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ORDER OF THE DEPARTMENT OF COMMERCE

EMERGENCY RULE RELATING TO
DISABLED VETERAN-OWNED BUSINESS CERTIFICATION PROGRAM

Exemption From Finding of Emergency

The Legislature, by SECTION 101 (1) in 2009 Wisconsin Act 299, exempts the Department from providing evidence that this emergency rule is necessary for the preservation of public peace, health, safety or welfare; and exempts the Department from providing a finding of emergency for the adoption of this rule.

Pursuant to section 227.24 of the Statutes, this rule is adopted as an emergency rule to take effect upon publication in the official state newspaper and filing with the Legislative Reference Bureau.

The Wisconsin Department of Commerce adopts an order to create chapter Comm 103 relating to certification of disabled-veteran-owned businesses, and affecting small businesses.

Rule Summary

1. Statutes Interpreted.

Section 560.0335, as created in 2009 Wisconsin Act 299.

2. Statutory Authority.

Sections 227.11 (2) (a) and 560.0335 (4).

3. Explanation of Agency Authority.

Section 227.11 (2) (a) of the Statutes authorizes the Department to promulgate rules interpreting the provisions of any Statute administered by the Department. Section 560.0335 (4) directs the Department to promulgate rules for certifying disabled-veteran-owned businesses.

4. Related Statute or Rule.

Chapters Comm 104 and 105 contain the requirements for the Department's Woman-Owned Business Certification program and Minority Business Certification program, respectively. Although the statutory directives for those two programs differ somewhat from the statutory directives for certifying disabled-veteran-owned businesses, many of the best practices that the Department has developed in those two programs are extrapolative to certifying disabled-veteran-owned businesses.

5. Plain Language Analysis.

The rules in this order primarily specify (1) which businesses are eligible for becoming certified in this program; (2) how to apply for certification and recertification; (3) how the certifications will be issued, renewed, and rescinded; and (4) how to appeal a decision by the Department. Parameters are also included for recognizing equivalent certifications that are issued by other public agencies.

6. Summary of, and Comparison With, Existing or Proposed Federal Regulations.

Title 13 of the Code of Federal Regulations, Part 125, Subparts A thru E, address various requirements under the federal Small Business Administration's Service-Disabled Veteran-Owned (SDVO) Small Business Concern (SBC) program. The purpose of the SDVO SBC program is to assist these businesses in obtaining a fair share of federal-government contracts, subcontracts, and property sales. An SDVO SBC is one in which at least 51 percent of the business is owned, controlled, and actively managed by service-disabled veterans – or in the case of a veteran with a permanent and severe disability, a spouse, surviving spouse, or permanent caregiver of the veteran.

Title 38 of the Code of Federal Regulations, Part 74, addresses various requirements of the U.S. Department of Veterans Affairs Center for Veterans Enterprise (CVE) VetBiz Vendor Information Pages (VIP) database. Eligibility for the CVE VIP is based on the type of ownership and control, and the absence of (1) debarment or suspension concerns, (2) false application statements, and (3) significant unresolved financial obligations to the federal government.

7. Comparison With Rules in Adjacent States.

An Internet-based search of State-level rules in Minnesota, Iowa, Illinois, and Michigan revealed that Minnesota, Iowa, and Illinois have rules for programs targeting state-level procurements to businesses which are small and owned by minorities, women, or people with disabilities. These programs include state-level certification of eligible businesses, and many of the requirements for those certifications are similar to the requirements in this order. However, the rules in this order differ by applying more narrowly to only veterans with disabilities, and by not being limited to just small businesses.

8. Summary of Factual Data and Analytical Methodologies.

The data and methodology for developing the rules in this order were derived from and consisted of incorporating the criteria in section 560.0335 of the Statutes; incorporating many of the best practices the Department has developed in its current, similar programs for certifying minority-owned businesses and woman-owned businesses; and reviewing Internet-based sources of related federal, state, and private-sector information.

9. Analysis and Supporting Documents Used to Determine Effect on Small Business or in Preparation of an Economic Impact Report.

The primary document that was used to determine the effect of the rules on small business was 2009 Wisconsin Act 299. This Act requires the Department to promulgate rules for certifying disabled-veteran-owned businesses. However, this Act does not require these businesses to become certified, and the rules in this order do not require this certification.

10. Effect on Small Business.

The rules in this order are not expected to impose a negative effect on small business, because the rules only address applying for, receiving, and maintaining voluntary credentials.

11. Agency Contact Person.

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SECTION 1. Chapter Comm 103 is created to read:

Chapter Comm 103

DISABLED VETERAN-OWNED BUSINESS CERTIFICATION PROGRAM

Comm 103.10 Purpose. Pursuant to s. 560.0335 (4), Stats., this chapter sets forth the criteria and procedures for certification, certification renewal, recertification, and decertification of a disabled veteran-owned business, financial adviser, or investment firm.

Comm 103.12 Definitions. In this chapter, unless the context requires otherwise:

(1) “Administrator” means the administrator of the division of business development.

(2) “Affiliate” means a company effectively controlled by another, such as a branch, division, or subsidiary. As prescribed in 15 USC 80a-2, an affiliate includes a company in which there is ownership, direct or indirect, by another company, of 5 percent or more of the voting stock.

(3) “Appeal” means a written request by an applicant to reconsider a determination of a denial of application, certification renewal, recertification or decertification.

(4) “Applicant” means any business, financial adviser, or investment firm that applies to the department for certification as a disabled veteran-owned business, financial adviser, or investment firm under s. 560.0335 (3), Stats., and this chapter, through submission of application forms.

(5) “Application” means the forms, whether paper or electronic, all documentation requested by the department, and a report of an on-site visit, if one was conducted by the department, upon which the department will base its decision to grant or deny certification, certification renewal or recertification.

(6) “Assets” means the real and personal property of a business.

(7) “Beneficial ownership” means ownership of the rights in a business that are the normal incidents of owning a business.

(8) “Business” has the meaning given in s. 560.0335 (1) (a), Stats.

Note: Section 560.0335 (1) (a) of the Statutes reads as follows: “ ‘Business’ means a sole proprietorship, partnership, limited liability company, joint venture, or corporation.”

(9) “Capital contribution” means the cash or property contributed to a business, and may include a financial investment in the business or the contribution of property, space, patents and copyrights.

(10) “Control” means the power to direct the day-to-day and long-term operation and management of a business.

Note: Departmental assessments of operational and managerial control will rest upon the peculiarities of the industry of which the business is a part.

(11) “Conversion rights” means any agreement, option, scheme or documents that will create any rights which, if exercised, would result in less than 51 percent disabled-veteran ownership of the business, or less than dominant control by a disabled-veteran owner or their duly authorized representative, or both.

(12) “Corporation” means a corporation organized for profit, with capital stock.

(13) “Decertification” means the process by which the department determines that a certified DVB no longer meets the eligibility criteria, and then rescinds the certification status.

(14) “Denial” means the department’s reaction to an applicant that does not meet the certification eligibility requirements.

(15) “Department” means the department of commerce.

(16) “Disabled veteran” has the meaning given in s. 560.0335 (1) (b), Stats.

Note: Section 560.0335 (1) (b) of the Statutes reads as follows: “ ‘Disabled veteran’ means a person who is verified by the department of veterans affairs as being all of the following at the time the person applies for certification under sub. (3):

1. A veteran, as defined in s. 45.01 (12).
2. A resident of this state.
3. A person who is in receipt of an award from the U.S. department of veterans affairs of a service-connected disability rating under 38 USC 1114 or 1134 of at least 30 percent.”

(17) “Disabled veteran-owned entity” means a disabled veteran-owned business, financial adviser, or investment firm.

(18) “Disabled veteran-owned business, financial adviser, or investment firm or DVB” means a sole proprietorship, general partnership, corporation, limited liability company or joint venture, which is organized for a profit basis and which fulfills all of the following requirements:

(a) 1. If privately owned, it is at least 51 percent owned, controlled, and actively managed by one or more disabled veterans who are either U.S. citizens or lawfully admitted to the United States for permanent residence, as defined under 8 USC 1101 (a)(20), except as provided in subd. 2.

2. One or more duly authorized representatives of one or more disabled veterans may control the management and daily business operations of the business, financial adviser, or investment firm.

(b) 1. If publicly owned, at least 51 percent of the stock is owned and controlled by one or more disabled veterans who are either U.S. citizens or lawfully admitted to the United States for permanent residence, as defined under 8 USC 1101 (a)(20); and the management and daily operations are controlled by one or more of those disabled veterans, except as provided in subd. 2.

2. One or more duly authorized representatives of one or more disabled veterans may control the management and daily business operations of the business, financial adviser, or investment firm.

(c) It is currently performing a useful business function.

(d) It has its principal place of business in this state.

Note: Section 8 USC 1101 (a)(20) reads as follows “The term ‘lawfully admitted for permanent residence’ means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.”

(19) “Distributor” means one that markets or sells merchandise, such as a wholesaler.

(20) “Duly authorized representative” has the meaning given in s. 45.04 (1) (a), Stats.

Note: Section 45.04 (1) (a) of the Statutes reads as follows: “ ‘Duly authorized representative’ means any person authorized in writing by the veteran to act for the veteran, the veteran’s guardian if the veteran is adjudicated incompetent, or a legal representative if the veteran is deceased. Where for proper reason no representative has been or will be appointed, the veteran’s spouse, an adult child, or, if the veteran is unmarried, either parent of the veteran shall be recognized as the duly authorized representative.”

(21) “Expiration” means the specified end of the DVB certification, at the close of the three-year certification period.

(22) “Financial adviser” has the meaning given in s. 560.0335 (1) (d), Stats.

Note: Section 560.0335 (1) (d) of the Statutes reads as follows: “ ‘Financial adviser’ means a business that serves as an adviser with regard to the sale of evidences of indebtedness or other obligations.

(23) “General partner” means a partner who participates fully in the profits, losses and management of a partnership and who is personally liable for its debts.

(24) “Industry standard” means the usual and customary practice in the delivery of products or services within a particular business sector, such as procurement, billing payment and performance.

(25) “Interest” means a right, claim, financial or legal share in a business.

(26) “Investment firm” has the meaning given in s. 560.0335 (1) (e), Stats.

Note: Section 560.0335 (1) (e) of the Statutes reads as follows: “ ‘Investment firm’ means a business that serves as a manager, co-manager, or in any other underwriting capacity with regard to the sale of evidences of indebtedness or other obligations or as a broker-dealer as defined in s. 551.102 (4).”

(27) “Issued shares” means the shares of a corporation which its articles of incorporation have authorized for issuance and which have actually been sold to subscribers. They may include treasury shares.

(28) “Joint venture agreement” means a written agreement signed by each joint venturer specifying the terms and conditions of the joint venture.

(29) “Limited liability company” means a company similar in structure to a partnership, but its members are not personally liable for the entity’s debts and liabilities. Its members may participate in the management of the company without risking personal liability.

(30) “Marital-property agreement” means an agreement that complies with s. 766.58, Stats.

(31) “Marital property laws” means ch. 766, Stats.

(32) “Marital-property waiver” means a form provided by the department to document separate control and management of a business under marital property laws.

(33) “Nonprofit organization” means an organization as defined in s. 108.02 (19), Stats.

(34) “On-site visit” means a visit to an applicant’s physical place of business for the verification of information submitted in the application and accompanying documentation.

(35) “Parent company” means a company that has at least a majority direct-voting control over another company.

(36) “Partnership” means a contract entered into by two or more persons in which each agrees to furnish a part of the capital or labor for a business, and by which each partner shares in some fixed proportion in profits and losses.

(37) “Partnership agreement” means a written agreement signed by each partner specifying the terms and conditions of the partnership.

(38) “Partnership interest” means a partner’s share of the profits and losses of the partnership and the right to receive distributions of partnership assets.

(39) “Principal place of business” means the physical location at which or from which a business performs, is maintained, or operates the majority of its business.

(40) “Recertification” means the process by which DVB status is reconfirmed, prior to expiration at the close of the three-year certification period.

(41) “Renewal” means a one-year continuation of a DVB certification, at the end of each of the first two years of the three-year certification period, as subject to a review by the department.

(42) “Retailer” means the seller of goods or commodities directly to consumers at a retail price.

(43) “Secretary” means the secretary of the department.

(44) “Securities” means stocks, bonds, notes, convertible debentures, warrants or other documents that represent a share in a business, or a debt owed by a business.

(45) “Shares” means the units into which the proprietary interests in a corporation are divided.

(46) “Sole proprietorship” means a business in which one person owns all the assets of the business and is solely liable for all the debts of the business.

(47) “Stock-affirmation form” means a form provided by the department and affirmed by the applicant stating that the stock ownership of the corporation is as presented in the application, and in which the applicant agrees to notify the department in the event that additional stock is sold.

(48) “Stock certificate” means a certificate issued by a corporation certifying that the named person is the owner of a designated number of shares of stock.

(49) “Subsidiary” means a corporation in which one other corporation owns a majority of the voting shares.

(50) “Treasury shares” means the shares which have been issued but later re-acquired by a corporation and which have not been canceled or restored to the status of authorized but unissued shares.

(51) “Unissued shares” means shares which the corporation is authorized to issue but which have not yet been distributed to shareholders or subscribers.

(52) “Useful business function” means the provision of materials, supplies, equipment or services to customers, including the state. Acting as a conduit to transfer funds to a business that is not certified under this chapter does not constitute a useful business function, unless doing so is a normal industry practice.

(53) “Voting shares” means those shares that give the holder the right to vote for directors and other matters – in contrast to non-voting shares, which simply entitle the holder to dividends, if any.

(54) “Wholesaler” means a middle person or distributor who sells mainly to retailers, other merchants, and industrial commercial institutional users, as distinguished from consumers.

Comm 103.20 Certification criteria. In order to become certified as a DVB – a business, financial adviser, or investment firm shall meet all of the following eligibility standards:

(1) The business, financial adviser, or investment firm satisfies all of the criteria in the DVB definition in s. Comm 103.12 (18).

(2) If the business, financial adviser, or investment firm is a sole proprietorship, a disabled veteran owns 100 percent of the company assets.

(3) (a) If the business, financial adviser, or investment firm is a partnership, two or more persons agree to carry on a business or venture together, upon the terms of mutual participation in the profits and losses of the business. The partnership is a contract of mutual agency, each partner acting as a principal in their own behalf and as agent of their co-

partners, and general rules of law applicable to agents shall apply with equal force in determining rights and liabilities of partners.

(b) If the business, financial adviser, or investment firm is a general partnership, one or more disabled veterans own at least 51 percent of the partnership interests.

(c) If the business, financial adviser, or investment firm is a limited partnership, one or more disabled veteran general partners own at least 51 percent of the general partnership interest and exert at least 51 percent of the control among general partners. The disabled veteran general partners receive at least 51 percent of the profits and benefits, including tax credits, deductions and postponements. In addition, the disabled veteran limited partners shall own at least 51 percent of the limited partnership interests and receive at least 51 percent of the profits and benefits, including tax credits, deductions and postponements.

(4) If the business, financial adviser, or investment firm is a limited liability company, one or more disabled veterans own at least 51 percent of membership interests in the LLC organization, and exert at least 51 percent of the management and control among the members. The disabled veteran owners also participate in all risks and profits of the organization at a rate commensurate with their membership interests.

(5) If the business, financial adviser, or investment firm has a corporate form of organization, one or more disabled veterans own at least 51 percent of all voting stock of the corporation. Any voting agreements among the shareholders do not dilute the beneficial ownership, the rights, or the influence of the disabled veteran owners of the stock or classes of stock of the corporation. The disabled veteran owners possess the right to all customary incidents of ownership, such as the ability to transfer stock, title possession, and enter binding agreements.

Note: Nonprofit corporations do not meet the for-profit condition in section Comm 103.12 (18) (intro.) and therefore are not eligible for certification.

(6) If the business, financial adviser, or investment firm is a joint venture, one or more disabled veteran-owned entities hold at least 51 percent of the beneficial ownership interest in the joint venture, and exert at least 51 percent of the control and management of the joint venture. The disabled veteran-owned entity partners of the joint venture are certified or are eligible for certification as a DVB.

(7) If the business, financial adviser, or investment firm is a subsidiary or affiliate, one or more disabled veterans own at least 51 percent of the parent company .

Comm 103.22 Documentation of being a disabled veteran. An applicant shall submit the verification specified in s. 560.0335 (1) (b), Stats.

Note: Section 560.0335 (1) (b) of the Statutes, as reprinted under section Comm 103.12 (16), defines “disabled veteran” and addresses verification of that status by the department of veterans affairs.

Comm 103.24 Determination of ownership. (1) An applicant shall meet all of the following eligibility standards:

(a) 1. The ownership by one or more disabled veterans is real, substantial and continuing, going beyond the pro-forma ownership of the business as reflected in its ownership documents.

2. Each disabled veteran owner shares in all risk and profits commensurate with their ownership interest as demonstrated by a detailed examination of the substance of their business arrangements with others.

3. Each disabled veteran owner receives the customary incidents of ownership, such as salary, rights to dividends, ownership of assets and ownership of intangible assets such as copyrights and patents.

(b) The contributions of capital and expertise by the disabled veteran owner or owners to acquire their interest in the business is real and substantial, and in proportion to the interest acquired.

(2) Contributions of personal or professional services alone are not real and substantial for the purposes of this section, except these contributions shall receive consideration when given in conjunction with other tangible forms of investment. Other insufficient contributions include promises to contribute capital or expertise in the future, a note payable to the business or to its owners who are not disabled veterans, or the mere participation as an employee.

(3) Disabled veterans shall hold at least 51 percent of the securities that constitute ownership of a business.

(4) Securities or assets of a business that are held in trust are not considered as held by a disabled veteran in determining the ownership of a business, except under the following circumstances:

(a) The beneficial owner of the securities or assets held in trust is a disabled veteran, and the trustee is a disabled veteran.

(b) A disabled veteran is the sole grantor of assets held in a revocable living trust, and a disabled veteran is the beneficiary and trustee.

(5) The department may not consider securities that are held by any guardian for a minor, in determining ownership and control.

(6) An ownership interest arising in a spouse who is not a disabled veteran, solely because of the operation of marital property laws, may not disqualify an applicant from certification if both spouses certify that the disabled veteran or their duly authorized representative performs the majority of the control and management of the business.

Comm 103.25 Documentation of ownership. (1) (a) An applicant shall submit documentation showing ownership of at least 51 percent of the business by a disabled veteran. This documentation may include, but is not limited to, the three preceding years of business taxes, a current business financial statement, business licenses, buy-out agreements and financial agreements.

(b) For a sole proprietorship, additional documentation may include, but is not limited to, canceled checks used to purchase ownership.

(c) For a partnership, additional documentation may include, but is not limited to, partnership agreements, purchase agreements, and salary and profit-sharing records.

(d) For a corporation, additional documentation may include, but is not limited to, articles of incorporation, corporate by-laws, a corporate-borrowing resolution, stock certificates, stock-affirmation forms, and salary and profit-sharing records.

(e) For a joint venture, additional documentation may include, but is not limited to, a joint venture agreement that is written and signed by all of the joint venturers. Each joint venture agreement shall specify all of the following:

1. The capital contribution made by each joint venturer, the control each will exercise, and the distribution of profit and loss. The agreement shall allocate the control and the distribution of profit and loss in proportion to the contributions of the joint venturers.

2. The useful business function the joint venture will perform and the part of the work each joint venturer will do.

(2) The department may require documentation showing how and when the disabled veteran's interest in the business was acquired.

(3) (a) The department shall apply the following rules in situations in which marital assets form a basis for ownership of a business:

1. When marital assets other than the assets of the business in question are held jointly or as marital property by both spouses, and are used to acquire the ownership interest asserted by the disabled veteran, the department shall conclude that the disabled veteran acquired their ownership interest in the business with their own individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the business is domiciled. The department may not count a greater portion of joint or marital property assets toward ownership than state law would recognize as belonging to the qualifying member of the business.

2. The application for DVB certification shall include a copy of the document that is used for legally transferring and renouncing the rights as required in subd. 1.

(b) In instances where a disabled veteran and a person who is not a disabled veteran are married and the marital ownership is not clearly established, the department may request a marital-property waiver form in which both spouses certify that only the disabled veteran spouse or their duly authorized representative controls and manages the business, or an affidavit stating that the spouses have signed a marital-property agreement in which the spouse who is not a disabled veteran relinquishes control and management of the business.

Comm 103.28 Determination of control. (1) Factors that the department shall consider in determining whether one or more disabled veteran owners control a business include the following:

(a) Authority and restrictions as indicated in the articles of incorporation, by-laws, minutes of corporate meetings, bank signature cards, partnership and joint venture agreements and other business agreements and documents.

(b) Membership of one or more disabled veteran owners on the board of directors.

(c) Holdings by disabled veteran owners of the voting interests in the business.

(d) The managerial experience, knowledge and expertise of the disabled veteran owners in such areas as finance, budgeting, personnel, production, marketing and research.

(e) Whether the disabled veteran owners have the authority to make policy decisions in such areas as finance, budgeting, personnel, production, marketing and research.

(f) Whether the daily business operations are controlled by one or more duly authorized representatives of one or more disabled veterans.

(g) Whether the disabled veteran owners or their duly authorized representatives are substantially unconnected with the principal place of business, such as by being incarcerated.

(2) An applicant's assertion of being independent from a business that is owned by other than a disabled veteran may not rest solely on recognition of the disabled veteran owners by governmental taxing authorities. Other test criteria include the following:

(a) An applicant's relationship with any business that is not owned by a disabled veteran, which involves any long-term contract or lease agreements.

(b) The existence of working agreements with any business that is not owned by a disabled veteran.

(c) An applicant's status as a party to any contract or lease agreement on terms at variance with industry standards or prudent business practices.

(d) The existence of restrictive financing agreements with any business that is not owned by a disabled veteran or any financial institution which impose undue limitations on the applicant.

(e) Interlocking stock ownership of the applicant and any business that is not owned by a disabled veteran in the same industry.

(f) Common directors or officers between the applicant and any business that is not owned by a disabled veteran.

(g) An applicant's use of employees, equipment, expertise, facilities, or other resources from a business that is not owned by a disabled veteran.

(h) The receipt of financial benefits, such as profits and wages, that are not commensurate with the duties performed, by a business that is not owned by a disabled veteran.

(i) An applicant that cannot operate without licenses, permits or insurance held by another business.

(j) An applicant that does not possess all legal requirements necessary to its operation.

Comm 103.29 Documentation of control. (1) An applicant shall submit evidence that one or more disabled veteran owners or their duly authorized representatives have control over the business. Such evidence shall include, but is not limited to, the following:

(a) Signed bids and contracts.

(b) Signed debt instruments.

(c) Signed hiring decisions.

(d) Bank signature cards and bank resolution authorizations, for savings, checking and other financial accounts.

(e) Written proof that the organizational and governing documents of an applicant, such as limited liability company operating agreements, partnership agreements, or articles of incorporation and by-laws, do not contain any provision which restricts the disabled veteran owner or their duly authorized representative from exercising control of the business.

(f) 1. Documentation, such as résumés, showing that the disabled veteran owners or their duly authorized representatives have the managerial experience, knowledge and expertise – in such areas as finance, budgeting, personnel, production, marketing and research – needed for exercising day-to-day control over the business.

2. The department may waive the managerial experience required in subd. 1., when a disabled veteran is starting a disabled veteran-owned business, financial adviser, or investment firm.

(g) Documentation establishing the representation authorization prescribed in s. 45.04 (1) (a), Stats., if another person is acting for the disabled veteran.

Note: Section 45.04 (1) (a) of the Statutes defines “duly authorized representative” and is reprinted under section Comm 103.12 (20).

(2) The managerial experience, knowledge and expertise of the disabled veteran owners or their duly authorized representatives substantially demonstrates their ability to make independent and unilateral business decisions necessary to guide the future and destiny of the business. The applicant may document this ability and control in a number of ways. For a disabled veteran owner or their duly authorized representative to demonstrate the extent of this control, the department may consider the following or other aspects of a business:

(a) Authority to sign payroll checks and letters of credit.

(b) Signature responsibility for insurance or bonds.

(c) Authority to negotiate and execute contracts and financial services agreements.

(d) Ability to obtain bank authorization resolutions.

(3) Agreements for support services are permitted as long as the power of the disabled veteran owner or their duly authorized representative to control the company is not restricted or impaired, as determined by the department.

Comm 103.32 Determination of active management. Factors that the department shall consider in determining whether one or more disabled veteran owners or their duly authorized representatives actively manage a business include the following:

(1) **DIRECT OPERATIONAL MANAGEMENT.** (a) The operational management of the disabled veteran owner or their duly authorized representative is the demonstrated extent to which the disabled veteran owner or their duly authorized representative actually operates the day-to-day business.

(b) Departmental assessments of operational management shall rest upon the peculiarities of the industry of which the business is a part. In order to clarify the level of operational management of the disabled veteran owner or their duly authorized representative, the department may consider each of the following:

1. ‘Experience.’ The disabled veteran owner or their duly authorized representative has education, demonstrable working knowledge or experience in the area of specialty or industry claimed in the application.

2. ‘Responsibility for decision-making.’ a. The disabled veteran owner or their duly authorized representative makes basic decisions pertaining to the daily operation of the business, such as the purchase of goods, equipment, business inventory and services.

b. The disabled veteran owner or their duly authorized representative supervises the business’s employees.

3. ‘Technical competence.’ a. The disabled veteran owner or their duly authorized representative has technical competence in the industry or specialty of the business or a working knowledge of the technical requirements of the business sufficient to critically evaluate the work of subordinates.

b. The disabled veteran owner or their duly authorized representative has the ability to perform in their area of specialty or expertise without substantial reliance upon finances and resources – such as equipment, automobiles and facilities – of entities that are not owned by disabled veterans.

4. ‘Connection to the principal place of business. The disabled veteran owner or their duly authorized representative is not substantially removed from the principal place of business, such as by being incarcerated.

(2) **DELEGATED OPERATIONAL MANAGEMENT.** Where the actual day-to-day operational management is delegated to a person other than a disabled veteran owner or their duly authorized representative, the active-management requirements may be met if the disabled veteran owner or their duly authorized representative has the ultimate power to hire and fire that person.

(3) **POTENTIAL CONSTRAINTS ON OPERATIONAL MANAGEMENT.** In reviewing governance documents and issues, the department shall give special attention to the extent to which all of the following aspects affect the ability of the disabled veteran owner or their duly authorized representative to direct the management and policies of the business:

(a) The composition of the business’s governing body.

(b) The functioning of the governing body.

(c) The content of shareholder’s agreements, bylaws, or state incorporation statutes.

Comm 103.33 Documentation of active management. The applicant shall submit evidence that one or more disabled veteran owners or their duly authorized representatives actively manage the business. This evidence may include, but is not limited to, the following:

(1) Signed purchase orders, invoices and contracts.

(2) Evidence that the disabled veteran owners or their duly authorized representatives have delegated work assignments to the business employees.

(3) Documentation, such as résumés, showing that the disabled veteran owners or their duly authorized representatives have the education or work experience in the skill areas required to produce the product or service provided by the business.

(4) Where the actual day-to-day operational management is delegated to a person other than a disabled veteran owner or their duly authorized representative, documentation, such as a signed contract, showing that the disabled veteran owners or their duly authorized representatives have the ultimate power to hire and fire that person.

Comm 103.36 Determination of performance of a useful business function. Factors that the department shall consider in determining whether a disabled veteran-owned entity is performing a useful business function include the following:

(1) The degree to which the business has customers other than the state.

(2) The adequacy of the business's resources to carry out its business functions.

(3) The degree to which the business is independent of control or substantial influence by another business. Business relationships that tend to defeat the useful business function include shared space, equipment, employees, or other resources, and financing agreements.

(4) Whether the business acts as a conduit to transfer funds to a business that is not owned by a disabled veteran, unless doing so is a normal industry practice.

Comm 103.37 Documentation of performance of a useful business function. The applicant shall submit evidence that the business is performing a useful business function. This evidence may include, but is not limited to, the following:

(1) Contracts, purchase orders, invoices, and other documents demonstrating that the business has customers.

(2) Evidence that the quantity, type and condition of the business's equipment and inventory are adequate to carry out its business functions.

(3) Loans and other financing agreements, leases, employee contracts, payroll records and other documents demonstrating that the business' relationships with businesses that are owned by other than disabled veterans do not preclude it from performing a useful business function.

(4) Contracts, purchase orders, invoices, and other documents showing that the business has a diversity of suppliers and is not acting as a conduit for a single supplier.

Comm 103.40 Special circumstances. Any one of the following circumstances creates a presumption that an applicant does not satisfy the eligibility standards for certification as a DVB. In such instances, the applicant has the burden of establishing to the department's satisfaction that the business meets the eligibility standards despite the existence of one or more of the following factors:

(1) The business was formed less than three years but at least one year prior to an application for certification.

(2) The ownership or control of the business has changed within two years prior to an application for certification.

(3) Shares of stock transferred from a person other than a disabled veteran to a disabled veteran owner of the business, within two years prior to an application for certification.

(4) The business has unissued shares that, if issued, could result in less than 51 percent disabled veteran ownership of the business or in less than dominant control by disabled veteran owners or their duly authorized representatives.

(5) The business is subject to conversion rights that, if exercised, would result in less than 51 percent disabled veteran ownership of the business or in less than dominant control by disabled veteran owners or their duly authorized representatives.

(6) One or more of the disabled veteran owners is a former or current employee of a business which is not owned by a disabled veteran and which has an ownership interest in or a business relationship with the applicant, particularly if the business that is not owned by a disabled veteran is in a substantially similar line of business.

(7) An applicant's directors or management or both, are substantially the same as those of a business which is not owned by a disabled veteran and which has an ownership interest in, an investment in, or a business relationship with the applicant, particularly if the business that is not owned by a disabled veteran is in a substantially similar line of business.

(8) The business shares indistinguishable facilities, such as office space; production, distribution or storage facilities; machinery and equipment; or employees, with a business that is not owned by a disabled veteran.

Comm 103.50 Certification procedure for disabled veteran-owned entities. (1) APPLICATION AND REVIEW. (a) Any business, financial adviser or investment firm that meets the standards for certification may file a certification application with the department.

(b) The applicant shall submit a valid, department-supplied application form; the three preceding years of business taxes, except where one or two preceding years of business taxes are submitted under s. Comm 103.40 (1); current business financials; documentation showing conformance to the DVB definition in s. Comm 103.12 (18); and the documentation required under ss. Comm 103.22, 103.25, 103.29, 103.33, and 103.37 to the department of commerce, P.O. Box 7970, Madison, WI 53707.

Note: The application form that is currently valid, and guidance for completing it, can be obtained by accessing the Department's Web site at www.commerce.wi.gov and searching for the disabled veteran-owned business certification program. The form and guidance are also available from the Department at P.O. Box 7970, Madison, WI 53707.

(c) Each application shall include a fee of \$50, and an additional payment of \$100 for two, one-year renewal fees. The department shall refund the \$100 payment if certification is ultimately denied.

(d) Upon receipt of the application, the department shall review the application for completeness and for compliance with the requirements of s. 560.0335, Stats., and this chapter.

(e) The department may request, at any time that it deems necessary, that the applicant submit additional information or documentation for providing clarification or substantiation, or for resolving any ambiguities or inconsistencies in the application form. Failure to cooperate fully may result in denial of DVB certification.

(f) The department may impose a time limit of not less than 30 calendar days in which the applicant shall provide the requested information, except the department shall grant a time extension where good cause is shown by the applicant. Any request for a time extension shall specify the length of time for which the extension is requested and the reasons for the request.

(g) All information submitted shall become the property of the department.

(h) The department may conduct a scheduled or unannounced on-site visit of the applicant's operations. The visit may include, but is not limited to, the following:

1. A discussion of business operations with the owners.

2. An examination of the applicant's physical plant, inventory, machinery and equipment, financial records, accounting records, project files, customers accounts, and any legal documents and records that may be relevant to the certification of the business as a DVB.

3. A review of the applicant's organizational structure, management responsibilities and labor force characteristics. In this review, the department may do the following:

a. Analyze the ownership of stock in the business, if the applicant is a corporation.

b. Examine the work history of the applicant, including contracts the applicant has received and the work the applicant has completed.

(i) After completing a review of the application, the department shall send the applicant either a notice of certification – or a notice of intent to deny certification stating the reasons for denial and offering the applicant the opportunity for an informal hearing under s. Comm 103.70.

(j) The department shall maintain a DVB database that includes the name of the owner, business name, type of business industry, business owner e-mail address, sales volume and growth rates, number of full-time employees, and North American Industrial Classification or National Institute of Governmental Purchasing coding indicating the functional mission of the business.

(2) DENIAL OF CERTIFICATION. (a) The department shall deny certification for any of the following reasons:

1. The department determines that the applicant fails to meet the eligibility standards for certification or other requirements of this chapter.

2. The applicant fails to furnish the department with requested information within the allotted time period.

3. The applicant knowingly provides false or misleading information to the department.

4. The applicant shares indistinguishable facilities, such as office space; production, distribution or storage facilities; machinery and equipment; or employees, with a business that is not owned by a disabled veteran.

(b) Applicants shall have 30 calendar days from the date of a department notification of intent to deny certification, to submit a written request for an informal hearing.

(c) If no request for an informal hearing is made, the determination to deny certification shall become final, and the department shall send a final notice of denial to the applicant within 30 calendar days after expiration of the time period in par. (b). The notice shall state the reason for denial and notify the applicant of its appeal rights under ch. 227, Stats., and s. Comm 103.75.

(d) Each applicant denied certification may reapply for certification, no earlier than 12 months from the date of the final notice of denial of certification.

(3) LENGTH OF CERTIFICATION. A DVB shall remain on the DVB database for a period of three years unless the certification is not renewed under s. Comm 103.52, 103.70 or 103.75; or the DVB is decertified under s. Comm 103.65, 103.70 or 103.75.

Comm 103.52 Renewal procedure. (1) Prior to the end of each of the first two years of every three-year certification period, the department shall review any accumulated information for the DVB. As part of the review, the department may collect or require submittal of further information for the DVB. The review shall address whether the DVB is continuing to comply with this chapter. Unless the department notifies the DVB otherwise at the completion of the review, the certification shall renew for the following year.

(2) A DVB shall have 30 calendar days from the date of a department notification of intent to deny renewal of certification, to submit a written request for an informal hearing under s. Comm 103.70.

(3) If no request for an informal hearing is made, the determination to deny renewal of certification shall become final, and the department shall send a final notice of denial to the DVB within 30 calendar days after expiration of the time period in sub. (2). The notice shall state the reason for denial and notify the DVB of its appeal rights under ch. 227, Stats., and s. Comm 103.75. The department shall send a copy of the final notice to the departments of administration and transportation.

Comm 103.55 Recertification procedure. To maintain its certification status, a DVB shall reapply for its certification prior to the designated expiration date, in accordance with the following procedure:

(1) The department shall send a recertification application form to each DVB by electronic mail, at least 60 calendar days prior to the certification expiration date.

(2) The DVB shall submit the completed recertification application form, the three preceding years of business taxes, current business financials, attestation to providing a useful business function, and a fee of \$150, to the department within 30 calendar days of receipt of the application form, except the department shall grant a time extension where good cause is shown by the DVB. Any request for a time extension shall specify the length of time for which the extension is requested and the reasons for the request.

(3) Processing of recertification applications shall follow the certification procedure described in s. Comm 103.50.

Comm 103.60 Decertification criteria. (1) The department shall decertify a DVB that is found to not meet the DVB eligibility standards in s. Comm 103.20.

(2) Sufficient reasons for decertification include the following:

(a) The status of the DVB has changed to the extent that it no longer satisfies the requirement of ownership, control, and active management of the business or the requirement to perform a useful business function.

(b) The DVB fails to submit an application for recertification within the allotted time period.

(c) The DVB fails to comply with a request from the department for records or information within the allotted time period.

(d) The DVB knowingly provides false or misleading information in support of its certification or recertification application or in response to the department's request for records or information.

(e) The DVB is notified of a change to the certification standards and procedures and does not comply with the department's notification to comply.

(f) The DVB does not maintain current information on the DVB database.

Comm 103.65 Decertification procedure. (1) INITIATION OF DECERTIFICATION PROCESS. (a) The department may, at the request of any state agency or at its own discretion, examine any business certified as a DVB to verify that the DVB qualifies for certification.

(b) Any business or individual who believes that a business certified as a DVB does not qualify under the standards of eligibility for certification may request a decertification investigation by the department. This request shall be written and signed and shall contain specific identification of the affected DVB, and the basis for the belief that the DVB does not meet the eligibility standards.

(2) INVESTIGATION PROCEDURE. (a) The department shall notify the DVB, in writing, that the DVB is the subject of a decertification investigation. The notification shall explain the basis for the belief that the DVB does not meet the eligibility standards for certification.

(b) The department may request records or other documentation from the DVB, may conduct an on-site visit of the DVB facilities and may question other parties during its investigation.

(c) The department may impose a time limit of not less than 15 calendar days in which the DVB shall respond to a request for records or other documentation, except the department shall grant a time extension where good cause is shown by the DVB. Any request for a time extension shall specify the length of time for which the extension is requested and the reason for the request. If the DVB fails to provide the information within the time limit imposed, the department shall issue a notice of intent to decertify.

(d) Upon completion of the investigation, the department shall prepare a written report that includes all of the following:

1. A statement of the facts leading to the investigation.
2. Steps taken in the investigation.
3. Findings of the investigation.
4. A conclusion that contains a recommendation for disposition of the matter.

(3) NOTICE OF INTENT TO DECERTIFY. (a) 1. If the department determines that a DVB failed to comply with a reasonable request for records or other documentation or does not qualify for certification, the department shall send the DVB a copy of the report prepared under sub. (2) (d) – along with a notice of intent to decertify, stating the reasons for decertification and offering the DVB the opportunity for an informal hearing under s. Comm 103.70.

2. The department shall send a copy of any notice issued under subd. 1 to the departments of administration and transportation.

(b) The DVB shall have 30 calendar days from the date of the department's notification to submit a written request for an informal hearing.

(c) If no request for an informal hearing is made, the administrator shall issue a final notice of decertification, stating the factual and legal grounds therefore and notifying the DVB of its appeal rights under ch. 227, Stats., and s. Comm 103.75.

(d) The department shall send a copy of the final notice of decertification to the affected DVB and to the departments of administration and transportation, within 30 calendar days after expiration of the time period in par. (b).

(4) REAPPLICATION. A decertified business, financial adviser, or investment firm may reapply for certification no earlier than 12 months from the date of the final notice of decertification. Any reapplication shall comply with the same submittal requirements as an initial application for certification, except the reapplication shall include notation of the previous decertification.

Comm 103.70 Informal hearing procedure. (1) Any business, financial adviser, or investment firm that has received a notice of intent to deny certification, to deny renewal of certification, to deny recertification, or to decertify, may submit a written request for an informal hearing. The request shall set forth the grounds on which the business, financial adviser, or investment firm believes the decision is in error, and shall include any additional information that the business, financial adviser, or investment firm has to offer. The business, financial adviser, or investment firm shall

submit the request for the informal hearing to the secretary, at the department of commerce, P.O. Box 7970, Madison, WI 53707.

Note: Sections Comm 103.50 (2) (b), 103.52 (2), 103.55 (3), 103.65 (3) (b) and 103.94 (3) specify deadlines for submitting requests for informal hearings.

(2) The department shall schedule an informal hearing within 30 calendar days of receipt of the request. The department shall send a written notice of the scheduled hearing to all interested parties at least 10 calendar days prior to the hearing date. The notice shall specify the date, time and location of the hearing. Interested parties shall include all persons who signed the application for certification or recertification.

(3) The department shall conduct the hearing on an informal basis.

(4) Within 10 business days after the hearing, the secretary shall notify the business, financial adviser, or investment firm in writing of the final decision.

(5) If the final decision is to grant certification, renew a certification, or issue a recertification, the department shall inform the business, financial adviser, or investment firm of that decision. If the final decision is to deny a certification, a certification renewal, or a recertification, or to decertify, the department shall notify the business, financial adviser, or investment firm of that final decision and the reasons therefore. That notification shall also include reference to the applicant's appeal rights under subch. III of ch. 227, Stats., and s. Comm 103.75.

(6) Once the department has made a final decision on certification, recertification or decertification, that determination shall take effect immediately. If a business, financial adviser, or investment firm has been denied certification or recertification or has been decertified, and then appeals the department's decision in accordance with s. Comm 103.75, the department's decision remains in effect unless and until the decision is reversed as a result of the appeals process.

Comm 103.75 Appeal procedure. (1) Any business, financial adviser, or investment firm which has been denied certification, certification renewal, or recertification, or which has been decertified, may submit a written request for a formal hearing under s. 227.42, Stats. The request shall be submitted to the department within 30 calendar days of the mailing date of the department's notification. The request shall set forth the grounds on which the business, financial adviser, or investment firm believes the decision is in error, and shall include any additional information that the business, financial adviser, or investment firm has to offer. The business, financial adviser, or investment firm shall submit the request for the formal hearing to the office of the secretary, department of commerce, P.O. Box 7970, Madison, WI 53707.

(2) The department shall schedule the formal hearing and shall send a written notice of the scheduled hearing to all interested parties at least 10 calendar days prior to the hearing date. The notice shall specify the date, time and location of the hearing. Interested parties shall include all persons who signed the application for certification or recertification.

(3) The hearing shall be conducted pursuant to ss. 227.43 to 227.51, Stats. Both the business, financial adviser, or investment firm and the department may present evidence, subpoena witnesses and records, and cross-examine witnesses. The business, financial adviser, or investment firm and the department may be represented by counsel.

Note: Under ch. 227, Stats, the department may designate an official of the department or an employee on its staff or borrowed from another state agency as a hearing examiner to preside over a contested case.

(4) Within 20 business days after the conclusion of the hearing, the department shall make a decision based on findings of fact and conclusions of law, except as provided in sub. (5).

(5) The secretary may delegate the authority to make the final decision to the hearing examiner of another state agency. When this authority is delegated, the hearing examiner's decision shall be the final administrative decision of the department.

(6) Within 30 business days after the conclusion of the hearing, the department shall notify the affected business, financial adviser, or investment firm and the departments of administration and transportation of the final decision regarding certification, certification renewal, recertification or decertification.

Comm 103.80 Notification of changes in application information. (1) A DVB shall notify the department in writing of any change in the information contained in an application for certification or recertification within 30 calendar days of the change or before bidding on a state contract, whichever is earlier.

(2) Within 15 calendar days of receiving the changes in sub. (1), the department shall send the DVB a written determination of either of the following:

- (a) The change is not material, and the certification of the DVB continues.
- (b) The change is material and warrants a review of the status of the DVB.

(3) If the change warrants a review of the status of the DVB, the department shall conduct the review following the decertification procedures in s. Comm 103.65.

(4) Failure by a DVB to notify the department of a change that would reduce disabled veteran ownership, control or management, or change the business function performed, may result in decertification and may result in the department forwarding pertinent information to the appropriate law enforcement authority for investigation and possible prosecution.

Comm 103.90 Certification of a business, financial adviser, or investment firm by another public agency.

(1) The department may waive some or all of the certification application requirements and procedures under s. Comm 103.50 for a business, financial adviser, or investment firm that is already certified by another public-sector agency if the department determines that the agency's standards for certification and certification procedures are substantially equivalent to the department's.

(2) In making the determination in sub. (1), the department shall consider factors that include the following:

- (a) The documentation that the applicant was required to provide to receive certification by the agency.
- (b) Whether an on-site visit was performed.
- (c) The length of time for which certification is effective.

(3) To receive any waivers under this section, an applicant shall provide the department with documentation showing the equivalency specified in sub. (1) and addressing the factors specified in sub. (2), except the documentation for sub. (1) is not required for an applicant that submits proof of being certified by an agency listed under sub. (4).

(4) The department shall maintain a list of certification agencies whose certification procedures are found under sub. (1) to be equivalent to the department's standards.

Comm 103.95 Certification criteria for a corporation owned by a nonprofit organization. (1) The department may certify a corporation owned by a nonprofit organization if the department determines that the nonprofit organization is controlled and managed by a disabled veteran or their duly authorized representative. Factors that the department may consider in reaching this determination include the following:

- (a) At least 51 percent of the members who may elect the board of directors or trustees and who are entitled to vote on a dissolution of the nonprofit organization are disabled veterans.
- (b) At least 51 percent of the board of directors or trustees of the nonprofit organization are disabled veterans.

(c) The minutes of the organization's meetings document the active control and participation of the disabled-veteran members of the board in such areas as setting and monitoring financial policy, personnel policy and program policy.

(d) The nonprofit organization is independent of control or substantial influence by a nonprofit or for-profit organization that is not owned by a disabled veteran. The department shall refutably presume that the nonprofit disabled veteran-owned organization is dependent on an organization which is not owned by a disabled veteran if the disabled veteran-owned organization shares office space, staff, equipment, or other resources, with a for-profit or nonprofit organization that is not owned by a disabled veteran or if the disabled veteran-owned organization receives a majority of its funding from a single organization that is not owned by a disabled veteran.

(2) The applicant and department shall follow the certification procedures described in s. Comm 103.50.

(END)

EFFECTIVE DATE

Pursuant to s. 227.24 (1) (c), Stats., this rule shall take effect as an emergency rule upon publication in the official state newspaper.

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<p>Subject Disabled Veteran-Owned Business Certification Program</p>								
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<p>Affected Ch. 20 Appropriations</p>								

Assumptions Used in Arriving at Fiscal Estimate

The applications submitted under this program, as established under 2009 Wisconsin Act 299, will include revenues that will offset the Department's costs in administering this new program.

The Department estimates that 300 businesses will maintain the credential under this program, at an annual fee of \$50.

The rules are not expected to impose any significant, mandated costs on the private sector, because the rules only address applying for, receiving, and maintaining voluntary credentials.