

CR 09-045

ORDER OF THE DEPARTMENT OF COMMERCE

CREATING RULES

The Wisconsin Department of Commerce creates Comm 106.49 Note, 106.68 Note, 106.87 Note, 108.02 Note, 110.08 Note, 111.09 Note, 113.07 Note, 116.07 Note, 117.07 Note, 127.06 Note, 129.03 Note, 131.50 Note, 132.40 Note, 133.10 Note and chapter Comm 149 relating to statements and penalties for grant and loan programs, and penalties for tax credit programs, and affecting small businesses.

Rule Analysis

1. Statutes Interpreted.

Sections 560.01 (2) (ae) 6. and 7. and (as), as created by 2007 Wisconsin Act 125.

2. Statutory Authority.

Sections 560.01 (2) (ae) 6. and 7., and section 227.11 (2) (a).

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. Sections 560.01 (2) (ae) 6. and 7. direct the Department to require, by rule, penalties and statements in the economic-development grant or loan programs administered by the Department, and penalties in the tax credit programs administered by the Department.

4. Related Statute or Rule.

Several statute sections and other Departmental rules address financial incentives for economic development in Wisconsin. For example, (1) sections 560.70 to 560.7995 of the Statutes and chapters Comm 100, 107, 112 and 118 address statewide tax-credit programs for job creation, capital investment, employee training and corporate headquarters; (2) sections 560.60 to 560.685 of the Statutes and chapter Comm 106 direct economic development grants and loans towards capital financing, worker training, entrepreneurial development, providing assistance to technology-based business or to businesses at a foreign trade show or event, promoting urban or regional economic development, establishing revolving loan funds, providing working capital, and promoting employee ownership; and (3) several other sections of chapter 560 of the Statutes and other Comm chapters address more-narrowly targeted economic development incentives, such as for film productions, dairy manufacturing facilities, technology commercialization, rural economic development, and brownfield redevelopment.

5. Rule Summary.

The rules in this order (1) require each recipient of an economic development grant, loan or tax credit administered by the Department to enter into a contract with the Department, prior to receiving allocation of the grant, loan or tax credit; (2) require each recipient of a grant or loan to submit to the Department a statement which contains a detailed accounting of the funding and deliverables for the grant or loan; (3) require verification by a certified public accountant for the statements for grants or loans that total \$100,000 or more; and (4) establish penalties for recipients who submit false or misleading information or who fail to comply with the terms of a contract.

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

The federal Government Performance and Results Act (GPRA) of 1993, as primarily enacted in sections 1115 and 1116 of Title 31 of the United States Code, contains several main elements that are substantially similar to the main

elements of 2007 Wisconsin Act 125 – such as requiring governmental executive agencies to (1) establish measurable goals and performance indicators for each applicable program administered by the agency, and (2) annually submit a corresponding detailed report to legislative reviewers that assesses the overall effectiveness of each of those programs. However, GPRA does not include the Act 125 requirements that (1) the recipients of the program benefits must submit performance and financial reports and corresponding verified statements to the administering agency; and (2) administering agencies must establish penalties for a recipient who submits false or misleading information, or who fails to comply with the terms of a contract and then fails to adequately explain the noncompliance.

Section 6304 of Title 31 of the United States Code requires a federal executive agency to use a grant agreement as the legal instrument reflecting the relationship between the United States Government and a State, a local government, or other recipient when (1) the principal purpose of the relationship is to transfer something of value to the recipient to carry out a public purpose, and (2) substantial involvement is not expected between the executive agency and the recipient when carrying out the activity contemplated in the agreement. Several of the economic development programs administered by the Department include federal grant funding and therefore are addressed in such grant agreements. The Department likewise uses similar grant and loan agreements with the local recipients of the benefits of these and other economic development programs. Federal administrative requirements for grant agreements between federal agencies and nonprofit organizations, for example, are established in section 215 of Title 2 of the Code of Federal Regulations. Those requirements include having the recipient submit performance reports and financial status reports to the awarding agency at least annually – and the financial status report must include a certification statement from an authorized official for the recipient, that attests to the accuracy and completeness of the report and to the validity of all included outlays. This required recipient performance reporting closely matches the recipient performance reporting that is required in 2007 Wisconsin Act 125; and the required certification statement on the financial report closely matches the verification statement which is likewise required in Act 125, and which is addressed in the adopted rules.

Sections 215.61 and 215.62 of Title 2 of the Code of Federal Regulations specify that grant awards may be withheld, suspended, or terminated in whole or in part if a recipient fails to comply with the terms and conditions of an award. These penalties for this failure closely match the withholding-payment penalty which is authorized in Act 125 for recipients who fail to comply with the terms of a grant or loan agreement, and which is addressed in the adopted rules.

Under the federal civil money penalty law, as enacted in 1981 and as currently applied, for example, to the Social Security program through section 1320a-8 of Title 42 of the United States Code, any person who submits false or misleading statements for an agency's use in determining eligibility for program benefits is subject to a penalty of not more than \$5000 for each such statement, and to an assessment of not more than twice the amount of benefits or payments paid as a result of the statements. Since 1981, the provisions of the civil money penalty law have been expanded by reference to numerous types of fraudulent and abusive activities, including those addressed by the federal Economic Development Administration. These penalties for these statements closely match the Act 125 penalties which impose a forfeiture or recoup a payment in response to submittal of false or misleading statements, and which are addressed in the adopted rules.

An Internet-based search of recent editions of the *Federal Register* did not reveal any currently proposed federal regulations regarding penalties in the economic development grant and loan programs administered by the Department; or regarding penalties for submitting false or misleading information in the economic development tax credit programs administered by the Department. In the November 21, 2007, edition of the *Federal Register*, notice was found of a proposal by the federal Department of Housing and Urban Development to extend its information-collection requirements to include requirements for grant recipients to report against their baseline performance standards, in a manner that standardizes progress-reporting requirements for grants and promotes greater emphasis on performance and results in grant programs.

7. Comparison With Rules in Adjacent States.

Minnesota

An Internet-based search did not reveal any similar Minnesota rules. However, sections 116J.993 to 116J.995 of the Minnesota Statutes require recipients of state-level economic development funding to (1) enter into a formal subsidy agreement with the State, (2) perform annual reporting, and (3) pay back subsidies for failures to meet terms of the agreements. These requirements are similar to the requirements for the contracts, reporting and penalties that are

addressed in the adopted rules. As in the adopted rules, the Minnesota reporting requirements are more detailed for larger funding levels.

Michigan

An Internet-based search did not reveal any similar Michigan rules. However, sections 208.1431 to 208.1434 of the Michigan Statutes address tax credits for job development and economic development – and require recipients of the credits to enter into a formal agreement with the State, and to submit a verified statement from a Certified Public Accountant addressing the actual jobs created, if required by the Michigan Economic Growth Authority. The tax credits can be reduced or terminated for failure to meet the terms of the contract, and must be paid back in full to the State if 51% or more of the new qualified jobs are moved out of state within three years after claiming the credit.

Illinois

Section 20 ILCS 715 of the Illinois Statutes requires recipients of state-level economic development funding to (1) enter into a formal subsidy agreement with the State, (2) perform annual reporting, and (3) pay back subsidies for failures to meet terms of the agreements. The Illinois Administrative Code contains further requirements relating to these topics in Title 32 section 130.110 for renewable fuels and in Title 14 sections 527.80, 527.90, 527.100, 540.190, and 545.560 for economic development and technology development. These requirements are similar to the requirements for the contracts, reporting and penalties that are addressed in the adopted rules. As in the adopted rules, the Illinois reporting requirements are more detailed for larger funding levels.

Iowa

Chapters 15, 15A and 15E of the Iowa statutes, and the Iowa Administrative Code chapters administered by the Department of Economic Development address state-level financial incentives for economic development and job development and require recipients of these incentives to (1) enter into a formal agreement with the State, (2) perform annual reporting, and (3) pay back subsidies for failures to meet terms of the agreements. These requirements are similar to the requirements for the contracts, reporting and penalties that are addressed in the adopted rules.

8. Summary of Factual Data and Analytical Methodologies.

The data and methodology for developing these rules were derived from and consisted of (1) incorporating the criteria in 2007 Wisconsin Act 125; (2) incorporating applicable best practices the Department has developed in administering similar programs for economic development, business development, and tax-credit verification; and (3) 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 2007 Wisconsin Act 125. This Act applies its private-sector requirements only to businesses for which a corresponding grant, loan or tax credit is desired.

10. Effect on Small Business.

The rules are not expected to impose significant costs or other adverse impacts on small businesses because the rules address submittal of documentation, and other activities, only by applicants that choose to pursue grants, loans or tax credits for economic development.

11. Agency Contact Person.

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File reference: Comm 149/rules2009 analysis A

SECTION 1. Comm 132.40 Note is created to read:

Comm 132.40 Note: See chapter Comm 149 for additional requirements relating to (1) contracts between the Department and recipients of economic-development grants, loans or tax credits; (2) submittal of statements for such grants and loans; and (3) penalties for submitting false or misleading information, or for failing to comply with the terms of a contract.

[Note to Legislative Reference Bureau: Insert an identically worded Note at the end of each of the following sections: Comm 106.49, 106.68, 106.87, 108.02, 110.08, 111.09, 113.07, 116.07, 117.07, 127.06, 129.03, 131.50 and 133.10.]

SECTION 2. Chapter Comm 149 is created to read:

Chapter Comm 149

STATEMENTS AND PENALTIES FOR GRANT AND LOAN PROGRAMS, AND PENALTIES FOR TAX CREDIT PROGRAMS

Comm 149.10 Purpose, scope and authority. (1) The purpose and scope of this chapter is to implement the provisions of s. 560.01 (2) (ae), Stats., that relate to statements and penalties for each of the economic-development grant or loan programs administered by the department, and penalties for each of the economic-development tax credit programs administered by the department.

Note: The Department and other state agencies have additional administrative rules that address economic development programs, including chapters Comm 100, Tax Benefits for Job Creation, Capital Investment, Employee Training, and Corporate Headquarters; Comm 106, Wisconsin Development Fund; Comm 108, Community Development Block Grant Program; Comm 110, Brownfields Grant Program; Comm 111, Certified Capital Companies; Comm 113, Allocation of Volume Cap on Tax-Exempt Private Activity Bonds; Comm 116, Rural Economic Development Program; Comm 117, Business Development Initiative Program; Comm 127, Main Street Program; Comm 129, Technology Commercialization Programs; Comm 131, Diesel Truck Idling Reduction Grants; Comm 132, Dairy Manufacturing Facility Investment Credit; and Comm 133, Film Production Accreditation Program.

The Department also administers other economic development programs directly under applicable provisions of chapter 560 of the Statutes or federal specifications, rather than in combination with administrative rules, including the Early Planning Grant Program, the Entrepreneurial Training Grant Program, the Business Employees' Skills Training Program, the Gaming Economic Diversification Grant And Loan Program, and the Wisconsin Trade Project Program.

(2) This chapter is promulgated under the authority of s. 560.01 (2) (ae) 6. and 7., Stats.

Comm 149.20 Definitions. In this chapter:

(1) "Contract" includes a written agreement that establishes responsibilities which a recipient will fulfill with regard to the department's terms and conditions of an award.

(2) "Department" means the department of commerce.

(3) "Economic development program" has the meaning given in s. 560.001 (1m), Stats.

Note: Section 560.001 (1m) of the Statutes reads as follows: " 'Economic development program' means a program or activity having the primary purpose of encouraging the establishment and growth of business in this state, including the creation and retention of jobs, and that satisfies all of the following:

(a) The program receives funding from the state or federal government that is allocated through an appropriation under ch. 20.

(b) The program provides financial assistance, tax benefits, or direct services to specific industries, businesses, local governments, or organizations.”

(4) “Recipient” means the direct beneficiary of a grant or loan or tax credit that is issued or authorized by the department under an economic development program.

Comm 149.30 Contracts. The recipient’s authorized director or principal officer shall enter into a contract with the department on behalf of the recipient, for each grant, loan or tax credit, prior to receiving allocation of the grant, loan or tax credit.

Comm 149.40 Statements for grants and loans. (1) For each grant or loan, the recipient’s authorized director or principal officer shall sign and submit to the department a statement on behalf of the recipient, that contains all of the following:

(a) Itemized description and accounting of the department’s funding, including the dollar amount and what the funds were used for.

(b) Itemized description and accounting of the match funding as defined in the recipient’s contract with the department, including the dollar amount and what the funds were used for.

(c) Detailed description of all deliverables as specified in the recipient’s contract with the department and the date on which these deliverables were met.

(2) The signature in sub. (1) shall attest to the accuracy, completeness and validation of all of the submitted information.

(3) Each statement submitted under sub. (1) for a grant or loan that totals \$100,000 or more shall also be signed by an independent certified public accountant licensed or certified under ch. 442, Stats., attesting to the accuracy of the information specified in sub. (1) (a).

(4) The statement required in this section shall be prepared and submitted in accordance with the format and timeline specified in the recipient’s contract with the department.

Comm 149.50 Penalties for grants, loans and tax credits. (1) The department may impose any of the following penalties on a recipient who submits false or misleading information or who fails to comply with the terms of a contract and fails to explain the noncompliance to the satisfaction of the department:

(a) The department may recoup payments made to the recipient.

(b) The department may withhold payments to be made to the recipient.

(c) The department may impose a forfeiture on the recipient. This forfeiture may take the form of cash penalties, an increase in the loan interest rate, debarment from accessing Commerce programs, or other forfeitures as specified in the contract.

Note: Section 560.075 (2) of the Statutes requires a recipient of a grant, loan or tax credit to enter into an agreement with the Department to repay the grant, loan or tax credit if, within 5 years after either receiving the grant or loan or being certified to receive the tax credit, the recipient (1) ceases to conduct in Wisconsin the economic activity

for which the recipient either received the grant or loan or was certified to receive the tax credit, and (2) then commences substantially the same economic activity outside Wisconsin.

(2) (a) Any penalties imposed under sub. (1) shall be in accordance with the procedures and amounts and any other relevant terms prescribed in the recipient's contract with the department.

(b) Any fine or other penalty that is imposed under this chapter may not be paid for with funds obtained through a grant, loan or tax credit program administered by the department.

(END)

EFFECTIVE DATE

Pursuant to s. 227.22 (2) (intro.), Stats., these rules shall become effective on the first day of the month commencing after the date of publication in the Wisconsin administrative register.

File reference: Comm 149/rules 2009LR2