



Notice of Rule Changes

The Office of Minority and Women's Business Enterprises (OMWBE) has adopted new and revised rules regarding certification of small businesses owned by minorities, women and other socially and economically disadvantaged persons. These changes apply to state certification and do not affect federal "DBE" certification.

The attached rule changes will take effect on July 7, 2019. The rule changes were adopted as proposed.

This document is prepared in compliance with RCW 34.05.325; the concise explanatory statement requirement of the Administrative Procedure Act. It includes:

- The reasons for adopting the rules.
- A summary of comments received, and responses to the comments by subject matter.

OMWBE appreciates your involvement in the rule making process. If you have any questions, please contact Amal Joury, at 360-664-9756 or rules@omwbe.wa.gov.

Reasons for adopting the rules:

- Allow for the additional evidence of ownership over a business, including: contributions of expertise under certain circumstances, ownership based on a final property settlement or court order in a divorce, legal separation, or inheritance, and gifts or transfers without consideration in certain circumstances.
- Modify the presumption of social disadvantage by replacing language requiring an individual be "visibly identifiable" as a presumptively disadvantaged person with the requirement a person sign a sworn declaration, and that the agency may rebut their presumption of disadvantage for a well-founded reason.
- Eliminate the requirement that applicants for state certification must be citizens or permanent legal residents of the United States. This requirement is not based in state law and is not a requirement for other business-related state licenses.
- Add clarifying language that a firm may be owned by an Indian tribe, Native Hawaiian organization, or Alaska Native Corporation.
- Add language that OMWBE may certify subsidiaries if there is 51% cumulative ownership of the subsidiary by a socially and economically disadvantaged individual(s).
- Eliminate references to a former program: corporate sponsored dealerships.
- Allow for additional evidence of control, including factors considered in determining control;

such as local and state laws licensing and credentialing requirements, owner(s) demonstrable ability to make independent and daily operating business decisions, delegations of authority, remunerations, and business affiliation.

- Update the language defining the performance of a commercially useful function for a modern business environment and remove WAC 326-02-045 from chapter 326-02 and add it to chapter 326-20.
- Eliminate the need for business owner(s) to sign an application under oath as OMWBE uses sworn affidavits.
- Provide more guidance to applicants and the office regarding the acquisition and removal of NAICS codes. The proposed updates will also allow businesses to provide the office a clear, specific, and detailed narrative of the type of work they perform if they believe an existing code does not fully or clearly describe the work in which the business is certified.
- Clarify that a non-applicant spouse or registered domestic partner may co-sign on loans and other documents. Clarify that OMWBE will look carefully at the application when ownership transfers occur between spouses and domestic partners.
- Include new language regarding the examination of past relationships between certified and noncertified firms to ensure independence.
- Eliminate WAC 326-20-092, WAC 326-20-095 and WAC 326-20-096 and combine the contents of these rules under proposed WAC 326-20-099, as these rules all interrelate to firm size and accompanying standards.
- Update rules for grammar and to reflect modern language and terminology.

Summary of public comments received and agency response

OMWBE received 2 written comments on the proposed rule changes. In addition, three people provided comment during a public hearing held in Olympia and by webinar on May 16, 2019.

Below are the comments received; organized by category. The comments are edited only for brevity, punctuation and grammar. Some individuals commented on more than one issue.

Comments expressing general support for the rule changes:

- 1. As a member of the OMWBE Advisory Committee and a national expert on certifications and contract compliance, I support the proposed rule changes. A lot of thought and consideration went into these proposed changes. It balances making the certification process easier for applicants, clarifying intent and requirements, and ensuring process integrity. The overall effect is a more realistic and modern program. I do not propose any changes or modifications to the proposed rules. I ask OMWBE adopt the proposed rules as presented.*
- 2. OMWBE's efforts to streamline and clarify rules is appreciated. It is challenging and costly to win procurement dollars from government agencies and the contracting community, and sometimes the rules for programs designed to help small businesses add to existing barriers and create a divisive culture within the community.*

Agency response to comments 1 and 2: Thank you for taking the time to support the proposed rule changes. The rules were adopted as proposed.

Comments related to the new proposed WAC 326-20-086 Native American/Native Hawai'ian/Alaska Native Corporations:

- 3. Please explain how a Native American Corporation owned business can apply for certification and what is a firewall?*

Agency Response: Thank you for your question. Businesses that are owned by Native American, Native Hawai'ian, or an Alaska Native Corporation can be certified as long as; they meet the small business requirements for their NAICS code, are controlled, according to the requirements of WAC 326-20-080, by a member of a presumptive group who meets the personal net worth standards as outlined in WAC 326-20-048. The proposed rule changes also clarify that these firms will not be considered affiliated with other businesses owned by the same tribal entity if there is a legally binding mechanism or agreement (a firewall) in place to prevent the certified firm from accessing the resources of the other tribally owned business entities.

Comments related to the proposed amendments to WAC 326-20-099: Small business concern requirement and size standards:

- 4. WAC 326-20-099(1)(c) references use of the Small Business Act 15 U.S.C. 632 to determine whether a business qualifies as a small business concern. Part 1c ends with "taking into consideration statewide markets". This reference is very general. Is there a way to be more descriptive regarding what is meant by statewide markets? As an example, does that mean the procurement market, the general economy, the construction market, specific industry markets, concentration ratios, etc.?*
- 5. WAC 326-20-099(3) is about the office verifying that a certified business is still a small business concern through a variety of financial documentation. The section lists several items that the office may use for verification and ends with "and other relevant information". Throughout the certification process, businesses are required to provide very specific information to ensure that they meet criteria to be certified. Can you please clarify and be more specific about what "other relevant information" would be requested by the office?*
- 6. WAC 326-20-099(6)(c) outlines the method for determining annual receipts. This part lists specific sources of determining a business concern's revenues then continues with "along with other information the office deems relevant." This is very vague, open-ended and subjective. What other information would the office deem relevant, and how do businesses applying for certification know what to expect? Please consider clarifying what else the office would deem relevant when determining annual receipts.*

Agency Response to questions 4 through 6: Thank you for your questions. Although OMWBE defers to the Small Business Administration (SBA) standards for determining whether a firm is a small business concern, the proposed rule amendment allows us the flexibility to adapt as markets develop in the state that may not be captured by the SBA standards or the

corresponding North American Industry Classification Codes (NAICS). Describing the term “statewide markets” with specificity or limitation could impact OMWBEs ability to make determinations for certification on a case by case basis.

Similarly, setting specific standards and criteria for determining “other relevant information” and “other information the office deems relevant” used for verifying that a small business is a small business and the methodology for determining a business concern’s revenue could also limit OMWBE’s flexibility for certifying newly established firms that may not have certain formalized documentation, but are nonetheless eligible for certification. Describing the term with specificity or limitation could impact OMWBEs ability to make determinations for certification on a case by case basis.