

NEW SECTION

**WAC 326-20-035 Presumptive group membership.** (1) After reviewing an applicant's sworn declaration of membership in a presumptively disadvantaged group, the agency may ask the applicant to present additional evidence that the person is a member of the identified group, if the agency has a well-founded reason to question the applicant's claim of group membership.

(2) The agency will provide the applicant an explanation of the reason(s) for questioning the applicant's group membership. The agency will consider whether the person has held themselves out as a member of the group for an extended period of time prior to application for certification, and whether the relevant community regards the person as a member of that group. The agency may require the applicant to produce appropriate documentation of group membership.

(3) The agency will not impose a disproportionate burden on members of any particular designated group in violation of Title VI of the Civil Rights Act of 1964.

(4) If the agency determines an individual claiming membership of a presumed disadvantaged group is not a member, the individual must demonstrate social and economic disadvantage on an individual basis under WAC 326-20-045.

(5) The decisions concerning membership in a designated group are subject to the certification appeals process outlined in WAC 326-20-171.

AMENDATORY SECTION (Amending WSR 17-13-020, filed 6/12/17, effective 8/1/17)

**WAC 326-20-048 Presumption of disadvantage.** (1) ~~((The office presumes that citizens of the United States or lawfully admitted permanent residents who are women, African Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the program, are socially and economically disadvantaged individuals. Applicants are required to))~~ Social disadvantage. The agency rebuttably presumes the following persons are socially disadvantaged individuals for the purposes of certification, consistent with 49 C.F.R. Part 26.67: Women; persons who are black/African American, Hispanic/Latino, Native American, Asian, Pacific Islander, native Hawaiian, and Alaska native; and other minorities found disadvantaged by the small business association.

(2) Each presumptively socially disadvantaged applicant must submit a signed declaration that ((each disadvantaged owner is, in fact,)) she or he is socially and economically disadvantaged.

~~((2))~~ (3) (a) Economic disadvantage. Each owner of a firm applying for state certification must sign a declaration that he or she has a personal net worth that does not exceed 1.32 million dollars, per WAC 326-20-049.

(b) Rebuttal of economic disadvantage. If the statement of personal net worth that an individual submits under this section shows that the individual's personal net worth exceeds 1.32 million dollars or shows that a person has been able to accumulate substantial wealth,

the individual's economic disadvantage is rebutted, and the individual is not deemed to be economically disadvantaged. Such an individual is no longer eligible to participate in the program and cannot regain eligibility by making an individual showing of disadvantage. The office is not required to have a proceeding under this section in order to rebut the presumption of economic disadvantage in this case.

~~((3))~~ (4) Individual determinations of social and economic disadvantage. Firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged may apply for SEDBE certification. The office makes a case-by-case determination of whether each individual whose ownership and control are relied upon for SEDBE certification is socially and economically disadvantaged. In such a proceeding, the applicant firm has the burden of demonstrating to the office, by a preponderance of the evidence, that the individuals who own and control it are socially and economically disadvantaged. An individual whose personal net worth exceeds 1.32 million dollars shall not be deemed to be economically disadvantaged. In making these determinations, the office uses ~~((the guidance found in 49 C.F.R. Part 26, Appendix E))~~ WAC 326-20-046 and 326-20-047. The office requires that applicants provide sufficient information to permit determinations under ~~((the guidance of 49 C.F.R. Part 26, Appendix E))~~ WAC 326-20-046 and 326-20-047.

AMENDATORY SECTION (Amending WSR 04-08-093, filed 4/6/04, effective 5/7/04)

**WAC 326-20-050 Proof of ownership of business.** ~~((1) All minority, women, or socially and economically disadvantaged owners shall submit to the office proof of their ownership of the requisite percentage of the business at the time the application is submitted. Such proof shall consist of stock certificates, a notarized affidavit of stock ownership from the corporate treasurer, a partnership agreement, canceled check used to purchase ownership, or other recognized proof of ownership. The ownership shall be real, substantial, and continuing, shall go beyond the pro forma ownership of the business reflected in the ownership documents, and shall be based on the owner's capital contribution. The minority, and/or women, and/or socially and economically disadvantaged owner(s) shall enjoy the customary incidents of ownership and shall share in the risks and profits commensurate with their ownership interests, as demonstrated by an examination of the substance and the form of the arrangements.~~

~~(2) In cases of sole proprietorships or other cases where documentary proof of ownership is not available, the minority, women, or socially and economically disadvantaged owners shall so advise the office, which may undertake further investigation. The office may also require documents showing how and when the minority, women, or socially and economically disadvantaged owners' interest in the business was acquired.~~

~~(3) The office may, for any reason, require any minority, women, or socially and economically disadvantaged owners to provide additional proof of, or information concerning, ownership. The office may request additional information regarding separate ownership of a business including, but not limited to, a separate property agreement.~~

~~(4) Ownership of a corporate-sponsored dealership shall be evaluated by using the following standards:~~

~~(a) The minority, women, or socially and economically disadvantaged owner(s) have entered into a written agreement, contract, or arrangement with a national or regional corporation and has been granted a license to offer, sell, or distribute goods or services at wholesale or retail, leasing, or otherwise use the name, service mark, trademark, or related characteristics of the sponsoring corporation.~~

~~(b) The capital investment for the dealership or business is jointly contributed by the minority, women, or socially and economically disadvantaged owner(s) and the sponsoring corporation.~~

~~(c) The original investment contributed by the minority, women, or socially and economically disadvantaged owner(s) may be less than fifty-one percent, but must constitute at least twenty-five percent of the capitalization investment (total required equity capital) in the dealership corporation.~~

~~(d) A specified time limit of not more than ten years must be established, binding between the minority, women, or socially and economically disadvantaged owner(s) and the sponsoring corporation, within which the buy-out of the corporate sponsor's interest shall be complete.~~

~~(e) The sponsoring corporation must have specifically developed a national or regional corporate sponsored dealership program which includes such features as capitalization assistance from the sponsoring corporation, on-going business operations training, technical assistance to the dealership owner, and a corporate sponsored minority, women, and socially and economically disadvantaged individual's business program.~~

~~(f) The minority, women, or socially and economically disadvantaged owner(s) must demonstrate that the relationship between the corporate sponsor and the minority, women, or socially and economically disadvantaged individual's business was not formed for the primary purpose of achieving certification under chapter 39.19 RCW, or any similar provision of any ordinance, regulation, rule, or law.)~~ (1) In determining whether a socially and economically disadvantaged participant(s) in a firm owns the business, the agency considers all facts in the record viewed as a whole, including the origin of all assets and how and when they were used in obtaining the firm. All transactions for the establishment and ownership, or transfer of ownership, must be in the normal course of business.

(2) To be an eligible for certification, a firm must be at least fifty-one percent owned by a socially and economically disadvantaged individual(s).

(a) In the case of a sole proprietorship or other cases where documentary proof of ownership is not available, the agency may undertake further investigation and may require documents showing how and when the socially and economically disadvantaged owner(s) interest in the business was acquired.

(b) In the case of a corporation, a socially and economically disadvantaged individual(s) must own at least fifty-one percent of each class of voting stock outstanding and fifty-one percent of the aggregate of all stock outstanding.

(c) In the case of a partnership, a socially and economically disadvantaged individual(s) must own at least fifty-one percent of each class of partnership interest.

(d) In the case of a limited liability company, a socially and economically disadvantaged individual(s) must own at least fifty-one percent of each class of member interest.

(3) The socially and economically disadvantaged individual(s) ownership, including the individual's contribution of capital or expertise to acquire ownership interests, must be real, substantial, and continuing, going beyond pro forma ownership of the firm. It may include ownership interest acquired:

(a) As the result of a final property settlement or court order in a divorce or legal separation, provided no term or condition of the agreement or divorce decree is inconsistent with this section;

(b) Through inheritance or because of the death of the former owner; and

(c) Through debt instruments from financial institutions or other organizations lending funds in the normal course of business, even when the debtor's ownership interest is security for the loan.

(4) The disadvantaged owner(s) must enjoy the customary incidents of ownership, share in the risks, and be entitled to the profits and loss commensurate with their ownership interests, as demonstrated by the substance, not merely the form of arrangements.

(5) When expertise is relied upon as part of a disadvantaged owner's contribution to acquire ownership, the applicant must have a significant financial investment in the firm, and the applicant's expertise must be:

(a) In a specialized field;

(b) In areas critical to the firm's operations;

(c) Indispensable to the firm's potential success;

(d) Specific to the type of work the firm performs; and

(e) Documented in the records of the firm, which must show the contribution of expertise and value to the firm.

(6) The following are insufficient to be considered ownership in a firm by a socially and economically disadvantaged individual for the purposes of certification:

(a) A promise to contribute capital; an unsecured note payable to the firm or an owner who is not a disadvantaged individual; mere participation in a firm's activities as an employee; capitalization not commensurate with the value for the firm; and any terms or practices giving a nondisadvantaged individual or firm a priority or superior right to a firm's profits, compared to the disadvantaged owner(s).

(b) Except as allowed by this section, interests or assets obtained by an applicant in the form of a gift or transfer without adequate consideration from any nondisadvantaged individual or firm who is: Involved in the same firm or affiliate where the individual is seeking certification; involved in the same or a similar line of business; or engaged in an ongoing business relationship with the firm or an affiliate where the individual is seeking certification. To overcome this presumption and permit the interests or assets, the disadvantaged individual must demonstrate by clear and convincing evidence that: The gift or transfer to the disadvantaged individual was made for reasons other than obtaining certification; and the disadvantaged individual controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a nondisadvantaged individual who provided the gift or transfer.

NEW SECTION

**WAC 326-20-055 Subsidiaries.** An eligible firm must be owned by an individual(s) who is socially and economically disadvantaged, rather than owned by another firm, except as provided below:

(1) If a socially and economically disadvantaged individual(s) owns and controls a firm through a parent or holding company that is established for tax, capitalization, or other purposes consistent with industry practice; and the parent or holding company owns and controls the subsidiary.

(2) The agency may certify such a subsidiary if there is cumulatively fifty-one percent ownership of the subsidiary by a socially and economically disadvantaged individual(s). Examples of such subsidiaries include, but are not limited to:

(a) A socially and economically disadvantaged individual(s) owns one hundred percent of a holding company and has a wholly owned subsidiary. The subsidiary may be certified, if it meets all other requirements.

(b) A socially and economically disadvantaged individual(s) owns one hundred percent of the holding company and owns fifty-one percent of a subsidiary. The subsidiary may be certified, if all other requirements are met.

(c) A socially and economically disadvantaged individual(s) owns eighty percent of the holding company and the holding company in turn owns seventy percent of a subsidiary. In this case, the cumulative ownership of the subsidiary by disadvantaged individuals is fifty-six percent (eighty percent of the seventy percent). This is more than fifty-one percent, so the agency may certify the subsidiary, if all other requirements are met.

(d) Same as the examples in (b) and (c) of this subsection, but someone other than the socially and economically disadvantaged owner(s) of the parent or holding company control the subsidiary. Even though the subsidiary is owned by disadvantaged individuals, through the holding or parent company, the agency cannot certify it because it fails to meet control requirements.

(e) A socially and economically disadvantaged individual(s) owns sixty percent of the holding company and fifty-one percent of a subsidiary. In this case, the cumulative ownership of the subsidiary by disadvantaged individuals is approximately thirty-one percent. This is less than fifty-one percent, so the agency cannot certify the subsidiary.

(f) The holding company, in addition to the subsidiary seeking certification, owns several other companies. The combined gross receipts of the holding companies and its subsidiaries are greater than the size standard for the subsidiary seeking certification or the gross receipts cap of WAC 326-20-096. Under the rules concerning affiliation, the subsidiary fails to meet the size standard and cannot be certified.

AMENDATORY SECTION (Amending WSR 92-11-007, filed 5/11/92, effective 6/11/92)

**WAC 326-20-060 Community ownership.** (1) When an ownership interest ((arising)) arises in a nonapplicant spouse or registered domestic partner solely because ((of the operation)) of community property laws, the agency will not disqualify the applicant ((spouse from certification. Both spouses shall)) if both parties certify that:

(a) Only ((one)) the applicant spouse or registered domestic partner participates in the management of the business((-)); and

(b) The nonparticipating spouse or registered domestic partner relinquishes control over his/her community interest in the ((sub-jeet)) business.

(2) When an ownership interest arising in a nonapplicant spouse or registered domestic partner solely because of community property laws, the agency will not disqualify the applicant because of a provision for the nonapplicant spouse or domestic partner to cosign a financing agreement, contract for the purchase or sale of real or personal property, bank signature card, or other document.

(3) The agency must give particular scrutiny to the ownership and control of a firm to ensure it is owned and controlled, in substance as well as in form, by a socially and economically disadvantaged individual, when the ownership of the firm or its assets is transferred from a spouse or registered domestic partner who is not a socially and economically disadvantaged individual.

AMENDATORY SECTION (Amending WSR 04-08-093, filed 4/6/04, effective 5/7/04)

**WAC 326-20-080 Factors considered in determining control.** ~~((1) The minority, woman, or socially and economically disadvantaged owner(s) must possess and exercise managerial and operational control over the day-to-day affairs of the business.~~

~~(a) Managerial control. The minority, woman, or socially and economically disadvantaged owner(s) has the demonstrable ability to make independent and unilateral business decisions needed to guide the future and direction of the firm.~~

~~(b) Operational control. The minority, woman, or socially and economically disadvantaged owner(s) has the demonstrable ability to independently make basic decisions pertaining to the daily operations of the business.~~

~~(2) Whether a minority, woman, or socially and economically disadvantaged owner meets the control requirement is determined on an application-by-application basis. Office management, clerical, or other experience unrelated to the firm's field of operations, is insufficient to establish that the business is legitimately owned and controlled.~~

~~(3) Factors which may be considered in determining whether the minority, woman, or socially and economically disadvantaged owner meets the control requirement include, but are not limited to, the following:~~

~~(a) Authority and restrictions as indicated in the articles of incorporation, bylaws, partnership agreements and/or other business agreements and documents;~~

~~(b) The financial interest and/or participation in any other business by any owner or key personnel;~~

~~(c) Past and current employment history of minority and women owners involved in the business;~~

~~(d) Members of the board of directors and corporate officers;~~

~~(e) Experience, training, and expertise of any owners and key personnel;~~

~~(f) Recent changes in ownership and/or control of the business;~~

~~(g) Financial obligation to and capital contributions from owners and nonowners of the business; and~~

~~(h) Documentation indicating who has ultimate authority to make policy and management decisions and to legally obligate the business.~~

~~(4) If persons who are not minorities, women, or socially and economically disadvantaged are disproportionately responsible for the operation of the business, then the business is not eligible for certification.~~

~~(5) The requirements of this section shall not apply, if the business qualifies as a corporate-sponsored dealership under the provisions of WAC 326-20-050(4). Control of a corporate-sponsored dealership will be evaluated using the following standards:~~

~~(a) If the sponsoring corporation retains majority voting rights and control of the board of directors, then the minority, women, or socially and economically disadvantaged owner(s) must annually apply at least fifty percent of the net profit and bonuses toward the buy-out of the corporate sponsors' interest within the buy-out time limit established with the corporation.~~

~~(b) The minority, women, or socially and economically disadvantaged owner(s) must show active participation in the decision-making process on the board of directors of the dealership.~~

~~(c) The minority, women, or socially and economically disadvantaged owner(s) must have and exercise managerial and operational control over the day-to-day management of the dealership, with responsibility for sales, service volume, and profits.~~

~~(d) The minority, women, or socially and economically disadvantaged owner(s) must have prior business or management experience relating to the business being entered into as an owner.~~

~~(e) The minority, women, or socially and economically disadvantaged owner(s) must be president of any corporation formed by the business.))~~ (1) In determining whether disadvantaged owner(s) control a business, the office must consider all of the facts in the record, viewed as a whole.

(2) The disadvantaged owner(s) must demonstrate the ability to make independent and unilateral business decisions needed to guide the future and direction of the business.

(3) The certifiable business must not be subject to any formal or informal restrictions limiting the customary discretion of the disadvantaged owner(s). Restrictions through corporate charter provisions, bylaw requirements, contracts or any other formal or informal devices, such as cumulative voting rights, voting powers attached to different classes of stock, employment contracts, requirements for concurrence by nondisadvantaged partners, conditions precedent or subsequent, executory agreements, voting trusts, limitations on or assignments of voting rights, preventing the disadvantaged owner(s), without the cooperation or vote of any nondisadvantaged individual, from making any

business decision are prohibited. This subsection does not preclude a spouse or registered domestic partner cosignature on the office's spouse or domestic partner nonparticipation statement.

(4) Disadvantaged owner(s) must possess the power to direct or cause the direction of the management and policies of the business and make daily and long-term decisions on matters of management, policy, and operations.

(a) Disadvantaged owner(s) must hold the highest officer position in the company, such as chief executive officer or president.

(b) In a corporation, disadvantaged owners must control the board of directors.

(c) In a partnership, one or more disadvantaged owners must serve as general partners, with control over all partnership decisions. In order for a partnership to be controlled by disadvantaged individuals, any nondisadvantaged partners must not have the power, without the specific written concurrence of the socially and economically disadvantaged partner(s), to contractually bind the partnership or subject the partnership to contract or tort liability.

(d) Nondisadvantaged or immediate family members may be involved in a certified business as owners, managers, employees, stockholders, officers, or directors. They must not possess or exercise the power to control the business or be disproportionately responsible for the operation of the business.

(e) Disadvantaged owner(s) of the business may delegate various areas of the management, policymaking, or daily operations of the business to other participants in the business, regardless of whether these participants are disadvantaged individuals. Such delegations of authority must be revocable, and the disadvantaged owner(s) must retain the power to hire and fire any person to whom such authority is delegated. The disadvantaged owner(s) managerial role in the business's overall affairs must be such that the recipient can reasonably conclude the disadvantaged owners actually exercise control over the business's operations, management, and policy.

(f) Disadvantaged owner(s) must demonstrate the ability to make basic decisions pertaining to the daily operations of the business independently and have an overall understanding of, managerial and technical competence and experience directly related to, the type of business in which the business is engaged and operating. The owner(s) are not required to have experience or expertise in every critical area of operations or given field than managers or key employees. They must have the ability to intelligently and critically evaluate information presented by other participants in the business's activities and to use this information to make independent decisions concerning the business's daily operations, management, and policymaking. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principle business activities of the business is insufficient to demonstrate control.

(g) If state or local law requires the persons to have a particular license or other credential in order to own or control a certain type of business, then the disadvantaged person(s) who own and control a potential certifiable business of that type must possess the required license or credential. If state or local law does not require the applicant to possess such a license or credential to own or control a business, the office must not deny certification solely on the ground the person lacks the license or credential. However, the office may take into account the absence of the license or credential as one



factor in determining whether the disadvantaged owner(s) actually control the business.

(h) The office may consider differences in remuneration between the disadvantaged owner(s) and other business participants in determining whether to certify a business. Such consideration must be in the context of the duties of the persons involved, normal industry practices, the business's policy and practice concerning reinvestment of income, and any other explanations for the differences proffered by the business. The office may determine a disadvantaged owner controls a business although that owner's remuneration is lower than that of some other participants in the business. In a case where a nondisadvantaged individual formerly controlled the business, and a disadvantaged individual now controls it, the office may consider a difference between the remuneration of the former and current controller of the business as a factor in determining who controls the business, particularly when the nondisadvantaged individual remains involved with the business and continues to receive greater compensation than the disadvantaged individual.

(i) In order to be viewed as controlling a business, a disadvantaged owner cannot engage in outside employment or other business interests that conflict with the management of the business or prevent the individual from devoting sufficient time and attention to the affairs of the business to control its activities. For example, absentee ownership of a business and part-time work in a full-time business are not viewed as constituting control. However, an individual could be viewed as controlling a part-time business that operates only on evenings or weekends, if the individual controls it all the time it is operating.

(j) A disadvantaged individual may control a business even though one or more of the individual's nondisadvantaged immediate family members, participate in the business as a manager, employee, owner, or in another capacity. Except as otherwise provided in this subsection, the office must make a judgment about the control the disadvantaged owner exercises vis-a-vis other persons involved in the business as the office does in other situations, without regard to whether or not the other persons are immediate family members. If the office cannot determine the disadvantaged owners, as distinct from the family as a whole, control the business, then the disadvantaged owners failed to carry their burden of proof concerning control, even though they may participate significantly in the business's activities.

(k) When a business was formerly owned or controlled by a nondisadvantaged individual, whether or not an immediate family member, and ownership or control was transferred to a disadvantaged individual, and the nondisadvantaged individual remains involved with the business in any capacity, there is a rebuttable presumption of control by the nondisadvantaged individual unless the disadvantaged individual now owning the business demonstrates to the office, by clear and convincing evidence, that:

(i) The transfer of ownership or control to the disadvantaged individual was made for reasons other than obtaining certification; and

(ii) The disadvantaged individual actually controls the management, policy, and operations of the business, notwithstanding the continuing participation of a nondisadvantaged individual who formerly owned or controlled the business.

(l) In determining whether its disadvantaged owner controls a business, the office may consider whether the business owns equipment necessary to perform its work. However, the office must not determine

a business is not controlled by disadvantaged individuals solely because the business leases, rather than owns, such equipment, where leasing equipment is a normal industry practice and the lease does not involve a relationship with a prime contractor or other party that compromises the independence of the business.

(m) A business operating under a franchise or license agreement may be certified if it meets the standards in this paragraph and the franchiser or licensor is not affiliated with the franchisee or licensee. In determining whether affiliation exists, the office should generally not consider the restraints relating to standardized quality, advertising, accounting format, and other provisions imposed on the franchisee or licensee by the franchise agreement or license, provided the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Alternatively, even though a franchisee or licensee may not be controlled by virtue of such provisions in the franchise agreement or license, affiliation could arise through other means, such as common management or excessive restrictions on the sale or transfer of the franchise interest or license.

(n) The disadvantaged individual(s) controlling a business may use an employee leasing company. The use of such a company does not preclude the individual(s) from controlling their business if they continue to maintain an employer-employee relationship with the leased employees. This includes responsibility for hiring, firing, training, assigning, and otherwise controlling on-the-job activities of the employees, as well as ultimate responsibility for wage and tax obligations related to the employees.

AMENDATORY SECTION (Amending WSR 92-11-007, filed 5/11/92, effective 6/11/92)

**WAC 326-20-081 ((Intertwinement.)) Independence.** ~~((To be eligible for certification, a business must be independent. Intertwinement with a noncertified business may be grounds for denial or decertification of a business. The office will determine whether a business is intertwined with a noncertified business by looking for factors which include, but are not limited to, the following:~~

- ~~(1) Shared ownership;~~
- ~~(2) Common directors or partners;~~
- ~~(3) Shared equipment, facilities, resources, or employees;~~
- ~~(4) Beneficial financial arrangements which indicate less than arms length transactions with a noncertified business;~~
- ~~(5) Overdependency on a noncertified business to obtain and perform work;~~
- ~~(6) Such an identity of interest exists between the business seeking certification and a noncertified business that an affiliation may be presumed; and~~

~~(7) The degree to which financial, equipment, leasing, business and other relationships with noncertified businesses vary from normal industry practice.))~~ Only an independent business may be certified. An independent business is one the viability of which does not depend on its relationship with another business or businesses.

(1) In determining whether a potential certified business is an independent business, the office must scrutinize relationships with

noncertified businesses in areas such as personnel, facilities, equipment, financial or bonding support, and other resources.

(2) The office must consider whether present or recent employer and employee relationships between the disadvantaged owner(s) of the potential certifiable business and noncertified business or persons associated with noncertified businesses compromise the independence of the potential certifiable business.

(3) The office must examine the business's relationships with prime contractors to determine whether a pattern of exclusive or primary dealings compromises the independence of the potential certifiable business.

(4) In considering factors relating to the independence of a potential certifiable business, the office must consider the consistency of relationships between the potential certifiable business and non-certifiable businesses with normal industry practice.

#### NEW SECTION

**WAC 326-20-086 Native Americans—Native Hawaiians—Alaska native corporations.** (1) A firm owned by a Native American tribe, native Hawaiian organization, or Alaska native corporation, rather than by individuals, may be eligible for certification. Such a firm must meet the size standards of WAC 326-20-096 and be controlled by a socially and economically disadvantaged individual(s) per WAC 326-20-080.

(2) A firm owned by a Native American tribe, native Hawaiian organization, or Alaska native corporation will not be considered affiliated with other businesses owned by the tribe, organization, or corporation if there is a firewall, such as a legally binding mechanism, in place to prevent firms from accessing the resources of the tribe's, organization's, or corporation's other businesses.

AMENDATORY SECTION (Amending WSR 04-08-075, filed 4/5/04, effective 5/6/04)

**WAC 326-20-094 Assignment of North American Industrial Classification System (NAICS) code.** (~~((1) The office will determine which NAICS code an applicant falls under based on information submitted by the business. The office will prepare conversion tables showing the department of general administration's commodity code designations, the codes developed by the Construction Specifications Institute, and the corresponding NAICS codes listed in the directory of certified businesses as described in WAC 326-20-190.~~

~~(2) In the event the business plans to expand the areas in which it operates, it must notify the office in writing at least thirty calendar days before the effective date of such expansion.))~~ The office must grant certification to a business only for specific types of work the disadvantaged owner(s) have the ability to control. To become certified in an additional type of work, the business needs to demonstrate its owner(s) are able to control the business with respect to that type of work. The office must not require the business to recer-

tify or submit a new certification application but verify the disadvantaged owner(s) control of the business in the additional type of work.

(1) The types of work a business can perform, whether at initial certification or when a new type is added, must be described in terms of the most specific available North American Industry Classification System (NAICS) code for that type of work. In addition to applying the appropriate NAICS code, the office may apply a descriptor from a classification scheme of equivalent detail and specificity. A correct NAICS code is one describing, as specifically as possible, the principle goods or services the business would provide to the state. Multiple NAICS codes may be assigned when appropriate. The office must rely on, and not depart from, the plain meaning of NAICS code descriptions in determining the scope of a business's certification.

(2) Businesses and recipients must check carefully to make sure the NAICS codes cited in a certification are current and accurately reflect work the office has determined the business owners can control. The business bears the burden of providing detailed company information the office needs to make an appropriate NAICS code designation.

(3) If a business believes there is not a NAICS code that fully or clearly describes the type(s) of work in which it is seeking to be certified, the business may request the office, in its certification documentation, supplement the assigned NAICS code(s) with a clear, specific, and detailed narrative description of the type of work in which the business is certified. A vague, general, or confusing description is not sufficient for this purpose, and recipients must not rely on such a description in determining whether a business's participation can be counted toward goals.

(4) The office is not precluded from changing a certification classification or description if there is a factual basis in the record. However, the office must not make after-the-fact statements about the scope of a certification, not supported by evidence in the record of the certification action.

## NEW SECTION

**WAC 326-20-099 Small business concern requirement and size standards.** (1) In addition to meeting the ownership and control requirements of chapter 39.19 RCW, a business must qualify as a small business concern for certification eligibility or recertification.

(a) A small business concern is a business that is independently owned and operated, is not dominant in its field of operations, and does not exceed the size limitations as set forth in the current table of North American Industrial Classification System (NAICS) codes or corresponding industry size standards as set forth in 49 C.F.R. Part 26 and amendments or inflationary adjustments thereof.

(b) The number of employees or amount of annual receipts listed as the size standard for each NAICS code indicates the maximum allowed for a business, including its affiliates, to qualify as a small business concern.

(c) The office's determination of whether a business qualifies as a small business concern must be, whenever possible, based on criteria consistent with the small business requirements defined under section

3 of the Small Business Act, 15 U.S.C. 632, and its implementing regulations, taking into consideration statewide markets.

(2) A business exceeding the small business size limits after certification by the office must be subject to graduation.

(3) At the time of application for certification and recertification, a business must demonstrate to the office that it is a small business concern. The office may verify the business is still a small business concern at any time after certification. In verifying the business's size, the office will review such financial documentation made available to the office, such as annual financial statements, federal income tax returns, state and local excise tax reports, and other relevant information.

(4) Except as otherwise provided in this chapter, affiliation occurs when either directly or indirectly:

(a) One business controls or has power to control the other;

(b) A third party or parties controls or has power to control both; or

(c) An "identity of interest" exists among them so the presumption of affiliation exists.

(5) When reference sets the maximum size standard to "annual receipts," a business exceeding the monetary figure in the standard is not eligible for certification. Annual receipts includes all revenue received or accrued from sources, such as sales of products or services, interest, dividends, rents, royalties, fees, or commissions, reduced by returns and allowances. The term "receipts" excludes proceeds from any of the following:

(a) Sales of capital assets and investments;

(b) Proceeds from transactions between a concern and its domestic and foreign affiliates;

(c) Proceeds from payments of notes receivable, accounts receivable, and amounts collected as an agent for another, such as gross bookings when a commission is earned, in which case only the commission earned constitutes revenue, and taxes collected for remittance to a taxing authority.

(6) The measurement period must comply with the following:

(a) The size of a business with three or more completed fiscal years will be determined by averaging the annual receipts of the business for the most recent three years;

(b) The size of a business with less than three fiscal years will be determined by computing the average of the annual receipts from the time the business formed, calculating total revenues compiled over the period divided by the number of weeks, including fractions of a week, multiplied by fifty-two;

(c) Method of determining annual receipts. Revenue may be taken from the regular books of account of the concern. If the office so elects or the business has not kept regular books of account or the Internal Revenue Service has found such records to be inadequate and has reconstructed income of the concern, then revenue as shown on the federal income tax return of the concern may be used in determining annual receipts along with other information the office deems relevant.

(7) Where the size standard is "number of employees," size eligibility requires the concern may not exceed the number of employees in that standard.

(a) "Number of employees" means that average employment of the concern, including domestic and foreign affiliate employees, based

upon employment during each of the pay periods for the preceding completed twelve calendar months.

(b) In computing average employment, part-time and temporary employees count as full-time employees for each applicable pay period.

(c) If a concern has not been in business for twelve months, "number of employees" means the average employment of the concern, including its affiliates, during each of the pay periods during which it has been in business.

(8) No business, regardless of its primary NAICS code, is eligible for certification if it exceeds the largest annual revenue limit contained in 49 C.F.R. Part 26 and any amendments or inflationary adjustments thereof.

(9) In determining the business's primary industry, including its affiliates, the office must consider the distribution of receipts, employees, and costs in the differing industry areas the business operated during its most recently completed fiscal year. Other factors, such as patents, contract awards, and assets, may be considered.

(10) If the activities of the business encompass two or more NAICS codes, the first NAICS code listed in the directory is the primary industry classification of the business.

(11) A business exceeding the small business size limits after certification by the office must be subject to graduation.

(12) For purposes of utilization on projects funded by any operating modal of the U.S. Department of Transportation the maximum dollar size standard in 49 C.F.R. Part 26 as may be amended or adjusted for inflation, must apply, even if the size standard would otherwise be set by reference to number of employees. This standard is a maximum. Certified businesses are still subject to applicable lower limits on business size as established by the United States Small Business Administration and these regulations.

#### REPEALER

The following sections of the Washington Administrative Code are repealed:

WAC 326-20-030	Proof of minority status.
WAC 326-20-040	Proof of woman's status.
WAC 326-20-092	Small business concern requirement.
WAC 326-20-095	Determination of firm size.
WAC 326-20-096	Size standard.
WAC 326-20-115	Signatures of applicant business owners.