

## DEPARTMENT OF TRANSPORTATION

### Transportation Commission

## EMERGING SMALL BUSINESS PROGRAM

### 2 CCR 604-1

*[Editor's Notes follow the text of the rules at the end of this CCR Document.]*

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#### Chapter 1: General Provisions

##### 1.1. Statutory Authority

The statutory authority for the Transportation Commission of Colorado (the Transportation Commission) to adopt rules governing the Colorado Department of Transportation's Emerging Small Business Program is found at §§ 43-1-106(8)(j), (k) and (p), C.R.S. as amended.

##### 1.2. Purpose

The general purpose of these Rules is to implement § 43-1-106 (8)(p), C.R.S., which authorizes the creation of the Colorado Department of Transportation's (CDOT) Emerging Small Business (ESB) Program. CDOT will use the ESB Program to provide assistance to and increase opportunities for certified small Businesses, including minority-owned, women-owned, and Disadvantaged Business Enterprises. The assistance and opportunities provided by the ESB Program will aim to enable ESBs to gain the knowledge, experience, and resources needed to participate in the competitive process for CDOT Contracts, thereby aiding in the development of Colorado's small business community, increasing competition for CDOT Contract awards, and lowering the cost to the public for transportation-related work.

##### 1.3. Applicability

These Rules govern the development and administration of the ESB Program. In the case of a Contract for which a part of the Contract price is to be paid with funds from the United States Government and for which the United States Government's terms or conditions are inconsistent with any provisions of these Rules, the provisions of these Rules will not apply to such Contract to the extent of such inconsistency.

#### Chapter 2: Definitions

The following definitions will apply to terms used in these Rules.

##### 2.1. Affiliate: Businesses are affiliates of each other if:

- A. Directly or indirectly, either one controls or has the power to control the other,
- B. A third party controls or has the power to control both, or
- C. Relationships or identity of interests between or among parties exist such that affiliation may be found by a reasonable person.

- Indicia of control include but are not limited to: interlocking management or ownership, identity of interests among family members, shared facilities and equipment, and/or common use of employees.
- 2.2. Annual Update: Annual evaluation of an ESB's continued eligibility for Certification. For ESBs that are concurrently certified in the Disadvantaged Business Enterprise (DBE) and ESB Programs, CDOT may synchronize the deadline for updating both certifications based on a mutually agreed upon date.
  - 2.3. Applicant: A Business that is applying for Certification as an ESB.
  - 2.4. Bid: The offer of a Contractor, on the prescribed bid proposal form, to perform the work and to furnish the labor and materials in conformance with the invitation for bids.
  - 2.5. Business: A sole proprietorship, partnership, corporation, limited liability company, professional association or any other legal entity authorized by law and operating for profit, that is licensed and/or registered and otherwise authorized to operate in the state of Colorado.
  - 2.6. Certification: A determination by CDOT that a Business is eligible to participate in the ESB Program as an ESB, subject to continued compliance with these Rules and any other supplemental policies or procedures related to the ESB Program. While certain courses or licenses may be required for Certification, Certification neither represents nor implies that a business or individual is qualified to perform on a Contract.
  - 2.7. Certification Year: The annual period when an ESB's Certification is valid. The annual period begins on the date of an ESB's initial Certification or when the ESB's Annual Update is processed and approved, whichever is most recent. The annual period ends on the following calendar year and on the last day of the month when the initial Certification or Annual Update went into effect, whichever is most recent. For example, if an ESB is certified on August 15, 2020, that ESB's Certification Year begins on August 15, 2020, and ends on August 31, 2021. For ESBs that are concurrently certified as DBEs by CDOT, this period may be shortened or extended in a given year following a mutual agreement between CDOT and the ESB to synchronize the end of its Certification Year with the deadline to update its DBE certification.
  - 2.8. Construction: Building, altering, repairing, improving, or demolishing work as described in a CDOT project. This term includes "capital construction" and "controlled maintenance" as defined pursuant to § 24-30-1301, C.R.S.
  - 2.9. Contract: A written agreement with CDOT for the performance of Professional Services, Practice of Research, or Construction work.
  - 2.10. Contractor: A Business qualified to perform and contracting with or intending to Contract with CDOT to perform Professional Services, Practice of Research, or Construction work.
  - 2.11. Controlling Interest: Ownership of fifty-one percent (51%) or more of the Business by one (1) person, or ownership of the largest single portion of the Business by one (1) person if no one (1) person holds fifty-one percent (51%) or more.
  - 2.12. C.F.R.: United States Code of Federal Regulations.
  - 2.13. C.R.S.: Colorado Revised Statutes, as amended.
  - 2.14. Disadvantaged Business Enterprise (DBE): A Business that is certified by the Colorado Unified Certification Program as meeting the certification requirements of the DBE Program.

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- 2.15. Disadvantaged Business Enterprise Program (DBE Program): A federal United States Department of Transportation program governed by Title 49, Part 26 of the C.F.R.
  - 2.16. Emerging Small Business (ESB): A Business certified by CDOT to participate in the ESB Program.
  - 2.17. Emerging Small Business Program (ESB Program): The program pursuant to § 43-1-106(8)(p), C.R.S. and further set forth in these Rules, which is intended to provide assistance to and increase opportunities for ESBs.
  - 2.18. NAICS Code: The six-digit classification code and industry description (e.g., Corresponding Index Entry) under the North American Industry Classification System (NAICS).
  - 2.19. Overall Cap: The overall size limit for participation in the ESB Program will be equal to the United States Department of Transportation Disadvantaged Business Enterprise (DBE) Program size limit which can be found at 49 C.F.R. 26.65(b).
  - 2.20. Practice of Research: The performance of services involving the design, data collection and data analysis of studies such as evaluation studies, usage studies, feasibility studies, environmental impact studies, polling studies and other such studies performed by a person qualified by education or training or actual performance in the field but does not include "Professional Services".
  - 2.21. Preponderance of the Evidence: Proof by information that, compared with the opposing proof, leads to the conclusion that the fact at issue is more probably true than not.
  - 2.22. Principal: A sole proprietor, general partner, limited partner, director, or officer of the Business.
  - 2.23. Professional Services: Those services defined in § 24-30-1402(6), C.R.S., including: 1) the practice of architecture, 2) the practice of engineering, 3) the practice of professional land surveying, 4) the practice of landscape architecture, and 5) the practice of industrial hygiene.
  - 2.24. Program Benefits: The benefits of the ESB Program as prescribed in Chapter 4 of these Rules.
  - 2.25. Receipts: All revenue of the Business as defined by the DBE Program under 49 C.F.R. § 26.65.

### **Chapter 3: Certification**

- 3.1. Certification Procedures
  - A. Certification and Annual Update of Certification. CDOT will establish reasonable procedures and methods for the Certification and Annual Update of Certification of Businesses in order to effectuate the purposes of these Rules.
  - B. Application. At a minimum, all Applicants will be required to complete the prescribed CDOT application to be considered for Certification. The application will include questions regarding ethnicity and gender for the purpose of reporting the diversity of race-neutral participation in the ESB Program and on CDOT Contracts. CDOT may investigate the information provided in the application through reasonable means, including, but not limited to interviews and on-site investigations.

- C. Requests for Information. The Applicant must respond to all written requests for information within fifteen (15) calendar days of such request being made by CDOT, unless additional time is requested and granted in writing. If the Applicant does not respond within the prescribed timeframe to CDOT's requests for information, CDOT may, at its sole discretion, make a determination based upon the information provided or deem the application incomplete. Incomplete applications are administratively closed. Applicants whose applications are administratively closed may reapply for Certification at any time by submitting a new application.
- D. Notice of Determination. CDOT will issue a written Certification decision within ninety (90) calendar days of receipt of a complete application. CDOT may extend this time period once, for no more than an additional sixty (60) calendar days, upon written notice to the Applicant explaining the reasons for the extension. In the event that an Applicant is denied Certification, CDOT's written Certification decision must explain the reasons for the denial.
- E. Appeal. Any Applicant that is denied Certification may appeal such denial pursuant to §§ 24-4-104 and 105, C.R.S.
- F. Reapplication. Any Applicant that is denied Certification must wait at least one (1) year from the date of denial in order to reapply for Certification. This waiting period will not apply to Applicants that were denied Certification based on a size limit under paragraph (E) of Rule 3.2. that is no longer applicable (e.g., following a change in the U.S. Small Business Administration size standards).

3.2. Minimum Certification Requirements

- A. Burden of Proof. The Applicant has the burden of demonstrating, by a Preponderance of the Evidence, proof that it meets the Certification criteria, as determined by CDOT.
- B. Registration. Applicants must be in good standing with the Colorado Secretary of State to transact business or conduct its activities within the state of Colorado as applicable. CDOT may require all Applicants to register and maintain registration in an information database.
- C. Independence. The Applicant must be an independent Business. To be independent, the Business must demonstrate that its viability does not depend upon a relationship with another Business or Businesses. In determining whether a Business is independent, CDOT may consider, but is not limited to, evaluating the quality and consistency of relationships with other Businesses and individuals in comparison to normal industry practices.
- D. Qualifying Area of Business. The Applicant must be able to participate in the performance of Professional Services, Practice of Research, or Construction work on CDOT's transportation Contracts, including Contracts for aeronautic, transit and highway transportation.

1. Primary Industry Determination. All Applicants and ESBs will be assigned a primary industry using a NAICS Code. The NAICS Code will describe the primary services and/or goods provided by the Applicant or ESB as determined by CDOT. The primary industry determination will be based on a number of factors, including but not limited to, the ESB's revenue, equipment, expertise, marketing materials, and the amount of time and labor dedicated to a specific area of work as compared to other services being offered by the ESB. The primary industry determination will be the basis for categorizing the ESB as a Construction, Professional Services, or Practice of Research firm. The ESB's designation as a Construction, Professional Services, or Practice of Research firm will be listed on CDOT's ESB directory.
  2. Size Limit. The primary industry determination will be the basis for evaluating the Applicant's or ESB's ability to meet the ESB Program's size limit as described in paragraph (E) of this Rule.
  3. Notice. The Applicant or ESB must be notified in writing by CDOT of its primary industry determination at the time of initial Certification and with each Annual Update of the ESB's Certification. The ESB's designated primary industry at the time of initial Certification will remain in effect for the duration of the ESB's participation in the ESB Program except as provided in subparagraphs (4) and (5) of paragraph (D) of this Rule.
  4. Reevaluation. The Applicant or ESB may make a written request that CDOT reevaluate its primary industry determination at any time but may not make more than one (1) request in a given Certification Year. The reevaluation request must include all supporting information the Applicant or ESB would like for CDOT to consider as part of its request. CDOT may request additional information from the Applicant or ESB as part of its reevaluation. CDOT will notify the Applicant or ESB in writing of its determination within thirty (30) calendar days of the reevaluation request. If the request is denied, CDOT's written notice must explain the reasons for the denial. If approved, the new primary industry designation will remain in effect and not be modified except as provided in this subparagraph or subparagraph (5) of paragraph (D) of this Rule.
  5. Appeal. The Applicant may appeal a primary industry determination or the denial of a reevaluation request pursuant to §§ 24-4-104 and 105, C.R.S.
- E. Size Limit. The average annual Receipts of the Applicant or ESB for the preceding three (3) years, combined with the average annual Receipts of all Affiliates for the preceding three (3) years, will not exceed the current Overall Cap. The Applicant or ESB must also be a small Business for its primary industry as determined by the U.S. Small Business Administration pursuant to 13 C.F.R. § 121.201.
1. Levels. Certified ESBs will be divided into three categories: Level 1, Level 2, and Small Business Enterprise (SBE).
    - a. Level 1. Professional Services and Practice of Research ESBs whose average annual Receipts, as defined under 13 C.F.R. 121.104(c), do not exceed one million dollars (\$1,000,000) will be designated as a Level 1 ESB. Construction ESBs whose average annual Receipts, as defined under 13 C.F.R. 121.104(c), do not exceed three million dollars (\$3,000,000) will be designated as a Level 1 ESB.



3.3. Annual Update of ESB Certification

- A. Each ESB must annually update its ESB Certification with CDOT by submitting an affidavit sworn to by the ESB's owners before a person who is authorized by state law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of Colorado prior to the end of the ESB's Certification Year. This affidavit must affirm that there have been no changes in the ESB's circumstances affecting its continued ability to meet the eligibility requirements of the ESB Program.
- B. Responsibility of ESB. The ESB is responsible for submitting Annual Update information to CDOT before the end of its Certification Year. CDOT will send a notice regarding the Annual Update approximately forty-five (45) calendar days in advance, but it is the ESB's responsibility to ensure that all materials are submitted before the end of the Certification Year. If the ESB does not timely submit its Annual Update information, CDOT will initiate revocation procedures in accordance with paragraph (B) of Rule 3.4.
- C. Additional Investigation. If CDOT has reason to believe that an ESB may no longer be eligible for Certification or that a substantial change has occurred in the ownership or operation of the Business, it may further investigate the circumstances of the ESB and its owners.
- D. Extensions. At its discretion, CDOT may provide an extension to the ESB for submitting Annual Update information of no more than one (1) month past the end of the Certification Year. Such extension is only valid if requested by the ESB and confirmed by CDOT in writing. A request for an extension will only be granted when the ESB has demonstrated extenuating circumstances requiring an extension.
- E. ESBs must inform CDOT in writing of any change in circumstances affecting its ability to meet the eligibility requirements of these Rules or any material change in the information provided in its application form. ESBs must include supporting documentation demonstrating or describing in detail the nature of such changes. The written notification must be provided to CDOT within thirty (30) calendar days of the occurrence of the change. Failure to make a timely notification of such change may be grounds for revocation in accordance with paragraph (B) of Rule 3.4.

3.4. Graduation and Revocation of ESB Certification

- A. Graduation. An ESB will be deemed to have graduated from the ESB Program if the average annual Receipts of the ESB (including its Affiliates), as defined under 13 C.F.R. 121.104(c), exceeds the small business size standard established by the U.S. Small Business Administration for its primary industry or if the ESB's average annual gross receipts, as defined under 13 C.F.R. 121.104(a), for the three (3) most recent fiscal years exceeds the Overall Cap.
  - 1. Timing. Graduation will only occur upon the Annual Update of Certification.
  - 2. Notice. CDOT will provide the ESB with written notice that the ESB has graduated from the ESB Program and state the reasons why CDOT believes the ESB is no longer eligible for the ESB Program.
  - 3.. Effect on Participation. Graduation will not affect the ESB's status for Contracts that were bid for or awarded prior to the ESB's graduation from the ESB Program. Upon graduation, the Business will be removed from the ESB Program and ESB directory.

- B. Revocation.
1. Reasons for Revocation. CDOT may revoke the Certification of an ESB if:
    - a. The ESB fails to comply with the procedures for Annual Update of Certification or any other requirements for continued ESB Program participation;
    - b. The ESB continuously fails to cooperate with CDOT;
    - c. The ESB or any Principal thereof is reasonably believed to have made false, deceptive, or fraudulent statements on its application for Certification, in the course of any determination or hearing associated with Certification, or in any documents or any other information submitted to CDOT;
    - d. The Business or any Principal thereof commits any action or omission which evidences a lack of integrity or honesty in performing public projects; or
    - e. CDOT has reasonable grounds to believe that the public health, welfare, or safety imperatively requires immediate suspension of Certification.
  2. Notice. Revocation may occur at any time. Except as provided in subparagraph (3) of paragraph (B) of this Rule, CDOT must provide written notice to the ESB that CDOT is revoking the Business from the ESB Program and state the reasons why CDOT believes the Business is no longer eligible for the ESB Program.
  3. Effect on Participation. Revocation will not affect the ESB's status for Contracts that were bid for or awarded prior to the ESB's revocation from the ESB Program. Upon revocation, the Business will be removed from the ESB Program and ESB directory.
- C. Reapplication. If its previous ESB Certification is revoked, the Business must wait a period of twelve (12) months from the date of revocation before reapplying for certification. If an ESB graduates from the ESB Program, neither the Business, nor any Affiliate thereof, will be eligible for recertification.
- D. Appeals. The procedures contained in §§ 24-4-104 and 24-4-105, C.R.S. will apply to any graduation from or revocation of ESB Certification.

#### **Chapter 4: Program Benefits**

##### **4.1. Objectives and Priorities**

The programs and incentives set forth in this Rule aim to assist ESBs in competing for CDOT's prime and subcontracting opportunities. CDOT may design and limit certain ESB Program Benefits for the benefit of only ESBs in Level 1, Level 2, or SBE or any combinations of the levels to ensure the following objectives and priorities are achieved:

- A. Increase ESB prime contracting opportunities;
- B. Promote and assist smaller ESBs;



- C. Promote and assist ESBs that have no or little previous CDOT experience;
- D. Increase diversity in the work areas performed by DBEs and ESBs; and
- E. Incentivize ESBs to grow in subcontracting areas needing participation.

4.2. Limitations

The ESB Program Benefits will only be enacted to the extent allowed by all applicable federal and state laws, rules, and regulations.

4.3. Development Assistance Tools

- A. **Technical Assistance.** Based upon CDOT's evaluation of an ESB and its business needs, CDOT may, alone or in collaboration with other organizations, provide individualized technical assistance to an ESB including, but not limited to, the following areas: Construction management; time management and project work scheduling; project financing requirements, including insurance; personnel management; bidding, estimating, job costing, and contract administration procedures; evaluation and use of project plans; CDOT contracting procedures and specifications; marketing; and Construction, Professional Services, and Practice of Research techniques and industry standards. CDOT may also authorize technical assistance in other areas if it is determined that such assistance reasonably relates to the development of a Business in accordance with the purpose of these Rules.
- B. **Additional Training and Resources.** CDOT, alone or in collaboration with other organizations, may also provide additional training and business development resources for ESBs. Such training and resources may include, but not be limited to, CDOT administered courses, mentor-protégé programs, online bidding access, and financial assistance to participate in industry activities and business development courses.
- C. **Discretionary Distribution of Assistance.** CDOT will have discretion to determine which ESBs will receive the development assistance tools. Among other criteria, CDOT may consider the availability of funds, potential and need of the ESB, areas of need by CDOT, applicability of assistance to CDOT Contracts, past performance and assistance, and availability of resources from CDOT or other organizations to meet the needs of the ESB.
- D. **Cooperation.** At any time, CDOT may modify or terminate technical assistance to an ESB.

4.4. Means to Increase Contracting Opportunities

CDOT will utilize a variety of incentives as set forth in this Rule to increase prime and subcontracting opportunities for ESBs. However, CDOT may, at its sole discretion, design, and limit certain incentives for the benefit of only ESBs in Level I, Level 2, or SBE or any combinations of the levels as set forth in paragraph (E) of Rule 3.2.

- A. **Incentives.** CDOT may provide the following incentives to prime Contractors that are ESBs, commit to or demonstrate use of other ESBs as subcontractors, or agree to assist in the professional development of other ESBs:
  - 1. Evaluation points in point-based selection;
  - 2. Bid preference in competitive price selection;

3. Financial incentives in cost-based selection;
  4. Mentor-protégé programs;
  5. Bond Assistance Program; and
  6. Other innovative incentives provided such incentives further the purpose of the ESB Program.
- B. Participation as a Condition of Contract. CDOT may make attainment of a certain level of ESB participation, or good faith effort to achieve such participation, a condition of Contract award. The procedures for evaluating such participation and good faith efforts will be set forth in the advertisement for the Contract.
  - C. Restricted Contracts. CDOT may restrict the award of Contracts to ESB Contractors, joint ventures of which ESBs are a participant, and participants in CDOT's mentor-protégé program. CDOT may evaluate the need for restricted Contracts upon review and calculation of the DBE Overall Goal. At such time, CDOT will establish objectives for restricted projects for the corresponding period.
  - D. Restricted Contract Items. CDOT may identify items within a Contract that will be completed only by ESBs.
  - E. Increase Smaller Projects. CDOT may increase the number of smaller-sized transportation Contracts in order to increase the opportunities for ESBs to participate on such projects as prime Contractors. At a minimum, CDOT will not unnecessarily or unjustifiably bundle CDOT work and will take all reasonable steps to facilitate competition by small Businesses on Contracts. CDOT will evaluate its ability to unbundle projects upon review and calculation of the DBE Overall Goal. At such time, CDOT will establish objectives for unbundling projects for the corresponding period.
  - F. Advertisement. For each Contract, the applicable incentives will be detailed in the request for proposals, bidding advertisement, or other applicable advertising documents published by CDOT.
- 4.5. Prompt Payment
- A. State Law. Pursuant to § 24-91-103, C.R.S., every prime Contractor must pay the subcontractor within seven (7) calendar days of receipt of the payment from CDOT, or within any shorter time provided in the Contract between the prime Contractor and CDOT.
  - B. ESB Program Requirements. In addition, CDOT may develop additional prompt payment requirements for projects involving ESB prime Contractors and ESB subcontractors on CDOT projects.

## **Chapter 5: Program Administration**

### 5.1. Enforcement

- A. Burden. Any Business that participates in or utilizes the benefits of the ESB Program will have the burden of proving its compliance with the requirements of these Rules.

- B. Monitoring and Investigations. CDOT will monitor all Businesses that utilize the benefits of the ESB Program in order to assure compliance with these Rules. CDOT may also receive and investigate complaints and allegations and initiate its own investigations regarding compliance.
- C. Contract Provisions. CDOT will develop compliance requirements and Contract provisions related to the utilization of the ESB Program Benefits. On any Contract for which a Business has received or is to receive ESB Program Benefits the failure to meet the obligations of the Contract with respect to ESB participation or assistance will constitute a material breach of Contract. Additionally, if a Business is found to be in violation of the provisions of the Contract, CDOT may exercise any or all of its rights, including but not limited to withholding funds from the Contractor.

5.2. Directory

All ESBs will be listed in an ESB directory that will be available to the public. A listing on the ESB directory serves to confirm the current, certified status of an ESB. A Business is not a certified ESB until or unless it is listed on the ESB directory. An ESB's listing on the ESB Directory will include the Business name, any applicable trade name, email address, phone number, physical address, qualifying area of business, primary industry, and the ESB level as designated by CDOT as set forth in Rule 3.2. The Program Benefits and incentives available to an ESB will be limited to those associated with the ESB level on its directory listing.

5.3. Outreach

CDOT, at its sole discretion, may send communications to ESBs regarding program changes, support services, project opportunities, and other information related to ESB Program participation.

5.4. Reporting

At a minimum, on an annual basis, CDOT will report the progress of the ESB Program to the Transportation Commission. If necessary, the Transportation Commission may request additional periodic reports regarding the progress of and participation in the ESB Program.

5.5. Program Evaluation

CDOT may utilize various methods to obtain feedback, evaluation, and advice concerning the operation and content of the ESB Program. These methods may include forums, surveys, and annual meetings to assess the effectiveness of the program and make recommendations for improving the program.

**Chapter 6: Miscellaneous**

- 6.1. If any provision of these Rules or their application is held invalid or unenforceable, such invalidity or unenforceability will not affect other provisions or applications of these Rules which can be given effect without the invalid provisions or application. The remaining provisions are to remain in full force and effect.

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**Chapter 7: Incorporation by Reference**

- 7.1. The Rules are intended to be consistent with and not be a replacement for the federal requirements set forth in 13 C.F.R. Part 121, in effect as of February 10, 2020, and 49 C.F.R. Part 26, in effect as of January 13, 2021, which are hereby incorporated into these Rules by reference, and do not include any later amendments. Also incorporated by reference is the 2017 NAICS Code adopted on August 08, 2016, and effective on January 1, 2017, and does not include any later amendments.
- 7.2. All referenced regulations and the NAICS Code are available for copying for a reasonable charge or for public inspection during regular business hours from the Office of Policy and Government Relations, Colorado Department of Transportation, 2829 W. Howard Pl., Denver, Colorado 80204.
- 7.3. Copies of the referenced Code of Federal Regulations and the NAICS Code may be obtained from the following addresses:

U.S. Government Publishing Office  
732 North Capitol Street, N.W.  
Washington, DC 20401  
(202) 512-1800  
Available online at: <https://www.ecfr.gov/cgi-bin/ECFR>

U.S. Census Bureau  
North American Industry Classification System (NAICS)  
(888) 756-2427  
[naics@census.gov](mailto:naics@census.gov)  
Available online at: <https://www.census.gov/naics/>

**Chapter 8: Declaratory Orders**

- 8.1. The Transportation Commission may entertain, at its sole discretion, petitions for declaratory orders pursuant to § 24-4-105(11), C.R.S. relating to the ESB Program.

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**Editor's Notes**

**History**

Entire rule eff. 09/01/2011.

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