

Publication Date: June 8, 2010
Effective Dates: June 8, 2010 through November 4, 2010

ORDER OF THE DEPARTMENT OF COMMERCE
EMERGENCY RULE RELATING TO TAX CREDITS FOR INVESTMENTS
IN FOOD PROCESSING PLANTS AND FOOD WAREHOUSES

Finding of Emergency and Rule Analysis

The Department of Commerce finds that an emergency exists and that adoption of the rule included in this order is necessary for the immediate preservation of public welfare.

The facts constituting the emergency are as follows. Under sections 71.07 (3rm), 71.28 (3rm) and 71.47 (3rm) of the Statutes, as created in 2009 Wisconsin Act 295, a taxpayer may claim a tax credit for investments in food processing plants and food warehouses during taxable years beginning after December 31, 2009.

Section 560.2056 (4) of the Statutes, as likewise created in 2009 Wisconsin Act 295, requires the Department to (1) implement a program for certifying taxpayers as eligible for the food processing plant and food warehouse investment credit, (2) determine the amount of credits to allocate to those taxpayers, and (3) in consultation with the Department of Revenue, promulgate rules to administer the program. No other provisions are established in the Statutes regarding the specific process for taxpayers to use in applying for the credits, and for the Department of Commerce to use in certifying eligible taxpayers and in allocating the credits.

Because of enactment of 2009 Wisconsin Act 295, a number of entities that may be eligible for the tax credits have contacted the Department with inquiries concerning the process for applying for the credits, for expenditures that have been or will be incurred during taxable years that began after December 31, 2009. In addition, section 71.07 (3rm) of the Statutes includes a \$1,000,000 tax-credit allocation that became available on May 27, 2010, and expires on June 30, 2010.

Although the Department of Commerce has begun promulgating the permanent rule that is required by 2009 Act 295, the time periods in chapter 227 of the Statutes for promulgating permanent rules preclude the permanent rule from becoming effective in time to accommodate allocating the tax credits for the 2009-10 fiscal year. This emergency rule will enable the Department of Commerce to establish an application, certification, and tax credit allocation process for the entities that will be eligible for the allocation that expires on June 30, 2010.

Pursuant to section 227.24 of the Statutes, this rule is adopted as an emergency rule to take effect upon publication in the official state newspaper and filing with the Legislative Reference Bureau.

The Wisconsin Department of Commerce adopts an order to create chapter Comm 135 relating to investment tax credits for food processing plants and food warehouses, and affecting small businesses.

Analysis of Rules

1. Statutes Interpreted.

Sections 71.07 (3rm), 71.28 (3rm), 71.47 (3rm), and 560.2056 (4) – as created in 2009 Wisconsin Act 295.

2. Statutory Authority.

Sections 227.11 (2) (a) and 560.2056 (4).

3. Explanation of Agency Authority.

Section 560.2056 (4) of the Statutes requires the Department to promulgate rules for implementing and administering a program to certify applicants and allocate tax credits for the food processing plant and food warehouse investments addressed in sections 71.07 (3rm), 71.28 (3rm) and 71.47 (3rm) 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 those programs are not targeted specifically to investments in food processing plants and food warehouses.

5. Summary of Rule.

The rules in this order address (1) the eligibility requirements for applicants; (2) the documentation that must be submitted by applicants to become certified as eligible for the food processing plant and food warehouse investment credit, and to receive acceptance of incurred expenses; (3) the Department's response to the submitted documentation; and (4) filing a claim with the Department of Revenue for the corresponding tax credit.

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

Neither the Department nor the Department of Revenue is aware of any existing or proposed federal regulations that address this tax credit.

7. Comparison With Rules in Adjacent States.

Minnesota, Illinois and Iowa have various tax-credit programs but nothing similar to the food processing plant and food warehouse investment credit addressed in these rules. Michigan has an Agricultural Processing Renaissance Zone program that offers abatement of certain taxes to agricultural processing facilities.

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 criteria in 2009 Wisconsin Act 295; (2) incorporating applicable best practices the Department has developed in administering similar programs for economic development, business development, and tax-credit verification; (3) soliciting and utilizing input from the Department of Revenue; and (4) 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 document that was used to determine the effect of the rules on small business was 2009 Wisconsin Act 295. This Act requires the Department to implement a program to certify taxpayers as eligible for the food processing plant and food warehouse investment credit under sections 71.07 (3rm), 71.28 (3rm) and 71.47 (3rm) of the Statutes, and requires the Department to promulgate rules for administering the program. This Act applies its private-sector requirements only to food processing plants and food warehouses 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 applicants that choose to pursue tax credits for modernization or expansion of food processing plants and food warehouses.

11. Agency Contact Person.

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SECTION 1. Chapter Comm 135 is created to read:

Chapter Comm 135

FOOD PROCESSING PLANT AND FOOD WAREHOUSE INVESTMENT CREDIT

Comm 135.10 Authority and purpose. Pursuant to s. 560.2056 (4), Stats., this chapter sets forth the requirements for obtaining all of the following from the department:

(1) A certification that a taxpayer, including a taxpayer who is any of the following, is eligible for the food processing plant and food warehouse investment credit under s. 71.07 (3rm), 71.28 (3rm), or 71.47 (3rm), Stats.:

- (a) A partner of a partnership.
- (b) A member of a limited liability company.
- (c) A shareholder of a tax-option corporation.

(2) A determination of the maximum amount of tax credit that may be claimed under this chapter for an investment in a food processing plant or food warehouse.

Note: The statute sections listed in this section address income and franchise tax credits for investments in food processing plants and food warehouses.

Comm 135.20 Definitions. In this chapter:

- (1) “Department” means the department of commerce.
- (2) “Eligible capital investment” includes all expenses incurred in the acquisition, construction or improvement of buildings or facilities; and the purchase price of depreciable personal property or equipment.
- (3) “Food” has the meaning given in s. 97.01 (6), Stats.

Note: Section 97.01 (6) of the Statutes reads as follows: “ ‘Food’ means: (a) Articles used for food or drink by persons.

- (b) Chewing gum.
- (c) Articles used for components of matters specified in pars. (a) and (b).”

(4) “Food processing” has the meaning given in s. 97.29 (1) (g) (intro.) to 3., Stats.

Note: Section 97.29 (1) (g) (intro.) to 3. of the Statutes reads as follows: “ ‘Food processing’ means the manufacture or preparation of food for sale through the process of canning, extracting, fermenting, distilling, pickling, freezing, baking, drying, smoking, grinding, cutting, mixing, coating, stuffing, packing, bottling or packaging, or through any other treatment or preservation process. ‘Food processing’ includes the activities of a bakery, confectionary or bottling establishment, and also includes the receipt and salvaging of distressed food for sale or use as food. ‘Food processing’ does not include any of the following:

- 1. Activities covered under a dairy plant license issued under s. 97.20.
- 2. Activities covered under a meat or poultry establishment license issued under s. 97.42.
- 3. The retail preparation and processing of meals for sale directly to consumers or through vending machines if the preparation and processing is covered under a restaurant permit or other permit issued under s. 254.64.

(5) “Food processing plant” has the meaning given in s. 71.07 (3rm) (a) 2., Stats.

Note: Under section 71.07 (3rm) (a) 2. of the Statutes, “Food processing plant” means any place where food processing is conducted, except that it does not include (1) any establishment subject to the requirements of section 97.30

of the Statutes; (2) any restaurant or other establishment holding a permit under section 254.64 of the Statutes, to the extent that the activities of that establishment are covered by section 97.30 of the Statutes or the permit under section 254.64 of the Statutes; (3) dairy plants licensed under section 97.20 of the Statutes; or (4) meat establishments licensed under section 97.42 of the Statutes.

(6) “Food warehouse” has the meaning given in s. 71.07 (3rm) (a) 3., Stats.

Note: Under section 71.07 (3rm) (a) 3. of the Statutes, “Food warehouse” means a warehouse used for the storage of food, and includes a cold-storage warehouse, frozen-food warehouse and frozen-food locker plant. “Food warehouse” does not include (1) a warehouse used solely for the storage of grain or other raw agricultural commodities; (2) a retail food establishment, restaurant or other retail facility at which food is stored on a temporary basis incidental to retail preparation or sale; (3) A warehouse located in a dairy plant licensed under section 97.20 of the Statutes, a food processing plant licensed under section 97.29 of the Statutes, or a meat establishment licensed under section 97.42 of the Statutes, and used primarily for the storage of food ingredients or food products manufactured or processed at the licensed establishment; (4) a warehouse operated by a milk distributor licensed under section 97.21 (3) of the Statutes and used primarily for the storage and distribution of milk and fluid milk products, as defined in section 97.20 (1) (c) and (g) of the Statutes; and (5) a facility owned or operated by a consumer and used by that consumer to store food for the consumer's use.

Comm 135.30 Applying for certification and allocation. (1) (a) A taxpayer or one of the following entities may apply for a certification and an allocation for a food processing plant or food warehouse investment credit:

1. A partnership.
2. A limited liability company.
3. A tax-option corporation.

(b) A “taxpayer” or the “entities” in par. (a) may include either the operator of a food processing plant or food warehouse, or an owner of a building or facility in which a food processing plant or food warehouse is located.

(2) Application to the department for a certification and an allocation of the credit shall be made on a valid, department-prescribed form.

Note: The application form that is currently valid can be obtained from the Department at P.O. Box 7970, Madison, WI, 53707, or at www.commerce.wi.us.

(3) (a) Each application shall include all of the following information:

1. A description of the business operations of the applicant, in relation to the project.
2. A description of the project, including the eligible capital investment.
3. A description of how the project will promote economic development.
4. Any other information that the department deems necessary to evaluate applications and allocate available tax credits.
5. Any subsequent clarification requested by the department.

(b) No application may include costs incurred in taxable years beginning on or after January 1, 2017.

(4) Each application shall be completed and either postmarked or delivered to the department no sooner than upon completion of the taxable year in which the costs listed in the application were incurred and no later than February 15th of the subsequent taxable year, unless this deadline is extended by the department, except as specified in sub. (5).

(5) For tax credits that may be allocated in fiscal year 2009-10 under s. 71.07 (3rm) (c) 3. a., 71.28 (3rm) (c) 3. a., and 71.47 (3rm) (c) 3. a., Stats, each application shall be completed and either postmarked or delivered to the department no later than June 18, 2010.

Comm 135.40 Certifications for applicants, and allocation of tax credits. (1) After receipt of the applications submitted under s. Comm 135.30, the department shall issue certifications for the applicants that have met the criteria in s. Comm 135.30 (2) to (5).

(2) (a) In conjunction with issuing a certification for an applicant, the department shall determine the maximum amount of tax credit that the applicant may either claim or distribute to its partners, members or shareholders, except as specified in par. (b).

(b) In conjunction with issuing a certification for an applicant who submits an application under s. Comm 135.30 (5), the department shall determine the maximum amount of tax credit that the applicant may either claim or distribute to its partners, members or shareholders, based on eligible capital investments made by the applicant from January 1, 2010, to May 31, 2010.

Note: Under chapter 71; of the Statutes., the aggregate amount of credits that a taxpayer may claim under this chapter is \$200,000; except that partnerships, limited liability companies, tax-option corporations and other multiple-owner entities are limited to an aggregate of \$200,000 for an entity.

(3) (a) Due to the \$1,000,000; \$1,200,000 and \$700,000 maximum totals established in s. 71.07 (3rm) (c) 3., Stats., for allocations in fiscal years 2009-10, 2010-11 and thereafter, respectively, the department may allocate the tax credits in a manner that the department believes is most likely to promote economic development.

(b) In determining the allocation of tax credits under par. (a), the department shall consider all of the following:

1. The jobs created by the project.
2. The salaries, wages and other employee benefits of the jobs created by the project.
3. The impact of the project on the food processing and food warehouse industries in Wisconsin.
4. The extent to which the area served by the project is economically distressed.
5. The amount of new, eligible capital investment in the project.
6. The impact of the project on business in Wisconsin.
7. Any previous assistance from the department.

(c) The department may prorate some or all of the allocations in order to broaden the potential for promoting economic development and to address the criteria in par. (b).

Note: See chapter Comm 149 for additional requirements relating to (1) contracts between the Department and recipients of economic-development tax credits and (2) penalties for submitting false or misleading information.

Comm 135.50 Notifications. Following completion of the certifications and allocations in s. Comm 135.40, the department shall notify each applicant of the outcome of their application – and shall notify the department of revenue of every certification issued under this chapter and the amount of the tax credit allocated to the applicant.

Comm 135.60 Claims. A taxpayer may file for a tax credit under this chapter using forms acceptable to the department of revenue.

(END)

EFFECTIVE DATE

Pursuant to s. 227.2 (1) (c), Stats., this rule shall take effect as an emergency rule upon publication in the official state newspaper.

File reference: Comm 135/rules e2