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RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 99-089

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated September 1998.]

1. Statutory Authority

a. Section Comm 111.03 (2) (g) requires that at least two key employees of a certified capital company reside in Wisconsin. What statutory authority exists for this provision?

b. The placement of the statements in s. 560.32 (1) (a) and (b), Stats., in quotation marks indicates that s. 560.32 (1), Stats., contemplates that these statements will be reproduced verbatim in any offering material involving the sale of securities of a certified capital company. As such, the authority for the department to modify the content of these statements in s. Comm 111.04 (1) (a) and (b) is not apparent.

c. Paragraph (a) in the second sub. (1) in s. Comm 111.04 limits the amount of investments a person may make in a certified capital company at any time to \$10 million. This is in addition to the limit of \$10 million in certified capital investments in all certified capital companies prior to August 1, 2000 under par. (e) in the second sub. (1) in s. Comm 111.04. Since s. 560.32 (2), Stats., does not contain a similar limit on investments in a certified capital company as those specified in par. (a), the authority for the department to specify the \$10 million limit in par. (a) is not apparent.

d. Under s. Comm 111.06 (1) (a) (intro.), to be a qualified investment, a cash investment in a qualified business that is an equity security of the qualified business must be structured with a maturity or redemption of five years or greater. Since s. 560.34 (1) (a) 1., Stats., does not contain this five year or greater maturity redemption requirement, the

department's authority for imposing this structure on equity securities is not apparent. See also the new condition expressed in s. Comm 111.06 (1) (a) 2. c.

e. The provisions in the first sub. (3) in s. Comm 111.06 establish limits on "all capital not invested in qualified investments" by a certified capital company. The authority for the department to apply these limits to capital that the company derived from sources other than certified capital investments is not apparent. Also, the authority for the department to prescribe how the company shall manage certified capital investments not invested in qualified investments beyond the limits in s. 560.34 (2), Stats., is not apparent.

f. The department establishes in s. Comm 111.10 (3) (b) additional criteria for decertifying a certified capital company that are not specified in s. 560.37 (3), Stats. What is the statutory authority for the provision? Is it contained in ss. 227.11 (2) (a) and 560.31 (1), Stats.?

2. Form, Style and Placement in Administrative Code

a. The department should review the entire rule and, as appropriate, correct the following deficiencies in drafting style or form:

- (1) In s. Comm 111.01, the word "the" before the word "certified" should be deleted.
- (2) The preferred drafting style for the introduction to a list of definitions in a chapter of the administrative code is to use "In this chapter:". This style was not followed in s. Comm 111.02 (intro.).
- (3) Definitions should not contain substantive provisions. [See s. 1.01 (7) (b), Manual.] Definitions with substantive provisions include s. Comm 111.02 (2) (a) and (24).
- (4) To alert the reader of the rule that a definition is repeating a statutory definition, the rule should reference the statutory definition rather than repeat the definition in the text of the rule. For example, s. Comm 111.02 (1) should read: "(1) 'Affiliate' has the meaning specified in s. 560.30 (1)." If the department desires to have the text of the definition included with the rule, it can repeat the statutory definition in a note following the reference to the statutory definition.
- (5) Parentheses should not be used in the rule. [See s. 1.01 (6), Manual.] This style was not followed, for example, in ss. Comm 111.02 (2) (a), (3) and (9) (c) and 111.09 (1) (i) 3. In s. Comm 111.02 (3), the acronym "CAPCO" should be set off in quotation marks as an alternative defined term.
- (6) Definition should be drafted in a singular rather than the plural. See the definition of "employes" in s. Comm 111.02 (8). Similarly, "obligations" should be "obligation" in subd. 3. a. in the first sub. (3) in s. Comm 111.06.

- (7) To avoid ambiguity and facilitate any future amendments to the rule, lists of items should be drafted in the standard format that includes the use of “following” in the introductory clause to the list, delineation of whether the list is exclusive or inclusive through the use of terms such as “any of” versus “all of” in the introductory clause and ending each item in the list with a period. This format was not followed in numerous lists in the rule, including lists in s. Comm 111.02 (15) and the first sub. (3) in s. Comm 111.06.
- (8) Slashed alternatives should not be used in the rule. See, for example, s. Comm 111.02 (23) (c).
- (9) The rules should be drafted in the active voice. [See s. 1.01, Manual.] Examples of provisions that are not in the active voice include ss. Comm 111.03 (1) (a) and 111.04 (1) (intro.).
- (10) Mandatory duties should be denoted in a rule through the use of “shall”; an optional provision or discretionary authority should be denoted through the use of “may.” Prohibitions should be stated as “no person may . . .” or “a person may not . . .” In addition, “should,” “will,” “must” or “it is the responsibility of” should not be used to express a mandatory or permissive action. [See s. 1.01 (2), Manual.] This drafting style was not followed throughout the rule. See, for example, s. Comm 111.03 (1) (e) (intro.) and the second sub. (1) (b) in s. Comm 111.04.
- (11) A subsection number should be placed within parentheses. This style was not followed in the first sub. (2) in s. Comm 111.06.
- (12) A noun should not end in “(s)” to indicate that it may be singular or plural. [See s. 1.01 (6), Manual.] This style was not followed, for example, in s. Comm 111.09 (1) (c) 2.
- (13) Numbers, except “1,” should be written in numerals, unless a sentence begins with the number. See, for example, s. Comm 111.09 (1) (j).

b. The department should review the entire rule, and correct it as necessary, to ensure that it conforms to the preferred drafting style for the system of numbering and cross-references. Examples of deficiencies in numbering and cross-references include the following:

- (1) A reference to a consecutive series of provisions should use “to” rather than “through.” See, for example, s. 111.01 and subd. 3. f. following the first sub. (3) in s. Comm 111.06.
- (2) References to alternative provisions should be in the singular. See the use of “ss.” in s. Comm 111.02 (3). The notation “s.” should be used.

- (3) External references in an administrative rule should include the agency's abbreviation. For example, "s. 111.10" in s. Comm 111.06 (1) should be stated as "s. Comm 111.10."
- (4) All subunits of a rule should end with a period. See, for example, "par" rather than "par." in par. (b) 3. (intro.), 4. and 5. in the first sub. (2) in s. Comm 111.06.
- (5) The first two statutory references in s. Comm 111.10 (3) (a) should include "Stats." only once; the first "Stats." should be deleted. See s. 560.37 (3), Stats.
- (6) Paragraphs should be designated by a lowercase letter enclosed in parentheses. This was not done in the reference to "par. (b)" in s. Comm 111.10 (3) (c).
- (7) The subdivisions in the first sub. (3) in s. Comm 111.06 should be paragraphs following an introduction that grammatically leads into them. Regarding the inappropriate use of an introduction, see also, ss. Comm 111.03 (1) (e), 111.04 (1) (f) and 111.06 (2) (b).

c. The department should review the entire rule and, as appropriate, correct the following deficiencies in the placement of provisions within the rule:

- (1) A definition of one term should not be placed within the definition of another term. This style was not followed in pars. (a) to (e) in the definition of "equity in a qualified business" in s. Comm 111.02 (9).
- (2) Definitions should be placed in alphabetical order. This style was not followed for the definitions of "net worth," "primary business of a CAPCO" and "principal business operations in Wisconsin" in s. Comm 111.02 (19), (22) and (23).
- (3) The text in subs. (1) to (3) in s. Comm 111.03 (1) (e) appear to be placed in subdivisions because of the reference in these provisions to the notice in par. (e) (intro.), which should be renumbered as subd. 1. To avoid ambiguity, these subdivisions should include specific references to the notice using, for example, "the notice specified in subd. 1." In addition, s. Comm 111.03 (1) (e) 4. should be drafted as a separate paragraph as the contents of subd. 4. do not relate to the notification under par. (e) (intro.). Similar comments may be made on the use of "proceeds" in par. (b) 1. and 2. in the first sub. (2) in s. Comm 111.06.
- (4) Section Comm 111.04 contains two subs. (1) and no sub. (2).
- (5) Section Comm 111.06 contains two subs. (2) and two subs. (3).

- (6) Section Comm 111.07 contains two subs. (4).
 - (7) Section Comm 111.09 contains only one subsection. In this section, sub. (1) should be redrafted to be s. Comm 111.09 (intro.) and pars. (a) to (j) should be redrafted as subsections.
 - (8) The text of subs. 1. in s. Comm 111.09 (1) (b) should be incorporated into the text of par. (b) (intro.) as there is only one subdivision under par. (b).
 - (9) The relation of s. Comm 111.02 (2) (a) and (b) to the definition of “allowable organizational costs” in s. Comm 111.02 (2) (intro.) is not apparent. Since pars. (a) and (b) contain substantive provisions, their text should be placed in the substance of the rule and not in a definition.
- d. Section Comm 111.02 (2) (b) is more appropriately placed in a note to the rule.
 - e. In s. Comm 111.02 (13), the final occurrence of the letter “s” should be deleted.
 - f. In s. Comm 111.02 (15) (a), the word “common” should be replaced by the word “Common.”
 - g. Section Comm 111.02 (19) should be rewritten to read: “‘Net worth’ means assets minus liabilities in accordance with GAAP.”
 - h. In s. Comm 111.02 (23), the first letter of each paragraph should be capitalized.
 - i. In s. Comm 111.09 (1) (b) 1., the word “Principals” should be replaced by the word “principals.” Also, the notation “, Stats.” should be inserted following the statutory citation.
 - j. In s. Comm 111.09 (1) (f), only the first letter of each subdivision should be capitalized.

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

- a. The analysis accompanying the rule cites ss. 560.30 to 560.38, Stats., as authorizing rule making. This reference is unduly broad as it contains all of the statutes in ch. 560, Stats., relating to certified capital companies. The specific statutes that establish the duty of the department to adopt rules, ss. 560.31 (1) and 560.34 (1m) (b), Stats., should be cited.
- b. The rule incorporates by reference the generally accepted accounting principles adopted by the American Institute of Certified Public Accountants. [See s. Comm 111.02 (13).] Consent for incorporation of this standard must be obtained from the Revisor of Statutes and the Attorney General pursuant to s. 227.21 (2) (a), Stats. The analysis accompanying the rule should, but does not, indicate that this consent has been given either prior to this rule promulgation or concurrently with this rule promulgation.

c. The reference to the generally accepted accounting principles in s. Comm 111.02 (13) is vague. Which version of the principles is being referenced?

d. Sections Comm 111.03 and 111.04 refer to forms. The department should ensure that the requirements of s. 227.14 (3), Stats., are met.

e. The reference to “par. (b) or (c)” in par. (f) (intro.) of the second sub. (1) in s. Comm 111.04 appears to be in error. Based upon the cross-references in s. 560.32 (2) (d), Stats., on which par. (f) is based, it appears that this reference should be to “par. (d) or (e).”

f. The reference to “s. 111.06 (1) to (e)” in s. Comm 111.07 (2) is incorrect. The department should revise this reference.

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

a. “Operation” should begin with a capital “O” in the table of contents entry for s. Comm 111.06 at the beginning of the rule.

b. Section Comm 111.02 (2) needs to be rewritten. For example, only the first letter of the defined term should be capitalized. Next, the definition uses inconsistent terminology by referring to the term “direct costs” and “direct organizational costs.” The first sentence of the subsection is a run-on sentence containing substantive material that should be placed elsewhere in the rule. In par. (a), the reference to “generally accepted accounting principles” should be replaced by the acronym “GAAP,” which is a defined term. As noted previously in this report, the last two sentences of par. (a) are substantive and par. (b) should be placed in a note to the rule.

c. The definition of “employees” in s. Comm 111.02 (8) is unclear. What is “the business” referred to in this definition. Who are “persons leased to the business”?

d. Paragraphs (a) to (d) in s. Comm 111.02 (9) are grammatically incorrect. For example, in sub. (9) (a), it appears that the first comma should be replaced by the word “that” and that the word “and” should be replaced by the word “or.”

e. The rule uses the term “qualified Wisconsin business.” See, for example, s. Comm 111.02 (9) (c) and (b) 2. in the first sub. (2) in s. Comm 111.06. If this term is the same as a “qualified business,” as defined in s. Comm 111.02 (18), then “qualified Wisconsin business” should not be used in the rule. If it is different, then it should be defined in s. Comm 111.02.

f. The reference to a “significant equity interest” in s. Comm 111.02 (9) (e) is vague. Can the department define “significant”?

g. In s. Comm 111.02 (9) (f), “conceptually” is redundant and should be deleted. Also, this definition should end with “approved by the department” rather than “as the department may approve.”

h. Throughout the rule, the department should consistently use either “CAPCO” or “certified capital company.” See, for example, s. Comm 111.02 (15), where par. (a) uses “CAPCO” and par. (b) uses “certified capital company.”

i. Since “GAAP” is a defined term, the definition of “net worth” in s. Comm 111.02 (19) should end with the phrase “in accordance with GAAP.”

j. In s. Comm 111.02 (24), is the phrase “bank or other commercial lender” the same as “financial institution,” as defined in s. Comm 111.02 (12)? If so, “financial institution” should be used in sub. (24).

k. In s. Comm 111.03 (1) (d), the comma should not be underscored.

l. Section Comm 111.03 (1) (e) 2. is ambiguous. Is the “date completed” the date of the original application or the date that the completed application was resubmitted?

m. Since “net worth” is a defined term, the phrase “as defined by GAAP” in s. Comm 111.03 (2) (b) is redundant and should be deleted.

n. In s. Comm 111.03 (2) (g), what does the term “key” mean?

o. The last clause in par. (f) 2. in the second sub. (1) in s. Comm 111.04 is an incomplete sentence.

p. The last sentence in par. (g) in the second sub. (1) in s. Comm 111.04, refers to applications received on the same date as the forfeited investment application. Should this provision in this sentence also apply to applications received after the date of the forfeited investment application?

q. The phrase “this reduction” in par. (b) 3. a. in the first sub. (2) in s. Comm 111.06 is unclear. Which reduction does it refer to? Also, the word “may” should be replaced by the word “does.”

r. In par. (b) 4. in the first sub. (2) in s. Comm 111.06, the colon after “if” should be deleted.

s. In par. (b) 5. in the first sub. (2) in s. Comm 111.06, the script “),” should be deleted.

t. The provisions in pars. (b) 1. and 5. in the first sub. (2) in s. Comm 111.06 appear to be duplicative. The text of subd. 5. should be either clarified to distinguish it from subd. 1. or deleted.

u. The reference to the “date specified in par. (a)” or the “dates specified in par. (a)” in par. (c) (intro.), 1. and 2. in the first sub. (2) in s. Comm 111.06 are vague as par. (a) contains three dates, the investment date, three years after the investment date and five years after the investment date.

v. Since “trust company” is included in the definition of “financial institution,” “or trust company” should be deleted in subd. 3. b. in the first sub. (3) in s. Comm 111.06.

w. The phrase “the rules under” in the first sub. (4) in s. Comm 111.07 is redundant and should be deleted.

x. Can the department provide a definition of “business secret” in s. Comm 111.07 (5) to help ensure consistent interpretation of this subsection?

y. In s. Comm 111.09 (1) (intro.), “an” should be “and.”

z. The reference to “the application” in s. Comm 111.09 (1) (a) is vague. Which application does par. (a) refer to?

aa. In s. Comm 111.09 (1) (d) 9., what does the phrase “associated with” mean?

ab. In s. Comm 111.09 (1) (d) 1., should “and” be “or”?

ac. The reference to a “due diligence file” in s. Comm 111.09 (1) (e) 10. is vague. Can the department specify the specific records that should be kept in a due diligence file? Similarly, the records required under s. Comm 111.09 (1) (g) are vague. What specific records should a certified capital company maintain relating to its capital that is not invested in qualified businesses?

ad. In s. Comm 111.09 (1) (j), the use of the word “registered” is confusing. Does the department mean “certified”?

ae. The second period after the title of s. Comm 111.10 (2) should be deleted.

af. Should “section” in s. Comm 111.10 (3) (b) 1. and 2. be replaced with “chapter”?

ag. In s. Comm 111.10 (3) (b) 3., the word “against” should be replaced by the word “under.”

ah. The effect of decertification in s. Comm 111.10 (5) should contain an exception for decertification under s. Comm 111.10 (3) (c).