

Corporate Legal Alert: Proposed Regulations for NYS MWBE Certification

Earlier this year, during the height of the COVID-19 pandemic, the New York State Division of Minority and Women Owned Business Development proposed sweeping changes to the regulations governing MWBE eligibility and certification procedures. These proposed regulatory amendments will make it more difficult for women and minority-owned businesses to obtain the certification necessary to receive the benefits of the State's MWBE program.

While there are a number of significant changes, four are particularly noteworthy.

First, the amendments will implement more comprehensive and stringent eligibility requirements for certification. For example:

- The proposed regulations include requirements that mandate that the woman or minority owner refrain from relying on any other person in making critical business decisions and require the woman or minority owner to make all operational day-to-day decisions. Under the proposed regulations, woman and minority owners who rely on employees to assist in managing operations, particularly field work, will need to carefully consider the roles and decision-making authority of such employees. Women and minority owners will be required to demonstrate personal oversight and management of the revenue generating functions of the business.
- As with prior regulations, the new amendments require woman and minority owners to provide evidence of capital contributions. However, the proposed regulations make clear that woman and minority owners who cannot provide evidence of a cash contribution for their equity position must instead demonstrate clear, objective documentation of the value of non-monetary equity contributions. The proposed regulations make it likely that the Division will insist on documented evidence of a monetary or other tangible form of capital contribution to the business regardless of the business's actual history or capital needs.
- The proposed regulations require the woman or minority owner to earn substantially more money than non-qualifying co-owners and employees. With the proposed changes, woman and minority owners must consider the effects of reinvesting profits back into the business.

Second, the proposed amendments call for a subjective analysis by the Division of the "purpose" behind an MWBE's application for certification. The proposed regulations state that a business cannot be certified as an MWBE in New York State if the business was formed, or the woman or minority owner obtained his/her ownership interest, "*solely for the purposes of securing certification of such business enterprise as a minority- or woman-owned business enterprise.*" This raises the question of how the Division will assess the "purpose" for which an enterprise is formed. Such an inquiry may lead to subjective and inconsistent certification outcomes.

Third, the regulations call for a significant change to the appeal process. The current regulations provide

that a company that has been denied certification cannot reapply for recertification for two years after the date of the denial. The proposed regulations maintain the two-year waiting period but state that if *“an applicant appeals such denial determination, and such denial determination is upheld following a complete exhaustion of all appeals, the applicant may not reapply for certification for 2 years from the date of a final determination and/or judicial order, whichever is later.”* Given the inordinate delays applicants presently experience in both the application and appeals processes, this change could force businesses to wait for five or more years from the date of denial to reapply for certification.

Finally, the proposed changes also include an increase to the personal net worth requirement. Previously capped at \$3 million, the maximum personal net worth of the woman or minority owner has been raised to \$15 million. The increase in the cap under the proposed regulations may encourage owners to distribute profits without the fear of losing certification.

Other proposed changes to the regulations further increase reporting and utilization requirements on the part of State agencies, authorities and private government contractors. As we await finalization of these proposed regulations, we encourage companies presently certified as MWBEs or those considering applying for certification to reach out to our attorneys to discuss the best strategy for their application.

If you or your business have any questions regarding these proposed regulations, please contact [Jim Youngs](#), [Will Hython](#) or [Briana Wright](#).