

CR 10-041

ORDER OF THE DEPARTMENT OF COMMERCE

CREATING RULES

The Wisconsin Department of Commerce adopts an order to create chapter Comm 137 relating to reallocations for recovery zone facility bonds as established under the federal American Recovery and Reinvestment Act of 2009, and affecting small businesses.

Rule Summary

1. Statutes Interpreted.

Section 560.033.

2. Statutory Authority.

Sections 227.11 (2) (a) and 560.033.

3. Explanation of Agency Authority.

Section 227.11 (2) (a) of the Statutes authorizes the Department to promulgate rules interpreting the provisions of any Statute administered by the Department. Section 560.033 (1) of the Statutes directs the Department to establish by rule, a system for reallocating waived allocations for recovery zone facility bonds – as defined under 26 USC 1400U-3(b)(1) – to the authorities and local governmental units which are defined in section 66.1104 (1) (a) and (b) of the Statutes. Section 560.033 (3) of the Statutes authorizes the Department to place any condition on these reallocations that the Department deems is in the best interest of the State.

4. Related Statute or Rule.

Chapter Comm 113 contains rules relating to allocating volume cap on tax-exempt private activity bonds for manufacturing and housing, pursuant to 26 USC 146.

Chapter Comm 136 establishes a procedure by which the Governor can designate tax-exempt Midwestern disaster area bonds that can be issued by, or on behalf of, the State or any political subdivision thereof, under the federal Heartland Disaster Tax Relief Act of 2008. These are private activity bonds that are designed to facilitate the recovery and rebuilding of areas which were declared major disaster areas in 2008.

5. Plain Language Analysis.

The rules in this order establish a system for reallocating all of the federal recovery zone facility bond allocations that are not used by June 1, 2010, to the authorities and local

governmental units which are defined in section 66.1104 (1) (a) and (b) of the Statutes, as created in 2009 Wisconsin Act 112. This reallocation system includes deadlines that are designed to result in complete use of the federal bond allocation prior to its expiration on December 31, 2010.

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

Current federal law, including the American Recovery and Reinvestment Act of 2009 (ARRA), authorizes certain local governments to issue several different types of tax-exempt bonds, including recovery zone facility bonds. The amount of bonds that may be issued is limited. Through each State, the ARRA allocates to counties, and to cities with a population of at least 100,000, the limited amount of recovery zone facility bonds that may be issued. The ARRA also authorizes these counties and cities to then waive some or all of their allocation, in which case the State in which the local units are located may reallocate the waived allocation to other units of government in that State.

7. Comparison With Rules in Adjacent States.

Minnesota, Illinois, Iowa and Michigan have not yet promulgated any rules relating to counties or cities waiving allocations for recovery zone facility bonds. As a result, each county or city within those States may have developed their own requirements or guidelines for utilizing their portion of the State's recovery zone facility bond allocation.

8. Summary of Factual Data and Analytical Methodologies.

The data and methodology for developing these rules were derived from and consisted of (1) reviewing 2009 Wisconsin Act 112 and the corresponding criteria in section 1401 of the federal American Recovery and Reinvestment Act of 2009, Public Law 111-5; and (2) incorporating applicable best practices the Department has developed in administering similar programs for economic development and business development.

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 2009 Wisconsin Act 112 and the corresponding criteria in section 1401 of the federal American Recovery and Reinvestment Act of 2009.

No economic impact report was prepared.

10. Effect on Small Business.

The rules are expected to result in only beneficial effects on small business because the rules only address tax-exempt private activity bonds that allow businesses to finance certain depreciable capital projects in areas which are designated by the bond issuers as having significant poverty, unemployment, rate of home foreclosures, or general distress.

11. Agency Contact Person.

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SECTION 1. Chapter Comm 137 is created to read:

CHAPTER Comm 137, REALLOCATIONS FOR RECOVERY ZONE FACILITY BONDS

Comm 137.01 Purpose. The purpose of this chapter is to establish a system for the reallocation of waived allocations of the limitation on the issuance of recovery zone facility bonds, as defined under 26 USC 1400U-3(b)(1), among authorities and local governmental units.

Note: 26 USC 1400U-3 was created by Section 1401 of Title I in Division B of the American Recovery and Reinvestment Act of 2009, Public Law 111-5.

Comm 137.02 Definitions. In this chapter:

(1) “Authority” has the meaning specified in s. 66.1104 (1) (a), Stats.

(2) “Department” means the department of commerce.

(3) “Issuer” means any of the following:

(a) A municipality.

(b) An agency or authority that is empowered to borrow money, including any redevelopment authority, community development authority, or housing authority established by or on behalf of these entities.

(c) A person acting for or on behalf of an entity listed in par. (a) or (b).

(d) Any public corporation or commission established by or on behalf of an entity listed in par. (a) or (b).

(4) “Limitation on aggregate amount” means the limitation applicable to the state of Wisconsin on the aggregate amount for the issuance of recovery zone facility bonds.

Note: The limitation on aggregate amount for Wisconsin is \$238,217,000.

(5) “Local governmental unit” has the meaning specified in s. 66.1104 (1) (b), Stats.

(6) “Midwestern disaster area bond” has the meaning specified in s. 66.1104 (1) (bm), Stats.

Note: Section 66.1104 (1) (bm) of the Statutes reads as follows: “ ‘Midwestern disaster area bond’ means a bond described under 26 USC 1400N(a), as modified by P.L. 110-343, title VII, subtitle A, section 702(d)(intro.) and (1).”

(7) “Municipality” has the meaning given in s. 67.01 (5), Stats.

Note: Section 67.01 (5) of the Statutes reads as follows: “ ‘Municipality’ means any of the following which is authorized to levy a tax: a county, city, village, town, school district, board of park commissioners, technical college district, metropolitan sewerage district created under ss. 200.01 to 200.15 or 200.21 to 200.65, town sanitary district under subch. IX of ch. 60, transit authority created under s. 66.1039, public inland lake protection and rehabilitation district established under s. 33.23, 33.235, or 33.24, and any other public body empowered to borrow money and issue obligations to repay the money out of public funds or revenues. ‘Municipality’ does not include the state.”

(8) “Project” means any project for which recovery zone facility bonds may be issued.

(9) “Recovery zone facility bond” or “recovery zone bond” has the meaning specified in s. 66.1104 (1) (c), Stats.

Note: Section 66.1104 (1) (c) of the Statutes reads as follows: “ ‘Recovery zone bond’ means a bond described under 26 USC 1400U–3(b)(1).”

(10) “Shovel-ready” means planning has been completed, approvals have been secured, and construction or equipment acquisition is ready to proceed after the funding is in place for the project.

Comm 137.03 Accounting for the limitation on aggregate amount, waiver and reallocation. (1) The department shall keep a record of all waived allocations received, and reallocations made, by the department pursuant to s. 560.033, Stats.

(2) (a) The allocation of the limitation on aggregate amount received by a city or county shall be considered waived on March 1, 2010, except with regard to any amount about which the city or county sends written notice to the department before that date in which the city or county does one of the following:

1. States that recovery zone facility bonds have been issued pursuant to the city’s or county’s allocation of the limitation on aggregate amount.

2. Identifies the amount of a proposed issuance of recovery zone facility bonds and the nongovernmental entity that will own or operate the project being financed and includes a letter addressed to the department from the prospective purchaser of the recovery zone facility bonds that states the expectation of the prospective purchaser that an agreement will be executed before May 1, 2010, providing for the purchase of the recovery zone facility bonds and that the recovery zone facility bonds will be issued before June 1, 2010.

(b) The allocation of the limitation on aggregate amount received by a city or county and not waived pursuant to par. (a) shall be considered waived on May 1, 2010, except with regard to any amount about which the city or county sends written notice to the department before that date in which the city or county states one of the following:

1. That recovery zone facility bonds have been issued pursuant to the city’s or county’s allocation of the limitation on aggregate amount.

2. That an agreement has been executed by the city, county, other local governmental unit, or authority that will issue the recovery zone facility bonds, and a bond purchaser, providing for the purchase of recovery zone facility bonds.

(c) The allocation of the limitation on aggregate amount received by a city or county and not waived pursuant to par. (a) or (b) shall be considered waived on June 1, 2010, except with regard to any amount about which the city or county sends written notice to the department before that date in which the city or county states that recovery zone facility bonds have been issued pursuant to the city's or county's allocation of the limitation on aggregate amount.

(3) (a) The written notice to the department under sub. (2), shall consist of an official letter from a city or county, that is signed by the mayor, city manager, county board chairman or county executive.

(b) A written notice to the department in which the city or county states that recovery zone facility bonds have been issued pursuant to the city's or county's allocation of the limitation on aggregate amount shall include all of the following information for statistical purposes:

1. The amount of the bond issue.
2. The nongovernmental entity that will own or operate the project being financed.
3. The date of the bond issue.
4. The bond purchaser.
5. The economic impact of the project being financed including all of the following information:
 - a. The total investment in the project.
 - b. The total number of full-time jobs that will be created, retained or substantially upgraded in connection with the project.
 - c. The average wages and benefits that will be provided to persons hired as a result of the project.

Note: The written notice can either be sent by mail to Wisconsin Department of Commerce, Bureau of Business Finance and Compliance, P.O. Box 7970, Madison, WI 53707, or by fax at 608-264-6151, or by email to Steven.Sabatke@Wisconsin.gov.

(c) A written notice to the department in which the city or county states that an agreement as described in sub. (2) (b) 2. has been executed shall include a copy of the agreement.

Comm 137.04 (1) REQUEST PROCESS. A request for a reallocation of the limitation on aggregate amount under this chapter shall be made to the department on a form prescribed by the department and shall include all of the following:

- (a) The name and address of the issuer.
- (b) A description of the project, including the name and address of the owner, operator or sponsor of the project and the trade or business in which the project will be used.
- (c) The location of the project including both the county and the city, village or town.
- (d) The total investment in the project.
- (e) The total number of full-time jobs that will be created, retained or substantially upgraded in connection with the project.
- (f) The average wages and benefits that will be provided to persons hired as a result of the project.
- (g) The requested amount of the reallocation.

Note: The application form prescribed by the Department can be obtained from the Department at P.O. Box 7970, Madison, WI 53707 or from the Department's Web site at commerce.wi.gov.

(2) CERTIFICATION ITEMS. In addition to the material required in sub. (1), the department shall receive all of the following prior to certification of a reallocation of the limitation on aggregate amount:

- (a) 1. Evidence that official action has been taken by the issuer with respect to the issuance of the bonds.
- 2. For bonds issued pursuant to s. 66.1103, Stats., the evidence under subd. 1. shall be the initial resolution previously filed with the department with respect to the bonds.
- (b) Evidence that a recovery zone, as defined in 26 USC 1400U-1(b), has been designated by the issuer or by the county or the city in which the project is located.
- (c) A letter from bond counsel to the effect that the obligations would constitute recovery zone facility bonds.
- (d) A letter from a financial institution indicating a commitment to either purchase the obligations upon delivery by the issuer or issue a letter of credit.
- (e) A nonrefundable payment of \$300 by cash or by check payable to the department.

Comm 137.05 Review process. (1) Except as provided in sub. (3), the department shall review each reallocation request in the order in which qualifying requests are received.

(2) For the reallocation requests that meet the requirements of s. Comm 137.04, the department shall evaluate the included projects based upon consideration of all of the following:

- (a) The prospects for new investment and economic development in the area.

(b) The amount of investment that is likely to result from the project.

(c) The number of full-time jobs that are likely to be created or retained as a result of the project including green jobs that are created as a result of the project. In this paragraph, “green job” means a job that provides a service or produces a product in any of the following categories:

1. Increasing energy efficiency.
2. Producing renewable energy.
3. Recycling existing materials.
4. Preventing, reducing or mitigating environmental degradation.
5. Cleaning up and restoring the natural environment.

(d) Whether the project will result in the dislocation of a business from one municipality to another.

(e) Whether the project can be financed in whole or in part by any other forms of tax-exempt private activity financing, such as industrial revenue bonds or Midwestern disaster area bonds.

(f) The feasibility of the financial commitment for the bond issue.

(g) Whether the project is likely to occur or continue without the reallocation.

(h) The degree to which the project is shovel-ready.

(i) Whether a reallocation in the requested amount would cause the aggregate amount of allocations under this chapter to exceed the aggregate amount of waived allocations.

(j) The adequacy of any remaining waived allocation for other pending or expected requests.

(k) Any other factors that the department considers relevant.

(3) (a) In reviewing an application for a reallocation that is made after March 1, 2010, but before June 1, 2010, the department shall give priority to those requests for projects in the cities or counties that waived their allocations provided the request does not exceed the amount of the allocation that the city or county waived.

(b) Any priority assigned under this subsection shall comply with the allocation limitations specified in s. 560.033 (5), Stats.

Note: Section 560.033 (5) of the Statutes reads as follows: “For a reallocation made under this section after March 1, 2010, but before June 1, 2010, before making the reallocation, the department shall consider the amount of recovery zone bond limitation allocation waived

under s. 66.1104 (2) (a) or (b) by each city or county then seeking a reallocation under this section. The department shall reallocate from the aggregated waived allocation, as that term is used in sub. (1), an allocation of the recovery zone bond limitation to a project in a city or county that waived an allocation under s. 66.1104 (2) (a) or (b) in an amount up to the total limitation allocation waived by the city or county or equal to the limitation allocation determined by the city or county to be necessary for the project, whichever is less. In the event requests by cities and counties for a reallocation under this section exceed the aggregated waived allocation, the department shall prorate the available waived allocation among cities and counties in proportion to the amount waived by the cities and counties.”

Comm 137.06 Certification process. If the department approves an application under this chapter, the department shall promptly certify and reallocate the amount requested to the issuer. The reallocation shall be valid for a period equal to the lesser of 60 calendar days or the remainder of the calendar year 2010. The issuer may petition the department for a 15-day extension. The amount of the reallocation shall not exceed the maximum amount authorized for issuance under the official action taken by the issuer with respect to the obligation. Certain reallocations are subject to earlier termination pursuant to s. Comm 137.08 (3). Any reallocation made under this section shall be valid only with respect to bonds issued in calendar year 2010.

Comm 137.07 Emergency. Based upon the federal tax law requirement that a recovery zone facility bond must be issued prior to January 1, 2011, the department’s review and evaluation of each application shall be completed expeditiously and in any event within 30 days unless the department provides notice to the applicant of a need to extend the 30-day period for review and evaluation.

Comm 137.08 Post-reallocation process. (1) After making a reallocation, the department shall record that the corresponding portion of the limitation on aggregate amount has been allocated.

(2) (a) Each issuer shall notify the department in writing as to the amount of recovery zone facility bonds issued pursuant to the reallocation, within 5 business days after the issuance of the bonds. Each notification shall include all of the following information:

1. The date of the bond issue.
2. The term of the bond issue and interest rate.
3. The bond purchaser and whether the bond issue was either a private placement or public sale.

(b) 1. Each notification under par. (a) shall include a nonrefundable payment of 0.1% of the amount of the bonds issued pursuant to the reallocation, up to a maximum of \$10,000, by cash or by a certified or cashier’s check payable to the department.

2. The payment in subd. 1 may be reduced by the amount paid to the department under s. Comm 137.04 (2) (e).

(3) An issuer shall notify the department if it chooses to surrender all or any part of its rights to a reallocation under this chapter. Upon surrender, the surrendered portion of the reallocation shall expire.

(4) All recovery zone facility bonds shall be issued before January 1, 2011.

(END)

EFFECTIVE DATE

Pursuant to s. 227.24 (1) (c), Stats., these rules shall become effective on the first day of the month commencing after the date of publication in the Wisconsin administrative register.

File reference: Comm 137/rules p LR 2ac