

WSR 25-01-023
PERMANENT RULES
OFFICE OF MINORITY AND
WOMEN'S BUSINESS ENTERPRISES

[Filed December 6, 2024, 4:33 p.m., effective January 6, 2025]

Effective Date of Rule: Thirty-one days after filing.

Purpose: The office of minority and women's business enterprises (OMWBE) is the sole certifying agency for small minority, women, and socially and economically disadvantaged business enterprises. OMWBE has both a state and federal certification program with similar rules. On April 9, 2024, the United States Department of Transportation (USDOT) announced that the disadvantaged business enterprise and airport concessions disadvantaged business enterprise rules will change and become effective on May 9, 2024. The USDOT rules are codified in 49 C.F.R. Parts 23 and 26 and used for OMWBE's federal certification. To align OMWBE's state certification program with its federal program, OMWBE proposes changes to the above-listed certification rules, which are found in chapter 326-20.

Citation of Rules Affected by this Order: Amending chapter 326-20 WAC.

Statutory Authority for Adoption: RCW 34.05.353 (1)(b).

Adopted under notice filed as WSR 24-18-064 on August 28, 2024.

Number of Sections Adopted in Order to Comply with Federal Statute: New 1, Amended 1, Repealed 0; Federal Rules or Standards: New 1, Amended 1, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at the Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's own Initiative: New 0, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: December 6, 2024.

Julie Bracken
Public Records Officer
Records Manager
Rules Coordinator

OTS-5813.1

AMENDATORY SECTION (Amending WSR 04-08-093, filed 4/6/04, effective 5/7/04)

WAC 326-20-010 In general. (1) Any business which meets the definition of a minority business enterprise, a women's business enterprise, a minority woman's business enterprise, ~~((or))~~ a combination minority and women's business enterprise, ~~((or))~~ socially and economically disadvantaged business enterprise, ~~((or))~~ corporate-sponsored

dealership as set forth in this title, or public works small business enterprise is eligible to be certified by the state of Washington.

(2) It is not the intent of the program to encourage the participation of businesses owned and controlled by minorities, and/or women, and/or socially and economically disadvantaged individuals, who have not encountered practices which prohibited or limited their access to contract opportunities, markets, financing, and other resources, based on their race, ethnic origin, or sex, or disability.

(3) Notwithstanding the provisions in subsection (1) of this section, to be eligible for certification, any business applying for certification shall have obtained all licenses necessary to lawfully conduct business in the state of Washington.

AMENDATORY SECTION (Amending WSR 04-08-093, filed 4/6/04, effective 5/7/04)

WAC 326-20-047 Proof of economic disadvantage. Evidence of individual social disadvantage and/or individual economic disadvantage must include the following elements:

(1) Submission of narrative and financial information.

(a) Each individual claiming economic disadvantage must describe the conditions, which are the basis for the claim in a narrative statement, and must submit personal financial information.

(b) When married, an individual claiming economic disadvantage also must submit separate financial information for (~~his or her~~) their spouse, unless the individual and the spouse are legally separated.

(2) Factors to be considered. In considering diminished capital and credit opportunities, the office will examine factors relating to the personal financial condition of any individual claiming disadvantaged status, including personal income for the past two years (including bonuses and the value of company stock given in lieu of cash), personal net worth, and the fair market value of all assets, whether encumbered or not. The office will also consider the financial condition of the applicant compared to the financial profiles of small businesses in the same primary industry classification, or, if not available, in similar lines of business, which are not owned and controlled by socially and economically disadvantaged individuals in evaluating the individual's access to credit and capital. The financial profiles that the office will compare include total assets, net sales, pretax profit, sales/working capital ratio, and net worth.

(3) Transfers within two years.

(a) Except as set forth in (b) of this subsection, the office will attribute to an individual claiming disadvantaged status any assets which that individual has transferred to an immediate family member, or to a trust, a beneficiary of which is an immediate family member, for less than fair market value, within two years prior to a concern's application for participation in the program, unless the individual claiming disadvantaged status can demonstrate that the transfer is to or on behalf of an immediate family member for that individual's education, medical expenses, or some other form of essential support.

(b) The office will not attribute to an individual claiming disadvantaged status any assets transferred by that individual to an immediate family member that are consistent with the customary recogni-

tion of special occasions, such as birthdays, graduations, anniversaries, and retirements.

(c) In determining an individual's access to capital and credit, the office may consider any assets that the individual transferred within such two-year period described by (a) of this subsection that are not considered in evaluating the individual's assets and net worth (e.g., transfers to charities).

AMENDATORY SECTION (Amending WSR 19-13-014, filed 6/7/19, effective 7/8/19)

WAC 326-20-048 Presumption of disadvantage. (1) Social disadvantage. The agency rebuttably presumes the following persons are socially disadvantaged individuals for the purposes of certification, consistent with 49 C.F.R. (~~Part~~) Section 26.67: Women; persons who are black/African American, Hispanic/Latino, Native American, Asian, Pacific Islander, native Hawaiian, and Alaska native; and other minorities found disadvantaged by the small business association.

(2) Each presumptively socially disadvantaged applicant must submit a signed declaration of eligibility (DOE), as provided by the office, that ((she or he is)) they are socially and economically disadvantaged.

(3) (a) Economic disadvantage. Each owner of a firm applying for state certification must sign a declaration that ((he or she has)) they have a personal net worth that does not exceed ((1.32 million dollars)) \$2,047,000, per WAC 326-20-049. The office will adjust the personal net worth cap routinely.

(b) Rebuttal of economic disadvantage. If the statement of personal net worth that an individual submits under this section shows that the individual's personal net worth exceeds ((1.32 million dollars)) \$2,047,000 or ((shows that a person has been able to accumulate substantial wealth)) a reasonable person would not consider the person economically disadvantaged, the individual's economic disadvantage is rebutted, and the individual is not deemed to be economically disadvantaged. Such an individual is no longer eligible to participate in the program and cannot regain eligibility by making an individual showing of disadvantage. The office is not required to have a proceeding under this section ((in order)) to rebut the presumption of economic disadvantage in this case.

(4) Individual determinations of social and economic disadvantage. Firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged may apply for Socially and Economically Disadvantaged Business Enterprise (SEDBE) certification. The office makes a case-by-case determination of whether each individual whose ownership and control are relied upon for SEDBE certification is socially and economically disadvantaged. In such a proceeding, the applicant firm has the burden of demonstrating to the office, by a preponderance of the evidence, that the individuals who own and control it are socially and economically disadvantaged. An individual whose personal net worth exceeds ((1.32 million dollars)) \$2,047,000 shall not be deemed to be economically disadvantaged. In making these determinations, the office uses WAC 326-20-046 and 326-20-047. The office requires that applicants provide sufficient information to permit determinations under WAC 326-20-046 and 326-20-047.

AMENDATORY SECTION (Amending WSR 17-13-020, filed 6/12/17, effective 8/1/17)

WAC 326-20-049 Personal net worth. (1) Each individual owner of a firm applying for state certification, whose ownership and control are relied on for certification, must fill out a personal net worth statement and sign a declaration of eligibility that ~~((his or her))~~ their personal net worth does not exceed ~~((1.32 million dollars))~~ \$2,047,000. If any individual's personal net worth exceeds ~~((1.32 million dollars))~~ \$2,047,000, the individual's presumption of economic disadvantage is rebutted and the individual does not meet the criteria for certification.

(2) The office may require additional financial information where necessary to accurately determine an individual's personal net worth.

(3) In determining an individual's personal net worth, the office will use the following criteria:

(a) Exclude the individual's ownership interest in the applicant firm;

(b) Exclude the individual's equity in his or her primary residence. The equity is the market value of the residence less any mortgages and home equity loan balances;

(c) Not use a contingent liability to reduce the individual's net worth;

~~(d) ((With respect to assets held in vested pension plans, individual retirement accounts, 401(k) accounts, or other retirement savings or investment programs in which the assets cannot be distributed to the individual at the present time without significant adverse tax or interest consequences, include only the present value of such assets, less the tax and interest penalties that would accrue if the asset were distributed at the present time))~~ Exclude retirement assets in full;

(e) Include any assets the individual has transferred within two years prior to the application or ~~((renewal))~~ certification update to:

(i) An immediate family member;

(ii) A trust where the beneficiary is an immediate family member;

or

(iii) The applicant firm for less than fair market value.

(f) The assets described in (e) of this subsection will not be counted toward an individual's personal net worth if:

(i) The applicant demonstrates that the transfer is to or on behalf of an immediate family member for that individual's education, medical expenses, or some other form of essential support; or

(ii) The transfer is consistent with the customary recognition of special occasions, such as birthdays, graduations, anniversaries, and retirements.

(g) For the purposes of this section, "immediate family member" means father, mother, husband, wife, son, daughter, brother, sister, grandfather, grandmother, father-in-law, mother-in-law, sister-in-law, brother-in-law, and domestic partner and civil unions recognized under state law.

(4) If an individual's personal net worth does not exceed ~~((1.32 million dollars))~~ \$2,047,000 as described in this section, the office may rebut an individual's presumption of economic disadvantage if the statement of personal net worth and supporting documentation demonstrates that ~~((the individual is able to accumulate substantial wealth. In making this determination, the office may consider factors that include, but are not limited to:~~

~~(a) Whether the average adjusted gross income of the owner over the most recent three year period exceeds three hundred fifty thousand dollars;~~

~~(b) Whether the income was unusual and not likely to occur in the future;~~

~~(c) Whether the earnings were offset by losses;~~

~~(d) Whether the income was reinvested in the firm or used to pay taxes arising in the normal course of operations by the firm;~~

~~(e) Other evidence that income is not indicative of lack of economic disadvantage; and~~

~~(f) Whether the total fair market value of the owner's assets exceed six million dollars)) a reasonable person would not consider the individual to be economically disadvantaged even though the individual's personal net worth (PNW) did not exceed the limitation cap. Among the evidence the office can consider are ready access to wealth, income or assets of a type or magnitude inconsistent with economic disadvantage, a lavish lifestyle, community property, or other circumstances that economically disadvantaged people typically do not enjoy. Liabilities and the kind of asset exclusions used in PNW calculations would not be taken into account as part of this determination.~~

AMENDATORY SECTION (Amending WSR 19-13-014, filed 6/7/19, effective 7/8/19)

WAC 326-20-050 Proof of ownership of business. ~~((1) In determining whether a socially and economically disadvantaged participant(s) in a firm owns the business, the agency considers all facts in the record viewed as a whole, including the origin of all assets and how and when they were used in obtaining the firm. All transactions for the establishment and ownership, or transfer of ownership, must be in the normal course of business.~~

~~(2) To be an eligible for certification, a firm must be at least fifty-one percent owned by a socially and economically disadvantaged individual(s).~~

~~(a) In the case of a sole proprietorship or other cases where documentary proof of ownership is not available, the agency may undertake further investigation and may require documents showing how and when the socially and economically disadvantaged owner(s) interest in the business was acquired.~~

~~(b) In the case of a corporation, a socially and economically disadvantaged individual(s) must own at least fifty-one percent of each class of voting stock outstanding and fifty-one percent of the aggregate of all stock outstanding.~~

~~(c) In the case of a partnership, a socially and economically disadvantaged individual(s) must own at least fifty-one percent of each class of partnership interest.~~

~~(d) In the case of a limited liability company, a socially and economically disadvantaged individual(s) must own at least fifty-one percent of each class of member interest.~~

~~(3) The socially and economically disadvantaged individual(s) ownership, including the individual's contribution of capital or expertise to acquire ownership interests, must be real, substantial, and continuing, going beyond pro forma ownership of the firm. It may include ownership interest acquired:~~

~~(a) As the result of a final property settlement or court order in a divorce or legal separation, provided no term or condition of the agreement or divorce decree is inconsistent with this section;~~

~~(b) Through inheritance or because of the death of the former owner; and~~

~~(c) Through debt instruments from financial institutions or other organizations lending funds in the normal course of business, even when the debtor's ownership interest is security for the loan.~~

~~(4) The disadvantaged owner(s) must enjoy the customary incidents of ownership, share in the risks, and be entitled to the profits and loss commensurate with their ownership interests, as demonstrated by the substance, not merely the form of arrangements.~~

~~(5) When expertise is relied upon as part of a disadvantaged owner's contribution to acquire ownership, the applicant must have a significant financial investment in the firm, and the applicant's expertise must be:~~

~~(a) In a specialized field;~~

~~(b) In areas critical to the firm's operations;~~

~~(c) Indispensable to the firm's potential success;~~

~~(d) Specific to the type of work the firm performs; and~~

~~(e) Documented in the records of the firm, which must show the contribution of expertise and value to the firm.~~

~~(6) The following are insufficient to be considered ownership in a firm by a socially and economically disadvantaged individual for the purposes of certification:~~

~~(a) A promise to contribute capital; an unsecured note payable to the firm or an owner who is not a disadvantaged individual; mere participation in a firm's activities as an employee; capitalization not commensurate with the value for the firm; and any terms or practices giving a nondisadvantaged individual or firm a priority or superior right to a firm's profits, compared to the disadvantaged owner(s).~~

~~(b) Except as allowed by this section, interests or assets obtained by an applicant in the form of a gift or transfer without adequate consideration from any nondisadvantaged individual or firm who is: Involved in the same firm or affiliate where the individual is seeking certification; involved in the same or a similar line of business; or engaged in an ongoing business relationship with the firm or an affiliate where the individual is seeking certification. To overcome this presumption and permit the interests or assets, the disadvantaged individual must demonstrate by clear and convincing evidence that: The gift or transfer to the disadvantaged individual was made for reasons other than obtaining certification; and the disadvantaged individual controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a nondisadvantaged individual who provided the gift or transfer.)~~ (1) General rule: A socially and economically disadvantaged owner must own at least 51 percent of each class of ownership of the firm. Each socially and economically disadvantaged owner whose ownership is necessary to the firm's eligibility must demonstrate that their ownership satisfies the requirements of this section. If not, the firm is ineligible.

(2) Overall requirements. A socially and economically disadvantaged owner's acquisition and maintenance of an ownership interest meets the requirements of this section only if the owner demonstrates the following:

(a) Acquisition. The socially and economically disadvantaged owner acquires ownership at fair value and by one or more "investments" as defined in subsection (3) of this section.

(b) Proportion. No owner derives benefits or bears burdens that are clearly disproportionate to their ownership shares.

(c) Maintenance. This section's requirements continue to apply after the socially and economically disadvantaged owner's acquisition and the firm's certification. The socially and economically disadvantaged owner must maintain their investment and its proportion relative to those of other owners such that eligible individuals retain at least 51 percent ownership.

(i) The socially and economically disadvantaged owner may not withdraw or revoke their investment.

(ii) When an existing co-owner contributes significant, additional, post-acquisition cash or property to the firm, the socially and economically disadvantaged owner must increase their own investment to a level not clearly disproportionate to the nondisadvantaged owner's investment.

(iii) An organic increase in the value of the business does not affect maintenance because the value of the owners' investments remains proportional.

(3) Investments. A socially and economically disadvantaged owner may acquire ownership by purchase, capital contribution, or gift. Subject to the other requirements of this section, each is considered an "investment" in the firm, as are additional purchases, contributions, and qualifying gifts.

(a) Investments are unconditional and at full risk of loss.

(b) Investments include a significant outlay of the socially and economically disadvantaged owner's own money.

(c) For purposes of this part, title determines ownership of assets used for investments and of ownership interests themselves. This rule applies regardless of contrary community property, equitable distribution, banking, contract, or similar laws, rules, or principles.

(i) The person who has title to the asset owns it in proportion to their share of title.

(ii) However, the title rule is deemed not to apply when it produces a certification result that is manifestly unjust.

(d) If the socially and economically disadvantaged owner jointly (50/50) owns an investment of cash or property, the socially and economically disadvantaged owner may claim at least a 51 percent ownership interest, only if the other joint owner formally transfers to the socially and economically disadvantaged owner enough of his ownership in the invested asset(s) to bring the socially and economically disadvantaged owner's investment to at least 51 percent of all investments in the firm. Such transfers may be gifts described in subsection (5) of this section.

(4) Purchases and capital contributions.

(a) The following situations qualify as purchase and/or capital contributions:

(i) A purchase of an ownership interest is an investment when the consideration is entirely monetary and not a trade of property or services.

(ii) Capital that the socially and economically disadvantaged owner contributes directly to the company is an investment when the contribution is all cash or a combination of cash and tangible property and/or realty.

(iii) Debt-financed purchases or capital contributions are investments when they comply with the requirements of this section.

(b) The following situations do not qualify as purchase and/or capital contribution:

(i) Contributions of time, labor, services, and the like are not investments or components of investments.

(ii) Loans are not investments. The proceeds of loans may be investments to the extent that they finance the socially and economically disadvantaged owner's qualifying purchase or capital contribution.

(iii) Guarantees are not investments.

(iv) The firm's purchases or sales of property, including ownership in itself or other companies, are not the socially and economically disadvantaged owner's investments.

(v) Other persons' or entities' purchases or capital contributions are not the socially and economically disadvantaged owner's investments.

(5) Gifts. A gift to the socially and economically disadvantaged owner is an investment when it meets the requirements of this section. The gift rules apply to partial gifts, bequests, inheritances, trust distributions, and transfers for inadequate consideration. They apply to gifts of ownership interests and to gifts of cash or property that the socially and economically disadvantaged owner invests. The following requirements apply to gifts on which the socially and economically disadvantaged owner relies for their investment:

(a) The transferor/donor is or immediately becomes uninvolved with the firm in any capacity and in any other business that contracts with the firm other than as a lessor or provider of standard support services;

(b) The transferor does not derive undue benefit; and

(c) A writing documents the gift. When the socially and economically disadvantaged owner cannot reasonably produce better evidence, a receipt, canceled check, or transfer confirmation suffices, if the writing identifies transferor, transferee, amount or value, and date.

(d) Curative measures. The rules of this section do not prohibit transactions that further the objectives of, and compliance with, the provisions of this part. A socially and economically disadvantaged owner or firm may enter into legitimate transactions, alter the terms of ownership, make additional investments, or bolster underlying documentation in a good faith effort to remove, surmount, or correct defects in eligibility, as long as the actions are consistent with this part.

(i) The certifier may notify the firm of eligibility concerns and give the firm time, if the firm wishes, to attempt to remedy impediments to certification.

(ii) The firm may, of its own volition, take curative action up to the time of the certifier's decision. However, it must present evidence of curation before the certifier's decision.

(iii) The certifier may provide general assistance and guidance but not professional (legal, accounting, valuation, etc.) advice or opinions.

(iv) While the certifier may not affirmatively impede attempts to cure, it may maintain its decision timeline and make its decision based on available evidence.

(v) The certifier must deny or remove certification when the firm's efforts or submissions violate the rules in (e) of this subsection.

(e) Anti-abuse rules.

(i) The substance and not the form of transactions drives the eligibility determination.

(ii) The certifier must deny applications based on sham transactions or false representations, and it must decertify firms that en-

gage in or make them. Transactions or representations designed to evade or materially mislead subject the firm to the same consequences.

(iii) Fraud renders the firm ineligible and subjects it to possible sanctions, suspension, debarment, criminal prosecution, civil litigation, and any other consequence or recourse not proscribed in this part.

(6) Debt-financed investments.

(a) Subject to the other provisions of this subpart, a socially and economically disadvantaged owner may borrow money to finance an investment to acquire ownership if the following requirements are met:

(i) Money that the socially and economically disadvantaged owner receives as a gift is their own money.

(ii) The firm does not finance any part of the investment, directly or indirectly. The socially and economically disadvantaged owner does not rely on the company's credit or other resources to repay any part of the debt or otherwise to finance any part of their investment.

(iii) The loan is real, enforceable, not in default, not offset by another agreement, and on standard commercial, arm's length terms. The loan agreement requires level, regularly recurring payments of principal and interest, according to a standard amortization schedule. The loan agreement must permit prepayments, including by refinancing.

(b) If the creditor forgives or cancels all or part of the debt, or the socially and economically disadvantaged owner defaults, the entire debt-financed portion of the socially and economically disadvantaged owner's purchase or capital contribution is no longer an investment. This does not prohibit refinancing with debt that meets the requirements of this section or preclude prompt cures of ownership issues.

AMENDATORY SECTION (Amending WSR 19-13-014, filed 6/7/19, effective 7/8/19)

WAC 326-20-055 Subsidiaries. An eligible firm must be owned by an individual(s) who is socially and economically disadvantaged, rather than owned by another firm, except as provided below:

(1) If a socially and economically disadvantaged individual(s) owns and controls a firm through a parent or holding company that is established for tax, capitalization, or other purposes consistent with industry practice; and the parent or holding company owns and controls the subsidiary.

(2) The agency may certify such a subsidiary if there is cumulatively (~~(fifty-one)~~) 51 percent ownership of the subsidiary by a socially and economically disadvantaged individual(s). Examples of such subsidiaries include, but are not limited to:

(a) A socially and economically disadvantaged individual(s) owns (~~(one hundred)~~) 100 percent of a holding company and has a wholly owned subsidiary. The subsidiary may be certified, if it meets all other requirements.

(b) A socially and economically disadvantaged individual(s) owns (~~(one hundred)~~) 100 percent of the holding company and owns (~~(fifty-one)~~) 51 percent of a subsidiary. The subsidiary may be certified, if all other requirements are met.

(c) A socially and economically disadvantaged individual(s) owns (~~(eighty)~~) 80 percent of the holding company and the holding company

in turn owns (~~seventy~~) 70 percent of a subsidiary. In this case, the cumulative ownership of the subsidiary by disadvantaged individuals is (~~fifty-six~~) 56 percent (~~eighty~~) 80 percent of the (~~seventy~~) 70 percent). This is more than (~~fifty-one~~) 51 percent, so the agency may certify the subsidiary, if all other requirements are met.

(d) Same as the examples in (b) and (c) of this subsection, but someone other than the socially and economically disadvantaged owner(s) of the parent or holding company control the subsidiary. Even though the subsidiary is owned by disadvantaged individuals, through the holding or parent company, the agency cannot certify it because it fails to meet control requirements.

(e) A socially and economically disadvantaged individual(s) owns (~~sixty~~) 60 percent of the holding company and (~~fifty-one~~) 51 percent of a subsidiary. In this case, the cumulative ownership of the subsidiary by disadvantaged individuals is approximately (~~thirty-one~~) 31 percent. This is less than (~~fifty-one~~) 51 percent, so the agency cannot certify the subsidiary.

(f) The holding company, in addition to the subsidiary seeking certification, owns several other companies. The combined gross receipts of the holding companies and its subsidiaries are greater than the size standard for the subsidiary seeking certification or the gross receipts cap of WAC 326-20-096. Under the rules concerning affiliation, the subsidiary fails to meet the size standard and cannot be certified.

(3) Businesses certified by the office are limited to having one level of ownership above an operating company. That is, there could be a "parent" company but not a "grandparent" company.

AMENDATORY SECTION (Amending WSR 19-13-014, filed 6/7/19, effective 7/8/19)

WAC 326-20-060 Community ownership. (1) When an ownership interest arises in a nonapplicant spouse or registered domestic partner solely because of community property laws, the agency will not disqualify the applicant if both parties certify that:

(a) Only the applicant spouse or registered domestic partner participates in the management of the business; and

(b) The nonparticipating spouse or registered domestic partner relinquishes control over (~~his/her~~) their community interest in the business.

(2) When an ownership interest arising in a nonapplicant spouse or registered domestic partner solely because of community property laws, the agency will not disqualify the applicant because of a provision for the nonapplicant spouse or domestic partner to cosign a financing agreement, contract for the purchase or sale of real or personal property, bank signature card, or other document.

(3) The agency must give particular scrutiny to the ownership and control of a firm to ensure it is owned and controlled, in substance as well as in form, by a socially and economically disadvantaged individual, when the ownership of the firm or its assets is transferred from a spouse or registered domestic partner who is not a socially and economically disadvantaged individual.

AMENDATORY SECTION (Amending WSR 19-13-014, filed 6/7/19, effective 7/8/19)

WAC 326-20-080 Factors considered in determining control. (~~((1)~~)

~~In determining whether disadvantaged owner(s) control a business, the office must consider all of the facts in the record, viewed as a whole.~~

~~(2) The disadvantaged owner(s) must demonstrate the ability to make independent and unilateral business decisions needed to guide the future and direction of the business.~~

~~(3) The certifiable business must not be subject to any formal or informal restrictions limiting the customary discretion of the disadvantaged owner(s). Restrictions through corporate charter provisions, bylaw requirements, contracts or any other formal or informal devices, such as cumulative voting rights, voting powers attached to different classes of stock, employment contracts, requirements for concurrence by nondisadvantaged partners, conditions precedent or subsequent, executory agreements, voting trusts, limitations on or assignments of voting rights, preventing the disadvantaged owner(s), without the cooperation or vote of any nondisadvantaged individual, from making any business decision are prohibited. This subsection does not preclude a spouse or registered domestic partner cosignature on the office's spouse or domestic partner nonparticipation statement.~~

~~(4) Disadvantaged owner(s) must possess the power to direct or cause the direction of the management and policies of the business and make daily and long-term decisions on matters of management, policy, and operations.~~

~~(a) Disadvantaged owner(s) must hold the highest officer position in the company, such as chief executive officer or president.~~

~~(b) In a corporation, disadvantaged owners must control the board of directors.~~

~~(c) In a partnership, one or more disadvantaged owners must serve as general partners, with control over all partnership decisions. In order for a partnership to be controlled by disadvantaged individuals, any nondisadvantaged partners must not have the power, without the specific written concurrence of the socially and economically disadvantaged partner(s), to contractually bind the partnership or subject the partnership to contract or tort liability.~~

~~(d) Nondisadvantaged or immediate family members may be involved in a certified business as owners, managers, employees, stockholders, officers, or directors. They must not possess or exercise the power to control the business or be disproportionately responsible for the operation of the business.~~

~~(e) Disadvantaged owner(s) of the business may delegate various areas of the management, policymaking, or daily operations of the business to other participants in the business, regardless of whether these participants are disadvantaged individuals. Such delegations of authority must be revocable, and the disadvantaged owner(s) must retain the power to hire and fire any person to whom such authority is delegated. The disadvantaged owner(s) managerial role in the business's overall affairs must be such that the recipient can reasonably conclude the disadvantaged owners actually exercise control over the business's operations, management, and policy.~~

~~(f) Disadvantaged owner(s) must demonstrate the ability to make basic decisions pertaining to the daily operations of the business independently and have an overall understanding of, managerial and technical competence and experience directly related to, the type of busi-~~

ness in which the business is engaged and operating. The owner(s) are not required to have experience or expertise in every critical area of operations or given field than managers or key employees. They must have the ability to intelligently and critically evaluate information presented by other participants in the business's activities and to use this information to make independent decisions concerning the business's daily operations, management, and policymaking. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principle business activities of the business is insufficient to demonstrate control.

(g) If state or local law requires the persons to have a particular license or other credential in order to own or control a certain type of business, then the disadvantaged person(s) who own and control a potential certifiable business of that type must possess the required license or credential. If state or local law does not require the applicant to possess such a license or credential to own or control a business, the office must not deny certification solely on the ground the person lacks the license or credential. However, the office may take into account the absence of the license or credential as one factor in determining whether the disadvantaged owner(s) actually control the business.

(h) The office may consider differences in remuneration between the disadvantaged owner(s) and other business participants in determining whether to certify a business. Such consideration must be in the context of the duties of the persons involved, normal industry practices, the business's policy and practice concerning reinvestment of income, and any other explanations for the differences proffered by the business. The office may determine a disadvantaged owner controls a business although that owner's remuneration is lower than that of some other participants in the business. In a case where a nondisadvantaged individual formerly controlled the business, and a disadvantaged individual now controls it, the office may consider a difference between the remuneration of the former and current controller of the business as a factor in determining who controls the business, particularly when the nondisadvantaged individual remains involved with the business and continues to receive greater compensation than the disadvantaged individual.

(i) In order to be viewed as controlling a business, a disadvantaged owner cannot engage in outside employment or other business interests that conflict with the management of the business or prevent the individual from devoting sufficient time and attention to the affairs of the business to control its activities. For example, absentee ownership of a business and part-time work in a full-time business are not viewed as constituting control. However, an individual could be viewed as controlling a part-time business that operates only on evenings or weekends, if the individual controls it all the time it is operating.

(j) A disadvantaged individual may control a business even though one or more of the individual's nondisadvantaged immediate family members, participate in the business as a manager, employee, owner, or in another capacity. Except as otherwise provided in this subsection, the office must make a judgment about the control the disadvantaged owner exercises vis-a-vis other persons involved in the business as the office does in other situations, without regard to whether or not the other persons are immediate family members. If the office cannot determine the disadvantaged owners, as distinct from the family as a whole, control the business, then the disadvantaged owners failed to

carry their burden of proof concerning control, even though they may participate significantly in the business's activities.

~~(k) When a business was formerly owned or controlled by a nondisadvantaged individual, whether or not an immediate family member, and ownership or control was transferred to a disadvantaged individual, and the nondisadvantaged individual remains involved with the business in any capacity, there is a rebuttable presumption of control by the nondisadvantaged individual unless the disadvantaged individual now owning the business demonstrates to the office, by clear and convincing evidence, that:~~

~~(i) The transfer of ownership or control to the disadvantaged individual was made for reasons other than obtaining certification; and~~

~~(ii) The disadvantaged individual actually controls the management, policy, and operations of the business, notwithstanding the continuing participation of a nondisadvantaged individual who formerly owned or controlled the business.~~

~~(l) In determining whether its disadvantaged owner controls a business, the office may consider whether the business owns equipment necessary to perform its work. However, the office must not determine a business is not controlled by disadvantaged individuals solely because the business leases, rather than owns, such equipment, where leasing equipment is a normal industry practice and the lease does not involve a relationship with a prime contractor or other party that compromises the independence of the business.~~

~~(m) A business operating under a franchise or license agreement may be certified if it meets the standards in this paragraph and the franchiser or licensor is not affiliated with the franchisee or licensee. In determining whether affiliation exists, the office should generally not consider the restraints relating to standardized quality, advertising, accounting format, and other provisions imposed on the franchisee or licensee by the franchise agreement or license, provided the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Alternatively, even though a franchisee or licensee may not be controlled by virtue of such provisions in the franchise agreement or license, affiliation could arise through other means, such as common management or excessive restrictions on the sale or transfer of the franchise interest or license.~~

~~(n) The disadvantaged individual(s) controlling a business may use an employee leasing company. The use of such a company does not preclude the individual(s) from controlling their business if they continue to maintain an employer-employee relationship with the leased employees. This includes responsibility for hiring, firing, training, assigning, and otherwise controlling on-the-job activities of the employees, as well as ultimate responsibility for wage and tax obligations related to the employees.) (1) General rules.~~

~~(a) One or more socially and economically disadvantaged owners of the firm must control it.~~

~~(b) Control determinations must consider all pertinent facts, viewed together and in context.~~

~~(c) A firm must have operations in the business for which it seeks certification at the time it applies.~~

~~The office does not certify plans or intentions, or issue contingent or conditional certifications.~~

~~(2) Socially and economically disadvantaged owner as final decision maker. A socially and economically disadvantaged owner must be~~

the ultimate decision maker in fact, regardless of operational, policy, or delegation arrangements.

(a) Governance. Governance provisions may not require that any socially and economically disadvantaged owner obtain concurrence or consent from a nonsocially and economically disadvantaged owner to transact business on behalf of the firm.

(i) Highest officer position. A socially and economically disadvantaged owner must hold the highest officer position in the company (e.g., chief executive officer or president).

(ii) Board of directors. A socially and economically disadvantaged owner must have present control of the firm's board of directors, or other governing body, through the number of eligible votes.

(A) Quorum requirements. Provisions for the establishment of a quorum must not block the socially and economically disadvantaged owner from calling a meeting to vote and transact business on behalf of the firm.

(B) Shareholder actions. A socially and economically disadvantaged owner's authority to change the firm's composition via shareholder action does not prove control within the meaning of this section.

(iii) Partnerships. In a partnership, at least one socially and economically disadvantaged owner must serve as a general partner, with control over all partnership decisions.

(iv) Exception. Bylaws or other governing provisions that require nonsocially and economically disadvantaged owner consent for extraordinary actions generally do not contravene the control rules of this section. Nonexclusive examples are a sale of the company or substantially all of its assets, mergers, and a sudden, wholesale change of type of business.

(b) Expertise. At least one socially and economically disadvantaged owner must have an overall understanding of the business and its essential operations sufficient to make sound managerial decisions not primarily of an administrative nature. These requirements vary with type of business, degree of technological complexity, and scale.

(c) Socially and economically disadvantaged owner decisions. To distinguish control, the firm must show that the socially and economically disadvantaged owner has authority, critically analyzes information, and uses that analysis to make independent decisions. The firm must also demonstrate that the eligible owner makes the business decisions not primarily of an administrative nature.

(d) Delegation. A socially and economically disadvantaged owner may delegate administrative activities or operational oversight to a non-SED individual as long as at least one socially and economically disadvantaged owner retains unilateral power to fire the delegate(s), and the chain of command is evident to all participants in the company and to all persons and entities with whom the firm conducts business.

(i) No non-SED participant may have power equal to or greater than that of a socially and economically disadvantaged owner, considering all the circumstances. Aggregate magnitude and significance govern; a numerical tally does not.

(ii) Non-SED participants may not make nonroutine purchases or disbursements, enter into substantial contracts, or make decisions that affect company viability without the socially and economically disadvantaged owner's consent.

(iii) Written provisions or policies that specify the terms under which non-SED participants may sign or act on the socially and economically disadvantaged owner's behalf with respect to recurring matters generally do not violate this paragraph, as long as they are consis-

tent with the socially and economically disadvantaged owner having ultimate responsibility for the action.

(e) Franchise and license agreements. A business operating under a franchise or license agreement may be certified if it meets the standards in this subpart and the franchiser or licensor is not affiliated with the franchisee or licensee. In determining whether affiliation exists, the certifier should generally not consider the restraints relating to standardized quality, advertising, accounting format, and other provisions imposed on the franchisee or licensee by the franchise agreement or license, if the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Alternatively, even though a franchisee or licensee may not be controlled by virtue of such provisions in the franchise agreement or license, affiliation could arise through other means, such as common management or excessive restrictions on the sale or transfer of the franchise interest or license.

AMENDATORY SECTION (Amending WSR 19-13-014, filed 6/7/19, effective 7/8/19)

WAC 326-20-094 Assignment of North American ((Industrial)) Industry Classification System (NAICS) code. The office must grant certification to a business only for specific types of work the disadvantaged owner(s) have the ability to control. To become certified in an additional type of work, the business needs to demonstrate its owner(s) are able to control the business with respect to that type of work. The office must not require the business to recertify or submit a new certification application but verify the disadvantaged owner(s) control of the business in the additional type of work.

(1) The types of work a business can perform, whether at initial certification or when a new type is added, must be described in terms of the most specific available North American Industry Classification System (NAICS) code for that type of work. In addition to applying the appropriate NAICS code, the office may apply a descriptor from a classification scheme of equivalent detail and specificity. A correct NAICS code is one describing, as specifically as possible, the ((~~principle~~)) principal goods or services the business would provide to the state. Multiple NAICS codes may be assigned when appropriate. The office must rely on, and not depart from, the plain meaning of NAICS code descriptions in determining the scope of a business's certification.

(2) Businesses and recipients must check carefully to make sure the NAICS codes cited in a certification are current and accurately reflect work the office has determined the business owners can control. The business bears the burden of providing detailed company information the office needs to make an appropriate NAICS code designation.

(3) If a business believes there is not a NAICS code that fully or clearly describes the type(s) of work in which it is seeking to be certified, the business may request the office, in its certification documentation, supplement the assigned NAICS code(s) with a clear, specific, and detailed narrative description of the type of work in which the business is certified. A vague, general, or confusing description is not sufficient for this purpose, and recipients must not

rely on such a description in determining whether a business's participation can be counted toward goals.

(4) The office is not precluded from changing a certification classification or description if there is a factual basis in the record. However, the office must not make after-the-fact statements about the scope of a certification, not supported by evidence in the record of the certification action.

AMENDATORY SECTION (Amending WSR 19-13-014, filed 6/7/19, effective 7/8/19)

WAC 326-20-099 Small business concern requirement and size standards. (1) In addition to meeting the ownership and control requirements of chapter 39.19 RCW, a business must qualify as a small business concern for certification eligibility or (~~recertification~~) certification update.

(a) A small business concern is a business that is independently owned and operated, is not dominant in its field of operations, and does not exceed the size limitations as set forth in the current table of North American (~~Industrial~~) Industry Classification System (NAICS) codes or corresponding industry size standards as set forth in 49 C.F.R. Part 26 and amendments or inflationary adjustments thereof.

(b) The number of employees or amount of annual receipts listed as the size standard for each NAICS code indicates the maximum allowed for a business, including its affiliates, to qualify as a small business concern.

(c) The office's determination of whether a business qualifies as a small business concern must be, whenever possible, based on criteria consistent with the small business requirements defined under section 3 of the Small Business Act, 15 U.S.C. 632, and its implementing regulations, taking into consideration statewide markets.

(2) A business exceeding the small business size limits after certification by the office must be subject to graduation.

(3) At the time of application for certification and recertification, a business must demonstrate to the office that it is a small business concern. The office may verify the business is still a small business concern at any time after certification. In verifying the business's size, the office will review such financial documentation made available to the office, such as annual financial statements, federal income tax returns, state and local excise tax reports, and other relevant information.

(4) Except as otherwise provided in this chapter, affiliation occurs when either directly or indirectly:

(a) One business controls or has power to control the other;

(b) A third party or parties controls or has power to control both; or

(c) An "identity of interest" exists among them so the presumption of affiliation exists.

(5) When reference sets the maximum size standard to "annual receipts," a business exceeding the monetary figure in the standard is not eligible for certification. Annual receipts includes all revenue received or accrued from sources, such as sales of products or services, interest, dividends, rents, royalties, fees, or commissions, reduced by returns and allowances. The term "receipts" excludes proceeds from any of the following:

- (a) Sales of capital assets and investments;
- (b) Proceeds from transactions between a concern and its domestic and foreign affiliates;
- (c) Proceeds from payments of notes receivable, accounts receivable, and amounts collected as an agent for another, such as gross bookings when a commission is earned, in which case only the commission earned constitutes revenue, and taxes collected for remittance to a taxing authority.
- (6) The measurement period must comply with the following:
- (a) The size of a business with three or more completed fiscal years will be determined by averaging the annual receipts of the business for the most recent three years;
- (b) The size of a business with less than three fiscal years will be determined by computing the average of the annual receipts from the time the business formed, calculating total revenues compiled over the period divided by the number of weeks, including fractions of a week, multiplied by (~~fifty-two~~) 52;
- (c) Method of determining annual receipts. Revenue may be taken from the regular books of account of the concern. If the office so elects or the business has not kept regular books of account or the Internal Revenue Service has found such records to be inadequate and has reconstructed income of the concern, then revenue as shown on the federal income tax return of the concern may be used in determining annual receipts along with other information the office deems relevant.
- (7) Where the size standard is "number of employees," size eligibility requires the concern may not exceed the number of employees in that standard.
- (a) "Number of employees" means that average employment of the concern, including domestic and foreign affiliate employees, based upon employment during each of the pay periods for the preceding completed (~~twelve~~) 12 calendar months.
- (b) In computing average employment, part-time and temporary employees count as full-time employees for each applicable pay period.
- (c) If a concern has not been in business for (~~twelve~~) 12 months, "number of employees" means the average employment of the concern, including its affiliates, during each of the pay periods during which it has been in business.
- (8) No business, regardless of its primary NAICS code, is eligible for certification if it exceeds the largest annual revenue limit contained in 49 C.F.R. Part 26 and any amendments or inflationary adjustments thereof.
- (9) In determining the business's primary industry, including its affiliates, the office must consider the distribution of receipts, employees, and costs in the differing industry areas the business operated during its most recently completed fiscal year. Other factors, such as patents, contract awards, and assets, may be considered.
- (10) If the activities of the business encompass two or more NAICS codes, the first NAICS code listed in the directory is the primary industry classification of the business.
- (11) A business exceeding the small business size limits after certification by the office must be subject to graduation.
- (12) For purposes of utilization on projects funded by any operating modal of the U.S. Department of Transportation the maximum dollar size standard in 49 C.F.R. Part 26 as may be amended or adjusted for inflation, must apply, even if the size standard would otherwise be set by reference to number of employees. This standard is a maxi-

mum. Certified businesses are still subject to applicable lower limits on business size as established by the United States Small Business Administration and these regulations.

AMENDATORY SECTION (Amending WSR 92-11-007, filed 5/11/92, effective 6/11/92)

WAC 326-20-150 On-site investigations. The office may, whenever it deems necessary, conduct unannounced on-site investigations into the operations of a business. By submitting the certification application form, an applicant agrees that the office may conduct such investigations at any time. On-site reviews may be conducted in-person or virtually.