered so they can be accurately identified and referred to in the notes to the rule. In addition, there seem to be several discrepancies between the rule and the material in the appendix. The note following s. Comm 104.50 (1) (b) states that the appendix contains an affidavit for self-certification of a business as a WBE. However, the appendix appears to contain only an affidavit for agency-verified certification and recertification. Section Comm 104.50 (2) (c) states that a fee of \$50 must be submitted with an application for agency-verified certification, with “an additional cost of \$100 for a two-year renewal fee.” It is unclear whether the “renewal fee” must be submitted with the original application for certification. The application for certification in the appendix requires submission of a “processing fee” of \$150, but the text of the rule does not mention a “processing” fee. The rule and the appendix should be rewritten to be consistent regarding the types and amount of fees that must be submitted with an initial application for agency-verified certification.

z. The notes following s. Comm 104.50 (1) (b) and (2) (b) are confusing. It appears that they require a potential applicant for certification to check the department website to determine whether the affidavit set forth in the appendix has been superseded by a different version of the affidavit. If that is the case, it should be clearly stated in the note.

aa. In s. Comm 104.50 (2) (a) the phrase “meets the standards for certification...” should be replaced with “Any business that seeks certification.”

bb. Section Comm 104.50 (2) (f) states that an extension “may” be given for good cause. Should “may” be replaced with “shall”? If not, what are the conditions under which the department will not grant an extension when good cause has been shown by the applicant?

cc. The rule should clarify whether an on-site visit will be conducted for every applicant for agency-verified certification. Section Comm 104.50 (2) (h) states that an on-site visit “may” be conducted. However, in the “General Instructions” for the certification application in the appendix, it is stated that a site visit “is conducted.”

dd. In s. Comm 104.50 (2) (i), how is it determined whether an application will be submitted to the WBE certification committee for review? If the application is sent to the committee for review, must the committee provide a recommendation to the department? Should the rule set forth time limits for the committee review and the department’s issuance of a notice of its decision?

ee. In s. Comm 104.50 (2) (j), “will” should be changed to “shall.”

ff. Use of the passive voice should be avoided. When the passive voice is used, it is unclear who has a duty to take an action. For example, in s. Comm 104.50 (2) (k) states that "...a final notice of denial shall be sent to the applicant..." The rule should specify who must send the notice. The entire rule should be reviewed and whenever feasible, directives written in the passive voice should be changed to the active voice.

gg. Section Comm 104.50 (3) states that the department "may" deny certification for any of the listed reasons. Should "may" be changed to shall? If not, what is the rationale for authorizing the department to grant certification to an applicant who fails to meet the eligibility standards for certification? In addition, the rule should affirmatively state that if the department finds that an applicant meets all the requirements for certification, the department shall certify the applicant.

hh. Section Comm 140.50 (4) (a) and (b) state that a certified WBE "shall remain on" the department's database for three years. However, s. Comm 104.52 requires review of a WBE's certification at the end of each of the first two years of a three-year certification period. It appears that s. Comm 104.50 (4) (a) and (b) should be revised to indicate that a WBE will be removed from the database if it fails to be renewed pursuant to s. Comm 104.52. Finally, ss. Comm 104.12 (45) state or imply that renewal is for a one year period. These provisions should be compared to s. Comm 104.50 (2) (c), which refers to a two-year renewal fee.

ii. Section Comm 104.52 states that the department "may" review the accumulated information for a certified WBE. What is the "accumulated information" referred to in the rule? Should "may" be changed to "shall"? If not, how will the department determine whether it will conduct a review of a certified WBE? If the department does not "review the accumulated information" of a WBE, on what basis will the department decide whether to renew or not renew a WBE's certification? The appendix implies that \$100 of the \$150 certification fee includes the cost of two annual reviews. Will the money be refunded to a WBE that is not reviewed? Will certification automatically renew for a WBE that is not reviewed annually? What is the process for appeal of the department's decision to not renew a WBE's certification? What are the standards for the review?

jj. Should s. Comm 104.55 (1) (b) allow for extension of the date by which a WBE must submit the recertification affidavit in order to avoid losing certification, as s. Comm 104.55 (2) (b) does for recertification of agency-verified WBEs?

kk. Section Comm 104.55 (1) (b) should require a WBE to provide the information and fee listed and should state the outcome of providing the information and fee.

ll. In s. Comm 104.55 (2) (b), how will it be determined whether a request for a time extension will be reviewed by the certification committee? If the request is so reviewed, what is the purpose of the review?

mm. Section Comm 104.60 (1) states that the department "may" decertify a business that is found to not qualify as a certified WBE. Should "may" be changed to "shall"? If not, what is the rationale for authorizing the department to allow a business that does not meet the

eligibility standards for certification to remain certified? Section Comm 104.65 (2) (a) states that the department “may” notify a business that it is subject to decertification investigation. Under what rationale does the department propose to have authority to decide in each case whether to provide this notice? Why does the department propose to provide notice in some cases but not in others?

nn. In s. Comm 104.75 (3), the phrase “shall have the right to” should be replaced by the word “may.” Also, in this section and in s. Comm 104.70, the cross-reference to ch. 227, Stats., should be expanded to refer to the appropriate section numbers.

oo. Section Comm 104.65 (3) (a) should specify that the department must provide a copy of the report prepared under s. Comm 104.65 (2) (d) to the WBE along with the notice of intent to decertify.

pp. Section Comm 104.75 (4) should specify a more precise time by which the department must issue a decision than “[a]t the conclusion of the hearing,” and sub. (6) should specify the time limit for the notification under that subsection.

qq. Sections Comm 104.90 and 104.92 use four different terms, “public agency,” “public sector agency,” “applicable public-sector agency,” and “certification agency” to refer to what has already been defined in s. Comm 104.12 (4) as simply “agency.” The defined term should be used in place of the undefined terms.

rr. Section Comm 104.90 (1) should require the *standards* for certification, not only the process, to be substantially similar to those in ch. Comm 104 in order to be granted reciprocity. The rule should set forth a procedure to be followed by a business that is requesting reciprocal certification and should specify what information a business must submit to the department in this situation.

ss. Section Comm 104.90 (2) (a) is imprecise. It appears that it should be rewritten as follows: “The documentation that the applicant was required to provide to receive certification by the agency.”

tt. Section Comm 104.92 authorizes the department to certify a non-Wisconsin business that is certified by “any applicable public-sector agency in their own state.” Section Comm 104.94 sets forth the procedure for certification of non-Wisconsin businesses, but it applies only to applicants who are certified by another “state.” It appears that s. Comm 104.94 should be revised to clarify that it applies to all non-Wisconsin businesses certified by any agency in another state.

uu. In s. Comm 109.94 (1) (intro.), should the word “may” be replaced by the word “shall”? Also, in sub. (3), “shall have the right to” should be replaced by the word “may” and the cross-reference to ch. 227, Stats., should be expanded to refer to the appropriate section or sections of the statutes.

4. Adequacy of References to Related Statutes, Rules and Forms

In s. Comm 104.28 (1) (intro.), a cross-reference to or a description of “the control requirements” referred to should be provided.

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. In s. Comm 104.12 (3), the phrase “affiliate is” should be replaced by the phrase “affiliate includes.”

b. In s. Comm 104.12 (6), the period following the word “application” should be replaced by a comma.

c. In s. Comm 104.12 (35) and (63), how is a business categorized if it has its principal place of business in Wisconsin, but it is incorporated in another state?

d. In s. Comm 104.12 (49), the phrase “they meet” should be replaced by the phrase “it meets.”

e. In s. Comm 104.12 (60), the list of business entities should be made consistent with the list provided in s. Comm 104.12 (14).

f. In s. Comm 104.32 (1) (b) 2. q., “be able to” is superfluous and should be deleted.

g. In s. Comm 104.32 (1) (b) 3., “enough” is superfluous and should be deleted.

h. In s. Comm 104.32 (1) (a), should “ability” be changed to “extent”?

i. What is the difference between the terms “pertinent” and “relevant” used in s. Comm 104.50 (2) (h) 2.? Is it necessary that both terms be used?

j. In s. Comm 104.55 (1) (c), the word “their” should be replaced by the word “its.”