

CR 09-121

**ORDER OF THE
DEPARTMENT OF COMMERCE
CREATING RULES**

The Wisconsin Department of Commerce adopts an order to create chapter Comm 136 relating to allocation of the Midwestern disaster area bonding authority provided to Wisconsin under the federal Heartland Disaster Tax Relief Act of 2008, and affecting small businesses.

Rule Summary

1. Statutes Interpreted.

Section 560.03.

2. Statutory Authority.

Sections 227.11 (2) (a) and 560.03.

3. Explanation of Agency Authority.

Section 227.11 (2) (a) of the Statutes authorizes the Department to promulgate rules interpreting the provisions of any Statute administered by the Department. Section 560.03 of the Statutes authorizes and directs the Department to assist in implementing economic and community development programs, and to perform such other functions as the Governor may direct for aiding industrial development.

4. Related Statute or Rule.

Chapter Comm 113 contains rules relating to allocating a volume cap on tax-exempt private activity bonds for manufacturing and housing, pursuant to 26 USC 146.

5. Plain Language Analysis.

The rules in this order establish a procedure by which the Governor can designate tax-exempt Midwestern disaster area bonds that can be issued by, or on behalf of, the State or any political subdivision thereof, under the federal Heartland Disaster Tax Relief Act of 2008. These are private activity bonds that are designed to facilitate the recovery and rebuilding of areas which were declared major disaster areas in 2008.

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

In the Emergency Economic Stabilization Act of 2008 (Public Law 110-343), subtitle A of title VII is the Heartland Disaster Tax Relief Act of 2008 (HDTRA). HDTRA modified section 1400N(a) of the Internal Revenue Code of 1986 to establish tax-exempt Qualified Midwestern Disaster Area (MDA) bonds for areas that in 2008 were declared by the President as being major disaster areas because of severe storms, tornados or flooding. HDTRA limits the aggregate face amount of bonds that may be designated as MDA bonds. HDTRA also delegates to the Governor the power to make certain designations in connection with the issuance of MDA bonds, including designation of the bonds as MDA bonds and designation of a trade or business as replacing another trade or business for these purposes.

7. Comparison With Rules in Adjacent States.

Although each of the adjacent states are listed in HDTRA as having areas eligible for MDA bonds, an Internet-based search produced corresponding administrative rules only in Iowa. Those rules and related information, by the Iowa Finance Authority, are available at http://www.iowafinanceauthority.gov/en/economic_development/midwestern_disaster_area_bonds/.

Highlights of the Iowa rules include the following:

- Through December 2009, \$2,000,000,000 of Iowa's allocation of MDA bonds will be apportioned based on the amount of damage suffered by each county, and based on FEMA allocations of housing assistance. The remaining \$615,995,000 of Iowa's allocation will be available to all eligible projects. After December 2009, any remaining MDA bonds will be available to all eligible projects. MDA bonds will be allocated on a first-come, first-served basis. Applications are received on a continuous basis.
- An application must be completed and submitted to the Governor's designee by the borrower, or an agent acting on behalf of the borrower. Applications may be submitted at any time after an inducement resolution for the project has been adopted. A fee of two basis points (.02%) of the amount of MDA bonds for which an application is made must be paid by the applicant upon filing the application.
- A Certification of Allocation is sent to the applicant when an allocation is made. Allocations are valid for 150 days. After the bonds are issued, a representative of the borrower must complete and return a Notice of Issuance and Delivery of Bonds within 10 days of the delivery date for the bonds.

8. Summary of Factual Data and Analytical Methodologies.

The data and methodology for developing these rules were derived from and included (1) reviewing the criteria in HDTRA and in Executive Order #288 as issued by Governor Jim Doyle; (2) incorporating applicable best practices the Department has developed in administering similar programs for economic development and business development; 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 documents that were used to determine the effect of the rules on small business were HDTRA and Executive Order #288.

No economic impact report was prepared.

10. Effect on Small Business.

The rules are expected to result in only beneficial effects on small business because the rules only address tax-exempt private activity bonds that are designed to facilitate the recovery and rebuilding of areas which were declared major disaster areas in 2008.

11. Agency Contact Person.

Steven Sabatke, Wisconsin Department of Commerce, Bureau of Business Finance and Compliance, P.O. Box 7970, Madison, WI, 53707-7970; telephone (608) 267-0762; e-mail Steven.Sabatke@Wisconsin.gov.

SECTION 1. Chapter Comm 136 is created to read:

CHAPTER Comm 136, MIDWESTERN DISASTER AREA BONDS

Comm 136.01 Purpose. The purposes of this chapter are as follows:

(1) To establish a procedure for the designation by the governor of bonds issued by, or on behalf of, the state of Wisconsin, or any political subdivision thereof, as qualified Midwestern disaster area bonds for the purposes of 26 USC 1400N(a), as modified and applied by section 702(d)(intro.) and (1) of the federal Heartland Disaster Tax Relief Act of 2008, Public Law 110-343, title VII, subtitle A.

(2) To implement allocation of the qualified Midwestern disaster area bonding authority provided to Wisconsin under the Act specified in sub. (1), for eligible projects in affected counties, with a basis of providing assistance to areas in the order in which such assistance is most needed.

Comm 136.02 Definitions. In this chapter:

(1) "Affected county" means any of the following counties in Wisconsin: Adams, Calumet, Columbia, Crawford, Dane, Dodge, Fond du Lac, Grant, Green, Green Lake, Iowa, Jefferson, Juneau, Kenosha, La Crosse, Manitowoc, Marquette, Milwaukee, Monroe, Ozaukee, Racine, Richland, Rock, Sauk, Sheboygan, Vernon, Walworth, Washington, Waukesha and Winnebago.

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

(3) "Issuer" means any of the following:

(a) A municipality.

(b) An agency, authority or political subdivision of the state of Wisconsin that is empowered to borrow money, including any redevelopment authority, community development authority, or housing authority established by or on behalf of these entities.

(c) A person acting for or on behalf of an entity listed in par. (a) or (b).

(d) Any public corporation or commission established by or on behalf an entity listed in par. (a) or (b).

(4) “Limitation on aggregate amount” means the limitation on the aggregate amount for the issuance of bonds designated as Midwestern disaster area bonds applicable to the state of Wisconsin, which is \$3,830,112,000.

(5) “Midwestern disaster area bonds” or “MDA bonds” means bonds described in, and designated for the purposes of, 26 USC 1400N(a), as modified and applied by section 702(d)(intro.) and (1) of the federal Heartland Disaster Tax Relief Act of 2008, Public Law 110-343, title VII, subtitle A.

(6) “Municipality” has the meaning given in s. 67.01 (5), Stats.

Note: Section 67.01 (5) of the Statutes reads as follows: “ ‘Municipality’ means any of the following which is authorized to levy a tax: a county, city, village, town, school district, board of park commissioners, technical college district, metropolitan sewerage district created under ss. 200.01 to 200.15 or 200.21 to 200.65, town sanitary district under subch. IX of ch. 60, transit authority created under s. 66.1039, public inland lake protection and rehabilitation district established under s. 33.23, 33.235, or 33.24, and any other public body empowered to borrow money and issue obligations to repay the money out of public funds or revenues. ‘Municipality’ does not include the state.”

(7) “Nonresidential real property project” means a project located in any of the affected counties for which private activity bonds, as defined in 26 USC 141(a), may be issued for the cost of acquisition, construction, reconstruction or renovation of nonresidential real property, including fixed improvements associated with such property.

(8) “Project” means any residential rental project, owner-occupied residence financed with a qualified mortgage issue, public utility property project, or nonresidential real property project for which exempt facility bonds may be issued under 26 USC, as modified and applied by section 702(d) of the federal Heartland Disaster Tax Relief Act of 2008, Public Law 110-343, title VII, subtitle A.

(9) “Public utility property project” means a project that includes public utility property, as defined in 26 USC 168(i)(10), located in any of the affected counties.

(10) “Qualified mortgage issue” means a qualified mortgage issue as defined in 26 USC 143(a)(2) and as modified and applied by section 702(d) (intro.) and (1) of the federal Heartland Disaster Tax Relief Act of 2008, Public Law 110-343, title VII, subtitle A, the proceeds of which are used to finance owner-occupied residences located in any of the affected counties.

(11) “Residential rental project” means a qualified residential rental project under 26 USC 142(d)(1) and 1400N(a), as modified and applied by section 702(d) of the federal Heartland

Disaster Tax Relief Act of 2008, Public Law 110-343, title VII, subtitle A, located in any of the affected counties.

Comm 136.03 Reservation for each affected county. (1) Prior to January 1, 2011, \$50,000,000 of the limitation on aggregate amount shall be reserved and made available for designations in respect to bonds issued for projects located in each affected county, and the balance of the limitation on aggregate amount shall be available for designations without regard to the affected county in which the project to be financed is located.

(2) Commencing on January 1, 2011, the \$50,000,000 of designations reserved for each affected county under sub. (1) shall terminate, and thereafter designations may be made from the entire unused balance of the limitation on aggregate amount for bonds to finance projects located in any of the affected counties without regard to the affected county in which the project is located.

Comm 136.04 Eligible applicants. Applicants for a designation to allow the issuance of MDA bonds are eligible only if either of the following conditions is met:

(1) The person using the property suffered a loss in a trade or business attributable to severe storms, tornadoes or flooding, in an affected county, in 2008.

(2) The cost is or will be incurred by a person who is designated as a person carrying on a trade or business replacing a trade or business with respect to which another person suffered a loss as specified in sub. (1).

Comm 136.05 Request, review and designation process. (1) A request for a designation under this chapter shall be made to the department on a form prescribed by the department and shall include all of the following:

(a) The name and address of the issuer.

(b) A description of the project, including, except for bonds expected to qualify as a qualified mortgage issue, the name and address of the owner, operator or sponsor of the project.

(c) The location of the project in one or more of the affected counties.

(d) Evidence that official action has been taken by the issuer with respect to the issuance of the bonds, which, for bonds issued pursuant to s. 66.1103, Stats., shall be the initial resolution previously filed with the department with respect to the bonds.

(e) A certification of the applicant to the effect that a preliminary determination has been made by bond counsel that the obligations would constitute private activity bonds under federal tax law and that the bonds are expected to qualify as one or more of the following:

1. Bonds for a nonresidential real property project.

2. Bonds for a public utility property project.

3. Bonds for a residential rental project.
4. A qualified mortgage issue.
- (f) The requested amount of the designation.
- (g) Evidence of compliance with s. Comm 136.04.
- (h) A nonrefundable payment of \$300 by cash or by a certified or cashiers check payable to the department.

Note: The application form prescribed by the Department can be obtained from the Department at P.O. Box 7970, Madison, WI 53707.

(2) Upon receipt of a completed application, the department shall evaluate whether it meets the requirements of sub. (1).

(3) The department shall forward a request for a designation to the governor, in the order in which qualifying requests are received, if the department determines all of the following:

- (a) The application meets the requirements of sub. (1).
- (b) A designation in the requested amount would not cause the aggregate amount of bonds designated under this chapter to exceed \$3,830,112,000 and would be in compliance with s. Comm 136.03.

Note: The \$3,830,112,000 limitation on aggregate amount is established under 26 USC 1400N(a), as modified and applied by section 702(d) (1) (E) (i) of the federal Heartland Disaster Tax Relief Act of 2008, Public Law 110-343, title VII, subtitle A.

Comm 136.06 Emergency. Based upon the extensive damage to property in the affected counties that resulted from severe storms, tornados or flooding in 2008 and the resulting substantial adverse economic impact to the affected counties caused thereby, the department's review and evaluation of each application shall be completed expeditiously and in any event within 30 days unless the department provides notice to the applicant of a need to extend the 30-day period for review and evaluation.

Comm 136.07 Post-designation process. (1) After the governor makes a designation, the department shall record that the corresponding portion of the limitation on aggregate amount has been designated.

(2) All MDA bonds shall be issued no later than 120 days after a corresponding designation by the governor, or before January 1, 2013, whichever comes first.

(3) (a) Each issuer shall notify the department in writing as to the amount of MDA bonds issued pursuant to the designation from the limitation on aggregate amount, within 15 business days after the issuance of the bonds.

(b) 1. Each notification under par. (a) shall include a nonrefundable payment of 0.1% of the amount issued in the bonds, up to a maximum of \$10,000, by cash or by a certified or cashiers check payable to the department.

2. The payment in subd. 1. may be reduced by the amount paid to the department under s. Comm 136.05 (1) (h).

(4) An issuer shall notify the department if it chooses to surrender all or any part of its rights to a designation under this chapter. Upon receipt of such notice, the department shall record the surrender.

(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 136/rules 2009LRac