

CR 10-116

**ORDER OF THE
DEPARTMENT OF COMMERCE**

CREATING RULES

The Wisconsin Department of Commerce adopts an order to repeal Comm 133.20 (1) Note [3], 133.32, 133.70 (2) (a), and 133.90 (2) (b) and (c);

to renumber Comm 133.34 (1), 133.36 (1) (h), and 133.90 (2) (a) 1. and 2.;

to renumber and amend Comm 133.70 (1) (a) 4. and Note and (2) (b) and (c);

to amend Comm 133.10 (1) (c); 133.20 (1) Note [1] and (3); 133.36 (title), (1) (b) and (c), and (2) (b) (intro.); 133 subchapter III (title); 133.60 (1) Note and (3); and 133.70 (1) (a) 3., (3), and (5);

to repeal and recreate Comm 133.36 (1) (e) to (g) and (2) (c);

and to create Comm 133.34 (1) (b) and (c), 133.35, 133.36 (1) (h), and 133.70 (1) (a) 4. and Note, relating to administering a film production accreditation program, and affecting small business.

Rule Summary

1. Statutes Interpreted.

Sections 71.07 (5f) and (5h), 71.28 (5f) and (5h), 71.47 (5f) and (5h), and 560.206.

2. Statutory Authority.

Sections 227.11 (2) (a) and 560.206 (4).

3. Explanation of Agency Authority.

Section 560.206 (4) of the Statutes requires the Department to promulgate rules for administering a program to accredit film productions for the purposes of sections 71.07 (5f) and (5h), 71.28 (5f) and (5h), and 71.47 (5f) and (5h) of the Statutes. Section 227.11 (2) (a) of the Statutes authorizes the Department to promulgate rules interpreting the provisions of any Statute administered by the Department.

4. Related Statute or Rule.

The Department has rules for several other programs associated with tax credits, but none of those rules specifically relate to accrediting film productions and to establishing or operating film production companies.

5. Plain Language Analysis.

The rule changes would update chapter Comm 133 to make it consistent with the portions of 2007 Wisconsin Act 20 and 2009 Wisconsin Act 28 that relate to tax credits for film production services and film production company investments. The changes include (1) modifying the definitions of accredited production, production expenditures, and previously owned property; (2) extending the tax credits to operating a film production company, rather than only establishing it; (3) modifying the definition of claimant; (4) clarifying which expenses are ineligible; (4) requiring spending at least 35 percent of the total budget for an accredited production in Wisconsin; (5) requiring the purchase of tangible personal property or items, property, or goods to be sourced to Wisconsin; (6) requiring an application fee of 2 percent of the production expenditures or \$5,000, whichever is less; and (7) capping the total annual, aggregated credit at \$500,000.

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

A federal tax incentive program for film and television productions is available under Section 181 of the Internal Revenue Code. Under the program, investors in qualifying film and television productions may elect to immediately deduct the cost of qualifying film expenditures in the year the expenditures occur. The program is in effect for qualifying productions commencing before January 1, 2010. The federal deduction applies to qualifying productions up to \$15 million, or up to \$20 million if the production occurs in a qualifying distressed area. The incentive can be used in conjunction with any state film incentive. The Web site reference for the section in the Code is http://www.law.cornell.edu/uscode/html/uscode26/usc_sec_26_00000181_---000-.html.

7. Comparison With Rules in Adjacent States.

Michigan

Michigan has a 40 percent refundable tax credit, across the board on Michigan expenditures. Claimants can claim an extra 2 percent if filming in one of the core communities in the state. The claimant must spend at least \$50,000 in Michigan to be eligible. There is also a 30 percent tax credit for non-resident, below-the-line crew members. There is a \$2,000,000 salary cap per employee per production. There is no other cap and no sunset. No corresponding administrative rules were found, but the corresponding Web site is <http://www.michiganfilmoffice.org/For-Producers/Incentives/Default.aspx>.

Minnesota

Minnesota offers a reimbursement of up to 15 percent of production costs incurred in Minnesota by eligible productions that spend \$5,000,000 or less in Minnesota within 12 months from the date of project certification, and up to 20 percent for productions that spend in excess of \$5,000,000 in Minnesota within 12 months of project certification. Reimbursement of up to 20 percent of film production costs are made to productions that either (1) shoot 60 percent of production days outside of the metropolitan area as defined in section 473.121, subdivision 2 of the statutes within 12 months from the date of project certification; or (2) spend at least 60 percent of the total production budget outside of the metropolitan area as defined in section 473.121, subdivision 2 within 12 months from the date of project certification. No corresponding administrative rules were found, but the corresponding Web site is <http://www.mnfilmtv.org/incentives>.

Iowa

Iowa has suspended the Iowa Film Program until July 1, 2013, and does not have financial assistance or tax credits available for film projects. The corresponding Web site is <http://www.iowalifechanging.com/film/>.

Illinois

In December of 2008, Illinois passed the Illinois Film Production Tax Credit Act, which offers producers a credit of 30 percent of all qualified expenditures, including post-production, and has no sunset. This includes a 30 percent credit on Illinois salaries up to \$100,000 per worker. Applicants can receive an additional 15 percent tax credit on the salaries of individuals who live in an economically disadvantaged area. Illinois Production Spending includes tangible, personal property and services purchased from Illinois vendors, and compensation paid to Illinois resident employees. The claimant must spend at least \$50,000 in Illinois Production Spending for a project 29 minutes or under. The claimant must spend at least \$100,000 in Illinois Production Spending for a project 30 minutes or over. The corresponding Web site is <http://www.illinoisfilm.biz/>. Administrative rules are at <http://www.illinoisfilm.biz/IFO/tax/2007TaxCreditRules.pdf>.

8. Summary of Factual Data and Analytical Methodologies.

The data and methodology for developing these rules were derived from and consisted of (1) incorporating the applicable criteria in 2007 Wisconsin Act 20 and in 2009 Wisconsin Act 28; (2) soliciting input from the Department of Revenue; and (3) reviewing Internet-based sources of related federal, state, and private-sector information.

9. Analysis and Supporting Documents Used to Determine Effect on Small Business or in Preparation of an Economic Impact Report.

The primary documents that were used to determine the effect of the rules on small business were 2007 Wisconsin Act 20 and 2009 Wisconsin Act 28. These Acts modified several provisions of sections 71.07 (5f) and (5h), 71.28 (5f) and (5h), and 71.47 (5f) and (5h) of the Statutes that relate to the Department's film production accreditation program. These Acts apply their private-sector requirements only to film productions and to film production companies, for which a corresponding tax credit is desired.

10. Effect on Small Business.

The rules are not expected to impose significant costs or other impacts on small businesses because the rules address submittal of documentation only by businesses that choose to pursue tax credits for producing film productions or for establishing or operating film production companies.

11. Agency Contact Person.

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SECTION 1. Comm 133.10 (1) (c) is amended to read:

Comm 133.10 (1) (c) Certification of expenses that are related to establishing or operating a film production company in Wisconsin.

SECTION 2. Comm 133.20 (1) Note [1] is amended to read:

Comm 133.20 (1) Note [1]: Sections 71.07 (5f) (a) 1. to 3., Stats., read as follows: “1. ‘Accredited production’ means a film, video, ~~electronic game~~, broadcast advertisement, or television production, as approved by the department of commerce, for which the aggregate salary and wages included in the cost of the production for the period ending 12 months after the month in which the principal filming or taping of the production begins exceeds \$100,000 for a production that is 30 minutes or longer or \$50,000 for a production that is less than 30 minutes. ‘Accredited production’ also means an electronic game, as approved by the department of commerce, for which the aggregate salary and wages included in the cost of the production for the period ending 36 months after the month in which the principal programming, filming, or taping of the production begins exceeds \$100,000. ‘Accredited production’ does not include any of the following, regardless of the production costs:

- a. News, current events, or public programming or a program that includes weather or market reports.
- b. A talk show.
- c. A production with respect to a questionnaire or contest.
- d. A sports event or sports activity.
- e. A gala presentation or awards show.
- f. A finished production that solicits funds.
- g. A production for which the production company is required under 18 USC 2257 to maintain records with respect to a performer portrayed in a single media or multimedia program.
- h. A production produced primarily for industrial, corporate, or institutional purposes.

2. ‘Claimant’ means a ~~film production company that operates an accredited production in this state, if the company owns the copyright in the accredited production or has contracted directly with the copyright owner or a person acting on the owner’s behalf and if the company has a viable plan, as determined by the department of commerce, for the commercial distribution of the finished production~~ person who files a claim under this subsection.

3. ‘Production expenditures’ means any expenditures that are incurred in this state and directly used to produce an accredited production, including expenditures for set construction and operation, wardrobes, make-up, clothing accessories, photography, sound recording, sound synchronization, sound mixing, lighting, editing, film processing, film transferring, special effects, visual effects, renting or leasing facilities or equipment, renting or leasing motor vehicles, food, lodging, and any other similar expenditure as determined by the department of commerce. ‘Production expenditures’ include expenditures for music that is performed, composed, or recorded by a musician who is a resident of this state or published or distributed by an entity that has its headquarters in this state; air travel that is purchased from a travel agency or company that has its headquarters in this state; and insurance that is purchased from an insurance agency or company that has its headquarters in this state. ‘Production expenditures’ do not include salary, ~~or wages, or expenditures for the marketing and distribution of an accredited production~~ labor-related contract payments.”

SECTION 3. Comm 133.20 (1) Note [3] is repealed.

SECTION 4. Comm 133.20 (3) is amended to read:

Comm 133.20 (3) “Incurred” means funds equal to the total cost have been ~~dispersed~~ disbursed by a potential claimant.

SECTION 5. Comm 133.32 is repealed.

SECTION 6. Comm 133.34 (1) is renumbered Comm 133.34 (1) (a).

SECTION 7. Comm 133.34 (1) (b) and (c) are created to read:

Comm 133.34 (1) (b) An application for accrediting a production shall be submitted at least 21 days prior to the start of filming or taping the production.

(c) Applications shall be reviewed by the department on a first-come, first-served basis.

SECTION 8. Comm 133.35 is created to read:

Comm 133.35 Ineligible expenditures. Expenditures for any of the following are not eligible for submittal or acceptance under s. Comm 133.36:

- (1) Marketing and distribution of an accredited production.
- (2) Alcoholic beverages.
- (3) Tobacco.
- (4) Gifts to cast and crew members.
- (5) Expenses related to cast and crew parties.
- (6) Per diems paid to non-Wisconsin residents.
- (7) Bank and transaction fees.
- (8) Legal fees, such as for development, marketing or business set-up.
- (9) Expenditures for forfeitures, fees, expenses and costs associated with violation of federal or state law or local ordinances.
- (10) Losses and damages.

SECTION 9. Comm 133.36 (title) and (1) (b) and (c) are amended to read:

Comm 133.36 (title) Determination of production expenditures, and resident salary, or wages, and sales or use taxes labor-related contract payments.

(1) (b) A list of the salary, ~~or wages~~ or labor-related contract payments that were paid as specified in sub. (2) (b), and a description of the corresponding services.

(c) Attestation that the employees who received the salary, ~~or wages~~ or labor-related contract payments as specified sub. (2) (b) ~~met department of revenue residency criteria, were residents of this state under s. 71.02, Stats.,~~ at the time of being paid.

~~**Note:** The application form that is referenced under s. Comm 133.34 (1) is accompanied with instructions that describe the department of revenue's residency criteria.~~

SECTION 10. Comm 133.36 (1) (e) to (g) are repealed and recreated to read:

Comm 133.36 (1) (e) Verification that the 35-percent threshold in s. 71.07 (5f) (c) 1., 71.28 (5f) (c) 1. or 71.47 (5f) (c) 1. was met.

Note: Sections 71.07 (5f) (c) 3., 71.28 (5f) (c) 3. and 71.47 (5f) (c) 3., Stats., read as follows: "A claimant may not claim a credit under this subsection if less than 35 percent of the total budget for the accredited production is spent in this state."

(f) Verification of compliance with the sourcing requirement in s. 71.07 (5f) (c) 3., 71.28 (5f) (c) 3. or 71.47 (5f) (c) 3., Stats.

Note: Sections 71.07 (5f) (c) 3., 71.28 (5f) (c) 3. and 71.47 (5f) (c) 3., Stats., read as follows: "No credit may be claimed under par. (b) 3. for the purchase of tangible personal property or items, property, or goods under s. 77.52 (1) (b), (c), or (d) the sale of which is not sourced to this state, as provided under s. 77.522."

(g) A fee in the amount of 2 percent of the production expenditures listed in the application, or \$5,000, whichever is less.

SECTION 11. Comm 133.36 (1) (h) is renumbered Comm 133.36 (1) (i).

SECTION 12. Comm 133.36 (1) (h) is created to read:

Comm 133.36 (1) (h) Documentation evidencing that receipt of the credit is a major factor in the applicant's decision to operate the accredited production in this state. The documentation shall include details showing that the applicant has multistate or international location options and either could reasonably operate the production outside the state or is considering operating the production in at least one other state or nation.

SECTION 13. Comm 133.36 (2) (b) (intro.) is amended to read:

Comm 133.36 (2) (b) (intro.) The salary, ~~or wages~~ or labor-related contract payments that were paid during the taxable year by the claimant to those employees of the claimant who met both of the following criteria:

SECTION 14. Comm 133.36 (2) (c) is repealed and recreated to read:

Comm 133.36 (2) (c) Any reduction in allocation of tax credits that is needed to either broaden the potential for promoting economic development or to avoid exceeding the annual aggregated cap of \$500,000 specified in ss. 71.07 (5f) (c) 5. and (5h) (c) 4m., 71.28 (5f) (c) 5. and (5h) (c) 4m., and 71.47 (5f) (c) 5. and (5h) (c) 4m., Stats.

SECTION 15. Comm 133 subchapter III (title) is amended to read:

CHAPTER Comm 133 SUBCHAPTER III (title), TAX CREDITS FOR ESTABLISHING OR OPERATING A FILM PRODUCTION COMPANY

SECTION 16. Comm 133.60 (1) Note is amended to read:

Comm 133.60 (1) Note: Sections 71.07 (5h) (a) 1. to 4., Stats., read as follows:

“1. ‘Claimant’ means a person who files a claim under this subsection and who does business in this state as a film production company.

2. ‘Film production company’ means an entity that exclusively creates ~~films, videos, electronic games, broadcast advertisement, or television productions, not including the productions described under s. 71.07~~ accredited productions, as defined in sub. (5f) (a) 1. a. to h.

3. ‘Physical work’ does not include preliminary activities such as planning, designing, securing financing, researching, developing specifications, or stabilizing property to prevent deterioration.

4. ‘Previously owned property’ means real property that the claimant or a related person owned during the 2 years prior to doing business in this state as a film production company and for which the claimant may not deduct a loss from the sale of the property to, or an exchange of the property with, the related person under section 267 of the Internal Revenue Code, except that section 267 of the Internal Revenue Code is modified so that if the claimant owns any part of the property, rather than 50 percent ownership, the claimant is subject to section 267 of the Internal Revenue Code for purposes of this subsection.”

SECTION 17. Comm 133.60 (3) is amended to read:

Comm 133.60 (3) “Incurred” means funds equal to the total cost have been ~~dispersed~~ disbursed by a potential claimant.

SECTION 18. Comm 133.70 (1) (a) 3. is amended to read:

Comm 133.70 (1) (a) 3. A description of how the estimated expenses will relate to establishing or operating a film production company in Wisconsin.

SECTION 19. Comm 133.70 (1) (a) 4. and Note are renumbered Comm 133.70 (1) (a) 5. and Note and amended to read:

Comm 133.70 (1) (a) 5. Documentation showing that the expenses will comply with the limitations in s. 71.07 (5h) (c) 1. to 3., 71.28 (5h) (c) 1. to 3. or 71.47 (5h) (c) 1. to 3., Stats.

Note: Sections 71.07 (5h) (c) 1. to 3., 71.28 (5h) (c) 1. to 3. and 71.47 (5h) (c) 1. to 3., Stats., read as follows:

“Limitations. 1. A claimant may claim the credit under par. (b) 1. ~~{for the purchase price of depreciable, tangible personal property}~~, if the tangible personal property, or item, property, or good under s. 77.52 (1) (b), (c), or (d), is purchased after December 31, ~~2007~~ 2008, and the tangible personal property, item, property, or good is used for at least 50 percent of its use in the claimant’s business as a film production company.

2. A claimant may claim the credit under par. (b) 2. for an amount expended to construct, rehabilitate, remodel, or repair real property, if the claimant began the physical work of construction, rehabilitation, remodeling, or repair, or any demolition or destruction in preparation for the physical work, after December 31, ~~2007~~ 2008, ~~or if~~ and the completed project is placed in service after December 31, ~~2007~~ 2008.

3. A claimant may claim the credit under par. (b) 2. for an amount expended to acquire real property, if the property is not previously owned property and if the claimant acquires the property after December 31, ~~2007~~ 2008, ~~or if~~ and the completed project is placed in service after December 31, ~~2007~~ 2008.”

SECTION 20. Comm 133.70 (1) (a) 4. and Note are created to read:

Comm 133.70 (1) (a) 4. Documentation showing that the expenses will be within the scope prescribed in s. 71.07 (5h) (b) 1., 71.28 (5h) (b) 1. or 71.47 (5h) (b) 1., Stats.

Note: The expenses prescribed in s. 71.07 (5h) (b) 1., 71.28 (5h) (b) 1. and 71.47 (5h) (b) 1., Stats., consist of “The purchase price of depreciable, tangible personal property and items, property, and goods under s. 77.52 (1) (b), (c), and (d), if the sale of the tangible personal property, items, property, or goods is sourced to this state under s. 77.522.”

SECTION 21. Comm 133.70 (2) (a) is repealed.

SECTION 22. Comm 133.70 (2) (b) and (c) are renumbered Comm 133.70 (2) (a) and (b) and amended to read:

Comm 133.70 (2) (a) The film production company and its investment would enhance economic development in Wisconsin.

(b) The film production company and its investment would enhance the potential for increasing the film, video or electronic game industry in Wisconsin.

SECTION 23. Comm 133.70 (3) and (5) are amended to read:

Comm 133.70 (3) If the department determines that the expenses submitted under sub. (1) are ~~likely expected~~ to comply with s. 71.07 (5h) (c) 1. to 3., 71.28 (5h) (c) 1. to 3. or 71.47 (5h) (c) 1. to 3., Stats., and that the film production company is likely expected to meet the conditions in sub. (2) (a) ~~to (e)~~ and (b), the department shall issue a preliminary approval to the potential claimant.

(5) (a) In accordance with ss. 71.07 (5h), 71.28 (5h), and 71.47 (5h), Stats., and subject to any reduction under par. (b), the department shall certify, in writing to a potential claimant, expenses that the department determines are related to establishing or operating a film production company in Wisconsin.

(b) The department may award a lesser allocation of tax credits than what the applicant may be eligible for, to either broaden the potential for promoting economic development or to avoid exceeding the annual aggregated cap of \$500,000 specified in ss. 71.07 (5f) (c) 5. and (5h) (c) 4m., 71.28 (5f) (c) 5. and (5h) (c) 4m., and 71.47 (5f) (c) 5. and (5h) (c) 4m., Stats.

SECTION 24. Comm 133.90 (2) (b) and (c) are repealed.

SECTION 25. Comm 133.90 (2) (a) 1. and 2. are renumbered Comm 133.90 (2) (a) and (b).

(END)

EFFECTIVE DATE

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