

**Title 1—OFFICE OF ADMINISTRATION
Division 10—Commissioner of Administration
Chapter 17—Office of Equal Opportunity**

PROPOSED AMENDMENT

1 CSR 10-17.040 Minority/Women's Business Enterprise Certification. The Commissioner is amending sections (1)-(17).

PURPOSE: This amendment updates the procedures by which Minority Business Enterprises (MBEs) and Women's Business Enterprises (WBEs) may be certified by the Office of Equal Opportunity (OEO).

(1) Any firm desiring to obtain certification as a Minority Business Enterprise (MBE) or Women's Business Enterprise (WBE) shall submit an application and required documentation to **the Office of Equal Opportunity (OEO), and be registered and in good standing with the Missouri Secretary of State, if applicable.** There are three ~~[(3)]~~ (2) methods ~~[of]~~ to obtain certification — initial/standard~~[,]~~ **and** rapid response ~~[, and out-of-state].~~

(2) ~~[All applicants are]~~ **An applicant is** required to submit to OEO documentation **related to the legal structure, ownership, and control of the firm that is** necessary to determine eligibility for certification. Such documentation may include, but is not limited to: **Articles of Incorporation/Organization; shareholder meeting minutes, bylaws or operating agreements, board meeting minutes, partnership agreements, stock ledgers and certificates, tax returns, lease and loan agreements, bank account signature cards, and joint venture agreements.**

(A) **The application must be signed by all of the applicant firm's minority or women owners who are in control of the firm. The application must include a statement attesting to the accuracy, completeness and truthfulness of the information on and accompanying the application form.**

(B) **Each application received shall be reviewed by OEO for completeness, and the applicant firm will be notified in writing by OEO of any additional information required. The additional information requested must be received within a maximum of thirty (30) days from the date on the notice for additional information or as otherwise specified in writing by OEO. After that period, if the additional information required has not been received by OEO and no extension of time has been requested and granted in writing, OEO may deny the application for the firm's failure or refusal to provide the relevant information requested by OEO.**

(C) **After all required information is received, an on-site visit to the office(s) of the applicant firm whose principal place of business is located in Missouri and possible visits to job sites at which the firm is working in Missouri, may be scheduled by OEO. OEO will not make an on-site visit to a firm whose principal place of business is outside of Missouri, but will contact the firm's home state (or another certifying entity) for a copy of its on-site visit.**

(3) ~~[Every]~~ **An applicant seeking certification has the burden of demonstrating to OEO, by a preponderance of the evidence, that it meets the requirements of section 37.020, RSMo, and these regulations.**

(4) *[Initial/standard certification]* **Initial/standard certification and a rapid response certification** are effective for three (3) years **from the date of issuance**. *[Rapid response and out-of-state certifications are based on the certification from other certifying entities and are effective until the expiration date that appears on the certificate provided to OEO.]* Joint venture certifications are effective for either *[one (1) year]* **two (2) years** or the term of the joint venture, **whichever occurs first**.

(5) *[Out-of-State Certifications. OEO will not conduct on-site reviews outside the state of Missouri; certification determinations for out-of-state applicants will be made based upon a desk audit of the application and all submitted documentation. Out-of-state applicants may only be certified by OEO if their home state allows Missouri-based minority-and women-owned firms to certify there. All currently certified out-of-state firms who might be affected by this rule will be allowed to maintain certification unless upon expiration they do not complete the renewal process or fail to meet other standards of ownership and control required by these regulations.]*

Rapid Response Certifications. An applicant who possesses a current M/WBE certification or equivalent from another qualified certifying entity as determined by OEO may apply for certification through OEO's rapid response application process. The on-site review report from the primary certifying entity must be received by OEO. OEO shall provide a list of qualified certifying entities. Certification by another certifying entity does not guarantee certification by OEO regardless of the other certifying entity which may have previously or currently certified a firm as a M/WBE, OEO will make an independent determination of whether the applicant firm will be certified.

(6) If an applicant is approved for certification, a *[letter]* **notice** of approval and a certificate will be *[mailed]* **sent** to the Minority and/or Women's Business Enterprise (M/WBE) **by OEO. Such certification may identify the specific category or categories of work or industry code(s) in which the firm is certified. The firm and its pertinent information, including any approved specific categories of work shall be added to OEO's directory.**

(7) *[Firms]* **A firm** certified by OEO must notify OEO **in writing** of any changes that may affect *[their]* **its** eligibility for continued certification under section 37.020, RSMo, and these regulations **within thirty days of the effective date of such change. The notice must provide supporting documentation describing in detail the nature of such change(s).**

(8) *[Applicants]* **An applicant** denied certification **or whose certification is revoked** will be notified in writing of the reasons for denial **or revocation**. Reasons may include but are not limited to: incomplete or inaccurate application, failure to provide requested information, failure to meet certification standards, or failure to cooperate during the certification process. If OEO denies **or revokes** a certification, an applicant *[has twenty-one (21) calendar days from the date the denial letter to appeal in writing]* **may appeal** to the commissioner. **The appeal shall be in writing and addressed to the commissioner. The appeal shall be received by the commissioner no later than twenty-one (21) calendar days from the date of the denial or revocation notification. Appeals received by the commissioner after twenty-one calendar days will not be considered.** The appeal shall clearly state why the denial **or revocation** is alleged to be in error. Information that was requested but not provided before the denial **or**

revocation will not be considered in an appeal. The commissioner's decision shall be final. Applicants denied certification **or revocation** are ineligible to reapply for one *[hundred eighty (180) days]* **year** from the date of the denial *[letter]* **or revocation notification**.

(9) *[Third parties]* **A third party** who *[have]* **has** reason to believe that an applicant has been wrongly denied or granted certification as an M/WBE or joint venture may file a third-party challenge with OEO. *[Challenges]* **A challenge** by a third *[parties are]* **party is** not considered *[appeals]* **an appeal**.

(A) The third-party challenge must be submitted in writing with supporting documentation in sufficient detail to support the allegations. OEO may require additional documentation from the challenger.

(B) The third-party challenge must contain the name, address, telephone number, and signature of the challenger.

(C) Third-party challenges will not be considered confidential.

(D) *[The M/WBE or applicant will be notified in writing that a challenge has been filed.]*

OEO will review the complaint and related material concerning the firm in question, including available material from other sources within or outside OEO. OEO may conduct an investigation, including requests for information or documentation and unannounced site visits. However, OEO is not obligated to conduct any investigation beyond a document review. At an appropriate time in the complaint investigative phase, OEO will notify the certified firm in writing that a complaint alleging the firm's ineligibility has been filed. OEO may request additional information from the firm relating to the allegations.

(E) *[OEO will investigate the challenge and issue a written decision.]* **After OEO has reviewed the complaint and conducted any investigation deemed necessary, OEO shall make a determination whether there is reasonable cause to believe that the firm in question is ineligible to be certified.**

(F) **If OEO finds reasonable cause to believe that the firm is ineligible, OEO will provide written notice to the firm that OEO proposes to find the firm ineligible, setting forth the reasons for the proposed determination and supporting documentation. If OEO determines that such reasonable cause does not exist, it will notify the complainant and the firm in writing of this determination and the reasons for it.**

(G) **If OEO notifies a firm of its ineligibility, the firm may appeal the decision to the commissioner pursuant to the requirements of subsection (9) of this regulation.**

(H) **OEO may decline rather than deny certification when one (1) or more questions are identified during the preview for certification. Applicants declined certification will be notified in writing and may respond with additional documentation or clarification within the time frame stated in the notice.**

(I) **Firms shall cooperate fully with OEO's request for information relevant to the certification process. Failure or refusal to provide such information is a ground for a denial or revocation of certification.**

(10) OEO will be guided by the following standards when evaluating applicants for certification:

(A) In determining whether an applicant meets the requirements of section 37.020, RSMo, and these regulations, OEO will consider all information in its possession;

(B) OEO will evaluate an applicant based on current circumstances and will not deny certification solely because an applicant was not owned or controlled by a minority or woman at some time in the past;

(C) OEO may authorize a one (1)-year provisional certification in certain circumstances, such as to allow time for a minority or woman to transition from being an employee to a business owner, **to allow entities who have not been in business for at least a year to be certified** or to review tax information that is not available for a new firm at the time of application;

(D) An applicant will not be denied certification solely because it is a newly-formed firm; **has not completed projects or contracts at the time of its application; has not yet realized profits from its activities; or has not demonstrated a potential for success;** and

(E) *[OEO may decline rather than deny certification when one (1) or more questions are identified during the preview for certification. Applicants declined certification will be notified in writing and may respond with additional documentation or clarification within the time frame stated in the notice.]*

Per OEO's discretion, it shall grant certification to a firm, and such certification may identify the specific category or categories of work or industry code in which the firm is certified. To become certified in an additional type of work after initial certification, OEO may require the firm to demonstrate that it meets the criteria for certification to perform that type of work. OEO shall not require that the firm be recertified or submit a new application for certification, but OEO may verify the minority or woman owner's control of the firm in the additional category of work.

1. OEO shall use categories or codes that describe, as specifically as possible, the principal goods or services which the firm provides to its customers. Multiple categories or codes may be assigned where appropriate.

2. OEO and the certified firm shall ensure that the categories or codes listed in a certification are kept up-to-date and accurate. The firm bears the burden of providing detailed company information to OEO to make an appropriate designation.

3. If a firm and OEO agree that there is not a category or code that fully or clearly describes the type(s) of work in which the firm is seeking to be certified, the firm may request that OEO, in its certification documentation, supplement the assigned category or code with a clear, specific, and detailed narrative description of the type of work in which the firm is certified. OEO may grant such request if appropriate. A vague, general, or confusing description is not sufficient.

4. OEO is not precluded from changing at any time a certification classification or description if there is a factual basis supported by documentation pursuant to the process identified in subsection 14 of this regulation.

(11) Each year **following the original date of certification**, OEO will *[send an annual update form to]* **notify** each firm certified under this program. Each firm must *[complete and return the form]* **accurately, truthfully, and fully provide the requested information and supporting documentation** to OEO. **The annual update information and supporting documentation must be verified by all of the applicant firm's minority or women owners who are in control of the firm. The verification shall be in the form of a statement attesting to the accuracy, completeness and truthfulness of the information and supporting documentation.** OEO may revoke the certification of a firm that fails to complete and return the form. *[Information provided in the annual update form helps ensure that OEO's Directory of Certified*

*M/WBEs remains accurate. It also provides verification that ownership, **management** and control have remained the same.]* If changes have taken place, the M/WBE must provide information and/or documentation to substantiate that it continues to meet the requirements of these regulations **as required by subsection 7 of this regulation.**

(12) OEO will *[send a Recertification Application]* **notify** a certified firm *[one (1) month]* **approximately 60 days** before the expiration date of the certification. *[This application must be completed and returned to OEO before the expiration date.]* **However, regardless of whether the firm receives the recertification notification, it is the firm's responsibility to timely submit the required information and supporting documentation. If the recertification update materials and supporting documentation are received by OEO on or before the certification expiration date, then the firm's certification will not lapse on the third anniversary date after certification. While a timely recertification application is pending, the prior certification shall continue until OEO rules on the recertification request. If recertification information and supporting documentation are not timely received by OEO on or before the anniversary date of certification, then that firm's certification shall lapse, and the firm shall no longer be certified as a M/WBE, and will be removed from the active list of certified M/WBE vendors. Should a firm whose certification has lapsed later apply for M/WBE certification with OEO, that firm shall remain without M/WBE certification unless and until its new M/WBE certification is approved by OEO.** Recertification will be determined by information submitted on the renewal *[form]* **update**, tax returns, and any documented changes regarding ownership, **management** or control. Recertification is not guaranteed. *[If the recertification application is not submitted before the expiration date, the firm will be removed from the active list of certified M/WBE vendors. To become recertified after the expiration date of the original certification, the applicant must submit the renewal form with an explanation for the delay. If one (1) year or more has passed, a complete new application will be required.]* **Rapid response recertification is subject to continued certification by another qualified certifying entity as determined by OEO.**

(13) Revocation of Certification.

(A) *[OEO may revoke a firm's certification for reasons including, but not limited to, the following:*

- 1. The firm does not meet the requirements of section 37.020, RSMo, and these regulations;*
- 2. The firm's certification with OEO is based on certification by another entity, and that entity has revoked the firm's certification; or*
- 3. The firm has falsified or intentionally misrepresented information to OEO.]*

If, based on notification by the firm of a change in its circumstances or other information that comes to OEO's attention, a determination is made that there is reasonable cause to believe that the currently certified firm is ineligible for certification in whole or per certain categories or codes, OEO shall provide written notice to the firm that OEO proposes to find the firm ineligible. The notice shall set forth the reasons for the proposed determination and state the date by which the firm must provide a written response to the proposed determination if it desires to challenge OEO's determination. Reasons for ineligibility may include, but are not limited to, a change in the firm's circumstance effecting eligibility such as information not available to OEO at the time the

firm was certified or information relevant to eligibility that was concealed or misrepresented by the firm; the firm's certification with OEO is based on certification by another entity whose certification has been revoked; a change in the certification standards or requirements; or OEO's decision to certify the firm was against the weight of the evidence. The firm may respond in writing to the stated reasons and provide arguments as to why the firm should remain certified. OEO shall provide written notice of its final decision regarding the status of the firm's certification. Firms found to be ineligible may appeal to the commissioner pursuant to the procedures set forth in subsection (9) of this regulation.

(B) OEO shall immediately suspend a firm without adhering to the requirements in subsection 14(A) of this regulation when an individual owner, whose ownership and control of the firm is necessary to the firm's certification, dies or is incarcerated.

(14) OEO will use the following standards in determining ownership:

(A) [The contribution of capital or expertise by the minorities or women shall be real and substantial. Examples of insufficient contributions include: a promise to contribute capital, participation as employee rather than a manager, or an unsecured note payable to the firm or an owner who is not a minority or woman. Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business would not render a firm ineligible, even if the debtor's ownership interest is security for the loan] **In considering whether a minority or woman owns a firm, OEO will consider all relevant facts viewed as a whole, including the origin of all assets and how and when they were used to acquire the ownership interest in the firm. All transactions for the establishment of ownership (or transfer of ownership) must be in the normal course of business, reflecting commercial and arms-length practices;**

(B) The contribution of capital or expertise by the minorities or women to acquire their ownership interests in a firm shall be real, substantial, and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. Proof of contribution of capital shall be submitted at the time of the application. When the contribution of capital is through a loan, documentation must be provided to OEO of the value of assets used as collateral for the loan. Examples of insufficient contributions include: a promise to contribute capital, capitalization not commensurate with the value for the firm, participation as employee rather than a manager, or an unsecured note payable to the firm or an owner or former owner who is not a minority or woman. Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan;

[(B)] **(C) Securities held in trust, or by a guardian for a minor, shall not be considered as held by a minority or woman in determining the ownership or control of a [corporation] firm. However, securities or assets held in trust are considered as held by a minority or a woman for purposes of determining ownership of the firm if [—] :**

1. The beneficial owner of securities or assets held in trust is a minority or a woman, and the trustee is the same or another such individual; *[or]*

2. The beneficial owner of a trust is a minority or a woman who, rather than the trustee, exercises effective control over the management, policy-making, and daily activities of the *[trust.]* **firm; or**

3. Assets held in a revocable living trust may be counted only if the same minority and/or woman is the sole grantor, beneficiary, and trustee;

[(C)] (D) In determining ownership of a firm, assets or interests acquired in the following ways will be considered held by a minority or woman:

1. From a final property settlement or court order in a divorce or legal separation, provided that no term or condition of the agreement or divorce decree is inconsistent with these regulations; or

2. Through inheritance, or otherwise because of the death of the former owner;

[(D)] (E) Expertise of a minority or woman applicant may be regarded as a contribution toward ownership if the **minority or** woman has a significant financial investment in the firm and if the expertise is—

1. In a specialized field;

2. **Of outstanding quality;**

3. In areas critical to the firm's operations;

[3.] (4.) Indispensable to the firm's potential success;

[4.] (5.) Specific to the type of work the firm performs; and

[5.] (6.) Documented in the records of the firm. These records must clearly show the contribution of expertise and its value to the firm;

[(E)] (F) Ownership and control of the *[enterprise]* **firm** by the minorities or women must be real, substantial, and continuing. The minorities or women shall enjoy the customary incidents of ownership and shall share in the risks and profits commensurate with ownership, **as demonstrated by the substance, not merely the form, of arrangements. Any terms or practices that give a non-minority or male a priority or superior right to a firm's profits, compared to the minority or woman owner, are grounds for denial;**

[(F)] (G) The applicant must show that ownership has not been acquired as a gift or by transfer without adequate consideration from a non-minority or male, within one (1) year before application. Thereafter, it is presumed that ownership is not held by the minority or woman if received from a non-minority or male who[—]:

1. Continues to be involved in the same firm for which the applicant is seeking certification or is an affiliate of that firm **in a manner that suggests control of the firm;**

2. Continues to be involved in the same or similar line of business **that suggests control of the firm;** or

3. Is engaged in an ongoing business relationship with the firm, or an affiliate of the firm, for which the individual is seeking certification;

[(G)] (H) To overcome the presumption in subsection [(14)(F)](15)(G), the minority or woman must clearly demonstrate to OEO that[—]:

1. The gift or transfer to the minority or woman was made for reasons other than obtaining certification; and

2. The minority or woman actually controls the management, policy, and daily operations of the firm, notwithstanding the continuing participation of a non-minority or male who provided the gift or transfer;

[(H)] (I) When marital assets (other than the assets of the firm in question), held jointly or as community property by both spouses, are used to acquire the ownership interest asserted by a minority or woman spouse, OEO will deem the ownership interest in the firm to have been acquired by the minority or woman with his or her own individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the

manner sanctioned by the laws of the state *[of Missouri]* **in which the spouse is domiciled**. A copy of the document legally transferring and renouncing the non-minority or *[female]* male spouse's rights in the jointly-held or community assets used to acquire an ownership interest in the firm must be included with the firm's application. **OEO cannot count a greater portion of joint or community property assets toward ownership than applicable state law would recognize as belonging to the minority or woman owner of the applicant firm;** and

[(I)] **(J)** A contribution of capital may be real and substantial even though financing agreements, contracts for the purchase or sale of real estate or personal property, bank signature cards, and the like, require the co-signature of a spouse who is not a minority or a woman.

(15) OEO will use the following standards in determining control:

(A) The minority or women owners must have the power to direct or cause the direction of the management and policies of the firm and to make day-to-day as well as long-term decisions on matters of management, policy, and operations. There can be no restrictions upon the minority or woman's discretion;

(B) Only independent firms are eligible for certification. A firm is independent if its viability does not depend on its relationship with another firm or firms. In determining whether a firm is independent, OEO will consider the firm's relationships with non-M/WBEs in areas such as personnel, facilities, equipment, and financial and bonding support and other resources. OEO must consider whether a present or recent employer/employee relationship between minority or women owners of the applicant and any non-M/WBE firms or persons associated with those firms compromise the independence of the applicant. **OEO will examine the firm's relationship with any applicable contractor to determine whether a pattern of exclusive or primary dealings with a contractor compromises the independence of the potential firm;**

(C) There can be no restrictions through corporate charters, by-laws, contracts, or any other formal or informal devices (e.g., cumulative voting rights, voting powers attached to different classes of stock, employment contracts, requirements for concurrence by non-minority or non-female partners, conditions precedent or subsequent, [executor] **executory** agreements, voting trusts, restrictions on or assignments of voting rights) that prevent the minority or woman, without the cooperation or vote of any non-minority or male, from making any business decision of the firm. This does not preclude a spousal co-signature on documents;

(D) A minority or woman must hold the highest official position in the firm (e.g., chief executive officer or president). Board meeting minutes must be provided to verify the results of the most recent officer election, if applicable;

(E) In a corporation, the minority or women owners must control the board of directors. Shareholder meeting minutes and by-laws must be provided to verify who is elected to the board and establish who controls it. In a partnership, one or more of the minority or women owners must serve as general partners, with control over all partnership decisions. A written partnership agreement must be provided. In a limited liability corporation (LLC), the minority or women owners must be the managing members. The operating agreement must be provided to OEO;

(F) Certification will not be denied solely because non-minorities or males may be involved with a firm as owners, managers, employees, stockholders, officers, or directors. Non-minorities or males must not, however, have or exercise the power to control the firm, or be disproportionately responsible for the daily operations of the firm;

(G) The minority or women owners of the firm may delegate various areas of the management, policymaking, or daily operations of the firm to other participants in the

firm, regardless of whether these participants are non-minorities or males. Such delegations of authority must be revocable, and the minority or women owners must retain the power to hire and fire any person to whom such authority is delegated. The managerial role of the minority or women owners in the firm's overall affairs must be such that OEO can reasonably conclude that the owner actually exercises control over the firm's operations, management, and policy.

(H) The minority or women owners must have an overall understanding of, and managerial and technical competence or experience directly related to, the type of business in which the firm is engaged and the firm's operations. **The minority or women owners are not required to have experience or expertise in every critical area of the firm's operation, or to have greater experience or expertise in a given field than managers or key employees.** The minority or women owners must have the ability to evaluate information presented by other participants in the firm's activities and be able to use this information to make independent decisions concerning the firm's daily operations, management, and policymaking. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate competency of the business's area of expertise and control over its daily operations;

[(H)] **(I)** If state or local law requires the business to maintain a particular license or other credential in order to own or operate a certain type of firm, then the minority or women owners who exercise majority control of that type of business must possess the required license or credential. If state or local law does not require those persons to have such a license or credential in order to own or operate such a firm, OEO will not deny certification solely on the grounds that the minority or women owners lack such license or credential. However, OEO will consider the absence of the license or credential as one (1) factor in determining whether the minority or women owners actually exercise daily control over the firm;

[(I)] **(J)** OEO will consider the difference in remuneration between the minority or women owners and other participants in the firm in determining whether to certify a firm. Such consideration shall be in the context of the duties of the persons involved, normal industry practices, the firm's practices and policies concerning the reinvestment of income, and any other explanations for the difference offered by the firm. Based upon the evidence, OEO will make a determination about whether a firm is controlled by its minority or women owners, even though that owner's remuneration may be lower than other participants in the firm. In a case where a non-minority or male owner has formerly controlled the firm, and a minority or a female owner now controls it, OEO may consider the difference between the remuneration of the former and current controller of the firm as a factor in determining who exercises true control over the firm, particularly when the non-minority or male owner remains involved with the firm and continues to receive greater compensation than the minority or female owner;

[(J)] **(K)** In order to be viewed as controlling a firm, a minority or female owner cannot engage in outside employment or other business interests that could conflict with the management of the firm or prevent them from devoting sufficient time and attention to the affairs of the firm to control its daily activities. For example, absentee ownership **or management** of a firm and part-time work in a full-time firm are viewed as not exercising effective daily control over the firm;

[(K)] **(L)** Minority or women owners may control a firm even though one (1) or more of the individual's immediate family members (who themselves are not minorities or women) participate in the firm as a manager, employee, owner, or in some other capacity. OEO will

consider how much control the minority or women owners exercise as compared to other persons involved in the business, without regard to whether those other persons are immediate family members;

[(L)] (M) If OEO cannot determine that the minority or woman owner versus the family as a whole actually controls the firm, then the minority or female owners have failed to meet their burden of proof concerning control, even though they may participate significantly in the firm's activities;

[(M)] (N) If a firm was formerly owned and controlled by a non-minority or male who still remains involved in the firm, then the minority or women owners seeking certification must show that—

1. The transfer of ownership and/or control to the minority or women owners was [*not made solely*] **made for reasons other than** to obtain certification; and
2. The minority or women owners actually control the management, policy, and daily operations of the firm, notwithstanding the continuing participation of a non-minority or male who formerly owned and/or controlled the firm;

[(N)] (O) In determining whether a firm is actually controlled by its minority or women owners, OEO will consider whether the firm owns equipment necessary to perform its work. Lack of control by a minority or woman owner will not be found solely because a firm leases, rather than owns such equipment, if leasing equipment is a normal industry practice, and the lease is not with a contractor or other party that compromises the independence of the firm;

[(O)] (P) Lack of control by a minority or woman owner will not be found solely because a firm leases employees so long as the minority or women owners maintain an employer-employee relationship with the leased employees and are responsible for hiring, firing, training, assigning, and otherwise controlling the leased employees;

[(P)] (Q) A firm operating under a franchise or license agreement may be controlled by a minority or woman even though the franchise or license arrangement imposes restraints relating to standardized quality, advertising, accounting format, and the like, so long as the firm has the right to profit from its efforts, bears the risk of loss commensurate with ownership, and meets all other requirements of section 37.020, RSMo, and these regulations. Factors that indicate a lack of control by the minority or woman owner include common management or excessive restrictions on the sale or transfer of the franchise interest or license; and

[(Q)] (R) In order for a partnership to be deemed controlled by a minority or a woman, any non-minority or male partners must be incapable of, without the specific written authorization of the minority or female partners, contractually binding the partnership. A written partnership agreement is necessary to establish both ownership and control.

(S) Recognition of a business as a separate entity for tax or corporate purposes is not necessarily sufficient to demonstrate that a firm is an independent business, owned and controlled by a woman or minority.

(T) A firm that is owned by an Indian tribe or Native Hawaiian organization, rather than by Indians or Native Hawaiians as individuals, may be eligible for certification if otherwise qualifying. Such a firm must be controlled by Indians or Native Hawaiians.

(16) An applicant that is not owned by minorities or women, but is instead owned by another firm, even though that firm is a certified M/WBE, is ineligible to be certified as an M/WBE except as provided below.

If the minority or women owners own and control the applicant firm through a parent or holding company, established for tax, capitalization, or other purposes consistent with industry practices, and the parent or holding company, in turn, owns and controls an operating subsidiary, OEO may certify the subsidiary if it otherwise meets all requirements of these regulations. In this situation, the individual owners and operators of the parent or holding company are deemed to control the subsidiary through the parent or holding company.

OEO may certify such a subsidiary as an M/WBE if and only if the subsidiary is fifty-one percent (51%) cumulatively owned by a minority or a woman. The following examples illustrate how the provision for cumulative ownership works:

Example 1: A minority or a woman owns one hundred percent (100%) of a holding company which in turn has a wholly-owned subsidiary. The subsidiary may be certified as an M/WBE, if it meets all other requirements of these regulations.

Example 2: A minority or woman owns one hundred percent (100%) of a holding company which, in turn, owns fifty-one percent (51%) of a subsidiary. The subsidiary may be certified, if it meets all other requirements of these regulations.

Example 3: A minority or woman owns eighty percent (80%) of a holding company which in turn, owns seventy percent (70%) of a subsidiary. In this case, the cumulative ownership of the subsidiary by a minority or a woman is fifty-six percent (56%) ($80\% \text{ of } 70\% = 56\%$). This is more than the fifty-one percent (51%) threshold, so it may be certified as an M/WBE, if it meets all other requirements of these regulations.

Example 4: A minority or a woman owns sixty percent (60%) of the holding company, which, in turn, owns fifty-one percent (51%) of a subsidiary. In this case, the cumulative ownership would be thirty-one percent (31%) ($60\% \text{ of } 51\% = 31\%$). This is less than the required fifty-one (51%) threshold, so it cannot be certified as an M/WBE.

Example 5: Someone other than the minority or women owners of the parent or holding company controls the subsidiary. Even though the subsidiary is owned by minorities or women, through the holding or parent company, it cannot be certified as an M/WBE because it does not meet the control requirement.

(17) Joint Venture. As required by section 37.020.1(3)(b), RSMo, in order to qualify for joint venture certification, at least fifty-one percent (51%) of the ownership interest in the joint venture must be held by minorities, and the management and daily business operations of the joint venture must be controlled by one (1) or more of the minorities who own it. OEO *[may]* **shall** require a joint venture applicant to submit documentation including but not limited to a copy of the joint venture agreement and a copy of the certification issued to the M/WBE participant in the joint venture. Any changes proposed in the joint venture agreement must be filed with and approved by OEO prior to the implementation of the changes in order to maintain certification. Failure to comply may result in revocation of the joint venture certification.

AUTHORITY: section 37.023, RSMo 2000. This rule originally filed as 1 CSR 40-1.080. Original rule filed Oct. 20, 1997, effective May 30, 1998. Amended: Filed March 24, 2000, effective Oct. 30, 2000. Amended: Filed June 1, 2011, effective Nov. 30, 2011. Amended: Filed April 5, 2016.*

**Original authority: 37.023, RSMo 1995.*

PUBLIC COST: This proposed amendment will not cost state agencies or political subdivisions more than five hundred dollars (\$500) in the aggregate.

PRIVATE COST: This proposed amendment will not cost private entities more than five hundred dollars (\$500) in the aggregate.

NOTICE TO SUBMIT COMMENTS: Anyone may file a statement in support of or in opposition to this proposed rule with the Commissioner of Administration, P.O. Box 809, Jefferson City, MO, 65102. To be considered, comments must be received within thirty (30) days after publication of this notice in the Missouri Register. No public hearing is scheduled.