

**WSR 18-13-009**  
**PERMANENT RULES**  
**DEPARTMENT OF**  
**EARLY LEARNING**

[Filed June 6, 2018, 4:10 p.m., effective July 7, 2018]

Effective Date of Rule: Thirty-one days after filing.

Purpose: Rules explain the procedures for requesting public records from the department of children, youth and families, when fees will be charged, and how requests will be processed. Codifying process and procedures aids in the agency's consistent processing of public records requests.

Citation of Rules Affected by this Order: Repealing WAC 170-01-0210 and 170-01-0220; and amending WAC 170-01-0010, 170-01-0020, 170-01-0030, 170-01-0040, 170-01-0050, 170-01-0100, 170-01-0110, 170-01-0120, 170-01-0200, 170-01-0230, 170-01-0240, 170-01-0250, 170-01-0260, 170-01-0270, and 170-01-0290.

Statutory Authority for Adoption: RCW 43.215.070; chapter 42.56 RCW.

Adopted under notice filed as WSR 18-09-110 on April 18, 2018.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at the Request of a Non-governmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's own Initiative: New 2, Amended 14, Repealed 2.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 2, Amended 14, Repealed 2.

Number of Sections Adopted using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: June 6, 2018.

Heather Moss  
Director

AMENDATORY SECTION (Amending WSR 12-09-035, filed 4/11/12, effective 5/12/12)

**WAC 170-01-0010 Purpose.** The purpose of this chapter is to provide rules for the department ~~((of early learning))~~ to implement the Public Records Act, chapter 42.56 RCW.

AMENDATORY SECTION (Amending WSR 16-09-060, filed 4/15/16, effective 5/16/16)

**WAC 170-01-0020 Definitions.** The definitions set forth in chapter 42.56 RCW shall apply to this chapter. ~~((Additional definitions not listed in the Public Records Act are listed in this section, except as provided in this section))~~ The following definitions also apply to this chapter.

"Authorization" means a detailed document that gives the department permission to use or disclose confidential information records for specified purposes.

"Client" means a person who receives services or benefits from the department.

~~((("DEL" or))~~ "Department" means the department of ((early learning)) children, youth, and families. Where appropriate, ~~((DEL))~~ "department" also may refer to the officials and employees of the department of ((early learning)) children, youth, and families.

"Disclosure" means inspection ((and/or)) or copying of public records, unless the record is exempt from disclosure by law.

"Public records" includes any writing, as defined in RCW 42.56.010, containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. Almost all records held by an agency relate to the conduct of government; however, some do not. A purely personal record having no relation to the conduct of government is not a "public record." While the contents of the personal record might not be a public record, a transaction of the record itself may be.

"Public records officer" or "PRO" means the designated person for the department who oversees all records requests under RCW 42.56.580. This person is identified in the Washington state register.

"Redact" means to edit from a released record information that is exempt from disclosure to the public, by covering over the information with black ink or other method without deleting the information from the original record.

AMENDATORY SECTION (Amending WSR 16-09-060, filed 4/15/16, effective 5/16/16)

**WAC 170-01-0030 ((Description of the)) Department ~~((of early learning))~~ locations.** (1) ~~((DEL was formed in July 2006 under chapter 265, Laws of 2006 to bring together child care and early learning programs previously under the departments of social and health services and commerce, as well as the state office of public instruction.~~

~~((2) The department was established to oversee child care licensing and early childhood learning programs and initiatives.~~

~~((3)) The administrative office of the department ((of early learning)) is located ((in Olympia, Washington. To request any information, contact: P.O. Box 40970, Olympia, WA 98504-0970, or call toll free 1-866-482-4325)) at 1500 Jefferson Street, S.E., Olympia, Washington.~~

~~((4))~~ (2) Field offices are located throughout the state and contact information can be found on ~~((DEL's))~~ the department's web site, www.dcyf.wa.gov.

AMENDATORY SECTION (Amending WSR 12-09-035, filed 4/11/12, effective 5/12/12)

**WAC 170-01-0040 Public records officer.** ~~((DEL's))~~ The department's director will appoint a public records officer (PRO) whose responsibility is to serve as a "point of contact" for members of the public seeking public records. ~~((DEL))~~ The department will provide the public records officer's name and contact information by publishing it in the state register. ~~((DEL))~~ The department will also provide the

public records officer's contact information on ~~((the department))~~ its web site, [www.dcyf.wa.gov](http://www.dcyf.wa.gov).

A request may be fulfilled by the PRO, or ~~((other DEL))~~ department staff designated by the PRO.

AMENDATORY SECTION (Amending WSR 12-09-035, filed 4/11/12, effective 5/12/12)

**WAC 170-01-0050 Records index.** (1) The ~~((department keeps an index (list) of the following documents:~~

~~(a) Rules adopted by DEL under chapter 34.05 RCW.~~

~~(b) Substantive final orders issued by the department in adjudicative proceedings under chapter 34.05 RCW and chapter 170-03 WAC.~~

~~(c) Interpretive and policy statements filed by the department under chapter 34.05 RCW.~~

~~(2) The department finds that it would be unduly burdensome and would interfere with agency operations to maintain an index of other records because of the complexity and diversity of its operations and the resulting volume of manuals, correspondence, electronic data and constituent records.~~

~~(3) The department will make available for public disclosure all indices if at a future time they are developed for agency use.) records retention schedule established by the division of state archives of the office of the secretary of state serves as an index for the identification and location of the department's records including those described in RCW 42.56.070(5).~~

(2) The records retention schedule indexes records according to the originating program or section, and then the record series title. Each title is further identified by a statement of function or purpose, and the retention period. The records retention schedule is available to the public for inspection and copying. The records retention schedule is updated by the department as needed. With the assistance of the public records officer or designee, any person can obtain access to the department's public records using the records retention schedule.

AMENDATORY SECTION (Amending WSR 12-09-035, filed 4/11/12, effective 5/12/12)

**WAC 170-01-0100 Availability of public records.**

Public records are available for inspection and copying during ~~((DEL's))~~ the department's normal business hours, Monday through Friday, 8 a.m. to 5 p.m., excluding legal holidays. A department staff person must be present at all times when a record is being inspected. Appointments are not required, but significantly help ~~((DEL))~~ the department provide prompt and efficient service. Some ~~((DEL))~~ department records may be stored in other locations, in computer storage systems, or the state records warehouse, and may take time ~~((for DEL))~~ to identify and gather ~~((them))~~. Other records may be exempt from disclosure. Original records cannot be removed from ~~((a DEL building))~~ the inspection location. If required by law, ~~((DEL))~~ department staff must redact information in a record before making it available for inspection. ~~((DEL))~~ Department staff will make copies of records on request.

AMENDATORY SECTION (Amending WSR 12-09-035, filed 4/11/12, effective 5/12/12)

**WAC 170-01-0110 Organization of records.** ~~((DEL))~~ The department will maintain its records in an organized manner and will take reasonable actions to protect records from damage and disorganization. Records available on the ~~((DEL))~~ department's web site ~~((at www.del.wa.gov))~~, [www.dcyf.wa.gov](http://www.dcyf.wa.gov), are available to the public without a records request, and the department does not copy those records. Requestors are encouraged to view the documents available on the web site prior to submitting a records request.

AMENDATORY SECTION (Amending WSR 16-09-060, filed 4/15/16, effective 5/16/16)

**WAC 170-01-0120 How to make a public records request.** (1) Public records requests should be made directly to the ~~((DEL))~~ department's public records officer.

(2) Public records requests may be made verbally or in writing.

(a) Written requests may be sent by email to ~~((public.records@del.wa.gov))~~ [dcyf.publicrecords@dcyf.wa.gov](mailto:dcyf.publicrecords@dcyf.wa.gov), by fax to 360-725-4925 or mail. Requests may be delivered to ~~((Department of Early Learning, P.O. Box 40970, Olympia, WA 98504 0970))~~ [1500 Jefferson Street S.E., Olympia, Washington](http://1500JeffersonStreetSE.Olympia.WA.98504-0975) or P.O. Box 40975, Olympia, WA 98504-0975.

(b) ~~((DEL's))~~ The department's public records request form is on its web site. The department recommends that requestors submit requests using the department's public records request form.

(c) A written request without using the DEL public records request form should contain:

(i) Name of requestor;

(ii) Address of requestor;

(iii) Other contact information, including telephone number and any email address;

(iv) The date on which the request was made;

(v) A sufficient description of the record requested; and

(vi) If the ~~((information))~~ record being requested may include a list of individuals or businesses, a statement that the list will not be used for commercial purposes, which is prohibited by law.

(3) The department may ask an individual requesting a public record for proof of identification when the law restricts disclosure to a specific person.

AMENDATORY SECTION (Amending WSR 12-09-035, filed 4/11/12, effective 5/12/12)

**WAC 170-01-0200 How ~~((DEL))~~ the department responds to ~~((your))~~ public records requests.** Within five business days ~~((after))~~ of receiving the request, ~~((DEL))~~ the department will either:

(1) Provide the ~~((record(s)))~~ record;

(2) Acknowledge the request and give a reasonable time estimate of how long the department will take to provide records;

(3) Contact the requestor to clarify the request if it isn't understood by the public records officer; or

(4) Deny all or part of the request in writing, with reasons for the denial. The explanation will include the law that ~~((DEL))~~ the department relied upon in its denial.

At his or her discretion, the public records officer may send the ~~((request))~~ requested records by email, fax, postal mail, or commercial delivery. The records may be delivered on paper, computer or compact discs, or other methods.

AMENDATORY SECTION (Amending WSR 12-09-035, filed 4/11/12, effective 5/12/12)

**WAC 170-01-0230 Reasons for ~~((DEL))~~ denying disclosure of all or part of a record.** RCW 42.56.030 states that the Public Records Act "shall be liberally construed and its exemptions narrowly construed." ~~((DEL))~~ The department will provide all records required by law. However, there are times when all or part of a record request ~~((would))~~ may be denied, such as when:

- (1) The record is exempt from disclosure by law.
- (2) The request is for lists of individuals for commercial purposes, including family home providers.
- (3) The requestor has not asked for an identifiable record. The Public Records Act requires access to existing, identifiable public records in an agency's possession at the time of the request.

(4) The request requires ~~((DEL))~~ the department to collect or organize data to create a public record, or to give data that did not exist at the time of the public records request.

AMENDATORY SECTION (Amending WSR 12-09-035, filed 4/11/12, effective 5/12/12)

**WAC 170-01-0240 Types of records that may be exempt from disclosure.** ~~((With any public records request, disclosure must occur unless a specific exemption exists in statute that would allow for DEL to not disclose the record or the information within a record.~~

~~DEL is always prohibited by statute from disclosing lists of individuals, including family home providers, for commercial purposes.~~

~~The Public Records Act lists exemptions or allows for "other statute" exemptions. Requestors should be aware of the following exemptions, outside the Public Records Act, that restrict the availability of some documents held by DEL, for inspection and copying: For example, RCW 5.60.060(2) restricts privileged attorney-client communications between DEL staff and the office of the attorney general.)~~ (1) Public records and information may be exempt from disclosure or production under chapter 42.56 RCW or other state or federal laws. Commonly applicable exemptions include, but are not limited to, the following:

(a) Under RCW 42.56.230(1), personal information in files maintained for welfare recipients and patients or clients of public institutions or public health agencies;

(b) Under RCW 42.56.230(2), personal information in files maintained for a child enrolled in licensed child care;

(c) Under chapter 13.50 RCW and related federal laws, information and records;

(d) Under chapter 26.33 RCW and related federal laws, information and records about adoption;

(e) Under RCW 42.56.230(3), personal information in files maintained for department employees or elected officials to the extent that disclosure would violate their privacy rights;

(f) Under RCW 42.56.250, personal information in personnel records, public employment related records, volunteer rosters, or included in any mailing list of employees or volunteers of any public agency; and

(g) Under RCW 42.56.640(2), names of family child care providers.

(2) If the requested public record contains information that is exempt from public disclosure, the department may:

(a) As appropriate, release the nonexempt portion, explaining what exemptions apply to redacted portions of the record;

(b) As appropriate, deny release of the entire record and send a written explanation citing the exemption that applies to the denial; or

(c) When a denial would reveal confidential information, neither confirm nor deny the existence of the requested records and provide the legal basis for confidentiality as if the responsive records existed.

AMENDATORY SECTION (Amending WSR 12-09-035, filed 4/11/12, effective 5/12/12)

**WAC 170-01-0250 If the public record requested is exempt from disclosure.** If ~~((DEL))~~ the department determines that a record is exempt from disclosure, ~~((you))~~ the requestor will be informed in writing of the specific exemption authorizing DEL to withhold the record.

AMENDATORY SECTION (Amending WSR 12-09-035, filed 4/11/12, effective 5/12/12)

**WAC 170-01-0260 If only part of the record requested is exempt from disclosure.** ~~((DEL))~~ The department may redact (see WAC 170-01-0020) identifying details or other information when the information is not subject to disclosure. The requestor will be informed in writing of the exemptions authorizing ~~((DEL))~~ the department to withhold information within a record.

AMENDATORY SECTION (Amending WSR 16-09-060, filed 4/15/16, effective 5/16/16)

**WAC 170-01-0270 ~~((DEL))~~ Department reviews of records request denials.** (1) All review requests must be in writing (letter, fax or email). All review requests must specify the part or parts of the denial or redaction that the requestor wishes to be reviewed.

(2) If ~~((DEL))~~ the department denies all or part of a request, or redacts any portion of a record, the requestor may request a review of this decision by:

(a) Asking the public records officer for an internal ~~((DEL))~~ review. ~~((After receiving a request for an internal review, the public records officer will refer the matter for review to the deputy director who may consult with other agency leaders.))~~ The denial will either be upheld or reversed within two business days after the receipt of the review request.

(b) Asking for an external review by the attorney general's office.

Requestors may initiate this by sending a request for review to Public Records Review, Office of the Attorney General, P.O. Box 40100, Olympia, WA 98504-0100 or publicrecords@atg.wa.gov.

(c) Asking for a judicial review.

To initiate a court review of a public records case, a requestor can file a "motion to show cause" which directs the agency to appear before the court and show any cause why the agency did not violate the act. The case must be filed in the superior court in the county in which the record is maintained.

AMENDATORY SECTION (Amending WSR 17-22-072, filed 10/27/17, effective 11/27/17)

**WAC 170-01-0290 Charges for public records.** (1)

There is no cost to inspect public records.

(2) Calculating the actual costs of charges for providing public records is unduly burdensome because ~~((it will consume searee))~~ the department ((of early learning)) does not have resources to conduct a study of actual costs(, and it is difficult to accurately calculate all costs directly incident to copying records, including equipment and paper costs, data storage costs, electronic production costs, and staff time for copying and sending)) for all requested records. In addition, conducting such a study would interfere with other essential agency functions.

(3) ~~((Instead of calculating the actual costs of charges for records, the director or director's designee shall establish, maintain, and make available for public inspection and copying a statement of costs that the department of early learning charges for providing photocopies or electronically produced copies of public records, and such charges for records shall not exceed the maximum default charges allowed in RCW 42.56.120 (2)(b), as amended by section 3, chapter 304, Laws of 2017. The department may also use any other method authorized by the Public Records Act for imposing charges for public records including, but not limited to, charging a flat fee, charging a customized service charge, or charging based on a contract, memorandum of understanding, or other agreement with a requestor.))~~ The department may do one or more of the following:

(a) Charge for copies of records according to the default fees in RCW 42.56.120 (2)(b), (c), and (d);

(b) Charge for customized services pursuant to RCW 42.56.120(3);

(c) Charge other copy fees authorized by statutes outside of chapter 42.56 RCW; and

(d) Enter into an alternative fee agreement with a requestor under RCW 42.56.120(4).

(4) **Fee waivers.** ~~((Fee waivers are an exception and are available for some small requests under the following conditions:~~

~~(a) It is within the discretion of the public records officer to waive copying fees when:~~

~~(i) All of the records responsive to an entire request are paper copies only and are twenty-five or fewer pages; or~~

~~(ii) All of the records responsive to an entire request are electronic and can be provided in a single email with attachments of a size totaling no more than the equivalent of one hundred printed pages. If that email for any reason is not deliverable, records will be provided through another means of delivery, and the requestor will be charged in accordance with this rule.~~

~~(b) Fee waivers are not applicable to records provided in installments.))~~ The department may waive copying fees in one or more of the following circumstances:

(a) Clients receiving the first copy of their file;

(b) Producing records assists in managing a program;

(c) The expense of billing exceeds the cost of producing records; and

(d) All of the records responsive to an entire request are paper copies only and are twenty-five or fewer pages.

(5) **Advance deposits.** The public records officer may require an advance deposit of ten percent of the estimated ~~((fees when the copying fees for an installment or an entire request, or customized service charge, exceeds twenty-five dollars.~~

~~(6) All required fees must be paid in advance of release of the copies or an installment of copies, or in advance of when a deposit is required. DEL will notify the requestor when payment is due. Payment should be delivered to the DEL Financial Services Office, P.O. Box 40970, Olympia, WA 98504 0970. Payment may be made by cash, check, or money order to the department of early learning. It should clearly be marked as payment for public records.~~

~~(7) DEL will close))~~ costs of copying records. The public records officer may also require the payment of the remainder of the copying costs before providing all of the records, or, when records are provided on an installment basis, require payment of the costs of copying an installment before providing that installment. If the requestor does not claim an installment of a records request, the department is not obligated to continue producing the balance of the request.

~~(6) A request will be closed~~ when a requestor fails by the payment date to pay in the manner prescribed for records, an installment of records, or a required deposit.

**REPEALER**

The following sections of the Washington Administrative Code are repealed:

WAC 170-01-0210 What DEL considers a reasonable time estimate.

WAC 170-01-0220 Reasons for DEL extending the time needed to fill a public records request.

**WSR 18-13-012**  
**PERMANENT RULES**  
**DEPARTMENT OF**  
**SOCIAL AND HEALTH SERVICES**  
 (Children's Administration)

[Filed June 7, 2018, 10:37 a.m., effective July 8, 2018]

Effective Date of Rule: Thirty-one days after filing.

Purpose: The department is amending and repealing sections in chapter 388-165 WAC, Children's administration child care subsidy programs, to help clarify when the children's administration will pay for child care and what rates will be used. Other changes are being made in order to align rules with the current collective bargaining agreement.

Citation of Rules Affected by this Order: Repealing WAC 388-165-120, 388-165-205 and 388-165-240; and amending WAC 388-165-108, 388-165-110, 388-165-180, 388-165-185, 388-165-190, 388-165-195, 388-165-200, 388-165-215, 388-165-220, 388-165-225, and 388-165-230.

Statutory Authority for Adoption: RCW 74.12.340, 74.04.050, 74.04.055, 74.08.090.

Adopted under notice filed as WSR 18-09-070 on April 16, 2018.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at the Request of a Non-governmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's own Initiative: New 0, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 11, Repealed 3.

Number of Sections Adopted using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 11, Repealed 3.

Date Adopted: June 6, 2018.

Katherine I. Vasquez  
 Rules Coordinator

AMENDATORY SECTION (Amending WSR 99-22-011, filed 10/22/99, effective 11/22/99)

**WAC 388-165-108 What are the types of child care subsidies?** This chapter relates to the following ~~((programs))~~ subsidies in children's administration (CA):

- ~~((1))~~ (1) ~~((Seasonal child care;~~
- ~~((2))~~ (2) ~~Teen parent child care;~~
- ~~((3))~~ (3) ~~Child protective services child care;~~
- ~~((4))~~ (2) ~~Child welfare services child care; and~~
- ~~((5))~~ (3) ~~Employed foster parent child care.~~

AMENDATORY SECTION (Amending WSR 99-15-076, filed 7/20/99, effective 7/20/99)

**WAC 388-165-110 Definitions.** The following definitions apply ~~((to WAC 388-15-171, 388-15-174, 388-15-175 and 388-15-176))~~ throughout this chapter.

**"Child"** means a person twelve years of age or younger or a person under nineteen years of age who is physically, mentally, or emotionally incapable of self-care as verified by a licensed medical practitioner or masters level or above mental health professional.

~~((("Copayment" means the amount of money the family is responsible to pay the child care provider toward the cost of child care each month.~~

~~("Income" means the gross earned income minus the average payroll and income tax paid at that income level, plus any unearned income.)~~

**"In-home/relative child care provider"** ~~((see definition for "in-home/relative provider" under WAC 388-290-020))~~ means a provider who meets the requirement in WAC 170-290-0130 through 170-290-0167.

**"Parent"** ~~((see definition for "parent" under WAC 388-290-020))~~ means a biological or adoptive parent of a child or an individual who have an established parent-child relationship under RCW 26.26.101, unless the legal rights of that person have been terminated or paternity has been disestablished.

~~((("Teen parent" means a parent twenty-one years of age or younger.)~~

AMENDATORY SECTION (Amending WSR 13-08-064, filed 4/1/13, effective 5/2/13)

**WAC 388-165-180 What are the maximum child care subsidy rates ((DSHS)) CA pays for child care in a licensed or certified child care center? ((DSHS)) CA** ~~maximum child care subsidy rates for licensed child care centers ((are located on the Washington state child care resource & referral network website at: <http://wa.childcareaware.org>))~~ can be found in WAC 170-290-0200.

AMENDATORY SECTION (Amending WSR 13-08-064, filed 4/1/13, effective 5/2/13)

**WAC 388-165-185 What are the maximum child care subsidy rates ((DSHS)) CA pays for child care in a licensed or certified family home child care ((home))?** ~~((DSHS)) CA~~ maximum child care subsidy rates for licensed or certified family home child care ((homes are located on the Washington state child care resource & referral network website at: <http://wa.childcareaware.org>)) can be found in WAC 170-290-0205.

AMENDATORY SECTION (Amending WSR 99-22-011, filed 10/22/99, effective 11/22/99)

**WAC 388-165-190 When can ((DSHS)) CA pay ((in addition to)) more than the maximum ((DSHS)) CA child care subsidy rate? ((DSHS)) CA** pays additional subsidies to a licensed or certified family child care home or center when:

(1) Care is for nonstandard hours ~~((see))~~ under WAC 388-165-195 and 388-165-200~~((t))~~;

(2) ~~((The infant bonus is authorized (see WAC 388-165-205);~~

~~((3))~~ (3) A child has a documented special ~~((need(s) (see))~~ needs under WAC 388-165-210, 388-165-215, or 388-165-220~~((t))~~; ~~((or~~

~~((4))~~ (3) Care is not available at the ~~((DSHS))~~ CA rate and the provider's usual rate is authorized;

(4) The provider is participating in the state's early achievers program and receives tiered reimbursement and state funds are available; or

(5) A child registration fee is applicable under WAC 170-290-0245.

To the extent that funds are available, CA may pay additional subsidies to licensed or certified family home child care for field trip and quality enhancement fees under WAC 170-290-0245.

AMENDATORY SECTION (Amending WSR 99-22-011, filed 10/22/99, effective 11/22/99)

**WAC 388-165-195 What is nonstandard hour child care?** ~~((DSHS))~~ CA authorizes nonstandard hours child care when ~~((fifteen or more))~~ the licensed or certified family home child care or center provider provides at least thirty hours of care ~~((are needed))~~ per month~~((s))~~ that are:

(1) Before 6:00 a.m. or after 6:00 p.m. Monday through Friday; ~~((and/or))~~ or

(2) Anytime on a Saturday ~~((or))~~, Sunday, or legal holiday as defined in RCW 1.16.050.

AMENDATORY SECTION (Amending WSR 99-22-011, filed 10/22/99, effective 11/22/99)

**WAC 388-165-200 How does ~~((DSHS))~~ CA pay for nonstandard hour child care?** ~~((DSHS))~~ CA authorizes the nonstandard hour bonus to licensed or certified child care providers~~((, DSHS pays:~~

(1) ~~The DSHS maximum child care subsidy rate as listed in WAC 388-165-180 or 388-165-185 or the provider's usual rate for that child, whichever is less; and~~

(2) ~~The monthly nonstandard hour bonus as listed in the table below))~~ as specified in WAC 170-290-0249.

((Monthly Nonstandard Hour Bonus

Region 1	\$74.00
Region 2	\$73.00
Region 3	\$91.00
Region 4	\$108.00
Region 5	\$80.00
Region 6	\$83.00))

AMENDATORY SECTION (Amending WSR 99-22-011, filed 10/22/99, effective 11/22/99)

**WAC 388-165-215 What is the ~~((DSHS))~~ CA child care subsidy rate for children with special needs in a licensed or certified child care center?** ~~((DSHS))~~ For chil-

dren with documented special needs, CA pays child care subsidies ~~((for a child with special needs))~~ to licensed or certified child care centers as described in WAC 388-165-180 ~~((and whichever of the following is greater))~~. In addition, CA pays the lesser of:

(1) ~~The ~~((provider's documented additional cost associated with the care of that child with))~~ actual cost of providing the special needs care; or~~

(2) The applicable rate listed in ~~((the table below))~~ WAC 170-290-0225 (1)(a) or (b).

~~((Licensed Child Care Centers Special Needs Rate~~

		Infants (Birth-11 mos.)	Toddlers (12-29 mos.)	Preschool (30 mos.-5 years)	School-age (5-12- years)
Region 1	Full-Day	\$6.82	\$5.96	\$5.40	\$5.04
	Half-Day	\$3.41	\$2.98	\$2.70	\$2.51
Region 2	Full-Day	\$6.95	\$6.14	\$5.33	\$5.05
	Half-Day	\$3.48	\$3.07	\$2.66	\$2.52
Region 3	Full-Day	\$9.05	\$7.80	\$6.60	\$5.93
	Half-Day	\$4.53	\$3.90	\$3.30	\$2.97
Region 4	Full-Day	\$11.34	\$8.86	\$7.84	\$7.02
	Half-Day	\$5.67	\$4.43	\$3.92	\$3.51
Region 5	Full-Day	\$7.75	\$6.65	\$5.84	\$5.25
	Half-Day	\$3.87	\$3.33	\$2.92	\$2.63
Region 6	Full-Day	\$7.68	\$6.82	\$6.00	\$6.00
	Half-Day	\$3.84	\$3.41	\$3.00	\$3.00

(3) ~~The maximum rate paid for a five year old child is:~~

~~(a) The preschool rate for a child who has not entered kindergarten; or~~

~~(b) The school-age rate for a child who has entered kindergarten.)~~

AMENDATORY SECTION (Amending WSR 99-22-011, filed 10/22/99, effective 11/22/99)

**WAC 388-165-220 What is the ~~((DSHS))~~ CA child care subsidy rate for children with special needs in a licensed or certified family home child care ~~((home))~~?** ~~((DSHS))~~ For children with documented special needs, CA pays child care subsidies ~~((for a child with special needs))~~ to licensed or certified family child care homes as described in WAC ~~((388-165-195 and whichever of the following is greater))~~ 388-165-185. In addition, CA pays the lesser of:

(1) ~~The ~~((provider's documented additional cost associated with the care of that child with))~~ actual cost of providing special needs care; or~~

(2) The applicable rate listed in ~~((the table below))~~ WAC 170-290-0230 (1)(a) or (b).

~~((Licensed Family Child Care Homes Special Needs Bonus~~

		Infants (Birth-11 mos.)	Toddlers (12-29 mos.)	Preschool (30 mos.-5 years)	School-age (5-12- years)
Region 1	Full-Day	\$5.70	\$5.28	\$5.10	\$4.50
	Half-Day	\$2.85	\$2.64	\$2.55	\$2.25
Region 2	Full-Day	\$5.40	\$5.40	\$4.80	\$4.50
	Half-Day	\$2.70	\$2.70	\$2.40	\$2.25

		Infants (Birth – 11 mos.)	Toddlers (12 – 29 mos.)	Preschool (30 mos. – 5 years)	School-age (5 – 12 years)
Region 3	Full-Day	\$8.40	\$7.20	\$6.60	\$6.00
	Half-Day	\$4.20	\$3.60	\$3.30	\$3.00
Region 4	Full-Day	\$9.00	\$8.18	\$7.50	\$6.75
	Half-Day	\$4.50	\$4.09	\$3.75	\$3.38
Region 5	Full-Day	\$6.30	\$6.00	\$5.70	\$5.10
	Half-Day	\$3.15	\$3.00	\$2.85	\$2.55
Region 6	Full-Day	\$6.15	\$6.00	\$5.40	\$5.10
	Half-Day	\$3.08	\$3.00	\$2.70	\$2.55

(3) The maximum rate paid for a five year old child is:

(a) The preschool rate for a child who has not entered kindergarten; or

(b) The school age rate for a child who has entered kindergarten.)

AMENDATORY SECTION (Amending WSR 99-22-011, filed 10/22/99, effective 11/22/99)

**WAC 388-165-225 What is the ((~~DSHS~~)) CA in-home/relative child care rate for children with special needs? ((~~DSHS~~ subsidy programs pay)) For children with documented special needs, CA may authorize payment to in-home/relative child care providers ((for care of a child)) in accordance with the applicable special needs ((as described in WAC 388-15-185) two dollars per hour plus whichever is greater of the following:**

(1) Sixty-two cents per hour; or

(2) The provider's documented additional cost associated with the care for that child with special needs)) rate listed in WAC 170-290-0235.

AMENDATORY SECTION (Amending WSR 99-22-011, filed 10/22/99, effective 11/22/99)

**WAC 388-165-230 What is the maximum child care subsidy rate ((~~DSHS~~)) CA pays for in-home/relative child care? (((1) The ~~DSHS~~ child care subsidy programs pay toward)) CA pays the cost of child care directly to the ((parent, who is the employer. ~~DSHS~~ pays whichever of the following that is less:**

(a) Two dollars and six cents per hours for the child who needs the greatest amount of care and one dollar and three cents per hour for the care of each additional child in the family; or

(b) The provider's usual rate for that care.

(2) ~~DSHS~~ may pay above the maximum rate for children who have special needs as stated in WAC 388-165-225)) provider as the rate specified in WAC 170-290-0240.

#### REPEALER

The following sections of the Washington Administrative Code are repealed:

WAC 388-165-120 Subsidized child care for teen parents.

WAC 388-165-205 Does DSHS pay a bonus for infants who receive child care subsidies?

WAC 388-165-240 What are the parent/guardian payment responsibilities when they choose in-home/relative child care?

#### **WSR 18-13-013**

#### **PERMANENT RULES**

#### **DEPARTMENT OF AGRICULTURE**

[Filed June 7, 2018, 11:39 a.m., effective July 8, 2018]

Effective Date of Rule: Thirty-one days after filing.

Purpose: This rule-making order amends chapter 16-305 WAC, Industrial hemp research program, as follows:

- Adds language to address activities that are outside the scope of enforcement under chapter 16-305 WAC.
- Adds language to WAC 16-305-030 to include definitions for civil penalty, end use product, notice of correction, notice of intent, publicly marketable hemp product, unprocessed industrial hemp, and violation.
- Adds language to WAC 16-305-240 regarding scope of enforcement, to include monetary penalties for licensees and unlicensed persons for violations of chapter 15.120 RCW or chapter 16-305 WAC.
- Adds language regarding enforcement actions being subject to availability of sufficient resources and funds.
- Adds language regarding the determination of civil penalties and license enforcement penalties.
- Adds a penalty matrix to address multiple categories of violations with aggravating and mitigating factors, including consideration of the status of a respondent as a small business as a potential mitigating factor.
- Adds penalty language for failure to follow industrial hemp destruction order.
- Adds language regarding other dispositions of alleged violations.

Citation of Rules Affected by this Order: New WAC 16-305-015, 16-305-242, 16-305-245, 16-305-251, 16-305-252, 16-305-253, 16-305-254, 16-305-255, 16-305-256 and 16-305-257; and amending WAC 16-305-030, 16-305-240, and 16-305-250.

Statutory Authority for Adoption: RCW 15.120.030, and 15.120.035.

Other Authority: Chapter 34.05 RCW.

Adopted under notice filed as WSR 18-09-115 on April 18, 2018.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 8, Amended 3, Repealed 0.

Number of Sections Adopted at the Request of a Non-governmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's own Initiative: New 3, Amended 1, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 1, Amended 1, Repealed 0.

Number of Sections Adopted using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: June 7, 2018.

Derek I. Sandison  
Director

#### NEW SECTION

**WAC 16-305-015 Activities outside the scope of enforcement.** The following activities are not subject to regulatory sanctions or penalties under this chapter, except as provided under WAC 16-305-180, and except for the limitation of THC content under RCW 15.120.010:

(1) Possessing, further processing, transporting, marketing and exchanging legally obtained publicly marketable hemp product;

(2) Producing, possessing, further processing, transporting, marketing and exchanging end use products legally made with publicly marketable hemp product; and

(3) Growing, producing, possessing, processing, marketing and exchanging marijuana as defined in RCW 69.50.101. Marijuana activities are regulated by the Washington state liquor and cannabis board under chapters 69.50 RCW and 314-55 WAC.

AMENDATORY SECTION (Amending WSR 17-09-034, filed 4/13/17, effective 5/14/17)

**WAC 16-305-030 Definitions.** "Applicant" means a person who submits an application for a license to participate in the industrial hemp research program as required under this chapter.

"Approved seed" means a variety of industrial hemp seed that is approved by the department for growing industrial hemp.

"Authorized representative" means any person identified in writing by a licensee who may act as agent on behalf of the licensee for purposes of the license subject to any limitations stated in writing by the licensee. The licensee remains responsible for compliance with the license requirements irrespective of the acts or omissions of an authorized representative.

"Certified seed" means an industrial hemp seed variety that has been bred to comprise satisfactory genetic purity and varietal identity and has been accepted by Association of Seed Certifying Agencies (AOSCA), Organization for Economic Cooperation and Development (OECD) or other certifying entity as determined by the department.

"Civil penalty" under this chapter means a monetary penalty imposed by the department for violations of the industrial hemp laws, chapters 15.120 RCW and 16-305 WAC, and applicable sections of chapters 16-302 and 16-303 WAC.

"Contiguous land area" means a specific field with designated boundaries that is planted with industrial hemp. Separate parcels connected only by thin or narrow plantings of industrial hemp or separated by physical barriers such as

ditches or roads are not considered contiguous for the purposes of this rule.

"Continuous licensing" means annual licenses renewed in such a way that the licensee is continuously operating under a valid license.

"DEA" means the federal Drug Enforcement Administration.

"Department" means the Washington state department of agriculture.

"Destroyed" means incinerated, tilled under the soil, made into compost, or another manner approved by the department.

"Devitalization" means the process of sterilizing viable industrial hemp seed in such a way that the seed is unable to grow into new plants. Devitalization may happen through steam sterilization, dehulling, pressing, or another method approved by the department. If using steam sterilization, the seeds must be steamed to one hundred eighty degrees Fahrenheit for at least fifteen minutes.

"End use product" means a product that contains publicly marketable hemp product and requires no further processing to be sold to a consumer. End use products include animal bedding, animal feed, beverages, biofuel, bioplastics, clothing, compost, construction materials, cosmetics, food, grain and grain products, insulation, seed oil, soil amendments and other products containing publicly marketable hemp products. End use products are subject to the limitations on the uses of industrial hemp under RCW 15.120.020.

"Field" means a contiguous land area, registered with the department, on which a licensee plans to grow industrial hemp.

"Grain" means any devitalized industrial hemp seeds that are not intended for replanting, but will be used for food, feed, fiber, oil or other products.

"Industrial hemp" means all parts and varieties of the genera *Cannabis*, cultivated or possessed by a grower, whether growing or not, containing a THC concentration of 0.3 percent or less by dry weight. Industrial hemp does not include plants of the genera *Cannabis* that meet the definition of "marijuana" as defined in RCW 69.50.101.

"Industrial hemp research program" means the department's "agricultural pilot program" established under chapter 15.120 RCW, this chapter, and the industrial hemp seed rules under chapters 16-302 and 16-303 WAC.

"Leadership position" means any board member, manager, or leader in a business or organization who will provide oversight and monitoring of subordinates.

"Licensee" means any person who holds a license from the department to grow, produce, possess, process, or exchange or sell industrial hemp. A licensee may be a person who is authorized to carry out department supervised research on the feasibility and desirability of industrial hemp production in Washington state.

"Notice of correction" means a document issued by the department to a licensee, consistent with RCW 43.05.100, that describes a condition or conduct that is not in compliance with chapter 15.120 RCW or the rules adopted thereunder and is not subject to civil penalties as provided for in RCW 43.05.110. A notice of correction is not a formal enforcement action, is not subject to appeal and is a public record. Viola-

tions of THC content are not subject to a notice of correction and will result in a notice of intent.

"Notice of intent" means a document issued by the department to an alleged violator that identifies specific violations of chapter 15.120 RCW or the rules adopted thereunder. A notice of intent states any proposed civil penalty or any intent to suspend, deny or revoke the alleged violator's industrial hemp license.

"Processing area" means any area, building, plant or facility registered with and approved by the department in which a licensee will make industrial hemp into a marketable product. For the purposes of this definition, a person's domicile, home or residence is not considered a processing area.

"Publicly marketable hemp product" means industrial hemp that has been processed in compliance with department regulations, or under an equivalent regulatory program recognized by the department, for which a processor or marketer license is not required. Publicly marketable hemp products include bare stalks that have been pressed or decorticated, bast fiber, hurd fiber, nonviable roots, nonviable seeds, seed oils and seed coats separated from the seed, and hemp plant extracts. Under RCW 15.120.020, only industrial hemp seed may be processed as "food, extract, oil, cake, concentrate, resin, or other preparation for topical use, oral consumption, or inhalation by humans."

"Registered land area" means a contiguous land area, including greenhouses, processing areas and storage areas registered with the department as a condition of licensing, on which a licensee will conduct licensed activities. A registered land area may include more than one field, greenhouse, processing area or storage area so long as those fields, greenhouses, processing areas or storage areas are at the same physical address.

"Report" means any data, statistics or information required to be provided to the department by a licensee under an industrial hemp license.

"Seed distributor" means any person licensed by the department to distribute or sell viable industrial hemp seed.

"Storage area" means any area, building, plant or facility registered with the department in which a licensee plans to store industrial hemp.

"THC concentration" means the percent of total tetrahydrocannabinol, which is the combined percent of delta-9 tetrahydrocannabinol and tetrahydrocannabinolic acid in any part of the genera *Cannabis*.

"Unprocessed industrial hemp" means any raw, unprocessed part of the industrial hemp plant, including viable seed, that has been harvested but has not been sufficiently processed to be transferred to an unlicensed person. Unprocessed industrial hemp includes industrial hemp that is green, dried, baled or pelletized, that is in the form of living hemp plants, viable seed, leaf materials, floral materials, and raw stalks.

"Violation" means any act or omission prohibited under chapter 15.120 RCW or the rules adopted thereunder.

"Volunteer plant" means an industrial hemp plant that results from a previous crop.

AMENDATORY SECTION (Amending WSR 17-09-034, filed 4/13/17, effective 5/14/17)

**WAC 16-305-240** (~~(Noncompliance conditions.)~~)  
**Scope of enforcement.** Licensees may be subject to monetary penalties and license suspension or revocation for ~~((any))~~ violations of chapter 15.120 RCW or ~~((this chapter))~~ the rules adopted thereunder. Unlicensed persons may be subject to monetary penalties and denial of a license application for violations of chapter 15.120 RCW or the rules adopted thereunder.

NEW SECTION

**WAC 16-305-242 Enforcement actions subject to availability of funds.** Any enforcement action considered by the department under this chapter is subject to the department's determination as to the availability of sufficient resources and funds.

NEW SECTION

**WAC 16-305-245 Determination of civil penalties and license enforcement penalties.** (1) Penalty selection. The department will use the penalty assessment schedule tables listed in WAC 16-305-251 through 16-305-255 to determine appropriate monetary penalties and license enforcement penalties. The department will determine any penalty based on the type of violation at the time of the incident(s) giving rise to any violation. An applicable listed penalty will be used unless the department identifies aggravating or mitigating factors and how those factors change the assessed penalty. For violations not expressly included in any of the penalty category tables, the department will identify any penalty that it determines most closely approximates the seriousness of the violation in comparison with penalties expressly identified in the penalty tables.

(2) In addition to any penalties provided for under WAC 16-305-250 through 16-305-256, any industrial hemp crop or material, processed or unprocessed, containing a THC concentration greater than 0.3 percent by dry weight is subject to a destruction order, regardless of whether any other penalty is assessed.

(3) Adjustment of penalty.

(a) The department may increase or decrease any penalties for identified aggravating or mitigating circumstances, including circumstances where licensing action(s) as a deterrent are ineffective. Factors for increasing or decreasing penalties include the following:

(i) Violations by persons who are not licensed; and

(ii) Situations where a listed civil penalty assessed is not substantially equivalent to the violator's estimated economic benefit derived from the violation.

(b) The department may decrease the civil penalty and increase the licensing enforcement penalty when the department determines that the civil penalty is an inadequate enforcement option to respond to a violation, including to serve as a deterrent.

(4) Aggravating factors. The department may consider circumstances for increasing a penalty based on the serious-

ness of the violation. Aggravating factors include the following:

(a) The number of separate alleged violations contained within a single notice of intent;

(b) The similarity of the current alleged violation to previous violations committed within the last three years;

(c) The extent to which the alleged violation is part of a pattern of the same or substantially similar conduct;

(d) Violations benefiting the violator or license applicant economically that are expressly prohibited under chapter 15.120 RCW and the rules adopted thereunder. Such violations include conducting grower, processor, or distributor operations without a license; processing and marketing industrial hemp products in violation of the limitation under RCW 15.120.020; or importing viable industrial hemp seed or propagules without department authorization.

(5) When the department determines that one or more aggravating factors are present, the department may assess the penalty as listed within the type of violation or may, in its discretion, increase the penalty to a level greater than the listed penalty, including suspension, revocation or denial of a license.

(6) Mitigating factors. The department may consider circumstances for decreasing a penalty based upon the seriousness of the violation. Mitigating factors include the following:

(a) Voluntary disclosure of a violation;

(b) Voluntary taking of remedial measures that will result in a decreased likelihood that the violation will be repeated;

(c) The status of the alleged violator as a small business under chapter 19.85 RCW and any circumstances that justify decreasing a listed penalty based on the status as a small business.

(7) When the department determines that one or more mitigating factors are present, and that those factors outweigh any aggravating factors, the department may decrease the listed penalty.

(8) The department considers each violation to be a separate and distinct event. When a person has committed multiple violations, the violations are cumulative for purposes of calculating the appropriate penalty. Each notice of intent will identify all applicable alleged violations and penalties to be imposed.

(9) Violation(s) committed during a period when a licensee's license is suspended or revoked may be subject to the maximum civil penalty of fifteen thousand dollars for each violation and revocation or denial of a license for a period of up to three years.

AMENDATORY SECTION (Amending WSR 17-09-034, filed 4/13/17, effective 5/14/17)

**WAC 16-305-250 Monetary penalties, license denial, suspension or revocation, and right to adjudicative proceeding.** Upon notice of intent by the department to an applicant to deny a license (~~(or)~~); notice of intent to a licensee to suspend or revoke a license (~~(or upon receipt of a)~~); notice of intent to impose a monetary penalty; or notice of intent for destruction of a hemp material or crop (~~(destruction order)~~), a

person may request an adjudicative proceeding under chapter 34.05 RCW, the Administrative Procedure Act, and chapter 16-08 WAC.

NEW SECTION

**WAC 16-305-251 Category 1 violations.** Category 1 violations are considered the most serious because they compromise required conformance of the industrial hemp research program with the program's federal enabling authority, 7 U.S.C. Sec. 5940.

Violation Type	Penalty
<b>Conducting activities outside the scope of chapter 15.120 RCW and this chapter</b>	Destruction of crop or hemp material AND \$15,000
<b>Licensee's industrial hemp tests higher than 0.3% THC concentration by dry weight (RCW 15.120.010(3))</b>	Destruction of crop AND \$15,000
<b>Operating as an industrial hemp seed distributor without a license</b>	Destruction of industrial hemp seed AND \$15,000
<b>Planting or growing industrial hemp without a grower license or combination license</b>	Destruction of crop AND \$15,000
<b>Processing any part of industrial hemp other than seed for human consumption</b>	Destruction of hemp material or unlawful end use product AND \$15,000
<b>Processing industrial hemp without a processor or combination license</b>	Destruction of hemp material AND \$15,000

NEW SECTION

**WAC 16-305-252 Category 2 seed distributor violations.** Category 2 violations are violations involving the manufacture, supply, processing, or distribution of viable industrial hemp seed by industrial hemp seed distributor licensees and prohibited practices between an industrial hemp seed distributor and grower or processor. Any industrial hemp seed in the possession of a licensed distributor that is not certified seed is subject to a destruction order, regardless of whether any other penalty is assessed. The department will not issue a notice of correction prior to issuing a destruction order.

Violation Type	Penalty
<b>Interstate transfer of viable hemp seed or propagules</b>	Destruction of seed or propagules AND \$15,000
<b>Distributing noncertified seed</b>	\$5,000

Violation Type	Penalty
Importing noncertified seed	Destruction of noncertified seed AND \$1,000
Importing industrial hemp seed or propagules without a valid importer certificate	\$500

NEW SECTION

**WAC 16-305-253 Category 3 grower or processor violations.** Category 3 violations are violations involving the growing, manufacture, supply, processing, or distribution of industrial hemp or hemp seed by industrial hemp grower, processor, or combination licensees.

Violation Type	Penalty
Failure to comply with chapter 16-302 WAC when growing industrial hemp for seed certification	\$1,000
Growing industrial hemp within 4 miles of any field or facility being used to grow marijuana	\$1,000
Failure to devitalize seed under a combination license	\$500
Using domicile, home or residence to process industrial hemp	Destruction of hemp material
Licensee's industrial hemp tests higher than 0.3% THC concentration by dry weight (RCW 15.120.010(3))	Destruction of crop
Plant material found not harvested during license period	Destruction of unharvested crop
Processing industrial hemp without a fit for commerce certificate or bill of lading or not otherwise obtained through legal means	Destruction of publicly marketable hemp product or end use product
Transporting industrial hemp without a fit for commerce certificate or bill of lading	Destruction of publicly marketable hemp product or end use product
Industrial hemp seed not planted within 24 hours of receipt	Return of seed to DEA approved storage facility

NEW SECTION

**WAC 16-305-254 Category 4 license violations.** Category 4 violations are violations involving licensing requirements, license classification, and terms and conditions of industrial hemp licenses.

Violation Type	Penalty
Failure to collect, retain, or transmit research data to the department	\$500
Failure to maintain required records, data and reports for 3 years from expiration date of license, including records regarding the sale of any industrial hemp grown under a grower or combination license	\$500
Failure to make research data available under the license conditions	\$500
Failure to post department-provided signs on at least every side of every field	\$500

NEW SECTION

**WAC 16-305-255 Category 5 regulatory violations.** Category 5 violations are violations involving general regulation and administration of industrial hemp licenses. Category 5 penalties imposed on a grower, processor, distributor, or combination licensee may include license suspension. Any industrial hemp crop may be subject to a destruction order during a license suspension.

Violation Type	Penalty
Failure to comply with a child support order	Suspension of license until licensee complies with child support order
Failure to pay fees or penalties adopted under this chapter	Suspension of license until fees or penalties are paid
Refusal to allow the department to inspect and sample any industrial hemp or inspect any registered lands, facilities, and records required of the licensee	Suspension of license until the department is allowed to inspect and sample any industrial hemp or inspect any registered land, facilities, and records required of the licensee

NEW SECTION

**WAC 16-305-256 Penalty for failure to follow industrial hemp destruction order.** The penalty for a licensee or unlicensed person who fails to follow a crop or hemp product

destruction order issued by the department within five business days is five hundred dollars per day for each day the destruction is delayed beyond five business days from the date of the destruction order.

#### NEW SECTION

**WAC 16-305-257 Other dispositions of alleged violations that the department may choose.** Nothing herein shall prevent the department from:

- (1) Choosing not to pursue a civil penalty, license suspension or license revocation.
- (2) Issuing a notice of correction in lieu of pursuing a civil penalty, license suspension or license revocation.
- (3) Negotiating settlement(s) of cases on such terms and for such reasons as it deems appropriate. Prior violation(s) covered by a prior settlement agreement may be used by the department for the purpose of determining the appropriate penalty for subsequent violation(s).
- (4) Referring violations or alleged violations to any federal, state or local government agency with jurisdiction over the activities in question including, but not limited to, the federal Drug Enforcement Administration (DEA) and the Washington state patrol (WSP).

#### **WSR 18-13-015**

##### **PERMANENT RULES**

#### **DEPARTMENT OF AGRICULTURE**

[Filed June 7, 2018, 3:56 p.m., effective July 8, 2018]

Effective Date of Rule: Thirty-one days after filing.

Purpose: The purpose of this rule making is to remove term limits from the Washington turfgrass seed commission marketing order. The change became necessary due to the challenge the commission has had in filling expiring or vacated positions. Removing term limits would allow willing participants to continue to serve on the commission. The term of office does not change, therefore allowing other willing growers to be nominated to serve on the commission.

Citation of Rules Affected by this Order: Amending WAC 16-545-020.

Statutory Authority for Adoption: RCW 15.65.047.

Other Authority: Chapter 34.05 RCW.

Adopted under notice filed as WSR 18-08-081 on April 4, 2018.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at the Request of a Non-governmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's own Initiative: New 0, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making:

New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: June 6, 2018.

Derek I. Sandison  
Director

AMENDATORY SECTION (Amending WSR 16-19-046, filed 9/15/16, effective 10/16/16)

**WAC 16-545-020 Turfgrass seed board.** (1) **Administration.** The provisions of this order and the applicable provisions of the act is administered and enforced by the board as the designee of the director.

(2) **Board membership.**

(a) The board consists of seven voting members numbered positions one through seven.

(b) Except as otherwise provided by this chapter, each district has one board member in positions one through four representing each of the numbered districts.

(c) Position five represents the district with the highest reported value of production of turfgrass seed the previous three years.

(d) Position six is a handler appointed by the appointed or elected producer members of the board.

(e) Position seven represents and is appointed by the director.

(3) **Board membership qualifications.**

(a) Positions one through five.

(i) Except as otherwise provided by this chapter, board members in positions one through five must be practical producers of turfgrass seed in the district in and for which they are nominated, appointed, or elected and each shall be a citizen and resident of the state, over the age of eighteen years. Each producer board member must be and have been actually engaged in producing turfgrass seed within the state of Washington for a period of three years and has during that time derived a substantial portion of his or her income therefrom and who is not engaged in business as a handler or other dealer.

(ii) If any district has fewer than three practical producers of turfgrass seed or if no nominations are made for a district, that district's position is deemed "at large" for that term of office and may be filled by a producer of turfgrass seed in another district who meets all membership qualifications. This provision does not apply to position five.

(b) The board member in position six must be a practical handler of turfgrass seed and must be a citizen and resident of the state, over the age of eighteen years. The handler board member must be and have been, either individually or as an officer or an employee of a corporation, firm, partnership, association or cooperative actually engaged in handling turfgrass seed within the state of Washington for a period of five years and has during that period derived a substantial portion of his or her income therefrom.

(c) The board member in position seven must be neither a producer nor a handler.

(d) The qualifications of members of the board must continue during their term of office.

(4) **Term of office.** ~~((a))~~ The term of office for members of the board is three years. One-third of the membership as nearly as possible must be appointed or elected each year.

~~((b) Except for the director's representative, no member of the board can serve more than two full consecutive three-year terms.))~~

**(5) Nomination of elected or director-appointed board members.**

(a) Each year the director shall call a nomination meeting for elected and/or director-appointed producer board members in those districts whose board members term is about to expire. The meeting(s) must be held at least thirty days in advance of the date set by the director for the election or advisory vote of board members.

(b) Notice of a nomination meeting must be published in a newspaper of general circulation within the affected district at least ten days in advance of the date of the meeting and in addition, written notice of every meeting must be given to all affected producers within the affected district according to the list maintained by the board pursuant to RCW 15.65.295.

(c) Nonreceipt of notice by any interested person will not invalidate the proceedings at the nomination meeting.

(d) Any qualified affected producer may be nominated orally for membership on the board at the nomination meetings. Nominations may also be made within five days after the meeting by written petition filed with the director, signed by at least five affected producers.

(e) When only one nominee is nominated by the affected producers for an elected and/or director-appointed position, RCW 15.65.250 shall apply.

(f) If the board moves and the director approves that the nomination meeting procedure be deleted, the director shall give notice of the open board position(s) by mail to all affected producers. Nominating petitions for producers must be signed by at least five affected producers of the district from which the candidate will be appointed or elected. The final date for filing nominations must be at least twenty days after the notice was mailed.

**(6) Election or advisory vote of board members.**

(a) An election or advisory vote shall be conducted by secret ballot under the supervision of the director within the month of January. Each affected producer shall be entitled to one vote.

(b) Elected members of the board must be elected by a majority of the votes cast by the affected producers within the affected district. If a nominee does not receive a majority of the votes on the first ballot a runoff election must be held by mail in a similar manner between the two candidates for the position receiving the largest number of votes.

(c) An advisory vote shall be conducted for producer board members appointed by the director under the provision of RCW 15.65.243. The names of the two candidates receiving the most votes in the advisory vote shall be forwarded to the director for potential appointment to the board. In the event there are only two candidates nominated for a board position, and advisory vote may not be held and the candidates' names shall be forwarded to the director for potential appointment.

(d) Notice of every election or advisory vote for board membership must be published in a newspaper of general cir-

ulation within the affected district at least ten days in advance of the date of the election or advisory vote. At least ten days before every election or advisory vote for board membership, the director shall mail a ballot of the candidates to each affected producer entitled to vote whose name appears upon the list of the affected producers maintained by the board pursuant to RCW 15.65.295. Any other affected producer entitled to vote may obtain a ballot by application to the director upon establishing their qualifications.

(e) Nonreceipt of a ballot by an affected producer will not invalidate the election or advisory vote of any board member.

**(7) Vacancies.**

(a) In the event of a vacancy on the board in an elected or commission-appointed position, the remaining members shall select a qualified person to fill the unexpired term. The appointment shall be made at the board's first or second meeting after the position becomes vacant.

(b) In the event of a vacancy in a director-appointed position, the position shall be filled as specified in RCW 15.65.270.

(8) **Quorum.** A majority of the members is a quorum for the transaction of all business and to execute the duties of the board.

(9) **Board compensation.** No member of the board will receive any salary or other compensation, but each member may be compensated for each day in actual attendance at or traveling to and from meetings of the board or on special assignment for the board, in accordance with RCW 43.03.230 together with travel expenses in accordance with RCW 43.03.050 and 43.03.060. The board may adopt by resolution provisions for reimbursement of actual travel expenses incurred by members and employees of the board in carrying out the provisions of this marketing order pursuant to RCW 15.65.270.

(10) **Powers and duties of the board.** The board shall have the following powers and duties:

(a) To administer, enforce and control the provisions of this order as the designee of the director.

(b) To elect a chairman and other officers as the board deems advisable.

(c) To employ and discharge at its discretion the personnel, including attorneys engaged in the private practice of law subject to the approval and supervision of the attorney general, as the board determines are necessary and proper to execute the purpose of the order and effectuate the declared policies of the act.

(d) To pay only from moneys collected as assessments or advances thereon the costs arising in connection with the formulation, issuance, administration and enforcement of the order. The expenses and costs may be paid by check; draft or voucher in the form and the manner and upon the signature of the person as the board may prescribe.

(e) To reimburse any applicant who has deposited money with the director to defray the costs of formulating the order.

(f) To establish a "turfgrass seed board marketing revolving fund" and to deposit the fund in a bank or banks or financial institution or institutions, approved for the deposit of state funds, in which all money received by the board, except as the amount of petty cash for each day's needs, not

to exceed one hundred dollars, shall be deposited each day or as often during the day as advisable.

(g) To keep or cause to be kept in accordance with accepted standards of good accounting practice accurate records of all assessments, collections, receipts, deposits, withdrawals, disbursements, paid outs, moneys and other financial transactions made and done under this order. The records, books and accounts must be audited at least once every five years subject to procedures and methods lawfully prescribed by the state auditor. The books and accounts must be closed as of the last day of each fiscal year of the commission. A copy of the audit shall be delivered within thirty days after completion to the governor, the director, the state auditor and the board.

(h) To require a bond of all board members and employees of the board in a position of trust in the amount the board may deem necessary. The board must pay the premium for the bond or bonds from assessments collected. The bond may not be necessary if any blanket bond covering officials or employees of the state of Washington covers any board member or employee.

(i) To prepare a budget or budgets covering anticipated income and expenses to be incurred in carrying out the provisions of the order during each fiscal year. The board, at least sixty days prior to the beginning of its fiscal year, shall prepare and submit to the director for approval its research plan, its commodity-related education and training plan, and its budget.

(j) To establish by resolution a headquarters, which shall continue unless, changed by the board. All records, books and minutes of board meetings must be kept at the headquarters.

(k) To adopt rules of a technical or administrative nature for the operation of the board, under chapter 34.05 RCW (Administrative Procedure Act).

(l) To execute RCW 15.65.510 covering the obtaining of information necessary to effectuate the order and the act, along with the necessary authority and procedure for obtaining the information.

(m) To bring actions or proceedings upon joining the director as a party for specific performance, restraint, injunction or mandatory injunction against any person who violates or refuses to perform the obligations or duties imposed by the act or order.

(n) To confer with and cooperate with the legally constituted authorities of other states and of the United States to obtaining uniformity in the administration of federal and state marketing regulations, licenses, agreements or orders.

(o) To execute any other grant of authority or duty provided designees and not specifically set forth in this section.

(p) To sue or be sued.

(q) To work cooperatively with other local, state, and federal agencies; universities; and national organizations for the purposes provided in this order.

(r) To enter into contracts or interagency agreements with any private or public agency, whether federal, state, or local.

(s) To accept and expend or retain any gifts, bequests, contributions, or grants from private persons or private and public agencies.

(t) To enter into contracts or agreements for research in the production, irrigation, and transportation of turfgrass seed.

(u) To retain in emergent situations the services of private legal counsel to conduct legal actions on behalf of the commission. The retention of a private attorney is subject to review by the office of attorney general.

(v) To engage in appropriate fund-raising activities for the purpose of supporting activities authorized by this order.

(w) To participate in international, federal, state, and local hearings, meetings, and other proceedings relating to the production, irrigation, manufacture, regulation, and transportation of turfgrass seed including activities authorized under RCW 42.17.190, including the reporting of those activities to the public disclosure commission.

(x) To maintain a list of the names and addresses of affected producers that may be compiled from information used to collect assessments under the provisions of this marketing order and data on the value of each producer's production for a minimum three-year period pursuant to RCW 15.65.280.

(y) To maintain a list of the names and addresses of persons who handle turfgrass seed within the affected area and data on the amount and value of the turfgrass seed handled for a minimum three-year period by each person pursuant to RCW 15.65.280.

(z) To maintain a list of names and addresses of all affected persons who produce turfgrass seed and the amount, by unit, of turfgrass seed produced during the past three years pursuant to RCW 15.65.295.

(aa) To maintain a list of all persons who handle turfgrass seed and the amount of turfgrass seed handled by each person during the past three years pursuant to RCW 15.65.-295.

(bb) To establish a foundation using commission funds as grant money for the purposes established in this marketing order.

**(11) Procedures for board.**

(a) The board shall hold regular meetings, at least quarterly, with the time and date fixed by resolution of the board and held in accordance with chapter 42.30 RCW (Open Public Meetings Act). Notice of the time and place of regular meetings shall be published on or before January of each year in the *Washington State Register*. Notice of any change to the meeting schedule shall be published in the state register at least twenty days prior to the rescheduled meeting date.

(b) The board shall hold an annual meeting, at which time an annual report will be presented. The proposed budget must be presented for discussion at the meeting. Notice of the annual meeting must be filed in accordance with chapter 42.30 RCW (Open Public Meetings Act). Notice of the annual meeting must be given at least ten days prior to the meeting by written notice to each producer and by notifying the regular news media.

(c) The board shall establish by resolution the time, place, and manner of calling special meetings of the board with twenty-four hours written notice to the members. A board member may waive in writing his or her notice of any special meeting. Notice for special meetings shall be in compliance with chapter 42.30 RCW.

**WSR 18-13-016**  
**PERMANENT RULES**  
**PUGET SOUND**  
**CLEAN AIR AGENCY**

[Filed June 7, 2018, 4:29 p.m., effective August 1, 2018]

Effective Date of Rule: August 1, 2018.

Purpose: This section currently adopts by reference various applicable sections of chapters 173-400 and 173-460 WAC related to new source review. Several referenced sections of these codes were updated with WSR 16-12-099, effective July 1, 2016. The changes to the WAC implemented new effective dates of the federal regulations referenced in those sections and a minor change consolidating how those dates are referenced in the WAC itself. The proposed amendments to Section 6.01 would update those sections of WAC adopted by reference. There are no benefits or costs associated with the proposed amendments.

Citation of Rules Affected by this Order: Amending Regulation I, Section 6.01 (Components of New Source Review Program).

Statutory Authority for Adoption: Chapter 70.94 RCW.

Adopted under notice filed as WSR 18-10-107 on May 2, 2018.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at the Request of a Non-governmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's own Initiative: New 0, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: June 7, 2018.

Craig Kenworthy  
Executive Director

**AMENDATORY SECTION**

**SECTION 6.01 COMPONENTS OF NEW SOURCE REVIEW PROGRAM**

(a) In addition to the provisions of this regulation, the Agency adopts by reference and enforces the following provisions of the new source review program established by the Washington State Department of Ecology:

WAC 173-400-030 Definitions. (effective 12/29/12)  
WAC 173-400-081 Startup and shutdown. (effective 4/01/11)

WAC 173-400-110 New source review (NSR) for sources and portable sources. (effective 12/29/12) (1)(c)(i), (1)(d) and (1)(e)

WAC 173-400-111 Processing notice of construction applications for sources, stationary sources and portable sources. (effective 7/01/16 (~~12/29/12~~))

WAC 173-400-112 Requirements for new sources in nonattainment areas. (effective 12/29/12)

WAC 173-400-113 Requirements for new sources in attainment or unclassifiable areas. (effective 12/29/12)

WAC 173-400-114 Requirements for replacement or substantial alteration of emission control technology at an existing stationary source. (effective 12/29/12)

WAC 173-400-117 Special protection requirements for federal Class I areas. (effective 12/29/12)

WAC 173-400-171 Public notice. (effective 7/01/16 (~~12/29/12~~))

WAC 173-400-200 Creditable stack height and dispersion techniques. (effective 2/10/05)

WAC 173-400-560 General order of approval. (effective 12/29/12)

WAC 173-400-700 Review of major stationary sources of air pollution. (effective 4/01/11)

WAC 173-400-710 Definitions. (effective 7/01/16 (~~12/29/12~~))

WAC 173-400-720 Prevention of significant deterioration (PSD). (effective 7/01/16 (~~12/29/12~~))

WAC 173-400-730 Prevention of significant deterioration application processing procedures. (effective 7/01/16 (~~12/29/12~~))

WAC 173-400-740 PSD permitting public involvement requirements. (effective 7/01/16 (~~12/29/12~~))

WAC 173-400-750 Revisions to PSD permits. (effective 12/29/12)

WAC 173-400-800 Major stationary source and major modification in a nonattainment area. (effective 4/01/11)

WAC 173-400-810 Major stationary source and major modification definitions. (effective 7/01/16 (~~12/29/12~~))

WAC 173-400-820	Determining if a new stationary source or modification to a stationary source is subject to these requirements. (effective 12/29/12)
WAC 173-400-830	Permitting requirements. (effective <u>7/01/16</u> ( <del>(12/29/12)</del> ))
WAC 173-400-840	Emission offset requirements. (effective <u>7/01/16</u> ( <del>(12/29/12)</del> ))
WAC 173-400-850	Actual emissions plantwide applicability limitation (PAL). (effective <u>7/01/16</u> ( <del>(12/29/12)</del> ))
WAC 173-400-860	Public involvement procedures. (effective 4/01/11)
WAC 173-460-020	Definitions. (effective 6/20/09)
WAC 173-460-030	Applicability. (effective 6/20/09)
WAC 173-460-040 (2)-(3)	New source review. (effective 6/20/09)
WAC 173-460-050	Requirement to quantify emissions. (effective 6/20/09)
WAC 173-460-060(1)	Control technology requirements. (effective 6/20/09)
WAC 173-460-070	Ambient impact requirement. (effective 6/20/09)
WAC 173-460-071	Voluntary limits on emissions. (effective 6/20/09)
WAC 173-460-080 (2)-(4)	First tier review. (effective 6/20/09)
WAC 173-460-090	Second tier review. (effective 6/20/09)
WAC 173-460-100	Third tier review. (effective 6/20/09)
WAC 173-460-150	Table of ASIL, SQER and de minimis emission values. - excluding references to de minimis emission values (effective 6/20/09)

(b) The Washington State Department of Ecology is the permitting agency for the Prevention of Significant Deterioration (PSD) program under WAC 173-400-700 through WAC 173-400-750 (as delegated by agreement with the US Environmental Protection Agency, Region 10), and for primary aluminum smelters, kraft pulp mills, and sulfite pulp mills.

(c) The Washington State Department of Health is the permitting agency for radionuclides under chapter 246-247 WAC.

(d) The Energy Facility Site Evaluation Council (EFSEC) is the permitting agency for large natural gas and oil pipelines, electric power plants above 350 megawatts, new oil refineries or large expansions of existing facilities, and underground natural gas storage fields under chapter 463-78 WAC.

**WSR 18-13-023**  
**PERMANENT RULES**  
**OFFICE OF THE**  
**INSURANCE COMMISSIONER**

[Filed June 8, 2018, 1:25 p.m., effective July 9, 2018]

Effective Date of Rule: Thirty-one days after filing.  
 Purpose: The rule revises existing language and adds new language, as applicable, in chapter 284-180 WAC to:

- Require the pharmacy benefits managers (PBM) to provide the name of a person who will serve as the PBM's single point of contact with the office of the insurance commissioner (OIC) for appeals;
- Require small pharmacies and PBMs to follow OIC's filing instructions when uploading documents;
- Require PBMs to respond to OIC using OIC's electronic appeal system; and
- Require PBMs, in their responses to appeals under WAC 284-180-400, to provide enough details so that OIC can identify the exact PBM entity that issued the response.

Citation of Rules Affected by this Order: Amending WAC 284-180-240, 284-180-400, and 284-180-420.

Statutory Authority for Adoption: RCW 48.02.060, 48.02.220.

Other Authority: Chapter 19.340 RCW.

Adopted under notice filed as WSR 17-24-127 on December 6, 2017.

Changes Other than Editing from Proposed to Adopted Version: The introductory sentence of WAC 284-180-400(8) was updated to provide more clarification on the subject of the sentence. That sentence now reads: A pharmacy benefits manager's response to an appeal submitted by a Washington small pharmacy that is denied, partially reimbursed, or untimely must include written documentation or notice to identify the exact corporate entity that received and processed the appeal.

A final cost-benefit analysis is available by contacting Mandy Weeks-Green, P.O. Box 40258, Olympia, WA 98504, phone 360-725-7100, fax 360-586-3109 or 360-586-3535, TTY 360-586-0241 or 360-75-7087 [360-725-7087], email RulesCoordinator@oic.wa.gov, web site <https://www.insurance.wa.gov>.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at the Request of a Non-governmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's own Initiative: New 0, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 3, Repealed 0.

Number of Sections Adopted using Negotiated Rule Making: New 0, Amended 3, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: June 8, 2018.

Mike Kreidler  
Insurance Commissioner

AMENDATORY SECTION (Amending WSR 17-01-139, filed 12/20/16, effective 1/1/17)

**WAC 284-180-240 Providing and updating registration information.** (1) At the time of registration, a pharmacy benefit manager must provide its legal name as well as any and all additional names that it uses to conduct business.

(2) Registered pharmacy benefit managers must provide the commissioner with a valid email address, which the commissioner will use as the official contact address for ~~((and))~~ communications regarding registrations, renewals and oversight activities.

(3) In addition to providing a valid email address, registered pharmacy benefit managers must identify a pharmacy benefit manager employee who is the single point of contact for appeals under WAC 284-180-420 and 284-180-430, and must fill out the form that the commissioner makes available for this purpose at [www.insurance.wa.gov](http://www.insurance.wa.gov).

(4) Registered pharmacy benefit managers must ensure that the information that they disclosed when they registered with the commissioner remains current by notifying the commissioner of any changes or additions.

(a) This information includes, but is not limited to:

(i) Any and all additional names that pharmacy benefit managers use to conduct business; ~~((and))~~

(ii) The email address for official communications between the commissioner and the pharmacy benefit manager; and

(iii) The name, contact information, and any other information that the pharmacy benefit manager submitted on the commissioner's form under subsection (3) of this section regarding the pharmacy benefit manager employee who is the pharmacy benefit manager's single point of contact for appeals under WAC 284-180-420 and 284-180-430.

(b) Within thirty days of any change, pharmacy benefit managers must report changes to the commissioner using the commissioner's electronic system.

AMENDATORY SECTION (Amending WSR 17-01-139, filed 12/20/16, effective 1/1/17)

**WAC 284-180-400 Appeals by network pharmacies to pharmacy benefit managers.** A network pharmacy may appeal a reimbursement to a pharmacy benefit manager (first tier appeal) if the reimbursement for the drug is less than the net amount the network pharmacy paid to the supplier of the drug. "Network pharmacy" has the meaning set forth in RCW 19.340.100 (1)(d). "Pharmacy benefit manager" has the meaning set forth in RCW 19.340.010 (6)(a). A pharmacy benefit manager must process the network pharmacy's appeal as follows:

(1) A pharmacy benefit manager must include language in the pharmacy provider contract and on the pharmacy benefit manager's web site fully describing the right to appeal under RCW 19.340.100. The description must include, but is not limited to:

(a) Contact information, including:

(i) A telephone number by which the pharmacy may contact the pharmacy benefit manager during normal business hours and speak with an individual responsible for processing appeals;

(ii) A summary of the specific times when the pharmacy benefit manager will answer calls from network pharmacies at that telephone number;

(iii) A fax number that a network pharmacy can use to submit information regarding an appeal; and

(iv) An email address that a network pharmacy can use to submit information regarding an appeal.

(b) A detailed description of the actions that a network pharmacy must take to file an appeal; and

(c) A detailed summary of each step in the pharmacy benefit manager's appeals process.

(2) The pharmacy benefit manager must reconsider the reimbursement. A pharmacy benefit manager's review process must provide the network pharmacy or its representatives with the opportunity to submit information to the pharmacy benefit manager including, but not limited to, documents or written comments. The pharmacy benefit manager must review and investigate the reimbursement and consider all information submitted by the network pharmacy or its representatives prior to issuing a decision.

(3) The pharmacy benefit manager must complete the appeal within thirty calendar days from the time the network pharmacy submits the appeal. If the network pharmacy does not receive the pharmacy benefit manager's decision within that time frame, then the appeal is deemed denied.

(4) The pharmacy benefit manager must uphold the appeal of a network pharmacy with fewer than fifteen retail outlets within the state of Washington, under its corporate umbrella, if the pharmacy demonstrates that they are unable to purchase therapeutically equivalent interchangeable product from a supplier doing business in the state of Washington at the pharmacy benefit manager's list price. "Therapeutically equivalent" is defined in RCW 69.41.110(7).

(5) If the pharmacy benefit manager denies the network pharmacy's appeal, the pharmacy benefit manager must provide the network pharmacy with a reason for the denial and the national drug code of a drug that has been purchased by other network pharmacies located in the state of Washington at a price less than or equal to the predetermined reimbursement cost for the multisource generic drug. "Multisource generic drug" is defined in RCW 19.340.100 (1)(c).

(6) If the pharmacy benefit manager upholds the network pharmacy's appeal, the pharmacy benefit manager must make a reasonable adjustment no later than one day after the date of the determination. If the request for an adjustment is from a critical access pharmacy, as defined by the state health care authority by rule for purpose related to the prescription drug purchasing consortium established under RCW 70.14.060, any such adjustment shall apply only to such pharmacies.

(7) If otherwise qualified, the following may file an appeal with a pharmacy benefit manager:

(a) Persons who are natural persons representing themselves;

(b) Attorneys at law duly qualified and entitled to practice in the courts of the state of Washington;

(c) Attorneys at law entitled to practice before the highest court of record of any other state, if attorneys licensed in Washington are permitted to appear before the courts of such other state in a representative capacity, and if not otherwise prohibited by state law;

(d) Public officials in their official capacity;

(e) A duly authorized director, officer, or full-time employee of an individual firm, association, partnership, or corporation who appears for such firm, association, partnership, or corporation;

(f) Partners, joint venturers or trustees representing their respective partnerships, joint ventures, or trusts; and

(g) Other persons designated by a person to whom the proceedings apply.

(8) A pharmacy benefits manager's response to an appeal submitted by a Washington small pharmacy that is denied, partially reimbursed, or untimely must include written documentation or notice to identify the exact corporate entity that received and processed the appeal. Such information must include, but is not limited to, the corporate entity's full and complete name, taxpayer identification number, and number assigned by the office of the insurance commissioner.

AMENDATORY SECTION (Amending WSR 17-01-139, filed 12/20/16, effective 1/1/17)

**WAC 284-180-420 Appeals by network pharmacies to the commissioner.** The following procedure applies to brief adjudicative proceedings before the commissioner for actions involving a network pharmacy's appeal of a pharmacy benefit manager's decision in a first tier appeal regarding reimbursement for a drug subject to predetermined reimbursement costs for multisource generic drugs, unless the matter is converted to a formal proceeding as provided in WAC 284-180-440(3).

(1) **Grounds for appeal.** A network pharmacy or its representative may appeal a pharmacy benefit manager's decision to the commissioner if it meets all the following requirements:

(a) The pharmacy benefit manager's decision must have denied the network pharmacy's appeal, or the network pharmacy must be unsatisfied with the outcome of its appeal to the pharmacy benefit manager;

(b) The network pharmacy must request review of the pharmacy benefit manager's decision by filing a written petition for review form. A form for this purpose is available at [www.insurance.wa.gov](http://www.insurance.wa.gov).

The petition for review must include:

(i) The network pharmacy's basis for appealing the pharmacy benefit manager's decision in the first tier appeal;

(ii) The network pharmacy's federal identification number, unified business identifier number, business address, and mailing address;

(iii) The documents from the first tier review, including the documents that the pharmacy submitted to the pharmacy benefit manager as well as the documents that the pharmacy benefit manager provided to the pharmacy in response to the first tier review; and

(iv) Any additional information that the commissioner may require.

(c) The network pharmacy must deliver the petition for review to the commissioner's Tumwater office by mail, hand delivery, or by other methods that the commissioner may make available;

(d) The network pharmacy must file the petition for review with the commissioner within thirty days of receipt of the pharmacy benefit manager's decision; and

(e) The network pharmacy making the appeal must have less than fifteen retail outlets within the state of Washington under its corporate umbrella. The petition for review that the network pharmacy submits to the commissioner must state that this requirement is satisfied, and must be signed and verified by an officer or authorized representative of the network pharmacy.

(2) **Time frames governing appeals to the commissioner.** The commissioner must complete the appeal within thirty calendar days of the receipt of the network pharmacy's appeal. An appeal before the commissioner is deemed complete when a presiding officer issues an initial order on behalf of the commissioner to both the network pharmacy and pharmacy benefit manager under subsection ((7)) (8) of this section. Within seven calendar days of the resolution of a dispute, the presiding officer shall provide a copy of the initial order to both the network pharmacy and pharmacy benefit manager.

(3) **Relief the commissioner may provide.** The commissioner, by and through a presiding officer or reviewing officer, may enter an order directing the pharmacy benefit manager to make an adjustment to the disputed claim, denying the network pharmacy's appeal, or may take other actions deemed fair and equitable.

(4) **Notice.** If the presiding officer under the use of discretion chooses to conduct an oral hearing, the presiding officer will set the time and place of the hearing. Written notice shall be served upon both the network pharmacy and pharmacy benefit manager at least seven days before the date of the hearing. Service is to be made pursuant to WAC 284-180-440(2). The notice must include:

(a) The names and addresses of each party to whom the proceedings apply and, if known, the names and addresses of any representatives of such parties;

(b) The official file or other reference number and name of the proceeding, if applicable;

(c) The name, official title, mailing address and telephone number of the presiding officer, if known;

(d) A statement of the time, place and nature of the proceeding;

(e) A statement of the legal authority and jurisdiction under which the hearing is to be held;

(f) A reference to the particular sections of the statutes or rules involved;

(g) A short and plain statement of the matters asserted by the network pharmacy against the pharmacy benefit manager and the potential action to be taken; and

(h) A statement that if either party fails to attend or participate in a hearing, the hearing can proceed and the presiding or reviewing officer may take adverse action against that party.

(5) **Appearance and practice at a brief adjudicative proceeding.** The right to practice before the commissioner in a brief adjudicative proceeding is limited to:

(a) Persons who are natural persons representing themselves;

(b) Attorneys at law duly qualified and entitled to practice in the courts of the state of Washington;

(c) Attorneys at law entitled to practice before the highest court of record of any other state, if attorneys licensed in Washington are permitted to appear before the courts of such other state in a representative capacity, and if not otherwise prohibited by state law;

(d) Public officials in their official capacity;

(e) A duly authorized director, officer, or full-time employee of an individual firm, association, partnership, or corporation who appears for such firm, association, partnership, or corporation;

(f) Partners, joint venturers or trustees representing their respective partnerships, joint ventures, or trusts; and

(g) Other persons designated by a person to whom the proceedings apply with the approval of the presiding officer.

In the event a proceeding is converted from a brief adjudicative proceeding to a formal proceeding, representation is limited to the provisions of law and RCW 34.05.428.

(6) **Method of response.** Upon receipt of any inquiry from the commissioner concerning a network pharmacy's appeal of a pharmacy benefit manager's decision in the first tier appeal regarding reimbursement for a drug subject to pre-determined reimbursement costs for multisource generic drugs, pharmacy benefit managers must respond to the commissioner using the commissioner's electronic pharmacy appeals system.

(7) **Hearings by telephone.** If the presiding officer chooses to conduct a hearing, then the presiding officer may choose to conduct the hearing telephonically. The conversation will be recorded and will be part of the record of the hearing.

~~((7))~~ (8) **Presiding officer.**

(a) Per RCW 34.05.485, the presiding officer may be the commissioner, one or more other persons designated by the commissioner per RCW 48.02.100, or one or more other administrative law judges employed by the office of administrative hearings. The commissioner's choice of presiding officer is entirely discretionary and subject to change at any time. However, it must not violate RCW 34.05.425 or 34.05.458.

(b) The presiding officer shall conduct the proceeding in a just and fair manner. Before taking action, the presiding officer shall provide both parties the opportunity to be informed of the presiding officer's position on the pending matter and to explain their views of the matter. During the course of the proceedings before the presiding officer, the parties may present all relevant information.

(c) The presiding officer may request additional evidence from either party at any time during review of the initial order. After the presiding officer requests evidence from a party, the party has seven days after service of the request to supply the evidence to the presiding officer, unless the presiding officer, under the use of discretion, allows additional time to submit the evidence.

(d) The presiding officer has all authority granted under chapter 34.05 RCW.

~~((8))~~ (9) **Entry of orders.**

(a) When the presiding officer issues a decision, the presiding officer shall briefly state the basis and legal authority for the decision. Within ten days of issuing the decision, the presiding officer shall serve upon the parties the initial order, as well as information regarding any administrative review that may be available before the commissioner. The presiding officer's issuance of a decision within the ten day time frame satisfies the seven day requirement in subsection (2) of this section.

(b) The initial order consists of the decision and the brief written statement of the basis and legal authority. The initial order will become a final order if neither party requests a review as provided in WAC 284-180-430(1).

**(10) Filing instructions.** When a small pharmacy or a pharmacy benefit manager provides information to the commissioner regarding appeals under WAC 284-180-420, the small pharmacy or pharmacy benefit manager must follow the commissioner's filing instructions, which are available at [www.insurance.wa.gov](http://www.insurance.wa.gov).

## WSR 18-13-028

### PERMANENT RULES

#### HORSE RACING COMMISSION

[Filed June 11, 2018, 8:44 a.m., effective July 12, 2018]

Effective Date of Rule: Thirty-one days after filing.

Purpose: Amends language to add additional duties that a groom may be expected to perform.

Citation of Rules Affected by this Order: Amending WAC 260-36-260.

Statutory Authority for Adoption: RCW 67.16.020.

Adopted under notice filed as WSR 18-10-064 on April 30, 2018.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 1, Repealed 0.

Number of Sections Adopted at the Request of a Non-governmental Entity: New 0, Amended 1, Repealed 0.

Number of Sections Adopted on the Agency's own Initiative: New 0, Amended 1, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 1, Repealed 0.

Number of Sections Adopted using Negotiated Rule Making: New 0, Amended 1, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: June 8, 2018.

Douglas L. Moore  
Executive Secretary

AMENDATORY SECTION (Amending WSR 12-23-015, filed 11/9/12, effective 12/10/12)

**WAC 260-36-260 Employees and duties.** (1) Employees of licensed trainers are grooms, assistant trainers, exercise riders (both at the track and at the farm), and pony riders (both at the track and at the farm). Employees of a trainer may only perform those duties for which they are licensed and as outlined in this section. For the purposes of industrial insurance coverage under the horse industry account, coverage will only extend while an employee is properly licensed by the commission, employed by a licensed trainer, and only performing duties associated with the employee's license.

(2) Exercise riders, both at the track and farm may only perform the following duties:

(a) Exercise horses, which includes riding, lunge and line drive horses;

(b) Assist with saddling horses for training;

(c) Unsaddle horses following training;

(d) Clean tack following training;

(e) An exercise rider may not perform any of the duties of a groom, assistant trainer, pony rider, or other duties not usually preparing horses for competition.

(3) Pony riders may only perform the following duties:

(a) Escort horses to the track during training;

(b) Escort horses to the receiving barn and to the stable following a race;

(c) Escort horses to the starting gate in the post parade during racing (pony rider - track only);

(d) Clean stalls, rake and clean stable area associated with their ponies;

(e) A pony rider may not perform any duties of a groom, assistant trainer, exercise rider, or other duties not normally associated with escorting horses.

(4) Grooms may perform the following duties:

(a) Clean stalls, rake and clean stable area;

(b) Bathe, groom, feed, and water horses;

(c) Lead horses to and from hot walkers or to the track and/or receiving barn and paddock;

(d) Apply bandages, salves, topical medications, etc.;

(e) Tack horses for training;

(f) Handle horses in the paddock and test barn; (~~and~~)

(g) Stacking or arranging feed and hay in the stable or barn area of a track or farm where a trainer has coverage, (when feed or supplies are delivered by a vendor the unloading of the feed or supplies is excluded);

(h) Assist in the loading and unloading of horses from trailers and van services in the stable or barn area of a track or farm where a trainer has coverage; and

(i) A groom may not mount or ride a horse.

(5) Assistant trainers may perform the duties of a groom and additionally may represent the trainer in other matters such as entering and scratching horses. An assistant trainer also may not mount or ride a horse.

## WSR 18-13-029

### PERMANENT RULES

#### DEPARTMENT OF TRANSPORTATION

[Filed June 11, 2018, 11:27 a.m., effective July 12, 2018]

Effective Date of Rule: Thirty-one days after filing.

Purpose: The proposal will require certified, for hire pilot escort vehicle operators to carry proof of insurance on them while performing the duties of a pilot/escort vehicle operator.

Citation of Rules Affected by this Order: Amending WAC 468-38-100(16).

Statutory Authority for Adoption: RCW 46.44.090, 46.44.093.

Adopted under notice filed as WSR 18-10-011 on April 20, 2018.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at the Request of a Non-governmental Entity: New 1, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's own Initiative: New 0, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted using Negotiated Rule Making: New 1, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: June 11, 2018.

Kara Larsen, Director  
Risk Management and  
Legal Services

AMENDATORY SECTION (Amending WSR 17-11-001, filed 5/3/17, effective 6/3/17)

**WAC 468-38-100 Pilot/escort vehicle and operator requirements.** (1) A certified pilot/escort operator, acting as a warning necessary to provide safety to the traveling public, must accompany an extra-legal load when:

(a) The vehicle(s) or load exceeds eleven feet in width: Two pilot/escort vehicles are required on two lane highways, one in front and one at the rear.

(b) The vehicle(s) or load exceeds fourteen feet in width: One escort vehicle is required at the rear on multilane highways.

(c) The vehicle(s) or load exceeds twenty feet in width: Two pilot/escort vehicles are required on multilane undivided highways, one in front and one at the rear.

(d) The trailer length, including load, of a tractor/trailer combination exceeds one hundred five feet, or when the rear overhang of a load measured from the center of the rear axle exceeds one-third of the trailer length including load of a tractor/trailer or truck/trailer combination: One pilot/escort vehicle is required at the rear on two-lane highways.

(e) The trailer length, including load, of a tractor/trailer combination exceeds one hundred twenty-five feet: One pilot/escort vehicle is required at the rear on multilane highways.

(f) The front overhang of a load measured from the center of the front steer axle exceeds twenty feet: One pilot/escort vehicle is required at the front on all two-lane highways.

(g) The rear overhang of a load on a single unit vehicle, measured from the center of the rear axle, exceeds twenty feet: One pilot/escort vehicle is required at the rear on two-lane highways.

(h) The height of the vehicle(s) or load exceeds fourteen feet six inches: One pilot/escort vehicle with height measuring device (pole) is required at the front of the movement on all highways.

(i) The vehicle(s) or load exceeds twelve feet in width on a multilane highway and has a height that requires a front pilot/escort vehicle: One rear pilot/escort vehicle is required.

(j) The operator, using rearview mirrors, cannot see two hundred feet to the rear of the vehicle or vehicle combination when measured from either side of the edge of the load or last vehicle in the combination, whichever is larger: One pilot/escort vehicle is required at the rear on all highways.

(k) In the opinion of the department, a pilot/escort vehicle(s) is necessary to protect the traveling public. Assignments of this nature must be authorized through the department's administrator for commercial vehicle services.

**(2) Can a pilot/escort vehicle be temporarily reassigned a position relative to the load during a move?** When road conditions dictate that the use of the pilot/escort vehicle in another position would be more effective, the pilot/escort vehicle may be temporarily reassigned. For example: A pilot/escort vehicle is assigned to the rear of an overlength load on a two-lane highway. The load is about to enter a highway segment that has curves significant enough to cause the vehicle and/or load to encroach on the oncoming lane of traffic. The pilot/escort vehicle may be temporarily reassigned to the front to warn oncoming traffic.

**(3) Can a certified flag person ever substitute for a pilot/escort vehicle?** In subsection (1)(d) and (e) of this section, the special permit may authorize a riding flag person, in lieu of a pilot/escort vehicle, to provide adequate traffic control for the configuration. The flag person is not required to ride in the pilot/escort vehicle but may ride in the transport vehicle with transporter's authorization.

**(4) Must an operator of a pilot/escort vehicle be certified to operate in the state of Washington?** Yes. To help assure compliance with the rules of this chapter, consistent basic operating procedures are needed for pilot/escort vehicle operators to properly interact with the escorted vehicle and the surrounding traffic. Operators of pilot/escort vehicles, therefore, must be certified as having received department-approved base level training as a pilot/escort vehicle operator and must comply with the following:

(a) A pilot/escort vehicle operator with a Washington state driver's license must have a valid Washington state pilot/escort vehicle operator certificate/card which must be on the operator's person while performing escort vehicle operator duties.

(b) A pilot/escort vehicle operator with a driver's license from a jurisdiction other than the state of Washington may acquire a Washington state escort vehicle operator certificate/card, or operate with a certification from another jurisdiction approved by the department, subject to the periodic review of the issuing jurisdiction's certification program. A current list of approved programs will be maintained by the department's commercial vehicle services office.

(c) A pilot/escort vehicle operator certification does not exempt a pilot/escort operator from complying with all state laws and requirements of the state in which she/he is traveling.

(d) Every applicant for a state of Washington pilot/escort operator certificate shall attend an eight-hour classroom training course offered and presented by a business, organization, government entity, or individual approved by the department. At the conclusion of the course, the applicant will be eligible to receive the certification card after successfully completing a written test with at least an eighty percent passing score. State of Washington pilot/escort vehicle operator certification cards must be renewed every three years.

**(5) What are the pretrip procedures that must be followed by the operator of a pilot/escort vehicle?**

(a) Discuss with the operator of the extra-legal vehicle the aspects of the move including, but not limited to, the vehicle configuration, the route, and the responsibilities that will be assigned or shared.

(b) Prerun the route, if necessary, to verify acceptable clearances.

(c) Review the special permit conditions with the operator of the extra-legal vehicle. When the permit is a single trip extra-legal permit, displaying routing information, the pilot/escort operator(s) must have a copy of the permit, including all special conditions and attachments.

(d) Determine proper position of required pilot/escort vehicles and set procedures to be used among the operators.

(e) Check mandatory equipment, provided in subsections (9) and (10) of this section. Each operator is responsible for his or her own vehicle.

(f) Check two-way communication system to ensure clear communications between the pilot/escort vehicle(s) and the transport vehicle and predetermine the channel to be used.

(g) Acknowledge that nonemergency electronic communication is prohibited except communication between pilot/escort operator(s) and the transport vehicle during movement.

(h) Adjust mirrors, mount signs and turn on lights, provided in subsections (8)(e) and (9)(a) and (b) of this section.

**(6) What are the responsibilities of the operator of a pilot/escort vehicle when assigned to be in front of the extra-legal movement?** The operator shall:

(a) Provide general warning to oncoming traffic of the presence of the permitted vehicle by use of signs and lights, provided in subsection (9) of this section;

(b) Notify the operator of the extra-legal vehicle, and the operator(s) of any trailing pilot/escort vehicle(s), about any condition that could affect either the safe movement of the extra-legal vehicle or the safety of the traveling public, in sufficient time for the operator of the extra-legal vehicle to take corrective action. Conditions requiring communication

include, but are not limited to, road-surface hazards; overhead clearances; obstructions; traffic congestion; pedestrians; etc.;

(c) Provide guidance to the extra-legal vehicle through lane changes, egress from one designated route and access to the next designated route on the approved route itinerary, and around any obstacle;

(d) In the event of traffic buildup behind the extra-legal vehicle, locate a safe place adjacent to the highway where the extra-legal vehicle can make a temporary stop. Notify the operator of the extra-legal vehicle, and the operator(s) of any trailing pilot/escort vehicle(s), in sufficient time for the extra-legal vehicle to move out of the traffic flow into the safe place, allowing the following traffic to pass safely;

(e) In accordance with training, be far enough in front of the extra-legal vehicle to allow time for the extra-legal vehicle to stop or take corrective action as necessary when notified by the front pilot/escort operator. Be far enough in front of the extra-legal vehicle to signal oncoming traffic to stop in a safe and timely manner before entering any narrow structure or otherwise restricted highway where an extra-legal vehicle has entered and must clear before oncoming traffic can enter;

(f) In accordance with training, do not be any farther ahead of the extra-legal vehicle than is reasonably prudent, considering speed of the extra-legal vehicle, other traffic, and highway conditions. Do not exceed a distance between pilot/escort vehicle and extra-legal vehicle that would interfere with maintaining clear two-way radio communication; and

(g) Assist in guidance to a safe place, and/or traffic control, in instances when the extra-legal vehicle becomes disabled.

**(7) What are the responsibilities of the operator of a pilot/escort vehicle when assigned to be at the rear of the extra-legal movement?** The operator shall:

(a) Provide general warning to traffic approaching from the rear of the extra-legal vehicle ahead by use of signs and lights, provided in subsection (9) of this section;

(b) Notify the operator of the extra-legal vehicle, and the operator(s) of any leading pilot/escort vehicle(s), about any condition that could affect either the safe movement of the extra-legal vehicle or the safety of the traveling public, in sufficient time for the operator of the extra-legal vehicle to take corrective action. Conditions requiring communication include, but are not limited to, objects coming loose from the extra-legal vehicle; flat tires on the extra-legal vehicle; rapidly approaching traffic or vehicles attempting to pass the extra-legal vehicle; etc.;

(c) Notify the operator of the extra-legal vehicle, and/or the operator of the lead pilot/escort vehicle, about traffic buildup or other delays to normal traffic flow resulting from the extra-legal move;

(d) In the event of traffic buildup behind the extra-legal vehicle, notify the operator of the extra-legal vehicle, and the operator(s) of any pilot/escort vehicle(s) in the lead, and assist the extra-legal vehicle in its move out of the traffic flow into the safe place, allowing the following traffic to pass safely;

(e) In accordance with training, be far enough behind the extra-legal vehicle to provide visual warning to approaching

traffic to slow or stop in a timely manner, depending upon the action to be taken by the extra-legal vehicle, or the condition of the highway segment (i.e., limited sight distance, mountainous terrain, narrow corridor, etc.);

(f) Do not follow more closely than is reasonably prudent, considering the speed of the extra-legal vehicle, other traffic, and highway conditions. Do not exceed one-half mile distance between the pilot/escort vehicle and the extra-legal vehicle in order to maintain radio communication, except when necessary to safely travel a long narrow section of highway; and

(g) Pilot/escort operators shall not perform tillerman duties while performing escorting duties. For this section, tillerman refers to an individual that operates the steering of the trailer or trailing unit of the transport vehicle; and

(h) Assist in guidance to a safe place, and/or traffic control, in instances when the extra-legal vehicle becomes disabled.

**(8) What kind of vehicle can be used as a pilot/escort vehicle?** In addition to being in safe and reliable operating condition, the vehicle shall:

(a) Be either a single unit passenger car, including passenger van, or a two-axle truck, including a nonplacarded service truck;

(b) Not exceed a maximum gross vehicle weight or gross weight rating of sixteen thousand pounds;

(c) Have a body width of at least sixty inches but no greater than one hundred two inches;

(d) Not exceed the legal limits of size and weight, as defined in chapter 46.44 RCW; ~~(and)~~

(e) Be equipped with outside rear-view mirrors, located on each side of the vehicle(-); and

(f) Not tow a trailer while escorting.

**(9) In addition to equipment required by traffic law, what additional equipment is required on the vehicle when operating as a pilot/escort, and when is it used?**

(a) A minimum of one flashing or rotating amber (yellow) light or strobe, positioned above the roof line, visible from a minimum of five hundred feet to approaching traffic from the front or rear of the vehicle and visible a full three hundred sixty degrees around the pilot/escort vehicle. Light bars, with appropriately colored lights, meeting the visibility minimums are acceptable. Lights must only be activated while escorting an extra-legal vehicle, or when used as traffic warning devices while stopped at the side of the road taking height measurements during the prerunning of a planned route. The vehicle's headlights must also be activated while escorting an extra-legal vehicle.

(b) A sign reading "OVERSIZE LOAD," measuring at least five feet wide, ten inches high with black lettering at least eight inches high in a one-inch brush stroke on yellow background. The sign shall be mounted over the roof of the vehicle and shall be displayed only while performing as the pilot/escort of an extra-legal load. When the vehicle is not performing as a pilot/escort, the sign must be removed, retracted or otherwise covered.

(c) A two-way radio communications system capable of providing reliable two-way voice communications, at all times, between the operators of the pilot/escort vehicle(s) and the extra-legal vehicle(s).

(d) Nonemergency electronic communications is prohibited except communication between the pilot/escort vehicle(s) and the transport vehicle during movement.

**(10) What additional or specialized equipment must be carried in a pilot/escort vehicle?**

(a) A standard eighteen-inch STOP AND SLOW paddle sign.

(b) Three bi-directional emergency reflective triangles.

(c) A minimum of one five-pound B, C fire extinguisher, or equivalent.

(d) A high visibility safety garment designed according to Class 2 specifications in ANSI/ISEA 107-1999, *American National Standard for High Visibility Safety Apparel*, to be worn when performing pilot/escort duties outside of the vehicle. The acceptable high visibility colors are fluorescent yellow-green, fluorescent orange-red or fluorescent red.

(e) A highly visible colored hard hat, also to be worn when performing pilot/escort duties outside of the vehicle, per WAC 296-155-305.

(f) A height-measuring device (pole), which is nonconductive and nondestructive to overhead clearances, when required by the terms of the special permit. The upper portion of a height pole shall be constructed of flexible material to prevent damage to wires, lights, and other overhead objects or structures. The pole may be carried outside of the vehicle when not in use. See also subsection (14) of this section.

(g) First-aid supplies as prescribed in WAC 296-800-15020.

(h) A flashlight in good working order with red nose cone. Additional batteries should also be on hand.

**(11) Can the pilot/escort vehicle carry passengers?** A pilot/escort vehicle may not contain passengers, human or animal, except that:

(a) A certified individual in training status or necessary flag person may be in the vehicle with the approval of the pilot/escort operator.

(b) A service animal may travel in the pilot/escort vehicle but must be located somewhere other than front seat of vehicle.

**(12) Can the pilot/escort vehicle carry any other items, equipment, or load?** Yes, as long as the items, equipment or load have been properly secured; provided that, no equipment or load may be carried in or on the pilot/escort vehicle that:

(a) Exceeds the height, length, or width of the pilot/escort vehicle, or overhangs the vehicle, or otherwise impairs its immediate recognition as a pilot/escort vehicle by the traveling public;

(b) Obstructs the view of the flashing or rotating amber lights, or "OVERSIZE LOAD" sign on the vehicle;

(c) Causes safety risks; or

(d) Otherwise impairs the performance by the operator or the pilot/escort vehicle of the duties required by these rules.

**(13) Can a pilot/escort vehicle escort more than one extra-legal load at the same time?** No, unless the department determines there are special circumstances that have resulted in an express authorization on the special permit.

**(14) When and how must a pilot/escort vehicle use a height-measuring device?** The height-measuring device (pole) must be used when escorting an extra-legal load in

excess of fourteen feet six inches high, unless an alternative authorization has been granted by the department and stated on the special permit. The height pole must extend between three and six inches above the maximum height of the extra-legal vehicle, or load, to compensate for the affect of wind and motion. The height measuring device (pole) shall be mounted on the front of the lead pilot/escort vehicle. When not in the act of escorting an extra-legal height move, or pre-running a route to determine height acceptance, the height pole shall be removed, tied down or otherwise reduced to legal height.

**(15) Do the rules change when a uniformed off-duty law enforcement officer, using official police car or motorcycle, performs the escorting function?** While the spirit of the rules remains the same, specific rules may be modified to fit the situation.

**(16) Are certified pilot/escort vehicle operators required to have commercial auto insurance? Yes, for hire certified pilot/escort vehicle operators are required to have insurance to conduct the duties associated to this rule:**

(a) One hundred thousand dollars for bodily injury to or death of one person in any one accident;

(b) Three hundred thousand dollars for bodily injury to or death of two or more persons in any one accident; and

(c) Fifty thousand dollars for damage to or destruction of property of others in any one accident.

Satisfactory evidence of the insurance shall be carried at all times by the operator of the pilot vehicle, which evidence shall be displayed upon request by a law enforcement officer.

## WSR 18-13-031

### PERMANENT RULES

### DEPARTMENT OF TRANSPORTATION

(Public Transportation Division)

[Filed June 11, 2018, 11:32 a.m., effective June 11, 2018]

Effective Date of Rule: June 11, 2018.

Purpose: To update chapter 468-550 WAC, Safety oversight of rail fixed guideway system rules, to meet the new federal requirements identified in 49 U.S.C. § 5329 Public Transportation Safety Program and further identified in 49 C.F.R. Part 674 State Safety Oversight.

The agency finds that an earlier effective date is required by federal statute. Specifically, 49 U.S.C. § 5329 (e)(3) requires the state to have in effect a state safety oversight program approved by the United States Secretary of Transportation no later than three years after the date on which 49 C.F.R. Part 674 becomes effective, that is, no later than April 15, 2019. The agency finds that this rule must become effective without delay in order to facilitate compliance with 49 U.S.C. § 5329 (e)(3) and provide the secretary with adequate time to review and approve the agency's state safety oversight program by the deadline. Accordingly, this rule shall become effective immediately upon filing with the code reviser. RCW 34.05.380 (3)(a).

Citation of Rules Affected by this Order: New WAC 468-550-015, 468-550-061, 468-550-062, 468-550-063, 468-550-100 and 468-550-110; and amending WAC 468-550-

010, 468-550-020, 468-550-030, 468-550-040, 468-550-050, 468-550-060, 468-550-070, 468-550-080, and 468-550-090.

Statutory Authority for Adoption: RCW 81.104.115.

Other Authority: 49 U.S.C. § 5329 Public Transportation Safety Program and further identified in 49 C.F.R. Part 674 State Safety Oversight.

Adopted under notice filed as WSR 18-10-009 on April 20, 2018.

Number of Sections Adopted in Order to Comply with Federal Statute: New 6, Amended 9, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at the Request of a Non-governmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's own Initiative: New 0, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: June 11, 2018.

Kara Larsen, Director  
Risk Management and  
Legal Services Division

AMENDATORY SECTION (Amending WSR 08-15-078, filed 7/15/08, effective 8/15/08)

**WAC 468-550-010 Purpose.** This chapter is adopted to comply with 49 C.F.R. Part ((659)) 674 and RCW 81.104.115, which requires the state of Washington to oversee the ((system)) agency safety program ((and the security and emergency preparedness plans)) of rail fixed guideway ((systems (RFGS) not regulated by the Federal Railroad Administration)) public transportation systems (RFGPTS) as defined in 49 C.F.R. Part 674.7. These rules prescribe the ((system)) safety ((and security)) criteria to be met by ((RFGS)) RFGPTS and are intended to improve the safety ((and security of RFGS)) of RFGPTS in Washington state. 49 C.F.R. Part 674.11c and Part 674.13a require the establishment of a state safety oversight agency (SSOA) in accordance with the requirements of 49 U.S.C. 5329c and 5329c(3)c. The Washington state department of transportation was designated in 1997 by Governor Gary Locke as the SSOA for the state of Washington. WSDOT's designation and authority as the SSOA is codified in RCW 81.104.115 and more recently in chapter 33, Laws of 2016 (Senate Bill 6358).

#### NEW SECTION

**WAC 468-550-015 Effective date.** These rules are necessary to comply with C.F.R. Part 674 and take effect upon filing with the code reviser for emergency rule making per the requirements outlined in RCW 34.05.350.

AMENDATORY SECTION (Amending WSR 08-15-078, filed 7/15/08, effective 8/15/08)

**WAC 468-550-020 Applicability.** These rules are applicable to all Washington state entities, public or private, which own, operate, or maintain ((RFGS that are not regulated by the Federal Railroad Administration)) RFGPTS as defined in 49 C.F.R. Part 674.7.

These rules apply to all owners of rail fixed guideway public transportation systems, as defined by ((RCW 81.104.015)) 49 C.F.R. Part 674, which are required by RCW 81.112.180, 35.21.228, 35A.21.300, 36.01.210, 36.57.120, 36.57A.170, ((or 81.112.180)) 81.104.015 to comply with the requirements of the Washington state department of transportation for the development and implementation of ((a system)) an agency safety program plan ((and a security and emergency preparedness plan)).

AMENDATORY SECTION (Amending WSR 08-15-078, filed 7/15/08, effective 8/15/08)

**WAC 468-550-030 Definitions.** For the purposes of this chapter, the following definitions of terms shall apply unless the context clearly indicates otherwise:

(1) Accident((, reportable)) means ((any)) an event ((involving the operation of a RFGS along a revenue line segment, if as a result:

(a) An individual dies; or

(b) An individual suffers bodily injury and immediately receives medical treatment away from the scene of the accident; or

(c) A collision, derailment, or fire causes property damage in excess of \$25,000.

(2) APTA Guidelines means the American Public Transit Association's "Manual for the Development of Rail Transit System Safety Program Plans."

(3) Chief executive officer means, but is not limited to, the mayor, county executive, or chair of the municipality, or corporate president of the public or private entity that owns, operates, or maintains a RFGS.

(4) Contractor means an entity that performs tasks required by this chapter on behalf of the department or a RFGS.

(5) that involves any of the following: A report of a serious injury to a person; a collision involving a rail transit vehicle; a runaway train; an evacuation for life safety reasons; or any derailment of a rail transit vehicle, at any location, at any time, whatever the cause.

(2) Accountable executive means a single, identifiable person who has ultimate responsibility for carrying out the safety management system of a public transportation agency; responsibility for carrying out the agency's transit asset management plan; and control or direction over the human and capital resources needed to develop and maintain both the agency's public transportation agency safety plan in accordance with 49 U.S.C. 5329(d) and the agency's transit asset management plan in accordance with 49 U.S.C. 5326.

(3) Agency means any entity that provides rail fixed guideway public transportation services.

(4) Agency safety plan is a document developed and implemented for each rail fixed guideway system, which

describes its safety policies, objectives, responsibilities, and procedures. The requirements for this plan are established by the Federal Transit Administration in C.F.R. 49 Part 674 and further by the Washington state rail safety oversight program standard.

(5) APTA guidelines means the American Public Transit Association's Manual for the Development of Rail Transit System Safety Program Plans.

(6) Collision means a vehicle/vessel accident in which there is an impact of a transit vehicle/vessel with:

- Another transit vehicle;
- A nontransit vehicle;
- A fixed object;
- A person(s) (suicide/attempted suicide included);
- An animal;
- A rail vehicle;
- A vessel;
- A dock.

(7) Contractor means an entity that performs tasks required by this chapter on behalf of the department or a RFGPTS.

(8) Department means the Washington state department of transportation, which has been designated as the state safety oversight agency.

~~((6))~~ Directional route mile means the mileage in each direction over which public transportation vehicles travel while in revenue service. Directional route miles are a measure of the route path over a facility or roadway and not the service carried on the facility. Directional route miles are computed with regard to direction of service, but without regard to the number of traffic lanes or rail tracks existing in the right of way. Directional route miles do not include staging or storage areas at the beginning or end of a route.

~~((7))~~ (9) Emergency means a situation which is life-threatening to passengers, employees, or others or which causes damage to any rail fixed guideway vehicle or facility or results in a significant ~~((theft))~~ loss of services which severely affects the ability of the system to fulfill its mission.

~~((8))~~ (10) Evacuation (reportable) is a condition that occurs when persons depart from transit vehicles or facilities for life safety reasons, including self-evacuations for life safety reasons. Evacuations to a location that may put passengers or patrons in imminent danger (such as controlled rail right of way) must also be reported.

(11) Fatality means a death or suicide confirmed within thirty days of a reportable event. Excludes deaths in or on transit property that are a result of illness or other natural causes.

(12) FTA means the Federal Transit Administration, or its successors, an agency within the U.S. Department of Transportation.

~~((9))~~ (13) Hazardous condition means a set of circumstances that if not identified and corrected has or will result in personal injury or property damage. It includes unacceptable hazardous conditions.

~~((10))~~ (14) Incident means an event that involves any of the following: A personal injury that is not a serious injury; one or more injuries requiring medical transport; or damage to facilities, equipment, rolling stock, or infrastructure that disrupts the operations of a rail transit agency.

(15) Incident reporting thresholds are criteria established by Federal Transit Administration in C.F.R. 49 Part ((659)) 674 and further by the Washington state rail safety oversight program standard for determining which accidents/incidents require investigation.

~~((11))~~ (16) Investigation means a procedure that the department or a ((RFGS)) RFGPTS utilizes to determine the cause of a reportable accident, hazardous condition, or security breach.

~~((12))~~ (17) Major system enhancement means any modification to an existing RFGPTS that will significantly impact the operations and maintenance of the system, including opening new stations, system wide modification or replacement of equipment, expanded operations and maintenance facilities, or significant increases to system capacity.

(18) Medical attention means emergency care at a state-licensed general hospital, critical access hospital, or health clinic, or by a religious practitioner.

~~((13))~~ Plan means the system safety program plan and the security and emergency preparedness plan of rail fixed guideway systems not regulated by the Federal Railroad Administration adopted by the RFGS detailing its safety and security policies, objectives, responsibilities and procedures.

~~((14))~~ (19) Procedure means an established and documented method to perform a task.

~~((15))~~ (20) Rail fixed guideway public transportation system or ((RFGS)) "RFGPTS" means ((a light, heavy, or rapid rail system, monorail, inclined plane, funicular, trolley, or other fixed rail guideway component of a high-capacity transportation system that is not regulated by the Federal Railroad Administration or its successor. "RFGS" does not include elevators, moving sidewalks or stairs, and vehicles suspended from aerial cables, unless they are an integral component of a station served by a rail fixed guideway system)) any fixed guideway system that uses rail, is operated for public transportation, is within the jurisdiction of a state, and is not regulated by the Federal Railroad Administration, or its successor. Rail fixed guideway public transportation system (or "RFGPTS") also means any such projects in engineering or construction phases. Rail fixed guideway public transportation systems include, but are not limited to, rapid rail, heavy rail, light rail, monorail, trolley, inclined plane, funicular, and automated guideway.

~~((16))~~ (21) Rail transit agency (RTA) means any city, town, county, transportation authority, public transportation benefit area, regional transit authority, or other agency that owns a RFGPTS and bears ultimate accountability for it.

(22) Revenue line segment means that portion of a fixed guideway system upon, under, or through which a ((RFGS)) RFGPTS provides service available to the ((general)) public. It includes stations used by the system's passengers to enter or leave the ((RFGS's)) RFGPTS's conveyance.

~~((17))~~ Risk means the probability that a security breach will occur.

~~((18))~~ (23) Safety means freedom from danger.

~~((19))~~ Security and emergency preparedness plan or "SEPP" is a document developed and implemented for each rail fixed guideway system which describes its security policies, objectives, responsibilities, and procedures. This plan is a requirement of RCW 81.104.115 and meets the standards

established by the Federal Transit Administration in C.F.R. 49 Part 659 and the Washington state rail safety oversight program.

~~((20))~~ (20) Seasonally means the provision of service available to the general public fewer than a total of one hundred eighty days within a twelve-month period. The provision of service any time on a calendar day is a day counted towards the threshold of one hundred eighty days.

~~((21))~~ (21) Security means freedom from intentional danger.

~~((22))~~ (22) Security breach means an unforeseen event or occurrence that endangers life or property and may result in the loss of services or system equipment.

~~((23))~~ (23) Service available to the general public does not include operations for a specific private function when a RFGS accepts hire, such as group charters, weddings, or other private events that are not available to the general public on a walk-in basis.

~~((24))~~ (24) Standard means the system safety and security program standard which is the standard developed and adopted by the department which complies with the requirements of C.F.R. 49 Part 659.

~~((25))~~ (25) System means a composite of people, property, environment, and procedures which are integrated to perform a specific operational function in a specific environment.

~~((26))~~ (26) System safety program plan or "SSPP" is a document developed and implemented for each rail fixed guideway system which describes its safety policies, objectives, responsibilities, and procedures. The requirements for this plan are established by the Federal Transit Administration in C.F.R. 49 Part 659 and further by the Washington state rail safety oversight program standard.

~~((27))~~ (27) Triennial safety and security audit means a formal, comprehensive, on-site examination by the department of a RFGS's safety and security procedures to determine whether it complies with the RFGS's policies and procedures as outlined in the RFGS's plan.

~~((28))~~ (28) Washington state rail safety oversight program is the program administered by the Washington state department of transportation to ensure compliance by rail fixed guideway systems with the Washington state rail safety oversight program standard.

~~((29))~~ (29) (26) System expansion means any modification to an existing RFGPTS that will increase the distance over which trains can travel in passenger service, including line extensions or new lines.

(27) Washington state rail safety oversight program is the program administered by the Washington state department of transportation to ensure compliance by rail fixed guideway public transportation systems with the Washington state rail safety oversight program standard.

(28) Washington state rail safety oversight program standard is a document developed and adopted by the Washington state department of transportation that describes the policies, objectives, responsibilities, and procedures used to provide safety and security oversight of rail fixed guideway systems. This document is a requirement established by the Federal Transit Administration in C.F.R. 49 Part ~~((659))~~ 674.

~~((30))~~ (30) Unacceptable hazard is a real or potential condition that may endanger human life or property that after an

assessment of its severity and probability cannot remain and must be mitigated.

~~((31))~~ (29) Unacceptable hazardous condition means a hazardous condition classified by the rail transit agency as being unacceptable based on a hazardous resolution matrix or other evaluation methodology approved by the department.

AMENDATORY SECTION (Amending WSR 08-15-078, filed 7/15/08, effective 8/15/08)

**WAC 468-550-040 Requirements for ~~((system safety program plan and security and emergency preparedness plans))~~ agency safety plans.** ~~((1))~~ Each RFGS, except any that operate seasonally, shall prepare a system safety program plan and security and emergency preparedness plans. Such plans shall describe the RFGS's procedures for:

(a) Reporting and investigating reportable accidents and unacceptable hazardous conditions;

(b) Submitting corrective action plans and annual safety and security audit reports;

(c) Facilitating on-site safety and security reviews by the department; and

(d) Addressing passenger and employee security.

The plans and any revisions thereto shall, at a minimum, conform to the standard set forth in WAC 468-550-050, be approved by the RFGS's chief executive officer and submitted for departmental review, or within three months prior to beginning operations or instituting revisions to the plans. The RFGS shall not transmit the security portions of its security and emergency preparedness plan to the department. The RFGS shall notify the department of the location and availability of the security portions of its plan.

(2) Each RFGS shall implement and comply with the provisions of its plans and any revisions thereto. Further, should the RFGS change ownership or operating or maintenance providers, the RFGS shall require its successors, assigns, and contractors to continue to comply with the RFGS's established plans and shall notify the department of any change of ownership or operating or maintenance providers within thirty days of the effective date of transfer or contract.

~~((3))~~ (3) The security section of the security and emergency preparedness plan is exempt from public disclosure under chapter 42.56 RCW. Each RFGS may develop procedures to implement this subsection. Completed reports of reportable accidents and unacceptable hazardous conditions, corrective action plans, annual safety and security audit reports, published reviews of the department, published RFGS internal safety and security audits, and notifications of reportable accidents and unacceptable hazardous conditions are not subject to this exemption.

(4) Each RFGS that operates seasonally shall submit a system description and organization structure to the department within ninety days of commencing operations. Each RFGS shall update this submittal within thirty days after any changes to the system description or organizational structure occur.

(a) The system description shall identify the revenue line segments, revenue equipment, and all locations for embarking or debarking passengers.

(b) The organizational structure shall identify the decision-making structure for the RFGS, including any firm or organization contracted to undertake its seasonal operations.

(c) This submittal shall include safety contact information for the RFGS and any firm or organization contracted to undertake its seasonal operations. (1) Rail transit agencies must establish an agency safety plan that complies with the requirements set forth in the Washington state rail safety oversight program standard, which conforms to current federal regulations for agency safety plans. These requirements include the establishment of an agency safety policy, a safety and risk management program, a safety assurance program, and a safety promotion program.

(2) Agency safety plans must establish the agency procedures for the review and revision of the plan. The filing, submittal, review, and approval of agency safety plans must comply with the standard set forth in WAC 468-550-050.

(3) As described in WAC 468-550-060, agency safety plans are subject to reviews and audits from the Washington state rail safety oversight program and the Federal Transit Administration.

(4) Rail transit agencies must conduct internal audits of agency safety plans per the requirements of WAC 468-550-060.

(5) Agency safety plans must establish procedures for the notification, investigation, and reporting of accidents, incidents, and hazards in conformance with the requirements of WAC 468-550-070.

(6) Agency safety plan policy statements must be approved and signed by the agency's accountable executive. The policy statement must assign responsibility for carrying out the plan to the designated agency accountable executive.

(7) Each RFGPTS shall implement and comply with the provisions of its plans and any revisions thereto. Further, should the RFGPTS experience a change in ownership or a change in operating or maintenance providers, the RFGPTS shall require continued compliance with the RFGPTS's established plans and shall notify the department of any change of ownership or operating or maintenance providers within thirty days of the effective date of transfer or contract.

AMENDATORY SECTION (Amending WSR 08-15-078, filed 7/15/08, effective 8/15/08)

**WAC 468-550-050 ((Department)) Procedures for ((reviewing, approving)) the submittal, review, approval, and filing ((rail fixed guideway system safety program plan and security and emergency preparedness plans and inspections)) of agency safety plans.** (((1)(a) The department shall review each RFGS system safety program plans, and all subsequent revisions, for compliance with these rules and the standard, using the system safety checklist which includes:

- Policy statement and authority for the plan
- Description of purpose for the plan
- Clearly stated goals for plan
- Identifiable and attainable objectives
- System description and organizational structure
- The plan control and update procedures

- Hazard identification and resolution process
- Accidents, hazardous conditions and reporting and investigation procedures
- Internal safety audit process
- Facilities inspections (includes system equipment and rolling stock)
- Maintenance audits and inspections (all systems and facilities)
- Rules and procedures review
- Training and certification reviews and audits
- Emergency response planning, coordination and training
- System modification review and concurrence process
- Safety data acquisition and analysis
- Interdepartmental and interagency coordination
- Configuration management
- Employee safety program
- Hazardous materials program
- Drug abuse and alcohol misuse programs
- Contractor safety coordination
- Procurement

(b) The department shall provide written concurrence with the RFGS's system safety program plan or provide written comments to the RFGS specifying required changes. The RFGS shall revise its plan to incorporate the department's review comments, if any, within sixty days after receipt thereof, and resubmit its revised plan for review. After resolving issues arising in the review process, the department shall notify the RFGS of its concurrence with the plans. The plans and the department's concurrence shall be maintained by the department in a permanent file.

(2)(a) The department shall review RFGS's security and emergency preparedness plan, and all subsequent revisions, for compliance with these rules and the standard, using the WSDOT security and emergency preparedness checklist which includes:

- Policy statement for the plan
- Purpose for the plan
- Clearly stated goals and identifiable and attainable objectives
- Scope of plan and system security program
- Security and law enforcement functions that manage and support plan
- Management authority which oversees the operation and management of the agency
- Interface of the plan with local, state and federal authorities
- Security acronyms and definitions
- Background and history of agency's rail transit services

- Organization charts and lines of authority
- Description of passenger and ridership characteristics
- Description of operations and services including operating environment
- Description of how the plan integrates with other plans including the SSPP
- Current security conditions
- Capabilities and practices
- Identification of person(s) responsible for establishing SEPP policy and developing and approving plan
- Identification of person(s) responsible for the management of the SEPP program
- Listings of the SEPP related responsibilities of individuals working within the security function
- Description of equipment used to support implementation of the plan
- Description of training, exercises, and procedures in place to ensure employee proficiency and readiness
- Description of activities to identify threats and vulnerabilities and to assess their likely impacts
- Response strategies for prioritizing vulnerabilities
- Identification and schedule of tasks to be performed for implementing the plan
- Description of methods for evaluating the effectiveness of the plan
- Process for reviewing and revising the plan and for implementing any revisions

(b) ~~The department shall provide written concurrence with the RFGS's security and emergency preparedness plan or provide written comments to the RFGS specifying required changes. The RFGS shall revise its plan to incorporate the department's review comments, if any, within sixty days after receipt thereof, and resubmit its revised plan for review. After resolving issues arising in the review process, the department shall notify the RFGS of its concurrence with the plan. The plan and the department's concurrence shall be maintained by the department in a permanent file.~~ (1) Agency safety plans must be submitted within three months prior to operations of a new RFGPTS, a system expansion, or a major system enhancement to an existing RFGPTS.

(2) Full compliance and approval of agency safety plans must be obtained in writing from WSDOT prior to commencing RFGPTS operations. The department and the RTA must accelerate review and revision timelines as necessary to ensure agency safety plan approval prior to the RFGPTS start of service date.

(3) The department must review and evaluate plans according to criteria set forth in the Washington state rail safety oversight program standard.

(4) Each calendar year, as part of its annual safety program report submittal, the transit agency must provide the department with documentation of its annual review of the agency's safety plan.

(5) The department shall provide written approval of the RFGPTS's agency safety plan or provide written comments to the RFGPTS specifying required changes. The RFGPTS shall revise its plan to incorporate the department's review comments, if any, within sixty days after receipt thereof, and resubmit its revised plan for review. After resolving issues arising in the review process, the department shall notify the RFGPTS of its concurrence with the plans. The plans and the department's concurrence shall be maintained by the department in a permanent file.

(6) The RFGPTS shall not transmit any security sensitive portions of its plans, as defined by 49 C.F.R. Part 1520. The RFGPTS shall notify the department of the location and availability of any security sensitive information.

(7) Each RFGPTS may develop procedures to implement this subsection. The Washington state rail safety oversight program standard may require these procedures to be included, summarized, or cited in the agency safety plan.

(8) Failure to comply with the requirements established in WAC 468-550-040, 468-550-050, 468-550-060, 468-550-070, and the Washington state rail safety oversight program standard may result in financial or other penalties. Financial or other penalties will be determined in accordance with WAC 468-550-080.

AMENDATORY SECTION (Amending WSR 08-15-078, filed 7/15/08, effective 8/15/08)

**WAC 468-550-060 Annual ~~(and triennial)~~ internal safety ~~(and security)~~ audits and reports.** (1) ~~((a) Each RFGS))~~ Each RFGPTS shall perform scheduled internal safety ~~(and security)~~ audits to evaluate compliance with the Washington state rail safety oversight program standard, to identify hazardous and risk conditions, and ~~((measure the effectiveness of its plans. The RFGS))~~ to verify that it is fully implementing its safety program as described in its plans and procedures. The RFGPTS shall include its internal safety ~~((and security))~~ audit schedule for the ~~((next year with))~~ following year in the annual report as required ~~((in))~~ by WAC 468-550-070(5). These audits shall ~~((include, but are not limited to:~~

(i) Observing work practices and employee performance during system operations;

(ii) Sampling and inspecting selected system components to verify proper maintenance; and

(iii) Reviewing RFGS records for all phases of system operations, maintenance, and security.) determine the level at which the agency has implemented the agency safety plan. Audits may include, but are not limited to, the observation of employees performing system operations and maintenance activities, employee rules compliance checks, the sampling and inspection of selected system components, interviews, and records reviews.

(2) ~~((RFGS))~~ RFGPTS shall select a qualified person(s) or contractor to perform its internal audits and shall notify the department not later than ten days prior to perform-

ing the internal audits. The notification shall include date(s) of audit, what is to be audited, and the qualifications of those selected to perform the audit, such qualifications are subject to departmental concurrence and should describe what relevant experience and/or training qualifies the auditor(s) to conduct these audits. The department may assess the effectiveness of each ((RFGS)) RFGPTS audit program; however, any departmental review or concurrence shall not substitute for the ((RFGS's)) RFGPTS's own safety ((and security)) inspection audit programs, nor relieve the ((RFGS)) RFGPTS from its ((sole liability)) responsibility for the safety ((and security)) of its system.

~~((b)) Each RFGS, as a basis for its audit process, shall prepare, maintain, and make available for departmental review records that document the results of all tests, inspections, and audits conducted by the RFGS or its contractor in compliance with the plans. These records shall include, but are not limited to:~~

- ~~(i) Start-up test records;~~
- ~~(ii) Drug and alcohol test records;~~
- ~~(iii) Training and certification records;~~
- ~~(iv) Operation performance evaluation records;~~
- ~~(v) Facility inspections;~~
- ~~(vi) Maintenance audits and inspections (all systems and facilities);~~
- ~~(vii) Rules and procedures review;~~
- ~~(viii) Emergency response planning, coordination, and training;~~
- ~~(ix) System modification review and approval process;~~
- ~~(x) Safety and security data acquisition and analysis;~~
- ~~(xi) Interdepartmental and interagency coordination;~~
- ~~(xii) Employee safety and security program;~~
- ~~(xiii) Hazardous materials program;~~
- ~~(xiv) Contractor safety coordination; and~~
- ~~(xv) Procurement records.~~

~~These records shall be maintained by the RFGS for a minimum of three years.~~

~~((2)) (3) Where the agency is not fully implementing its agency safety plan, or is not implementing its safety program in accordance with the agency safety plan, the agency must clearly identify deficiencies in its audit report, per the requirements of Washington state rail safety oversight program standard.~~

~~(4) Each RFGPTS shall prepare, maintain, and make available for departmental review, records that document the results of all tests, inspections, and audits conducted by the RFGPTS or its contractor in compliance with the plans. These records shall be maintained by the RFGPTS for a minimum of three years. Failure to provide the department with audit reports and associated records and documentation may result in financial or other penalties as described in WAC 468-550-080.~~

~~(5) Internal safety ((and security)) audits shall be documented in an annual report that includes the dates the audits were conducted, the scope of the audit activity, the audit findings and recommendations, the status of any corrective actions taken as a result of the audit activity and the results of each audit in terms of the adequacy and effectiveness of the plan. This annual report for the internal safety ((and security)) audits performed during the preceding year shall be~~

included with the annual safety report ((required)) specified in WAC ((468-550-070(5))) 468-550-100.

~~((3)) (6) The department ((shall audit each RFGS plan at least once every three years. The RFGS shall be given written notification at least thirty days in advance of the department's audit. The notification shall include a proposed schedule, planned scope, and list of activities to be reviewed for the audit. Each audit shall be preceded by an on-site, preaudit conference attended by the department's audit team, the RFGS's owner, and the RFGS staff in charge of the activities subject to audit. Each audit shall be conducted in accordance with an audit checklist. Checklists shall not restrict the department from performing additional investigations as it deems appropriate. The department shall use as a basis for its checklist the RFGS's plan and records which shall include, but are not limited to:~~

- ~~(a) The RFGS operating rule book, bulletins, and procedures;~~
- ~~(b) The RFGS maintenance manuals and procedures for vehicles, track and signals;~~
- ~~(c) The RFGS procedures for identifying, documenting, evaluating, and correcting hazards;~~
- ~~(d) The RFGS system design criteria and project engineering procedures for system modifications;~~
- ~~(e) The RFGS annual internal audit reports for the previous three years;~~
- ~~(f) The RFGS corrective action plans for reportable accidents and unacceptable hazardous conditions reported to the department during the previous three years;~~
- ~~(g) APTA audit reports;~~
- ~~(h) National Transportation Safety Board accident investigation reports, and any other agency peer review reports, if any, prepared during the previous three years and previously prepared department audit reports.~~

~~(4) Upon the department's completion of the triennial on-site audit, the audit team leader shall prepare a draft final audit report and submit it to the RFGS. The RFGS shall respond, in writing to the recommendations made in the draft final audit report, with a plan and schedule of corrective actions within thirty days of receipt thereof. An on-site, post audit conference shall be held following each departmental audit to review the results of the audit. Audit results that identify a deficiency that is not corrected before the post audit conference is held shall be documented in the final audit report. The final audit report shall contain the department audit team's findings and recommendations and the RFGS plan and schedule for corrective action. The final audit report shall also include the department audit team's evaluation of the effectiveness of the RFGS plan and a determination of whether the plan should be updated.~~

~~(5) The department shall summarize oversight activities for all RFGS performed during the preceding twelve months in a publicly available annual report and submit it to the FTA before March 15 of each year.~~

~~(6) Each RFGS that operates seasonally shall be exempt from the provisions of this section)) may conduct an independent investigation of the agency's audit program or of specific deficiencies and findings identified by the RFGPTS internal safety audits.~~

NEW SECTION

**WAC 468-550-061 Triennial safety program audits conducted by the department.** (1) The department shall audit each RFGPTS's compliance with the agency safety plan at least once every three years in accordance with the requirements of the Washington state rail safety oversight program standard. The RFGPTS shall be given written notification of the audit scope and schedule at least thirty days in advance of the department's audit. Each audit shall be conducted in accordance with an audit checklist. Documentation which may be requested by the department as part of the audit includes, but is not limited to:

- (a) The RFGPTS operating rule book, bulletins, and procedures;
- (b) Operations and maintenance logs and records;
- (c) The RFGPTS maintenance manuals and procedures for vehicles, facilities, track and signals;
- (d) The RFGPTS procedures for identifying, documenting, evaluating, and correcting hazards;
- (e) The RFGPTS system design criteria and project engineering procedures for system modifications;
- (f) The RFGPTS annual internal audit reports for the previous three years;
- (g) The RFGPTS corrective action plans for reportable accidents and unacceptable hazardous conditions reported to the department during the previous three years;
- (h) APTA audit reports;
- (i) National Transportation Safety Board accident investigation reports, Federal Transit Agency investigation or audit reports, or peer review reports, if any, prepared during the previous three years.

(2) Upon the department's completion of the on-site portion of the triennial safety program audit, the audit team leader shall issue a final audit report following the process established in the Washington state rail safety oversight program standard. The final audit report shall contain the department audit team's findings and recommendations. The final audit report shall also include the department audit team's evaluation of the RFGPTS agency safety plan's compliance with the Washington state rail safety oversight program standard and a determination of whether it should be updated. The RFGPTS must address all findings and recommendations identified in the final report by following the requirements set forth in the Washington state rail safety oversight program standard.

NEW SECTION

**WAC 468-550-062 Additional external audits conducted on RFGPTS safety programs and plans.** (1) The RFGPTS must notify the department of the schedule and scope for all external audits and investigations which include the review of the agency safety plan, safety programs, safety critical functions, safety certification, transit asset management plan or drug and alcohol program. These include, but are not limited to, audits and investigations to be conducted by the Federal Transit Administration, USDOT, DHS, NTSB, or OSHA. The RFGPTS must notify the department of the schedule and scope at least one week prior to the start of audit activities.

(2) The Federal Transit Administration conducts an audit of WSDOT's state safety oversight program once every three years. The RFGPTS will participate in these audits and provide relevant safety program documentation and records if requested by the Federal Transportation Administration or the department.

NEW SECTION

**WAC 468-550-063 Audits conducted of department's state safety oversight program.** The RFGPTS will provide documentation if requested by auditors or by department personnel in support of external state or federal audits of the department's state safety oversight program. These include, but are not limited to, triennial reviews conducted by the FTA Transit Safety Oversight office of the department's SSO program compliance.

AMENDATORY SECTION (Amending WSR 08-15-078, filed 7/15/08, effective 8/15/08)

**WAC 468-550-070 Notifying of, investigating, and reporting accidents and unacceptable hazardous conditions.** (1) Each ((RFGS)) RFGPTS shall notify the department ((by telephone, electronic mail or facsimile)) per the requirements set forth in the Washington state rail safety oversight program standard within two hours of the occurrence of any reportable accident ((, or within twenty-four hours of the identification or discovery of any unacceptable hazardous condition. The department shall notify each RFGS of the person to notify and the telephone, electronic mail and facsimile numbers for notification. The notification shall include all of the following details:

- (a) Name and title of the person making the notification;
- (b) Time and date the notification is transmitted;
- (c) Synopsis of what happened, such as, but not limited to: Collision with another RFGS revenue vehicle, derailment, collision with a motor vehicle, collision with a pedestrian, collision with a bicyclist, fire, bomb threat, or hostage-taking;
- (d) Specific location of the accident or unacceptable hazardous condition;
- (e) Time of the accident or discovery of the unacceptable hazardous condition;
- (f) Identification of RFGS vehicle(s) and/or facility involved;
- (g) Initial number of fatalities and/or individuals who suffered bodily injury and immediately received medical attention away from the scene of the accident; and
- (h) Description of and preliminary value of property damage.

(2) The department has authority to perform separate, independent investigations of reportable accidents or unacceptable hazardous conditions at its own discretion.

(3) Each RFGS shall investigate all reportable accidents and unacceptable hazardous conditions. The RFGS may use its own staff or a contractor to conduct its investigation and shall designate a staff person to be responsible for submitting written investigation reports and findings to the department, on a department form, within forty five calendar days after the reportable accident or unacceptable hazardous condition was discovered. This report shall identify the causal factors

contributing to the occurrence and contain a corrective action plan with an implementation schedule to prevent a recurrence of the accident, or to mitigate the unacceptable hazardous condition.

(4) The department shall review the RFGS investigation report, corrective action plan, and accompanying implementation schedule to ensure that it meets the goal of preventing and mitigating a recurrence of the reportable accident or unacceptable hazardous condition. In the event that the department does not concur with the findings of the RFGS investigation, the department shall confer with the RFGS of its preliminary review findings. The RFGS may amend its report to the department in writing, within ten calendar days after conferring with the department. If, after conferring with the RFGS, the department does not concur with the findings of the RFGS, the department shall notify the RFGS in writing of its review findings. The RFGS shall submit its response to the department's findings within forty-five calendar days of receipt thereof. Should the department and the RFGS disagree, the department will notify the FTA.

(5) Each RFGS shall submit an annual summary report to the department covering all reportable activities. The RFGS shall ensure delivery of the annual report to the department no later than February 1 after the year being reported).

(2) Each RFGPTS shall notify the Federal Transit Administration (FTA) of reportable hazards, incidents, and accidents per the requirements of 49 C.F.R. 674.33.

(3) Each RFGPTS shall notify the department per the requirements set forth in the Washington state rail safety oversight program standard within two hours of the discovery of any unacceptable hazardous condition.

(4) Each RFGPTS shall notify the department of all other reportable hazards or incidents within the reporting timelines set forth in the Washington state rail safety oversight program standard.

(5) Each RFGPTS shall investigate all reportable accidents and unacceptable hazardous conditions. The RFGPTS may use its own staff or a contractor to conduct its investigation and shall designate a staff person to be responsible for submitting written investigation reports and findings to the department, on a department form, within forty-five calendar days after the reportable accident or unacceptable hazardous condition was discovered. This report shall identify the causal factors contributing to the occurrence and contain a corrective action plan with an implementation schedule to prevent a recurrence of the accident, or to mitigate the unacceptable hazardous condition.

(a) In the event that the RFGPTS does not have all of the data and analysis necessary to complete a final report, the RFGPTS must submit a draft within forty-five days that documents progress to date.

(b) Under no circumstance may the final report be submitted more than four months from the date of the incident.

(c) The department shall review the RFGPTS final investigation report, corrective action plan, and accompanying implementation schedule to ensure that it meets the goal of preventing and mitigating a recurrence of the reportable accident or unacceptable hazardous condition.

(d) In the event that the department does not concur with the findings of the RFGPTS investigation, the corrective

action plan, or the implementation schedule, the department shall take the following actions:

(i) Within forty-five calendar days of receipt of the investigation report, confer with the RFGPTS about its preliminary review findings and explain what needs to be changed;

(ii) If the RFGPTS agrees with the department's recommendations, then the RFGPTS shall amend its report to the department in writing within ten calendar days. This then follows the normal WSDOT approval process;

(iii) If the RFGPTS does not agree with the department's recommendations, then it must submit its concerns and issues in writing within ten days to the department. The department shall submit the plan to the FTA transit safety oversight office for their review. The FTA shall make the final determination.

(6) The department has authority to perform separate, independent investigations of reportable accidents or unacceptable hazardous conditions at its own discretion.

(a) WSDOT at its discretion may choose to conduct an independent investigation of any accident meeting the thresholds specified in WSDOT SSO program standard utilizing its own personnel or an authorized contractor.

(b) WSDOT may initiate its own investigation at any time prior to adopting the RTA's accident investigation report. WSDOT will inform the RTA of its intention to conduct an independent investigation in advance of beginning investigation activities on RTA facilities and infrastructure or involving interviews with RTA personnel. WSDOT will advise the RTA of the personnel who will be conducting the independent investigation, and provide a preliminary schedule of the investigation process prior to the start of investigation activities.

(c) All WSDOT authorized accident investigation personnel, including consultants hired for the purpose of conducting an accident investigation, are granted authority under the state safety oversight program to do all things reasonable and necessary to conduct their investigation including, but not limited to, entering RTA facilities, accident scenes, and other relevant locations; examining the property, vehicles, and records of the RTA; interviewing RTA personnel; and evaluating records, materials, data, analysis, and other information which is pertinent to the investigation. It is expected that the RTA will provide the WSDOT investigation team the resources and information necessary to conduct the investigation in an effective and efficient fashion.

(7) All reportable accidents and hazards must be included in an annual safety program summary report to the department per WAC 468-550-100.

AMENDATORY SECTION (Amending WSR 08-15-078, filed 7/15/08, effective 8/15/08)

**WAC 468-550-080 Notifying of and applying financial penalties.** ((1) The due dates for documentation required herein are specified in (a) through (e) of this subsection. The department shall provide a RFGS a written notification of the required due date no later than one month before the applicable due date.

(a) System safety program plan and security and emergency preparedness plan within three months prior to beginning operations;

(b) Internal safety and security audit schedule for the next year by February 1;

(c) Annual report for the internal safety and security audits performed during the preceding year by February 1;

(d) Annual summary report to the department covering all reportable occurrences by February 1;

(e) Written investigation reports and findings within forty-five calendar days after a reportable accident occurred, or unacceptable hazardous condition was discovered.

(2) If any RFGS notified by the department fails to deliver the required documentation by the due date specified in subsection (1) of this section, the department shall schedule a meeting with the director responsible for the RFGS's operations and maintenance to discuss the RFGS's progress in completing the documentation and the potential consequences of further delay. In scheduling this meeting, the department shall notify the RFGS's chief executive officer of the purpose of the meeting and its time and location. The department shall attempt to schedule the meeting within one week of the specified due date.

(a) The department may cancel this meeting if the department receives the required documentation prior to the scheduled meeting.

(b) The department may defer scheduling the meeting in the event of a catastrophic event affecting the RFGS and its ability to conduct routine business.

(c) The department shall document the results of the meeting in writing to the director responsible for the RFGS's operations and maintenance and the RFGS's chief executive officer within one week of the meeting.

(d) Should the department determine that there is no reasonable cause for any further delay by the RFGS for submission of its required documentation, the department shall notify the RFGS's chief executive officer of the applicable financial penalty, as defined in subsection (5) of this section.

(e) If the department receives no further communication from the RFGS within ten calendar days of the notification made in accord with (d) of this subsection, the department shall proceed to notify FTA of the RFGS's failure to supply the required documentation and to apply the appropriate financial penalty in accord with subsection (5) of this section.

(3) If any RFGS delivers incomplete documentation by the required due date, the department shall notify the RFGS of any deficiency within one week. The RFGS shall supplement its required documentation within one week after receiving the department's notification. If the RFGS fails to supplement its documentation adequately, the department shall proceed to schedule a meeting and follow the procedures in subsection (2) of this section.

(4) If any RFGS fails to implement a corrective action plan, according to the implementation schedule developed pursuant to WAC 468-550-070(4), to prevent a recurrence of an accident or to mitigate an unacceptable hazardous condition, the department shall schedule a meeting with the director responsible for the RFGS's operations and maintenance to discuss the RFGS's progress in completing the corrective action plan and the potential consequences of further delay.

(a) The department may cancel this meeting if the department receives the required documentation prior to the scheduled meeting.

(b) The department may defer scheduling the meeting in the event of a catastrophic event affecting the RFGS and its ability to conduct routine business.

(c) The department shall document the results of the meeting in writing to the director responsible for the RFGS's operations and maintenance within one week of the meeting.

(d) Should the department determine that there is no reasonable cause for a RFGS's failure to implement the corrective action plan, the department shall notify the RFGS's chief executive officer that the department intends to notify FTA of the RFGS's noncompliance.

(e) If the department receives no further communication from the RFGS within ten calendar days of the notification made in accord with (d) of this subsection, the department shall notify FTA of the RFGS's failure to implement a corrective action plan.

(f) This subsection shall apply also to a corrective action plan upon which the department and the RFGS disagree. In this situation, the department shall use the corrective action plan and implementation schedule proposed by the RFGS.

(5) Any RFGS that fails to comply with the timelines as set forth in this chapter shall be assessed the financial penalties following:

(a) One thousand five hundred dollars for each calendar month two months prior to beginning operations, for failure to deliver to the department an acceptable system safety and security program plan;

(b) Five hundred dollars for each calendar month, beginning with February, for failure to deliver to the department an acceptable:

(i) Internal safety and security audit schedule for the next year;

(ii) Annual report for the internal safety and security audits performed during the preceding year; or

(iii) Annual summary report to the department covering all reportable occurrences; and

(c) One thousand dollars applied each thirty-day period, beginning the 90th day after a reportable accident occurred, or after an unacceptable hazardous condition was discovered for failure to deliver to the department an acceptable investigation report, corrective action plan, and accompanying implementation schedule.

(6) If FTA notifies the department that it will impose a financial penalty on the state of Washington as a consequence of a RFGS's failure to take appropriate action in a safety or security situation, the department shall:

(a) Notify that RFGS's chief executive officer that the department will impose all FTA financial penalties to that RFGS if the RFGS fails to take adequate action to bring itself into compliance to FTA's satisfaction. Said notice shall include a copy of FTA's written communication and an estimate of FTA's financial penalty.

(b) Recommend steps to the RFGS' chief executive officer that the RFGS should take to bring it into compliance with FTA requirements.

(7) Any RFGS notified by the department of its failure to take appropriate action in a safety or security situation shall

take immediate and adequate action to bring itself into compliance to FTA's satisfaction and provide adequate documentation to the department of its corrective measures. The department shall provide that documentation to FTA.

(8) If any RFGS notified by the department of its failure to take appropriate action in a safety or security situation also fails to respond to the department and FTA imposes a financial penalty on the state of Washington as a consequence, the department shall apply the full amount of the financial penalty on the RFGS.

(9) In applying any financial penalty, the department shall take the following steps:

(a) Invoice the RFGS for the amount of financial penalty; the invoice shall identify:

(i) The documentation not received by the specified due date;

(ii) The number of calendar months or, for failure to deliver to the department an acceptable investigation report, corrective action plan, and accompanying implementation schedule, thirty-day periods past the specified due date;

(iii) The applicable financial penalty rate per calendar month or, for failure to deliver to the department an acceptable investigation report, corrective action plan, and accompanying implementation schedule, thirty-day periods; and

(iv) Where payment should be made.

(b) If a RFGS fails to remit the full amount of the imposed financial penalty within sixty days of when due, the department may seek judicial enforcement to recover full payment. Venue for any action hereunder shall be Thurston County.) (1) If any RFGPTS fails to comply with any of the requirements or due dates specified in the Washington state rail safety oversight program standard, the department shall notify the RFGPTS in writing of such a violation. These violations will be designated by the department to be one or more findings of noncompliance.

(2) The RFGPTS will have fifteen calendar days to respond to this notification with:

(a) Documentation and records of corrective actions taken, for department review, that fully address the violations and findings of noncompliance; or

(b) Justification for its failure to comply or to provide the required records. The justification must include records of all supporting documentation, corrective actions taken, and all other mitigation plans proposed, planned or implemented with intent to address the violation.

(3) Within thirty days of receipt of the RFGPTS response, the department will review and issue one of the following determinations:

(a) Determination of compliance - Where the department determines that violations have been fully addressed and non-compliance findings can be closed.

(b) Determination of noncompliance with exception - Where the department determines that the RFGPTS has taken action to address violations and has a corrective action plan, acceptable in scope and schedule, in place to come into compliance.

(c) The department may establish a new deadline by which the corrective action plan addressing violations must be fully implemented. Failure by the RFGPTS to meet this

new deadline may result in the issuance of a determination of noncompliance.

(d) Determination of noncompliance - Where the department determines that violations have not been adequately addressed by the RFGPTS and there is an absence of acceptable corrective actions taken and/or of acceptable scope and schedule of corrective actions to be taken.

(4) Where, the department issues a determination of non-compliance, the department may issue a second and final notification in writing that states a new deadline by which a financial penalty will be imposed if noncompliance findings cannot be addressed. The amount of the financial penalty will be stated in the written notification. If more than one finding of noncompliance exists, more than one financial penalty may be imposed. Financial penalties will be as follows:

(a) The department may issue a financial penalty of ten thousand dollars for each determination of noncompliance.

(b) Thirty days following the issuance of a financial penalty, the department will determine if the status of the violation remains in noncompliance status. This determination will be based on a review of all additional submittals and actions taken by the RFGPTS. If the status has not been changed to determination of compliance or determination of noncompliance with exception, the department may impose an additional financial penalty of ten thousand dollars per finding of noncompliance.

(c) Following each subsequent thirty-day period, the department will review all additional submittals and actions and impose an additional financial penalty of ten thousand dollars until the determination is reduced to either a finding of noncompliance with exception or a finding of compliance.

(d) If a RFGPTS fails to remit the full amount of the imposed financial penalty within sixty days of when due, the department may seek judicial enforcement to recover full payment. Venue for any action hereunder shall be Thurston County.

(5) Additionally, following any issuance by the department of a determination of noncompliance or of inadequate progress in addressing it, the department may require a meeting with the director responsible for the RFGPTS's operations and maintenance, or with the agency's chief executive, to discuss the RFGPTS's progress in completing the documentation and the potential consequences of delay.

AMENDATORY SECTION (Amending WSR 08-15-078, filed 7/15/08, effective 8/15/08)

**WAC 468-550-090 ((Reimbursement for costs associated with the management of the rail safety oversight program.)) Suspension of service, modification of service, or the removal of equipment due to failure to mitigate to hazardous conditions. (((+)) Owners of rail fixed guideway systems shall reimburse WSDOT for costs incurred for its management of the Washington state rail safety oversight program. These reimbursable costs can be grouped as follows:**

(a) ~~Costs for conducting triennial safety and security audits.~~

(b) ~~Costs for WSDOT staff and/or consultants to conduct investigations of incidents or unacceptable hazards, as necessary.~~

(c) Labor, administrative, and travel costs incurred by WSDOT for its administration of the Washington state rail safety oversight program. These include but are not limited to:

(i) Staff hours dedicated to the oversight of system safety program plan and security and emergency preparedness plan development and implementation.

(ii) Office support and supplies necessary to carry out this oversight.

(iii) Travel and labor costs associated with WSDOT's administration of the program including for the attendance at federal and state safety, security, and emergency preparedness conferences, workshops, meetings, and trainings which enhance WSDOT oversight of system safety program plan and security and emergency preparedness plan development and implementation.

(2) Triennial safety and security audits. Within ninety days after receipt of an invoice, each RFGS shall reimburse the reasonable expenses of the department in carrying out its responsibilities pursuant to WAC 468-550-060. The department shall notify the RFGS of the estimated expenses at least six months in advance of when the department audits the system.

(3) Investigations of incidents or unacceptable hazards. WSDOT at its discretion may choose to conduct an independent investigation of unacceptable hazards or incidents given that they meet the incident reporting thresholds established in the Washington state safety program standard. Costs associated with these investigations are to be reimbursed in full by the owners of the rail fixed guideway systems being investigated. This includes the cost of hiring consultants to conduct investigations, if determined necessary by WSDOT.

(4) Administrative costs. All other reimbursable costs of the Washington state rail safety oversight program are allocated to each rail fixed guideway system owner based on a formula. This formula allocates the total of all reimbursable costs for the management of the program to each rail fixed guideway system. The owners of the rail fixed guideway systems are responsible for the reimbursement of costs allocated to each rail fixed guideway system for which they own. The allocation of such reimbursable costs is determined as follows:

(a) Fifty percent of all reimbursable costs, except those for investigations of unacceptable hazards or incidents, are allocated in equal share among rail fixed guideway systems. This allocation of reimbursable costs is equal among rail fixed guideway systems, regardless of the number of passengers they carry or the length of their system. The amount of all such reimbursable costs is arrived at by dividing all such reimbursable costs by the number of RFGS, and then multiplying that result by fifty percent or  $(\text{reimbursable costs}/\text{number of RFGS}) \times \text{fifty percent}$ .

(b) Fifty percent of all reimbursable costs, excluding those for investigations of unacceptable hazards or incidents, are allocated based on route mileage that is funded, obligated, and/or operational. These reimbursable costs are allocated to rail fixed guideway systems based on their share of the total directional route miles falling under the oversight of the Washington state rail safety oversight program. The owners of the rail fixed guideway systems are responsible for the

reimbursement costs allocated to each rail fixed guideway system for which they own. The amount of all such reimbursable costs is arrived at by dividing the RFGS's route miles by total route miles, and then multiplying that result by the product of reimbursable costs multiplied by fifty percent or  $(\text{RFGS route miles}/\text{total route miles}) \times (\text{reimbursable costs} \times \text{fifty percent})$ .

(e) The total allocation of reimbursable costs to owners of rail fixed guideway systems is the total of the fifty percent of costs allocated based on an equal share allocation, and the fifty percent allocated based on directional route miles.

(d) WSDOT will provide monthly invoices to owners of rail fixed guideway systems for the reimbursement of costs described above.) When a known unacceptable hazardous condition is not mitigated to an acceptable level by RFGPTS owners or operators, the department may require the suspension or modification of service or the suspended use or removal of equipment. The department may impose sanctions per WAC 468-550-080 upon owners or operators of RFGPTS for failure to meet deadlines of submissions of required reports and audits.

#### NEW SECTION

##### **WAC 468-550-100 Safety program annual report. (1)**

Per the requirements of the Washington state rail safety oversight program standard, the RFGPTS will prepare and submit to the department a safety program annual report which summarizes the agency's safety program activities during the most recent calendar year, including a summary of accidents, incidents, hazards, and internal safety program audits.

(2) The annual safety program annual report must be submitted to the department on or before February 15th of each year.

#### NEW SECTION

##### **WAC 468-550-110 Special provisions for rail fixed guideway public transportation systems crossing state lines and operating in both Washington and a bordering state. (1)**

When a RFGPTS crosses state lines and is operating in Washington and a bordering state, the department will comply with the requirements set forth in 49 C.F.R. Part 674.15 for the designation of an oversight agency for a multistate system. The department will coordinate with the neighboring state SSOA and either ensure that both Washington's SSOA and the bordering state's SSOA are implementing uniform safety standards and requirements upon the RFGPTS (674.15a) or that a single SSOA is designated as the SSOA (674.15b).

(2) Where a bordering state agency is serving as the single entity SSOA, the bordering state's program standard and other safety standards and procedures will be used for oversight of the RFGPTS, unless otherwise stated through agreement or law. The Washington state rail safety oversight program standard will continue to apply to all other RFGPTS within Washington not subject to the special provisions of this section.

(3) An agreement will be established with the bordering state to set coordination of oversight duties and reporting for the RFGPTS subject to the program standard of a bordering

state. The agreement must address the allocation of costs between the two states.

**WSR 18-13-053**  
**PERMANENT RULES**  
**SOUTHWEST CLEAN**  
**AIR AGENCY**

[Filed June 13, 2018, 11:57 a.m., effective July 14, 2018]

Effective Date of Rule: Thirty-one days after filing.

Purpose: SWCAA 476-030 Definitions. The proposed rule change adds additional definitions necessary for implementation and updates existing definitions.

SWCAA 476-040 Asbestos Survey Requirements. The proposed rule change clarifies and updates existing asbestos inspection and sampling procedures, adds alternate inspection and sampling procedures, and adds asbestos inspection reporting requirements to require detailed inspection information, as well as details of identified asbestos-containing materials.

SWCAA 476-050 Notification Requirements and Fees. The proposed rule change reduces the required notification period from ten business days to ten calendar days for both the Notice of Intent to Remove Asbestos and Notification of Demolition, adds abandoned asbestos-containing materials procedures, and adds State of Emergency procedures for storms, floods, or other disasters. Minor clarifications and updates will be made to existing language.

SWCAA 476-060 Procedures for Asbestos Emission Control. The proposed rule change adds a provision for storage of asbestos-containing materials in a leak tight container. Minor clarifications and updates will be made to existing language.

SWCAA 476-070 Disposal of Asbestos-Containing Waste Material. The proposed rule change adds waste tracking requirements for the disposal of any asbestos-containing waste materials. Minor clarifications and updates will be made to existing language.

SWCAA 476-080 Demolition By Intentional Burning. The proposed rule change increases the notification period for fire training burns from five calendar days to ten calendar days. Minor clarifications and updates will be made to existing language.

Citation of Rules Affected by this Order: Amending SWCAA 476-030, 476-040, 476-050, 476-060, 476-070, 476-080.

Statutory Authority for Adoption: RCW 70.94.141.

Adopted under notice filed as WSR 18-06-094 on March 6, 2018.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at the Request of a Non-governmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's own Initiative: New 0, Amended 6, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 6, Repealed 0.

Number of Sections Adopted using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: June 7, 2018.

Uri Papish  
Executive Director

**Reviser's note:** The material contained in this filing exceeded the page-count limitations of WAC 1-21-040 for appearance in this issue of the Register. It will appear in the 18-14 issue of the Register.

**WSR 18-13-057**  
**PERMANENT RULES**  
**CRIMINAL JUSTICE**  
**TRAINING COMMISSION**

[Filed June 14, 2018, 8:18 a.m., effective July 15, 2018]

Effective Date of Rule: Thirty-one days after filing.

Purpose: WAC 139-05-300 identifies the minimum in-service training requirements for certified and reserve peace officers. The addition of this language will add the online crisis intervention, two-hour course as one of the mandated courses as per RCW 43.101.427.

Citation of Rules Affected by this Order: Amending 2 [WAC 139-05-300 (1)(e) and (2)(d)].

Statutory Authority for Adoption: RCW 43.101.080.

Other Authority: SB 6145.

Adopted under notice filed as WSR 18-05-096 on February 21, 2018.

Changes Other than Editing from Proposed to Adopted Version: WAC 139-05-300 identifies the minimum in-service training requirements for certified and reserve peace officers. The addition of this language will add the online crisis intervention, two-hour course as one of the mandated courses as per RCW 43.101.427.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at the Request of a Non-governmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's own Initiative: New 0, Amended 1, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 2 [1], Repealed 0.

Date Adopted: June 13, 2018.

Sonja Peterson  
Rules Coordinator

AMENDATORY SECTION (Amending WSR 16-19-040, filed 9/14/16, effective 10/15/16)

**WAC 139-05-300 Requirement for in-service training.** The commission recognizes that continuing education and training is the cornerstone for a successful career as a peace officer in providing competent public safety services to the communities of Washington state.

(1) Effective January 1, 2006, every peace officer certified under RCW 43.101.095 or 43.101.157 will complete a minimum of twenty-four hours of in-service training annually.

(a) This requirement is effective January 1, 2006, for incumbent officers.

(b) The in-service training requirement for each newly hired officer must begin on January 1st of the calendar year following their certification as a result of successful completion of the basic law enforcement academy, equivalency academy, or approved waiver as provided by WAC 139-03-030.

(c) Training may be developed and provided by the employer or other training resources.

(d) The commission will publish guidelines for approved in-service training.

(e) As of July 1, 2018, the twenty-four hours must include the successful completion of the training commission's two-hour annual online crisis intervention course prescribed under RCW 43.101.427.

(2) Effective January 1, 2016, every reserve peace officer as defined by WAC 139-05-810 will complete a minimum of twenty-four hours of in-service training annually.

(a) The in-service training requirement for each newly appointed reserve peace officer/tribal peace officer must begin on January 1st of the calendar year following their appointment as a result of successful completion of the basic reserve law enforcement academy, basic reserve academy equivalency process, or approved waiver as provided by WAC 139-03-030.

(b) Training may be developed and provided by the employer or other training resources.

(c) The commission will publish guidelines for approved in-service training.

(d) As of July 1, 2018, the twenty-four hours must include the successful completion of the training commission's two-hour annual online crisis intervention course prescribed under RCW 43.101.427.

(3) All records for training required for this rule must be maintained by the employing agency and be available for review upon request by an authorized commission representative.

(a) The commission will maintain records of successfully completed commission-registered courses.

(b) Upon request, the commission will furnish a record-keeping template for use by agencies to track training.

(4) The sheriff or chief of an agency may request an extension of three months for peace officers in their employ by notification in writing to the commission, identifying those specific officers.

(a) A sheriff or chief may request a three-month personal extension of the requirement by doing so in writing to the commission.

(b) Written requests submitted under the provision of this subsection must be received by December 1st of the calendar year in question.

(c) The three month extension under this provision provides the individuals named until March 31st to complete the mandated twenty-four hours.

(d) Any training obtained during this three month extension only counts towards the previous year being audited.

(5) The commission auditor may, on a case-by-case basis, grant exceptions for individuals with extenuating circumstances where the employing agency has made every reasonable effort to obtain training for the officer.

**WSR 18-13-058**  
**PERMANENT RULES**  
**CRIMINAL JUSTICE**  
**TRAINING COMMISSION**

[Filed June 14, 2018, 8:24 a.m., effective July 15, 2018]

Effective Date of Rule: Thirty-one days after filing.

Purpose: This criminal records check will ensure that applicants to the basic corrections academy have undergone a search of state and national criminal history records information.

Statutory Authority for Adoption: RCW 43.101.080.

Adopted under notice filed as WSR 18-09-101 on April 18, 2018.

Changes Other than Editing from Proposed to Adopted Version: This criminal records check will ensure that applicants to the basic corrections academy have undergone a search of state and national criminal history records information.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at the Request of a Non-governmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's own Initiative: New 1, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted using Negotiated Rule Making: New 1, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: June 13, 2018.

Sonja Peterson  
Rules Coordinator

NEW SECTION

**WAC 139-10-211 Backgrounding requirement for admission to basic corrections officers academy.** For the purposes of this chapter, it is the responsibility of each sponsoring or applying agency to conduct a complete criminal

records check to include a search of state and national criminal history records information regarding its applicant through the submission of the applicant's fingerprints to an appropriate agency or agencies.

Each application for academy attendance must be accompanied by a written attestation by the applying agency that:

- (1) The criminal records check has been completed; and
- (2) There are no disqualifying convictions.

### WSR 18-13-059

#### PERMANENT RULES CRIMINAL JUSTICE TRAINING COMMISSION

[Filed June 14, 2018, 8:29 a.m., effective July 15, 2018]

Effective Date of Rule: Thirty-one days after filing.

Purpose: RCW 43.101.220 requires corrections employees to complete basic training within six months of hire. This rule will require corrections employees to successfully complete a basic corrections academy within the initial six months of employment.

Statutory Authority for Adoption: RCW 43.101.080.

Adopted under notice filed as WSR 18-09-099 on April 18, 2018.

Changes Other than Editing from Proposed to Adopted Version: RCW 43.101.220 requires corrections employees to complete basic training within six months of hire. This rule will require corrections employees to successfully complete a basic corrections academy within the initial six months of employment.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at the Request of a Non-governmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's own Initiative: New 1, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted using Negotiated Rule Making: New 1, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: June 13, 2018.

Sonja Peterson  
Rules Coordinator

#### NEW SECTION

**WAC 139-10-213 Employment of corrections personnel—Notification to commission.** Upon employment, all counties and municipal corporations of the state of Washington, or any political subdivision thereof, shall immediately notify the commission on a personnel action report form pro-

vided by the commission of each instance where corrections personnel begins continuing and regular employment with that agency. The commission shall maintain these notices in a permanent file, subject to RCW 43.101.400.

### WSR 18-13-060

#### PERMANENT RULES SUPERINTENDENT OF PUBLIC INSTRUCTION

[Filed June 14, 2018, 8:32 a.m., effective July 15, 2018]

Effective Date of Rule: Thirty-one days after filing.

Purpose: The purpose of these amendments is to reorganize and streamline chapter 392-105 WAC and to revise the chapter to conform with EHB 1595 (65th legislature, 2017, regular session).

The rules:

- Clarify the ways the public may make public records requests, and how the agency responds to and sends the requested records;
- Establish guidelines for inspection of public records;
- Remove current costs for copying public records and state the agency charges [for] copies under the default fees in RCW 42.56.120;
- Provide that the agency must identify how specific exemptions cited apply to denial of public records;
- Specify that denial notices include information about the requestor's right to a review; and
- Provide that the agency must maintain a records index.

As part of its streamlining, some sections were repealed as the content was incorporated into other sections.

Citation of Rules Affected by this Order: New WAC 392-105-070, 392-105-080, 392-105-090 and 392-105-100; repealing WAC 392-105-001, 392-105-003, 392-105-005, 392-105-007, 392-105-015, 392-105-025, 392-105-035, 392-105-045 and 392-105-055; and amending WAC 392-105-010, 392-105-020, 392-105-030, 392-105-040, 392-105-050, and 392-105-060.

Statutory Authority for Adoption: RCW 28A.300.040.

Other Authority: EHB 1595 (2017).

Adopted under notice filed as WSR 18-10-098 on May 2, 2018.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at the Request of a Non-governmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's own Initiative: New 4, Amended 9, Repealed 6.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 4, Amended 9, Repealed 6.

Number of Sections Adopted using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making:

New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: June 13, 2018.

Chris P. S. Reykdal  
State Superintendent  
of Public Instruction

AMENDATORY SECTION (Amending WSR 80-05-034, filed 4/15/80)

**WAC 392-105-010 (~~(Access to public records.)~~) Purpose and authority.** ~~((1) All public records as defined by RCW 42.17.020 (26) and (28) prepared, owned, used, or retained by the superintendent of public instruction shall be available for public inspection and copying during normal office hours in the office where they are located, except for the following:~~

~~(a) Personal information in files maintained by the superintendent of public instruction to the extent that disclosure would violate any individual's right to privacy.~~

~~(b) Preliminary drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated or recommended, except that a specific record shall not be exempt when publicly cited by the agency in connection with any agency action.~~

~~(c) Records which are relevant to a controversy to which the agency is a party but which records would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts.~~

~~(d) Any other information which is exempt from public inspection under RCW 42.17.310 where disclosure would violate personal privacy or vital government interests.~~

~~(2) The exemptions of this section shall be inapplicable to the extent that information, the disclosure of which would violate personal privacy or vital government interests, can be deleted from the specific records sought. No exception shall be construed to permit the nondisclosure of statistical information when such information is not descriptive of any readily identifiable person or persons.) The purpose of this chapter is to implement the requirements of the Public Records Act, chapter 42.56 RCW. The superintendent of public instruction adopts these rules to provide the fullest assistance to requestors and full access to the agency's public records while protecting those records from damage or disorganization; preventing excessive interference with essential agency functions, including the agency's core mission of supervising all matters pertaining to public schools; and not unreasonably disrupting agency operations.~~

AMENDATORY SECTION (Amending WSR 92-10-016, filed 4/28/92, effective 5/29/92)

**WAC 392-105-020 (~~(Office hours.)~~) Agency description—Contact information—Public records officer.** ~~((Public records shall be available for inspection and copying during the customary office hours of the agency. For purposes of this chapter, the customary office hours shall be from 8:00 a.m. to noon and from 1:00 p.m. to 4:30 p.m., Monday through Friday, excluding legal holidays.)) (1) The office of superintendent of public instruction is an agency~~

headed by the superintendent of public instruction, a constitutional officer of the state charged with supervision over all matters pertaining to public schools. The powers and duties of the superintendent and the agency are described in Title 28A RCW.

(2) The superintendent of public instruction's administrative offices are located at: Old Capital Building, 600 Washington Street S.E., Olympia, WA 98504.

(3) The superintendent of public instruction's public records officer may be contacted at the following mailing address, telephone number, or email address:

Public Records Officer  
Office of the Superintendent of Public Instruction  
P.O. Box 47200  
Olympia, WA 98504-7200  
360-725-6372  
[publicrecordsrequest@k12.wa.us](mailto:publicrecordsrequest@k12.wa.us)

Information and records are also available at the superintendent of public instruction web site at [www.k12.wa.us](http://www.k12.wa.us).

(4) The public records officer will oversee compliance with the act, but another agency staff member may process the request. Therefore, these rules will refer to the public records officer or designee. The public records officer or designee and the agency will provide the fullest assistance to requestors and prevent fulfilling public records requests from causing excessive interference with the agency's essential functions.

**Reviser's note:** The typographical error in the above section occurred in the copy filed by the agency and appears in the Register pursuant to the requirements of RCW 34.08.040.

AMENDATORY SECTION (Amending WSR 93-07-039, filed 3/11/93, effective 4/11/93)

**WAC 392-105-030 (~~(Copying.)~~) Definitions.** ~~((No fee shall be charged for the inspection of public records. The superintendent of public instruction may impose a reasonable charge for providing copies of public records and for the use by any person of agency equipment to copy public records; such charges shall not exceed the amount necessary to reimburse SPI for its actual costs incident to such copying. No person shall be released a record so copied until and unless the person requesting the copied public record has tendered payment for such copying to the appropriate official. All charges must be paid by money order, check, or cash in advance.)) (1) "Agency" means the office of superintendent of public instruction.~~

(2) "Public record" and "writing" shall have the meanings as stated in RCW 42.56.010.

(3) "Public records officer" means the employee designated by the superintendent under RCW 42.56.580(1) responsible for overseeing the agency's compliance with the Public Records Act.

(4) "Superintendent of public instruction" and "superintendent" mean the elected officer of the state as defined by RCW 28A.300.010 who is the head of the office of superintendent of public instruction.

AMENDATORY SECTION (Amending WSR 93-07-039, filed 3/11/93, effective 4/11/93)

**WAC 392-105-040 ((Review of denials of public records requests.)) Request, hours for inspection, and organization of public records.** ~~((1) Any person who objects to the denial of a request for a public record may petition for prompt review of such decision by tendering a written request for review. The written request shall specifically refer to the written statement which constituted or accompanied the denial.~~

~~(2) The written request by a person demanding prompt review of a decision denying a public record shall be submitted to the SPI or his or her designee.~~

~~(3) Within two business days after receiving the written request by a person petitioning for a prompt review of a decision denying a public record, the superintendent of public instruction or his or her designee, shall complete such review.~~

~~(4) During the course of the review the superintendent of public instruction or his or her designee shall consider the obligations of the agency fully to comply with the intent of chapter 42.17 RCW insofar as it requires providing full public access to official records, but shall also consider both the exemptions provided in RCW 42.17.310 through 42.17.315, and the provisions of the statute which require the agency to protect public records from damage or disorganization, prevent excessive interference with essential functions of the agency, and prevent any unreasonable invasion of personal privacy by deleting identifying details.))~~ **(1) Making a request for public records.**

(a) Any person wishing to inspect or copy public records of the agency must make the request in writing on the agency's request form or through an online portal, or by letter, or email addressed to the public records officer at the email address publicly designated by superintendent of public instruction, or by submitting the request in person at the address listed in WAC 392-105-020, and must include the following information:

(i) Name of requestor;

(ii) Address of requestor;

(iii) Other contact information, including telephone number and any email address;

(iv) Identification of the public records adequate for the public records officer or designee to locate the records; and

(v) The date and time of day of the request.

(b) If the requestor wishes to have copies of the records made instead of simply inspecting them, he or she should so indicate and make arrangements to pay for copies of the records or a deposit, in accordance with the allowable costs under WAC 392-105-060.

(c) A records request form is available for use by requestors at the office of the public records officer and online at [www.k12.wa.us/publicrecordsrequest](http://www.k12.wa.us/publicrecordsrequest).

(d) The public records officer or designee may accept requests for public records that contain the above information by telephone or in person. If the public records officer or designee accepts such a request, he or she will confirm receipt of the information and the substance of the request in writing.

**(2) Hours for inspection of public records.** Public records are available for inspection and copying during normal business hours of the agency, Monday through Friday,

8:00 a.m. to 5:00 p.m., excluding legal holidays. Records must be inspected at the administrative offices of the agency. Many public records are also available for inspection and copying on the agency's web site, [www.k12.wa.us](http://www.k12.wa.us), at any time, at no cost.

**(3) Organization of public records.** The agency will maintain its records in a reasonably organized manner. The agency will take reasonable actions to protect records from damage and disorganization. When inspecting records in person, a requestor must comply with protection requirements of WAC 392-105-060 and must make reasonable efforts to maintain the organization of the public records.

AMENDATORY SECTION (Amending WSR 92-10-016, filed 4/28/92, effective 5/29/92)

**WAC 392-105-050 Protection of public records.** ~~((Public records and a facility for their inspection will be provided by the public records officer. Such records shall not be removed from the place designated. Copies of such records may be arranged according to the provisions of WAC 392-105-030.))~~ In order to adequately protect the agency's public records, requestors must comply with the following guidelines while inspecting public records:

(1) Requestors may not remove any public record from the agency's premises.

(2) Requestors must have a designated agency employee present while inspecting a public record.

(3) Requestors may not mark or deface a public record in any manner during inspection.

(4) Requestors may not dismantle public records that are maintained in a file or jacket, or in chronological or other filing order, or those records that, if lost or destroyed, would constitute excessive interference with the agency's essential functions.

(5) Access to agency file cabinets, shelves, vaults, or other storage areas is restricted to agency personnel, unless other arrangements are made with the public records officer or designee.

AMENDATORY SECTION (Amending WSR 93-07-039, filed 3/11/93, effective 4/11/93)

**WAC 392-105-060 ((Records index.)) Costs of providing copies of public records.** ~~((1) The agency has available for the use of all persons a current index which provides identifying information as to the following records issued, adopted, or promulgated by the agency after June 30, 1972:~~

~~(a) Final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudicated cases;~~

~~(b) Those statements of policy and interpretative policy, statute and the constitution which have been adopted by the agency;~~

~~(c) Administrative staff manuals and instructional staff that affect a member of the public;~~

~~(d) Planning policies and goals, and interim and planning decisions;~~

~~(e) Factual staff reports and studies, factual consultant's reports and studies, scientific reports and studies, and any other factual information derived from tests, studies, reports,~~

or surveys, whether conducted by public employees or others; and

(f) Correspondence, and materials referred to therein, by and with the agency relating to any regulatory, supervisory, or enforcement responsibilities of the agency, whereby the agency determines, or opines upon, or is asked to determine or opine upon, the rights of the state, the public, a subdivision of state government, or of any private party.

(2) The current index maintained by the agency shall be available to all persons under the same rules and all the same conditions as are applied to public records available for inspection.) (1) **Inspection.** The agency does not charge a fee for the inspection of public records, either in person or on the agency's web site.

(2) **Statutory default costs.** Pursuant to RCW 42.56.120 (2), the agency declares for the following reasons that it would be unduly burdensome to calculate the actual costs it charges for providing copies of public records:

(a) Funds were not allocated for performing a study to calculate such actual costs and the agency lacks the necessary funds to perform a study and calculations;

(b) Staff resources are insufficient to perform a study and to calculate such actual costs; and

(c) A study would interfere with and disrupt other essential agency functions.

**(3) Fee schedule.**

(a) The agency may charge fees for production of copies of public records consistent with the fee schedule established in RCW 42.56.120 and as published in the agency's fee schedule available on the agency web site at [www.k12.wa.us](http://www.k12.wa.us).

(b) The agency will charge the actual amount charged by an external vendor for records copied by an external vendor including records in nonstandard sizes or formats as published in the agency's fee schedule available on the agency web site at [www.k12.wa.us](http://www.k12.wa.us).

(4) **Processing payments.** Before copying public records, the public records officer or designee may require a deposit of up to ten percent of the estimated costs of copying all of the records. The public records officer or designee may require payment of the remainder of the copying costs before providing all of the records, or the payment of costs of copying an installment before providing the installment. The agency will not charge sales tax when it makes copies of public records.

(5) **Customized electronic access services.** At the agency's sole discretion, the agency may provide customized electronic access to public records if the agency estimates that the request would require the use of information technology expertise to prepare data compilations, or provide customized electronic access services when such compilations and customized access services are not used by the agency for other agency purposes. The agency will charge the actual costs, including staff time, necessary to reimburse the agency for providing customized electronic access services.

(6) **Costs of mailing.** The agency may also charge actual costs of mailing, including the costs of the shipping container.

(7) **Payment of fees.** The agency will not release any requested copies of public records unless and until the

requestor has paid all copying and other charges as set forth in this section.

(8) **Waiver of fees.** The agency may waive any charges for providing public records at the discretion of the public records officer. This determination will be made on a case-by-case basis.

**NEW SECTION**

**WAC 392-105-070 Responses to public records requests.** (1) **Acknowledging receipt of request.** The agency will respond to a request within five business days of receipt, by:

(a) Providing the record(s);

(b) Providing an internet address and link to the record(s) on the agency web site;

(c) Acknowledging that the agency has received the request, asking for clarification to the extent the request is unclear, and providing a reasonable estimate of the time the agency will require to respond to the request if not clarified; or

(d) Denying the public record request.

(2) **Requests for clarification.** In acknowledging receipt of a public record request that is unclear, the agency may ask the requestor to clarify what information the requestor is seeking.

(3) **Additional time.** Additional time required to respond to a request may be based upon the following:

(a) The need to clarify the intent of the request;

(b) The need to locate and assemble the information requested;

(c) The need to notify third persons or agencies affected by the request; or

(d) The need to determine whether any of the information requested is exempt and that a denial should be made as to all or part of the request.

(4) **Processing requests.** The agency will process requests in the order in which they are received. The agency may modify this approach as necessary to ensure that requests that seek larger volumes of records, require closer review, or are otherwise more time consuming, do not unreasonably delay simpler, more routine requests.

**(5) Providing records in installments.**

(a) The agency may elect to provide responsive records on a partial or installment basis when:

(i) It appears that the number of records responsive to a request may be large; or

(ii) The process of locating, assembling, or reviewing the records may be lengthy.

(b) The agency has no obligation to locate and assemble records responsive to a subsequent installment until the previous installment has been claimed or inspected.

**(6) Providing electronic records.**

(a) When electronic records are requested, the agency will provide:

(i) The nonexempt records or portions of such records that are reasonably locatable in an electronic format that is used by the agency and is generally commercially available; or

(ii) At the agency's discretion, in a format that is reasonably translatable from the format in which the agency keeps the records.

(b) The agency is under no obligation to convert electronic records to a specific format identified by the requestor.

(c) When metadata is requested, the agency will provide the records in a native file format that preserves metadata where technically feasible. Metadata may be unavailable for records that require conversion to a nonnative format in order to apply exemptions.

(7) **Completion of inspection or disclosure.** When the inspection or disclosure of the requested records is complete and all requested copies are provided, the public records officer or designee will indicate that the agency has completed a reasonable search for the requested records and made any located nonexempt records available for inspection or disclosure.

(8) **Closing withdrawn or abandoned requests.** The public records officer or designee will close a request and indicate to the requestor that the agency has closed the request when:

(a) The requestor withdraws the request;

(b) The requestor fails to clarify a request within ten business days after being asked to clarify the information the requestor is seeking;

(c) The requestor fails to comply with the agency's guidelines for inspecting public records;

(d) The requestor fails to pay any copying or other charges; or

(e) The requestor fails to claim or inspect an installment within ten business days after the public records officer or designee provides notice of the installment's availability.

#### NEW SECTION

**WAC 392-105-080 Determination regarding exempt records.** (1) When the agency denies, in whole or in part, a request for inspection of any public record, the agency must include a statement of the specific exemption authorizing the denial and a brief explanation of how the exemption applies to the record withheld.

(2) If only a portion of a record is exempt from disclosure but the remainder is not exempt, the public records officer or designee will redact the exempt portions, provide the nonexempt portions, and indicate to the requestor why portions of the record are being redacted.

#### NEW SECTION

**WAC 392-105-090 Review of denials of public records requests.** (1) **Petition for internal administrative review of denial of access.** Any person who objects to the initial denial or partial denial of a records request may petition in writing, including email, to the public records officer for a review of that decision. The petition shall include a copy of or reasonably identify the written statement by the public records officer or designee denying the request.

(2) **Consideration of petition for review.** The public records officer must promptly provide the petition and any other relevant information to the superintendent of public instruction or his or her designee. The superintendent or des-

ignee must consider the petition and either affirm or reverse the denial within two business days following the agency's receipt of the petition, or within such other time as the agency and the requestor mutually agree to.

(3) **Review by the attorney general's office.** Pursuant to RCW 42.56.530, if the agency denies a requestor access to public records because the agency claims the record is exempt in whole or in part from disclosure, the requestor may request the attorney general's office to review the matter under WAC 44-06-160.

(4) **Judicial review.** Any person may obtain court review of denials of public records requests pursuant to RCW 42.56.550 at the conclusion of two business days after the initial denial regardless of any internal administrative appeal.

#### NEW SECTION

**WAC 392-105-100 Records index.** (1) The records retention schedule established by the division of the state archives of the office of the secretary of state serves as an index for the identification and location of the agency's records, including those described in RCW 42.56.070(5). The records retention schedule indexes records according to the originating program or section, and then the record series title. Each title is further identified by a statement of function or purpose, and the retention period. The records retention schedule is available to the public for inspection and copying. With the assistance of the public records officer or designee, any person can obtain access to the agency's public records using the records retention schedule.

(2) Policy statements and interpretive statements as defined in RCW 34.05.010 are available on the agency's web site or upon request through the agency's public records office.

#### REPEALER

The following sections of the Washington Administrative Code are repealed:

WAC 392-105-001 Purpose.

WAC 392-105-003 Description of organization.

WAC 392-105-005 Operations and procedures.

WAC 392-105-007 Definitions.

WAC 392-105-015 Public records officer.

WAC 392-105-025 Requests for public records.

WAC 392-105-035 Determination regarding exempt records.

WAC 392-105-045 Records index—Inspection.

WAC 392-105-055 List of employees and elected officers.

**WSR 18-13-061**  
**PERMANENT RULES**  
**CRIMINAL JUSTICE**  
**TRAINING COMMISSION**

[Filed June 14, 2018, 8:33 a.m., effective July 15, 2018]

Effective Date of Rule: Thirty-one days after filing.

Purpose: This rule is needed to clearly identify whether or not corrections personnel are still employed by a corrections agency.

Statutory Authority for Adoption: RCW 43.101.080.

Adopted under notice filed as WSR 18-09-100 on April 18, 2018.

Changes Other than Editing from Proposed to Adopted Version: This rule is needed to clearly identify whether or not corrections personnel are still employed by a corrections agency.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at the Request of a Non-governmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's own Initiative: New 1, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: June 13, 2018.

Sonja Peterson  
Rules Coordinator

NEW SECTION

**WAC 139-10-214 Termination of corrections personnel—Notification to commission.** Upon termination, all counties and municipal corporations of the state of Washington, or any political subdivision thereof, must immediately notify the commission by approved form of each instance where corrections personnel has been separated for any reason. The agency of termination shall, within fifteen days of the termination, notify the commission on a personnel action report form provided by the commission. The commission shall maintain these notices in a permanent file, subject to RCW 43.101.400.

**WSR 18-13-063**  
**PERMANENT RULES**  
**LIQUOR AND CANNABIS**  
**BOARD**

[Filed June 14, 2018, 10:29 a.m., effective July 15, 2018]

Effective Date of Rule: Thirty-one days after filing.

Purpose: The rule for meal requirements for spirits, beer, and wine restaurants needs to be revised to include culturally diverse meals.

Citation of Rules Affected by this Order: Amending WAC 314-02-035.

Statutory Authority for Adoption: RCW 66.24.410.

Adopted under notice filed as WSR 18-09-121 on April 18, 2018.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at the Request of a Non-governmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's own Initiative: New 0, Amended 1, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 1, Repealed 0.

Number of Sections Adopted using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: June 13, 2018.

Jane Rushford  
Chair

AMENDATORY SECTION (Amending WSR 17-12-030, filed 5/31/17, effective 7/1/17)

**WAC 314-02-035 What are the food service requirements for a spirits, beer, and wine restaurant license? (1)**

A spirits, beer, and wine restaurant licensee must serve at least eight complete meals. The board may make an exception to the eight complete meal requirement on a case-by-case basis. Establishments shall be maintained in a substantial manner as a place for preparing, cooking and serving of complete meals. For purposes of this title:

(a) "Complete meal" means an entree and at least one side dish. Side dishes are not required to be included with the entrée, however must be offered.

(b) "Entree" means the main course of a meal. Some examples of entrees are fish, steak, chicken, pork, pasta, pizza, ~~((hamburgers))~~ burgers, pho, sushi, street tacos, tikka masala, quiche, seafood salad, Cobb salad, chef's salad, sandwiches, and breakfast items (as long as they include a side dish). Entrees do not include snack items, or menu items which consist solely of precooked frozen food that is reheated, or consist solely of carry-out items obtained from another business.

(c) Examples of side dishes are soups, vegetables, salads, potatoes, ~~((french fries;))~~ rice, fruit, and bread. Garnishes such as, but not limited to, pickles, salsa, and dips do not qualify as a side dish.

(2) The restaurant must maintain the kitchen equipment necessary to prepare the complete meals required under this section.

(3) The complete meals must be prepared on the restaurant premises.

(4) A chef or cook must be on duty while complete meals are offered.

(5) A menu must be available to customers.

(6) The food items required to maintain the menu must be on the restaurant premises. These items must be edible.

(7) Restaurants that have one hundred percent dedicated dining area must maintain complete meal service any time liquor is available for sale, service, or consumption.

(8) Restaurants with less than one hundred percent dedicated dining area must maintain complete meal service for a minimum of five hours a day during the hours of 8:00 a.m. and 11:00 p.m., three days a week.

Limited food service, such as appetizers, sandwiches, salads, soups, pizza, ~~((hamburgers))~~ burgers, or fry orders, must be available outside of these hours. Snacks such as peanuts, popcorn, and chips do not qualify as limited food service.

(9) The hours of complete meal service must be conspicuously posted on the premises or listed on the menu. A statement that limited food service is available outside of those hours must also be posted or listed on the menu.

#### WSR 18-13-069

##### PERMANENT RULES

#### GAMBLING COMMISSION

[Filed June 15, 2018, 9:43 a.m., effective July 16, 2018]

Effective Date of Rule: Thirty-one days after filing.

Purpose: The purpose of the proposal is to repeal WAC rules that are either no longer needed or have been amended, if needed, and incorporated into chapter 230-05 WAC licensing and fee rules as part of the agency's ongoing fee simplification rule making.

Citation of Rules Affected by this Order: Repealing WAC 230-06-125, 230-06-130, 230-06-135, 230-06-140, and 230-06-145.

Statutory Authority for Adoption: RCW 9.46.070.

Adopted under notice filed as WSR 18-05-092 on February 21, 2018.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at the Request of a Non-governmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's own Initiative: New 0, Amended 0, Repealed 5.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 5.

Number of Sections Adopted using Negotiated Rule Making: New 0, Amended 0, Repealed 5; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: June 15, 2018.

Brian J. Considine  
Legal and Legislative Manager

#### REPEALER

The following sections of the Washington Administrative Code are repealed:

WAC 230-06-125 Renew your license in a timely manner.

WAC 230-06-130 Exceeding license class.

WAC 230-06-135 Failing to apply for license class upgrade.

WAC 230-06-140 Partial refund of license fees if gambling receipts limit not met.

WAC 230-06-145 Surrendering suspended or revoked licenses.

#### WSR 18-13-073

##### PERMANENT RULES

#### WESTERN WASHINGTON UNIVERSITY

[Filed June 15, 2018, 11:15 a.m., effective July 16, 2018]

Effective Date of Rule: Thirty-one days after filing.

Purpose: The manifestation of violence and intimidation observed in on-campus demonstrations in Washington state and across the United States necessitate changes to chapter 516-36 WAC, which includes separating regulations previously codified under the original chapter 516-36 WAC through the adoption of new chapter 516-35 WAC, in order to preserve the integrity of Western Washington University's educational mission, to protect the health, safety and welfare of students, faculty and staff, and to preserve university property and scarce state resources.

Citation of Rules Affected by this Order: New WAC 516-35-001, 516-35-005, 516-35-010, 516-35-020, 516-35-030, 516-35-040, 516-36-004, 516-36-008, 516-36-025, 516-36-035 and 516-36-060; and amending WAC 516-36-001, 516-36-020, 516-36-030, and 516-36-040.

Statutory Authority for Adoption: RCW 28B.35.120 (12).

Adopted under notice filed as WSR 18-09-062 on April 16, 2018.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at the Request of a Non-governmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's own Initiative: New 11, Amended 4, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 11, Amended 4, Repealed 0.

Number of Sections Adopted using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: June 15, 2018.

Jennifer L. Sloan  
Rules Coordinator

## Chapter 516-35 WAC

USE OF UNIVERSITY PROPERTY—FREEDOM OF  
EXPRESSION AND ASSEMBLYNEW SECTION

**WAC 516-35-001 Definitions.** As used in this chapter, the following words and phrases mean:

(1) **Business day.** Any day, Monday through Friday (excluding holidays), during which university offices are open.

(2) **Freedom of expression and assembly.** Any activity protected by the first amendment to the Constitution of the United States and Article I, sections 4 and 5 of the Washington state Constitution. Such activities may include, but are not limited to, informational picketing, petition circulation, distribution of information leaflets or pamphlets, speech-making, demonstrations, rallies, noncontracted appearances of speakers, protests, meetings to display group feelings or sentiments, and other types of constitutionally protected assemblies to share information, perspective, or viewpoints. Freedom of expression or assembly that involves the placement of any furniture, hardware, prop, vehicle, display, sound amplification, or audio-visual device or other object on university property requires prior approved space reservation. To reserve use of university property, refer to chapter 516-36 WAC.

(3) **Limited public forum areas.** Areas of campus available as spaces for freedom of expression and peaceable assembly as protected by the Constitution of the United States and the Washington state Constitution, subject to reasonable time, place, and manner restrictions. Limited public forum areas do not include:

(a) Classrooms or academic buildings conducting scheduled educational programming with the exception that nothing herein shall be read to interfere between or with the academic freedom of the instructor and enrolled students to engage in educational programs;

(b) Reservable or scheduled property subject to the provisions of chapter 516-36 WAC;

(c) Private administrative or academic offices;

(d) Lavatory or maintenance facilities;

(e) Roadways or sidewalks necessary to permit the free flow of pedestrian, vehicular, emergency responder, or maintenance traffic; or

(f) Any other university property, on a case-by-case basis, where the reasonable application of time, place, and manner restrictions render the location inappropriate for expressive activities.

(4) **Nonuniversity group or individual.** An individual or a collection of individuals who do not have a formal relationship with the university. The term also includes members of these groups who are individually affiliated with the university who desire to use university property for personal, private, or nonuniversity group related activities.

(5) **Time, place, and manner.** Reasonable limitations on the exercise of expressive rights that are neutral as to the content of expression and leave open alternative channels of expression.

(6) **University.** Western Washington University.

(7) **University affiliate.** An entity that has a formal relationship with the university and also encompasses such entity's officers, agents, and employees. The term includes, but is not limited to, the office of the attorney general, contracted agencies, and 501 (c)(3) organizations with formal relationships to the university.

(8) **University group or individual.** An individual or collection of individuals that has a formal relationship with the university, such as a recognized employee group of the university, a registered student group or organization or an individual acting on behalf of the group or organization as well as an individual who is a currently enrolled student or current employee.

(9) **University property.** All buildings, grounds, or assets owned or controlled by the university and the streets, sidewalks, plazas, parking lots, and roadways within the boundaries of property owned or controlled by the university.

NEW SECTION

**WAC 516-35-005 General policy and purpose.** The university believes that freedom of expression and assembly are indispensable qualities of university life, and that active participation in political and social expression both enhances the education of the individual and contributes to the betterment of society. The university is committed to respecting and promoting the rights afforded by the constitutions of the United States and the state of Washington, including the right to free speech, petition, and to peaceably assemble.

University property is intended for use by students, faculty, and staff in support of the university's mission of teaching, research, and public service. Individuals, groups, or organizations may use university property in accordance with university rules and regulations.

To achieve the objectives of this chapter, it is essential that free expression be accomplished in a manner that allows for the orderly function of normal university operations. Thus, the purpose of the time, place, and manner regulations set forth in this chapter are to:

(1) Promote opportunities for exercise of the rights protected by the constitutions of the United States and the state of Washington on the university campus.

(2) Ensure that these activities do not interfere with the furtherance of the university's mission-related responsibilities for which the university's property is dedicated by the state of Washington.

NEW SECTION

**WAC 516-35-010 Use of university property—Notice.** (1) Any nonuniversity group or individual who desires to use a limited public forum area on a temporary basis for freedom of expression or assembly in which more than fifty people are likely to assemble, must submit notice of planned use to the university police department and to the dean of students not less than fifteen business days prior to use. However, use may be permitted with less notice so long as the use does not interfere with any other function or university operations.

(2) University affiliates or university groups or individuals who desire to use university property or a limited public

forum area on a temporary basis for freedom of expression or assembly must adhere to applicable policies and laws and are requested to provide notice to the university police department and dean of students.

(3) Submitted notices may include, but are not limited to, the following:

(a) The contact information for the persons or organizations, including the organization's name and its contact person's name, person's name, address, email address, and telephone number;

(b) The date, time, and location requested for use;

(c) The nature and purpose of the use;

(d) The estimated number of people expected to be involved, including participants, spectators, supporters, and detractors or others; and

(e) Other information as may be reasonably requested.

#### NEW SECTION

**WAC 516-35-020 Use of university property—Evaluation.** (1) The president, or the president's designee, shall have the authority to accept, modify, or reject, in whole or in part, the planned use outlined or described in the notice submitted pursuant to this chapter.

(2) In evaluating a notice submitted pursuant to this chapter, the president, or the president's designee, may consider a variety of factors including, but not limited to, the following:

(a) Whether a university program or activity is scheduled at the location requested. First priority shall be given to the university program or scheduled activity;

(b) Whether the use is in connection with a university program or activity;

(c) Whether the intended use is compatible with the educational mission and objectives of the university.

(3) The president, or the president's designee, may specify reasonable fire, safety, law enforcement, sanitation, cleanup, insurance, and other risk- or impact-mitigating requirements for the use of university property. Charges may be applied in the event any of these requirements are deemed to have costs associated with them. The university will not provide utility connections or hookups.

(4) Whenever the president, or the president's designee, rejects, either in whole or in part, a request for use of university property, the reasons for such rejection shall be stated in writing.

#### NEW SECTION

**WAC 516-35-030 Use of university property—Exceptions and termination of use.** The president, or the president's designee, may apply time, place, and manner exceptions to limit, relocate, reschedule, terminate, cancel, or prohibit the use of university property for freedom of expression activities to protect persons or property from harm and the disruption of university operations including, but not limited to, violations of WAC 516-24-130, 516-52-020, or other laws or university policies.

#### NEW SECTION

**WAC 516-35-040 Unscheduled expression and assembly—University affiliates or a university group or individual.** Protecting impromptu and spontaneous peaceable assembly for the purposes of expression, protest, and dissent is essential to fulfilling the university's commitment to freedom of expression and assembly. Thus, the lack of notice to use university property by university affiliates or a university group or individual is not necessarily a sole basis for terminating any expressive activity, including impromptu activities, unless the protest or assembly conflicts with a previously scheduled event in the same location or is in violation of law and/or university policy including, but not limited to, WAC 516-24-130 and 516-52-020.

To ensure space is available for expression or assembly, university affiliates or a university group or individuals are encouraged to provide notice.

### Chapter 516-36 WAC

#### **USE OF UNIVERSITY ((FACILITIES)) PROPERTY—SCHEDULING AND GENERAL USE**

AMENDATORY SECTION (Amending WSR 90-10-042, filed 4/27/90, effective 5/1/90)

**WAC 516-36-001 Use of university ((~~facilities by off-campus persons or groups~~ Requests)) property—General policy and purpose.** ((~~Any person who is not affiliated with the university and who desires to use university facilities on a temporary basis for purposes other than assigned university activities shall submit a request for use of university facilities to the president or his designee.~~)) Western Washington University is an educational institution provided and maintained by the people of the state of Washington in order to carry out its broad missions of teaching, research, and public service. A state agency is under no obligation to make its public property available to the community for private purposes, and the university generally reserves its property, buildings, and grounds for its mission-related activities, including: Instruction, research, assembly, student activities, and recreational activities related to education. However, the university makes property available for a variety of uses that are of benefit to the general public under the conditions set forth in these regulations if such general uses substantially relate to, or do not interfere with, university missions.

The purpose of these regulations is to establish procedures and reasonable controls for the use of university property by nonuniversity groups or individuals, university affiliates, university groups or individuals, or students, faculty, or staff who desire to use university property for personal, private, or nonuniversity group related activity.

Reasonable conditions may be imposed to regulate the timeliness of requests, to determine the appropriateness of space assigned, time of use, and to ensure the proper maintenance of the property.

NEW SECTION

**WAC 516-36-004 Freedom of expression and assembly activities not covered.** Use of university property for freedom of expression and assembly activities is governed by rules set forth in chapter 516-35 WAC. This chapter does not apply to those individuals or groups using university property for freedom of expression and assembly activities.

NEW SECTION

**WAC 516-36-008 Definitions.** As used in this chapter, the following words and phrases mean:

(1) **Business day.** Any day, Monday through Friday (excluding holidays), during which university offices are open.

(2) **Freedom of expression and assembly.** Any activity protected by the first amendment to the Constitution of the United States and Article I, sections 4 and 5 of the Washington state Constitution. Such activities may include, but are not limited to, informational picketing, petition circulation, distribution of information leaflets or pamphlets, speechmaking, demonstrations, rallies, noncontracted appearances of speakers, protests, meetings to display group feelings or sentiments, and other types of constitutionally protected assemblies to share information, perspective, or viewpoints.

(3) **Limited public forum areas.** Areas of campus available as spaces for freedom of expression and peaceable assembly as protected by the Constitution of the United States and the Washington state Constitution, subject to reasonable time, place, and manner restrictions. The use of limited public forum areas for freedom of expression and peaceable assembly activities is governed by chapter 516-35 WAC. Limited public forum areas are identified in WAC 516-35-001. Limited public forum areas do not include property such as:

(a) Classrooms or academic buildings conducting scheduled educational programming with the exception that nothing herein shall be read to interfere between or with the academic freedom of the instructor and enrolled students to engage in educational programs;

(b) Reservable or scheduled property subject to the provisions of this chapter;

(c) Private administrative or academic offices;

(d) Lavatory or maintenance facilities;

(e) Roadways or sidewalks necessary to permit the free flow of pedestrian, vehicular, emergency responder, or maintenance traffic; or

(f) Any other university property, on a case-by-case basis, where the reasonable application of time, place, and manner restrictions render the location inappropriate for expressive activities.

(4) **Nonuniversity group or individual.** An individual or a collection of individuals who do not have a formal relationship with the university. The term also includes members of these groups who are individually affiliated with the university who desire to use university property for personal, private, or nonuniversity group related activities.

(5) **Space administrator.** A university employee, appointed by the president, or the president's designee, who has the authority and responsibility for a designated subset of

university property to create and enforce policies and procedures for space use, delegate space approval authority, and are responsible for university space being used in accordance with this chapter, chapter 516-35 WAC, and the university mission.

(6) **Space approval authority.** A university employee who has the authority, consistent with these regulations and approved campus policies and procedures, to review, approve, amend, or deny requests for rental or use of university property.

(a) The university shall maintain a list of the approving authorities.

(b) Requests for approval to lease space shall be governed by chapter 516-34 WAC.

(7) **Time, place, and manner.** Reasonable limitations on the exercise of expressive rights that are neutral as to the content of expression and leave open alternative channels of expression.

(8) **University.** Western Washington University.

(9) **University affiliate.** An entity that has a formal relationship with the university and also encompasses such entity's officers, agents, and employees. The term includes, but is not limited to, the office of the attorney general, contracted agencies, and 501 (c)(3) organizations with formal relationships to the university.

(10) **University group or individual.** An individual or collection of individuals that has a formal relationship with the university, such as a recognized employee group of the university, a recognized student group or organization, or an individual acting on behalf of the group or organization as well as an individual who is a currently enrolled student or current employee.

(11) **University property.** All buildings, grounds, or assets owned or controlled by the university and the streets, sidewalks, plazas, parking lots, and roadways within the boundaries of property owned or controlled by the university.

AMENDATORY SECTION (Amending WSR 90-10-042, filed 4/27/90, effective 5/1/90)

**WAC 516-36-020 Use of university ((facilities by off-campus persons or groups—Evaluation of request for use)) property—Requests.** ((1) The president, or the president's designee, shall have the authority to accept or reject, in whole or in part, a request submitted pursuant to WAC 516-36-001.

(2) In evaluating a request submitted pursuant to WAC 516-36-001, the president shall consider the following factors:

(a) Whether the facilities requested are to be used in connection with a regularly scheduled university program.

(b) Whether the intended use of the university's facilities is compatible with the educational mission and objectives of the university.

(c) Whether the intended use might cause a disruption of the university's relationship with the local community by conflicting with services provided by private enterprise within the Bellingham area.

(d) ~~The capabilities, qualifications, experience, and financial stability of the individual, organization, or group submitting the request.~~

(3) ~~Whenever the president (or the president's designee) rejects, either in whole or in part, a request for use of university facilities, the reasons for such rejection shall be stated in writing.)~~ (1) Requests for rental or use of university property must be directed to the space approval authority.

(2) Requests for leasing of university property must be directed to the vice president for business and financial affairs, the university president, or the president's designee, and governed by chapter 516-34 WAC.

(3) If a requestor is uncertain where to direct a request to use university property, or if the approving authority for a particular university property is not on the university list, the requestor should address the request to the vice president for business and financial affairs or designee.

#### NEW SECTION

**WAC 516-36-025 Scheduling and reservation practices—Duties of requestor.** (1) The primary purpose of university property is to serve the university's instructional, research, and public service activities. However, when not required for scheduled university use, property may be available for rental by nonuniversity groups or individuals in accordance with current fee schedules and other relevant terms and conditions.

(2) No university property may be used by individuals or groups unless the property, including buildings, equipment, and land, have been reserved. Reservations may not be required in limited public forum areas if the intended use of the property would not cause cost to the university or impact scheduled university activity.

(3) Requests to use university property are made to the space approval authority, as defined in WAC 516-36-008(6) and in accordance with WAC 516-36-020.

(4) The space approval authority may deny the request to use university property when such use would violate any of the limitations set forth in WAC 516-36-030 or where the requestor is unwilling to comply with university requirements for the use of property, as authorized by this chapter.

(5) The university may require an individual or organization to make an advance deposit, post a bond or obtain insurance to protect the university against cost or other liability as a condition to allowing use of any university property.

(6) When the university grants permission to an individual or organization to use its property it is with the understanding and on the condition that the individual or organization assumes full responsibility for any loss or damage resulting from such use and agrees to hold harmless and indemnify the university against any loss or damage claim arising out of such use.

(7) The university and/or government authorities may specify fire, safety, sanitation, and special regulations for activities occurring in, on or with university property. It is the responsibility of the user to obey those regulations, as well as to comply with other applicable university policies, procedures, rules, regulations, and state, local, and federal laws.

AMENDATORY SECTION (Amending WSR 90-10-042, filed 4/27/90, effective 5/1/90)

**WAC 516-36-030 Limitations on use** ~~((of university facilities by off-campus persons or groups—Assessment of fees)).~~ ~~((1) The president, or the president's designee, shall have authority to establish a schedule of fees to govern the use of university facilities by persons who are not affiliated with the university, and to alter or modify the fee schedule whenever such action is deemed to be necessary or appropriate or in the best interests of the university. The fee for each campus facility shall be sufficient to insure the recovery by the university of all direct and indirect costs associated with the use of the facility, including all direct and indirect costs of goods or services furnished by the university in connection with the use of the facility.~~

(2) The president, or the president's designee, may waive all or part of the normal fee for use of a particular facility by persons not affiliated with the university under the following circumstances:

(a) Members of the university community will receive a substantial benefit from the intended use of the facility and no person or group will derive profit from the intended use of the facility; or

(b) The group requesting the use of the university's facility is an agency of the state of Washington.) The following limitations apply to all uses of any university property, unless specifically permitted by the university for special events:

(1) University property may not be used in ways which obstruct vehicular, bicycle, pedestrian, or other traffic or otherwise interfere with ingress or egress to the university, any university building or facility, or that obstruct or interfere with educational activities or other lawful activities on university grounds, university controlled property, or at university sponsored events unless approved by the president, or the president's designee.

(2) University property may not be used in ways that interfere with educational, research, or public service activities inside or outside any university building or otherwise prevent the university from fulfilling its mission and achieving its primary purpose.

(3) University property may not be used for the purpose of campaigning regarding a ballot proposition or by, for, or against candidates who have filed for public office, except that:

(a) This provision does not apply to candidates for Western Washington University student offices or student ballot propositions;

(b) University groups may sponsor candidate forums as well as issue forums regarding ballot propositions;

(c) Candidates for office and proponents or opponents of ballot propositions may rent university property as a nonuniversity group or individual on a short-term basis for campaign purposes to the same extent and on the same basis as may other individuals or groups;

(d) Candidates for office and proponents or opponents of ballot propositions may use the limited public forum areas using the procedures of chapter 516-35 WAC to the same extent and on the same basis as may other individuals or groups; and

(e) For informational purposes, a university group may invite a candidate or another political speaker to one of the meetings of its membership on university property, if it has complied with the scheduling procedures of WAC 516-36-025 and applicable university policy.

(4) University property may not be used in ways that create safety hazards or pose unreasonable safety risks to students, employees, invitees, or guests.

(5) University property may not be used for commercial purposes, including: Advertising, commercial solicitation, sales, or other activities to promote a product, except as allowed under WAC 516-36-040.

(6) University property may not be used in furtherance of or in connection with illegal activity.

(7) University property may not be used in such manner as to create a hazard or result in damage to university property.

(8) University property may not be used where such use would create undue stress on university resources (e.g., a request for a major event may be denied if another major event is already scheduled for the same time period, because of demands for parking, security coverage, etc.); use of limited public forum areas for freedom of expression and assembly must be in accordance with chapter 516-35 WAC.

(9) Use of audio amplifying equipment or sound generation is permitted only in locations and at times that will not disturb the normal conduct of university operations. Advance permission by the president, or the president's designee, is required to use audio amplifying equipment or generate sound that may disturb the normal conduct of university operations.

(10) Alcoholic beverages may be served only as allowed under university policies. It is the responsibility of the event sponsor to obtain all necessary licenses from the Washington state liquor and cannabis board and adhere to their regulations, as well as all local ordinances, university rules, and regulations.

(11) No person may erect a tent or other shelter on university property or remain overnight on university property, including in a vehicle, trailer, tent, or other shelter, with the following exceptions:

(a) The use and occupancy of university housing in accordance with chapter 516-56 WAC;

(b) The use of property by a university employee or agent who remains overnight to fulfill the responsibilities of their position;

(c) The use of property by a university student who remains overnight to fulfill the responsibilities of their course of study;

(d) The use of property where overnight stays are specifically permitted in identified locations for attendees at special events designated by the university.

(e) The use of property during a university, local, state or federal declaration of an emergency as determined by the president, or the president's designee.

(12) Signs and posters and visual displays may be placed only at those locations authorized under, and in accordance with university policies.

(13) Handbills, leaflets, pamphlets, flyers, and similar materials may be distributed only in relation to university

sanctioned activities or for purposes of freedom of expression. Materials may not be distributed in a manner that results in littering or requires university resources for disposal.

(14) Animals are only allowed on university property in accordance with WAC 516-52-010 and university policies.

(15) Smoking is not allowed in or on university property, except in accordance with chapter 70.160 RCW.

(16) Mopeds, Segways, skateboards, roller skates, roller blades, bicycles, and similar personal transportation devices may be used on campus in accordance with chapters 516-13 and 516-15 WAC.

#### NEW SECTION

**WAC 516-36-035 University property rental/use fees.** (1) The president or the president's designee shall have authority to establish a schedule of fees to govern the use of university property and to alter or modify the fee schedule whenever such action is deemed to be necessary or appropriate or in the best interests of the university. The fee for use of university property shall be sufficient to ensure the recovery by the university of all direct and indirect costs associated with the use of the university property, including all direct and indirect costs of goods or services furnished by the university in connection with the use of the property.

(2) The president or the president's designee may waive all or part of the normal fee for use of a particular university property by persons not affiliated with the university under the following circumstances:

(a) Members of the university community will receive a substantial benefit from the intended use of the university property and no person or group will derive profit from the intended use of the property; or

(b) The group requesting the use of the university's property is a subdivision or agency of the state of Washington; or

(c) The intended use of the property is transient and would not cause a cost to the university.

(3) In the event that the fee for the use of particular university property has not been placed on the fee schedule, and if the university determines to allow the use of the property, the university will assess a fee based upon the full cost, direct and indirect, of using the property.

(4) The president or the president's designee reserves the right to create differential fee schedules for use of university property by university groups and university affiliates.

**AMENDATORY SECTION** (Amending WSR 90-10-042, filed 4/27/90, effective 5/1/90)

**WAC 516-36-040** ~~((Use of facilities by persons or groups affiliated with the university—Authority to develop policies.))~~ **Private or commercial enterprise or charitable use.** ~~((The president, or the president's designee, shall have authority to develop and implement policies relating to the use of university facilities by persons or groups affiliated with the university.))~~ (1) University property may not be used for private or commercial gain, including: Commercial advertising; solicitation and merchandising of any food, goods, wares, service, company, organization, or merchandise of any nature whatsoever; or any other form of sales

or promotional activity; except that commercial activity is allowable:

(a) If the president or the president's designee has determined that the private or commercial enterprise or charitable use will serve an educational or public service purpose related to the university's mission:

(b) By special permission granted by the university president or the president's designee if an agreement, lease, or other formal arrangement is entered into between the university and the person, corporation, or other entity desiring to engage in private, commercial or charitable activity:

(c) To the extent it represents the regular advertising, promotional, or sponsorship activities carried on, by, or in any university media, university bookstore, university athletic events, or other university authorized event, agent, or contractor:

(d) If the university purchasing department has authorized vendor representatives to solicit university departments, colleges, or business units, and where those representatives have appropriate university identification.

(2) University property may not be used by faculty, staff, or students to assist or promote a private or third-party commercial enterprise, with the following exceptions:

(a) Faculty, staff, or students may use university property that is generally available to the public on the same basis, including payment of the same fees, as may other private citizens; and

(b) Faculty may make use of university property to encourage basic and applied research in accordance with the provisions of the university policy adopted pursuant to RCW 42.52.220.

(3) University property may not be used to benefit a charitable organization, with the following exceptions:

(a) Charities that are licensed in the state of Washington may use university property that is generally available to the public on the same basis, including payment of the same fees, as may private citizens;

(b) Charities that are licensed in the state of Washington may use university property without charge by special permission granted by the university president or the president's designee where the university has determined that the charitable activity or use will serve an educational or public service purpose related to the university's mission and an agreement, lease, or other formal arrangement is entered into between the university and the person, corporation, or other entity desiring to engage in a charitable event; and

(c) Recognized student organizations may use university property to conduct fund-raising activities for charitable purposes pursuant to university policies, procedures and all scheduling requirements.

#### NEW SECTION

**WAC 516-36-060 Parades or other street and road activity.** Permits for parades, street/road runs, marches, or other events on university streets and roads may be obtained upon approval of the university chief of police.

Such events must be scheduled so as not to interfere with major traffic arterials or with university events or activities.

For use of city streets on and adjacent to campus, permits must be obtained through the city of Bellingham.

#### **WSR 18-13-078**

#### **PERMANENT RULES**

#### **DEPARTMENT OF**

#### **RETIREMENT SYSTEMS**

[Filed June 15, 2018, 2:11 p.m., effective July 16, 2018]

Effective Date of Rule: Thirty-one days after filing.

Purpose: Law enforcement officers' and firefighters' (LEOFF) Plan 2 disability rules: To clarify and update rules concerning the administration of LEOFF Plan 2 nonduty, duty and catastrophic disability retirement benefits.

Citation of Rules Affected by this Order: New WAC 415-104-478, 415-104-479, 415-104-481, 415-104-483, 415-104-484, 415-104-486 and 415-104-487; and amending WAC 415-104-480, 415-104-482, and 415-104-485.

Statutory Authority for Adoption: RCW 41.50.050.

Adopted under notice filed as WSR 18-10-110 on May 2, 2018.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at the Request of a Non-governmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's own Initiative: New 7, Amended 3, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 7, Amended 3, Repealed 0.

Number of Sections Adopted using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: June 15, 2018.

Tracy Guerin  
Director

#### NEW SECTION

**WAC 415-104-478 Am I eligible for a LEOFF Plan 2 disability benefit?** This section applies to you if you are a LEOFF Plan 2 member who becomes disabled.

**Definitions.** As used in this section:

**Disabled** - Totally incapacitated to perform the essential functions of his or her LEOFF Plan 2 eligible position.

**(1) Who is entitled to disability benefits?** Any member of LEOFF Plan 2 is entitled to disability benefits if the department determines the member has:

(a) Become disabled; and

(b) Separated from all LEOFF-eligible employment due to the disability.

**(2) Is there a time limit for filing an application for disability benefits?** There is no time limit for applying for

benefits. However, your eligibility for a benefit will be based on your condition at the time of separation.

(3) **What happens if I become disabled after I retire?** Your medical condition at the time of separation will determine whether you qualify for a disability retirement.

(4) **What evidence will the department use to determine whether I am entitled to benefits under this section?**

(a) To determine if you are entitled to disability benefits, the department will consider any relevant information submitted by you or your employer, or otherwise available to the department, including:

(i) Information and determinations by the department of labor and industries (L&I), a self-insurer or the Social Security Administration;

(ii) Medical, vocational, and other information about your disability;

(iii) Your job description;

(iv) Your membership records, maintained by the department;

(v) Independent medical reviews made by DRS contracted vendors; and

(vi) Any other relevant evidence.

(b) The department reserves the right to consult with a contracted vendor for the purpose of providing an independent medical review of any LEOFF member who applies for disability benefits.

(5) **What would disqualify me for disability benefits?** You are not eligible for disability benefits if any of the following apply:

(a) Your application does not provide adequate proof that you are disabled;

(b) Your disability is the result of your criminal conduct committed after April 21, 1997 (RCW 41.26.061). Criminal conduct means:

(i) If a member is a defendant in a civil proceeding or has been formally charged in court with a crime, and the member is applying for or receiving a disability retirement benefit for a disability that is the result of the alleged criminal conduct, the department shall withhold payment of any disability benefits until:

(A) The case or charges, or both if both are pending, are dismissed; or

(B) The member is found not guilty in the criminal case or prevails in the civil proceeding, or both if both are pending; or

(C) The member is convicted or found to have engaged in criminal conduct in the civil proceeding.

(ii) If the case or charges, or both if both are pending, are dismissed or if a member is found not guilty or prevails in the civil proceeding, or both if both are pending, the department shall pay the member a disability benefit if he or she otherwise qualifies.

(iii) If the member is convicted or found to be liable for criminal conduct in a civil proceeding, and the member's disability is the result of the criminal conduct, the department shall not pay the member a disability benefit.

(iv) In the absence of a criminal conviction, a superior court may determine by a preponderance of the evidence whether the person participated in criminal conduct.

(6) **Who decides if I meet the requirements for benefits under this section?** The director of the department of retirement systems (DRS) or their designee will decide if you meet the requirements for benefits under this section.

(7) **What if I disagree with a decision made by the director or their designee?** If you disagree with the decision of the director of DRS or their designee, you may petition for review under chapter 415-04 WAC.

#### NEW SECTION

**WAC 415-104-479 Does my LEOFF Plan 2 disability qualify as a line of duty disability?** This section applies to you if you are a LEOFF Plan 2 member who becomes disabled in the line of duty per RCW 41.26.470.

(1) **How is "line of duty" defined?** Line of duty means any action or activity occurring in conjunction with your employment or your status as a law enforcement officer or firefighter and required or authorized by law, rule, regulations, or condition of employment or service. "Line of duty" has the same meaning as "course of employment" in worker's compensation law, under RCW 51.08.013. If you have multiple conditions, some duty-related and some not, you may still qualify for a duty-related disability if:

(a) The duty-related condition or conditions, standing alone, would render you disabled; or

(b) The duty-related incident or incidents were the proximate cause of the disabling condition.

(2) **What if I have a preexisting condition?** The presence of a preexisting condition does not by itself disqualify a member from receiving benefits for duty-related disability.

**Example:** A LEOFF Plan 2 member has asymptomatic congenital osteoarthritis, a degenerative joint disease. While on duty, the member suffered a knee injury. Absent the osteoarthritis, the knee injury may not have been disabling. However, the preexisting degenerative joint disease prevented full recovery from the injury, leaving the member unable to resume LEOFF duties. In this case, the member could qualify for a LEOFF plan 2 duty disability benefit.

(3) **When are the duty disability provisions effective?** The duty disability provisions under RCW 41.26.470 (6) and (7) are effective June 10, 2004.

AMENDATORY SECTION (Amending WSR 13-18-034, filed 8/28/13, effective 10/1/13)

**WAC 415-104-480 Does my disability qualify me for a LEOFF Plan 2 catastrophic duty disability benefit((s-))?** ((This section applies to you if you are a LEOFF Plan 2 member who incurs a disability in the line of duty per RCW 41.26.470 (6) and (7) and this section.

~~(1) Who is entitled to duty disability benefits? Any member of LEOFF Plan 2 who the department determines has:~~

~~(a) Incurred a physical or mental disability in the line of duty;~~

(b) Become totally incapacitated for continued employment in a LEOFF eligible position; and

(c) Separated from a LEOFF eligible position due to the disability.

(2) **How is "line of duty" defined?** Line of duty means any action or activity occurring in conjunction with your employment or your status as a law enforcement officer or firefighter and required or authorized by law, rule, regulations, or condition of employment or service.

(3) **When are the duty disability provisions effective?** The duty disability provisions under RCW 41.26.470 (6) and (7) are effective June 10, 2004.

(4) **How do I apply for duty disability benefits?** The department must receive:

(a) A completed three part disability retirement application on the form provided by the department.

(i) Part 1: Disability retirement application. You must complete and sign the application. If you are married, your spouse must sign consenting to the retirement payment option you choose. Your signature(s) must be notarized.

(ii) Part 2: Employer's statement and report. Your employer must complete, sign and return it directly to the department.

(iii) Part 3: Medical report. You must complete Section 1. The remainder must be completed and signed by a person licensed according to Washington state law to practice medicine and surgery, osteopathic medicine and surgery, chiropractic, clinical psychology, podiatry, dentistry, or optometry;

(b) Additional information requested by the department; and

(c) Any other material you want the department to consider.

(5) **What evidence will the department use to determine whether I am entitled to benefits under this section?** The department will consider any relevant information submitted by you or your employer, or otherwise available to the department, including:

(a) Information and determinations by the department of labor and industries (L&I) or a self-insurer;

(b) Medical, vocational, and other information about your disability;

(c) Your job description;

(d) Your membership records, maintained by the department; and

(e) Any other relevant evidence.

(6) **What would disqualify me for duty disability benefits?** You are not eligible for duty disability benefits if any of the following apply:

(a) Your application does not provide adequate proof that you are totally incapacitated for continued employment in a LEOFF eligible position;

(b) Your application does not provide adequate proof that your disability was incurred in the line of duty;

(c) The disability occurred as a result of intentional misconduct including but not limited to:

(i) An action you took intentionally to bring about your own disability;

(ii) Gross negligence on your part; or

(iii) Your voluntary intoxication. As used in this section, "intoxication" means a disturbance of mental or physical faculties resulting from the introduction of:

(A) Alcohol into the body as evidenced by:

(I) A blood alcohol level of .20 per centum or greater; or

(II) A blood alcohol level of at least .10 per centum but less than .20 per centum unless the department receives convincing evidence that the officer or firefighter was not acting in an intoxicated manner immediately prior to the injury; or

(B) Drugs or other substances in the body.

(7) **Who decides if I meet the requirements for benefits under this section?** The LEOFF plan administrator.

(8) **May I petition a decision made by the LEOFF plan administrator?** Yes. If the LEOFF plan administrator denies your request for a disability benefit under this section, you may petition for review under chapter 415-04 WAC.

(9) **What are the duty disability retirement benefits?** As a duty disability retiree, you may choose between:

(a) A nontaxable, one-time lump sum payment equal to one hundred fifty percent of your retirement contributions; except that, any payments made to restore service credit after the five year deadline will be paid at one hundred percent; or

(b) A monthly allowance equal to:

(i) Ten percent of your final average salary (FAS), which is nontaxable; and

(ii) Two percent of your FAS for each year of service beyond five years.

Your monthly allowance will not be adjusted for early retirement. However, if you choose a benefit option with a survivor feature as described in WAC 415-104-215, your monthly allowance will be actuarially reduced to offset the cost. See WAC 415-02-380 for more information on how your monthly allowance is affected by choosing a survivor feature.

**Example:**

Tom incurs a duty disability at age 42 after twenty years of service. His final average salary is \$5,000 per month. Tom's wife is also age 42. He chooses Benefit Option Two so that, after his death, his wife will receive a monthly allowance equal to the gross monthly allowance he was receiving. For illustration purposes in this example only, we will use 0.87 as the corresponding Option Two joint and survivor factor (actuarial factors change periodically) for zero age difference between Tom and his wife.

Tom will receive a minimum allowance of \$435 (nontaxable) plus an additional \$1,305 (taxable), for a total monthly allowance of \$1,740. The department will use the following formula to determine Tom's monthly allowance:

$$\begin{aligned} \$5,000 \times 10\% \times 0.87 &= \$435 \text{ (nontaxable); PLUS} \\ 15 \times 2\% \times \$5,000 \times 0.87 &= \$1,305 \text{ (taxable)} \\ \text{TOTAL} &= \$1,740 \end{aligned}$$

~~(10) Are my duty disability benefits taxable?~~ The department reports disability benefits to the Internal Revenue Service as required by federal law. Based on current federal law, part of your benefit may be taxable. You should consult with your own tax advisor regarding all questions of federal or state income, payroll, personal property or other tax consequences regarding any payments you receive from the department.

The department does not:

- ~~(a) Guarantee that payments are exempt from federal income tax;~~
- ~~(b) Guarantee that it was correct in withholding or not withholding taxes from benefit payments to you;~~
- ~~(c) Represent or guarantee that any particular federal or state income, payroll, personal property or other tax consequence will occur because of its determination; or~~
- ~~(d) Assume any liability for your compliance with the Internal Revenue Code.~~

~~(11) If I previously withdrew my contributions, may I apply for duty disability benefits?~~ If you separated from employment due to a disability and withdrew your contributions, you may apply for duty disability benefits according to the provisions of subsection (4) of this section.

~~(12) If I previously withdrew my contributions and am approved for duty disability benefits, what will I receive as a benefit?~~ If the LEOFF plan administrator determines you are entitled to duty disability benefits, the department will amend Internal Revenue Service reporting to designate your previous withdrawal as nontaxable. In addition, you may choose either of the following:

- ~~(a) If you previously withdrew 100% of your contributions, you may choose to receive an additional lump sum payment equal to 50% of the contributions you withdrew. The payment will be nontaxable; or~~
- ~~(b) If you previously withdrew 100% or 150% of your contributions, you may choose to receive a monthly allowance according to subsection (9) of this section. You must repay the amount you withdrew, either in a lump sum payment or by having your monthly allowance permanently actuarially reduced to offset the amount of your previous withdrawal.~~

**Example:** John was injured on the job and separated from his LEOFF position in March 2002. At the time he separated, he was 43 years old, had 10 years of service, and his final average salary was \$5,000.00 per month. At that time, John chose to withdraw \$75,000, which equaled 150 percent of his retirement contributions.

John subsequently applied under the provisions of RCW 41.26.470 (6) and (7) and was deemed eligible for duty disability benefits.

The department calculated John's benefit according to the methods in subsection (9) of this section. For illustration purposes in this example only, we will use .0049904 as the

corresponding annuity factor for age 43 (actuarial factors change periodically). John determined it was to his advantage to take a monthly allowance.

If John repays the entire amount he withdrew in a lump sum, his monthly allowance will be calculated according to the formula in subsection (9)(b) of this section:

$$\begin{aligned}
 \$5,000 \times 10\% &= \$500 \text{ (nontaxable); PLUS} \\
 5 \times 2\% \times \$5,000 &= \$500 \text{ (taxable)} \\
 \text{TOTAL} &= \$1,000
 \end{aligned}$$

If John repays the withdrawn amount through a permanent actuarial reduction, his monthly allowance will be reduced as follows:

$$\begin{aligned}
 \text{Monthly amount from} &= \$1,000; \text{ LESS} \\
 \text{above} & \\
 \$75,000 \times .0049904 &= -\$374.28 \\
 \text{Monthly allowance} &= \$625.72^+
 \end{aligned}$$

<sup>+</sup> If John chooses a benefit option with a survivor feature, as described in WAC 415-104-215, his monthly allowance will be actuarially reduced to offset the cost. See also WAC 415-02-380.

~~(13) When does a duty disability retirement benefit end?~~ The department may require comprehensive medical examinations to reevaluate your eligibility for continued disability benefits according to the provisions of RCW 41.26.470(2). Your duty disability benefit will cease if:

- ~~(a) You return to work in a LEOFF-eligible position; or~~
- ~~(b) Medical examination reveals that you are no longer totally incapacitated for employment in a LEOFF-eligible position and you are no longer entitled to workers' compensation benefits under Title 51 RCW.~~

~~(14) If I retire for a duty disability and die, will my survivor beneficiary receive a monthly allowance?~~ If you choose a benefit option with a survivor feature under WAC 415-104-215(2) at the time of retirement, your survivor beneficiary will receive a monthly allowance after your death.

~~(15) What happens if I return to a LEOFF-eligible position?~~ If you return to a LEOFF-eligible position, your monthly allowance will stop.

~~(16) If I return to a LEOFF-eligible position, how will my future retirement benefit be affected?~~ When you re-retire, your monthly allowance will be calculated pursuant to RCW 41.26.500 and WAC 415-104-111.) (1) If the department determines you are disabled and you became disabled in the line of duty, you qualify for a catastrophic duty disability if:

- (a) The disability or disabilities that qualified you for a LEOFF Plan 2 duty disability benefit are so severe that considering your age, education, work experience, and transferable skills, you cannot engage in any other kind of substantial gainful activity in the labor market; and

(b) Your disability or disabilities have lasted or are expected to last at least twelve months, or are expected to result in your death.

(2) A person with multiple injuries/conditions, some duty-related and some not, could qualify for a catastrophic duty disability but only if the duty injury or injuries, standing on their own, are catastrophically disabling.

**Examples:**

• Totally disabled, but not from duty injury - Not eligible for catastrophic disability benefit.

A LEOFF Plan 2 member suffers a knee injury on duty, leaving them disabled from LEOFF employment. The knee injury, standing alone, is not totally disabling. The member also suffers from amyotrophic lateral sclerosis (ALS) or Lou Gehrig's disease, a progressive neurodegenerative disease that ultimately leaves the member totally disabled. Pursuant to the ALS diagnosis the member is granted a full disability from the Social Security Administration. In this case the member would qualify for a duty disability, but not for a catastrophic disability since the fully disabling condition, ALS, is not duty related.

• Totally disabled, duty injury totally disabling - Eligible for catastrophic disability benefits.

A LEOFF Plan 2 member suffers a knee injury while fishing. The knee injury, standing alone, is neither duty related nor catastrophically disabling. The member also suffers severe burns while fighting a fire, leaving him/her fully disabled. The Social Security Administration grants the member a full disability based on his/her total condition. The member qualifies for a LEOFF plan 2 catastrophic disability benefit because the burn injuries, standing alone, render him/her totally disabled.

(3) Medical insurance premium reimbursement is an additional benefit for a member who is catastrophically disabled in the line of duty (RCW 41.26.470). However, if you choose to withdraw one hundred fifty percent of your accumulated contributions pursuant to RCW 41.26.470(6) you are not entitled to the medical insurance premium reimbursement.

(4) Definitions. As used in this section:

(a) **Catastrophically disabled** means the same as "totally disabled" as defined under RCW 41.26.470(9).

(b) **Earnings** are any income or wages received, which are reportable as wages or self-employment income to the IRS.

(c) **Labor market** is the geographic area within reasonable commuting distance of where you were last gainfully employed or where you currently live, whichever provides the greatest opportunity for gainful employment.

(d) **Substantial gainful activity** describes a level of work activity and earnings. Substantial gainful activity is work activity that is both substantial and gainful. Earnings as defined in this section includes compensated work that meets or exceeds the defined income threshold:

(i) Work activity is substantial if it involves doing significant physical or mental activities. Your work may be substantial even if it is done on a part-time basis or if you do less, or get paid less, or have less responsibility than when you worked in your LEOFF position.

(ii) Work activity is gainful if it is work activity that you do for pay or profit. Work activity is gainful if it is the kind of work usually done for pay or profit, whether or not a profit is realized.

(iii) Generally, activities like taking care of yourself, household tasks, profits from rental income, hobbies, therapy, school attendance, club activities, or social programs are not substantial gainful activity.

(e) **Defined income threshold** means any substantial gainful activity that produces average earnings, as defined in (a) of this subsection, in excess of the federal Social Security disability standards, adjusted annually for inflation. Wages count toward earnings when they are earned, not when you receive them. Self-employment income counts when you receive it, not when you earn it.

(f) **Transferable skills** are any combination of learned or demonstrated behavior, education, training, work traits, and skills that you can readily apply. They are skills that are interchangeable among different jobs and workplaces.

NEW SECTION

**WAC 415-104-481 Does my disability qualify as a nonduty LEOFF Plan 2 disability?** This section applies to you if you are a LEOFF Plan 2 member who becomes disabled not in the line of duty.

**(1) Who is entitled to nonduty disability benefits?** Any member of LEOFF Plan 2 who the department determines has become totally incapacitated to perform the essential functions of his or her LEOFF Plan 2 eligible position as a result of their disability, but did not have the qualifying disability occur in the line of duty, is entitled to a nonduty disability per RCW 41.26.470(1).

**(2) What if I have a preexisting condition or conditions?** The presence of a preexisting condition does not disqualify a member from receiving benefits.

**Example:** A LEOFF Plan 2 member has asymptomatic congenital osteoarthritis, a degenerative joint disease. While off duty, the member suffered a knee injury. Absent the osteoarthritis, the knee injury may not have been disabling. However, the preexisting degenerative joint disease prevented full recovery from the injury, leaving the member unable to resume LEOFF duties. In this case, the member could qualify for a LEOFF Plan 2 nonduty disability benefit.

AMENDATORY SECTION (Amending WSR 16-06-069, filed 2/25/16, effective 3/27/16)

**WAC 415-104-482 ((What is the LEOFF Plan 2 catastrophic disability allowance?)) How are the different LEOFF Plan 2 disability benefits calculated?** ((Under RCW 41.26.470, two types of disability retirement are available to members of LEOFF Plan 2 who become disabled in the line of duty: Duty disability retirement benefits as described in WAC 415-104-480 and catastrophic disability retirement benefits as described in this section. If you are not

eligible for a catastrophic disability allowance under this section, you may still be eligible for duty disability benefits.

**(1) Am I eligible for a catastrophic disability allowance?** You are eligible for a catastrophic disability allowance if the department determines all of the following are true:

(a) You incurred a physical or mental disability in the line of duty, as defined in WAC 415-104-480;

(b) You separated from LEOFF-eligible employment due to your disability;

(c) Your disability is so severe that you are unable to do your previous LEOFF-eligible work, and considering your education, transferable skills, and work experience, you cannot engage in any other kind of substantial gainful activity in the labor market;

(d) Your condition has lasted or is expected to last at least twelve months, or your condition is expected to result in death; and

(e) Your disability is not the result of your criminal conduct committed after April 21, 1997. See RCW 41.26.061.

**(2) If I am receiving a retirement allowance for service, can I qualify for a catastrophic disability allowance?** You are eligible for a catastrophic disability allowance in lieu of your service retirement allowance if the department determines you meet the eligibility requirements in subsection (1) of this section.

**(3) How do I request a catastrophic disability allowance?** To request a catastrophic disability allowance, please contact the department of retirement systems. You, your physician, and your employer will be required to provide information regarding your catastrophic disability.

**(4) What information will the department use to determine whether I am entitled to an allowance under this section?** The department will consider information submitted by you, your physician, and your employer, and information otherwise available to the department, including:

(a) Medical and vocational information;

(b) Information from and determinations made by the department of labor and industries, the Social Security Administration, or an employer;

(c) Your job description at the time you separated from LEOFF Plan 2 service;

(d) Financial records;

(e) Your membership records, maintained by the department; and

(f) Any other relevant information.

**(5) Who determines my eligibility?** The LEOFF plan administrator determines your eligibility for a catastrophic disability benefit. The plan administrator will rely substantially on determinations that have been made by the Social Security Administration unless there is information available that would produce a different determination.

**(6) What are my options if my request is denied?** If your request is denied, you have the following options:

(a) You may apply for duty disability benefits under WAC 415-104-480; and/or

(b) You may petition for review under chapter 415-04 WAC.

**(7) If my request is approved, when will my monthly allowance begin to be paid?** If your request is approved, you will begin to receive a catastrophic disability allowance in the

month following the approval. Your first payment will include a retroactive payment of benefits that have accrued, but not yet been paid. The date your allowance for catastrophic disability accrues is determined as follows:

(a) If you separated from LEOFF Plan 2 employment due to a catastrophic disability, your allowance will accrue from the first of the month following your separation date.

(b) If you are receiving a duty disability allowance or a service retirement allowance, and you are subsequently approved for a catastrophic disability, your allowance will accrue from:

(i) The first of the month following the month in which a specific, one-time event, verified by medical records, occurred that clearly caused your duty disability to become a catastrophic disability; or

(ii) If the department determines there is not a one-time event that caused your disability to become catastrophic, the first of the month following the month in which the department receives your request for a catastrophic disability allowance.

**Example:** John has been receiving a duty disability allowance under WAC 415-104-480 since June 1, 2005, when he separated service as a firefighter due to a back injury he incurred in the line of duty.

**Example of (b)(i) of this subsection: A one-time event.** On January 15, 2007, John accidentally twisted his back causing a catastrophic disability. Because John's catastrophic disability was clearly the result of a specific one-time event, his catastrophic disability allowance will accrue from February 1, 2007, the first of the month following the month in which the event occurred.

**Example of (b)(ii) of this subsection: No specific event.** John's back gradually worsened until his disability qualified as a catastrophic disability. On May 15, 2007, John applied for a catastrophic disability allowance. His allowance will accrue from June 1, 2007, the first of the month following the month the department received his application.

**(8) How much is a catastrophic disability allowance?** The base catastrophic disability allowance is equal to seventy percent of your final average salary (FAS):

(a) Your allowance combined with other disability benefits, such as Title 51 RCW benefits or Social Security disability benefits, may not exceed one hundred percent of your FAS. If necessary, your catastrophic disability allowance will be reduced so that your combined allowance does not exceed one hundred percent of your FAS. Any such adjustment will be applied prospectively. Your catastrophic disability allowance will not be reduced below your accrued retirement allowance as defined in subsection (13) of this section.

(b) If you choose a benefit option with a survivor feature as described in WAC 415-104-215, the allowance calculated in (a) of this subsection will be actuarially reduced to cover the cost of providing benefits over two lifetimes.

(c) If you have been retired for at least one year by July 1st of each year, you will receive a cost-of-living adjustment each July based on the percentage change, if any, in the consumer price index.

**Example:** Michael separates from service on June 1, 2005, and is approved for a catastrophic disability allowance. Since his FAS is \$5,800, Michael's catastrophic disability allowance from the department is \$4,060 per month ( $\$5,800 \times 70\% = \$4,060$ ). Michael is also approved for a Social Security benefit in the amount of \$1,800 per month. Michael's combined benefit equals \$5,860 ( $\$4,060 + \$1,800$ ). This is \$60 over 100% of his FAS ( $\$5,860 - \$5,800$ ), so Michael's catastrophic disability benefit will be reduced by that amount; his new monthly benefit from the department is \$4,000 ( $\$4,060 - \$60$ ). In January 2006, Michael received a 4.1% COLA for his Social Security benefit. The department will recalculate his benefit as follows:

Amount over 100% of FAS	\$6,055.60 - \$5,974	= <b>\$81.60</b>
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Since Michael's combined benefit is \$81.60 over 100% of his FAS, his catastrophic disability benefit will be reduced by that amount. His new monthly benefit from the department is \$4,100.20 ( $\$4,181.80 - \$81.60$ ). This is compared to his accrued retirement allowance, \$3,584.40 ( $\$5,974 \times 30 \times 2\%$ ); since his benefit does not fall below his retirement allowance, Michael will receive \$4,100.20 from the department per month.

January 2006 Social Security benefit, with COLA	$\$1,800 \times 4.1\% = \$73.80 + \$1,800$	= <b>\$1,873.80</b>
Total combined benefit	$\$4,060 + \$1,873.80$	= <b>\$5,933.80</b>
Amount over 100% of FAS	$\$5,933.80 - \$5,800$	= <b>\$133.80</b>

Since Michael's combined benefit is \$133.80 over 100% of his FAS, his catastrophic disability benefit will be reduced by that amount. His new monthly benefit from the department is \$3,926.20 ( $\$4,060 - \$133.80$ ). Michael's benefit cannot be reduced more than the amount of his accrued retirement allowance. To determine his accrued retirement allowance, the department multiplies Michael's FAS, \$5,800, by his years of service credit, 30, by 2% ( $\$5,800 \times 30 \times 2\%$ ). Michael's accrued retirement allowance is \$3,480. Since his benefit does not fall below his retirement allowance, Michael will receive \$3,926.20 from the department per month. In July 2006, Michael received a 3% COLA for his catastrophic disability benefit. The department will recalculate his benefit as follows:

July 2006 catastrophic disability benefit, with COLA	$\$5,800 \times 3\% = \$174 + \$5,800 - \$5,974 \times 70\%$	= <b>\$4,181.80</b>
Total combined benefits	$\$4,181.80 + \$1,873.80$	= <b>\$6,055.60</b>

**(9) Is my catastrophic disability allowance taxable?** You should consult with your tax advisor regarding all payments you receive from the department. The department does not:

- (a) Guarantee that payments are exempt from federal income tax;
- (b) Guarantee that it was correct in withholding or not withholding taxes from disability payments;
- (c) Represent or guarantee that any particular federal or state income, payroll, personal property or other tax consequence will occur because of its determination; or
- (d) Assume any liability for your compliance with the Internal Revenue Code.

**(10) If I withdrew my contributions prior to December 2, 2004, and am approved for a catastrophic disability allowance, what will I receive?** You may apply for a catastrophic disability allowance even if you withdrew your accumulated contributions prior to December 2, 2004. If you are approved for a catastrophic disability allowance, your monthly allowance will be calculated as follows:

- (a) If you repay the entire amount you withdrew plus interest, in a lump sum payment, you will receive a monthly allowance calculated according to subsection (8) of this section.
- (b) If you do not repay the entire amount you withdrew, your monthly allowance will be actuarially reduced to offset the amount of your previous withdrawal.

**(11) Can my catastrophic disability allowance be discontinued?** Your catastrophic disability allowance will be discontinued if:

- (a) Medical/vocational examination, or other information commonly available or provided to the department by an employer, reveals that your disability no longer prevents you from performing substantial gainful activity; or
- (b) Your earnings exceed the threshold for substantial gainful activity.

The department may require or offer to provide comprehensive medical/vocational examinations and/or submission of earnings information to evaluate your eligibility for continued benefits. You are required to contact the department if your medical/vocational or financial situation changes.

**(12) If my catastrophic disability allowance terminates, may I qualify for duty disability benefits?** If you are no longer eligible for a catastrophic disability allowance, but have a disability that prevents you from returning to a

LEOFF-eligible position, the department will determine if you qualify for duty disability benefits under WAC 415-104-480.

(a) The department may request additional information from you, your physician, or others upon which to base the determination.

(b) If the department determines you are eligible, you will begin receiving a duty disability allowance under WAC 415-104-480 in lieu of your catastrophic disability allowance.

(13) **Definitions.** As used in this section:

(a) ~~Accrued retirement allowance~~ means a duty disability monthly allowance under WAC 415-104-480.

(b) **Earnings** are any income or wages received, which are reportable as wages or self-employment income on IRS form 1040.

(c) **Labor market** is the geographic area within reasonable commuting distance of where you were last gainfully employed or where you currently live, whichever provides the greatest opportunity for gainful employment.

(d) **Substantial gainful activity** means any activity that produces average earnings, as defined in (b) of this subsection, in excess of eight hundred sixty dollars a month in 2006, adjusted annually as determined by the department based on federal Social Security disability standards. Wages count toward earnings when they are earned, not when you receive them. Self-employment income counts when you receive it, not when you earn it.

(e) **Transferable skills** are any combination of learned or demonstrated behavior, education, training, work traits, and skills that you can readily apply. They are skills that are interchangeable among different jobs and workplaces.) (1)

**Line of duty:** As a line of duty disability retiree, you may choose between:

(a) A nontaxable, one-time lump sum payment equal to one hundred fifty percent of your retirement contributions; except that, any payments made to restore service credit after the five-year deadline will be paid at one hundred percent; or

(b) A monthly disability benefit equal to:

(i) Ten percent of your final average salary (FAS), which is nontaxable; and

(ii) Two percent of your FAS for each year of service beyond five years.

**Calculation of monthly disability benefit:**

**Example 1:** Chris was approved for line of duty disability. The final average salary (FAS) was \$10,000. Chris had 20 years of service credit at the time of retirement. To determine the line of duty disability benefit amount:

1.  $10\% \times \text{FAS} = \text{Nontaxable amount}$   
 $.10 \times \$10,000 = \$1,000$
2.  $\frac{2\% \times \text{FAS} \times \text{Number of Service Years beyond Five Years}}{\text{Years beyond Five Years}} = \text{Taxable amount}$   
 $\frac{.02 \times \$10,000 \times 15}{15} = \$3,000$
3.  $\frac{\text{Nontaxable amount} + \text{Taxable amount}}{\text{Taxable amount}} = \text{Total benefit}$

$$\underline{\$1,000 + \$3,000} = \underline{\$4,000}$$

**Example 2:** Pat was approved for line of duty disability. The final average salary (FAS) was \$10,000. Pat had 2 years of service credit at the time of retirement. To determine the line of duty disability benefit amount:

1.  $10\% \times \text{FAS} = \text{Nontaxable amount}$   
 $.10 \times \$10,000 = \$1,000$
2.  $\frac{2\% \times \text{FAS} \times \text{Number of Service Years beyond Five Years}}{\text{Years beyond Five Years}} = \text{Taxable amount}$   
 $\frac{.02 \times \$10,000 \times 0}{0} = \$0$
3.  $\frac{\text{Nontaxable amount} + \text{Taxable amount}}{\text{Taxable amount}} = \text{Total benefit}$   
 $\frac{\$1,000 + \$0}{\$0} = \$1,000$

(2) **Catastrophic duty disability:** As a catastrophic duty disability retiree, you may choose between:

(a) A nontaxable, one-time lump sum payment equal to one hundred fifty percent of your retirement contributions; except that, any payments made to restore service credit after the five-year deadline will be paid at one hundred percent. Under this option you waive your right to the medical insurance premium reimbursement; or

(b) A monthly disability benefit equal to:

(i) Seventy percent of your final average salary (FAS), which is nontaxable, reduced by any temporary disability benefits provided under Title 51 RCW and federal Social Security disability benefits, if necessary to ensure that the total combined benefits do not exceed one hundred percent of the member's final average salary (FAS).

(ii) The reduced benefit cannot be less than the earned service retirement benefit.

**Calculation of monthly disability benefit:**

**Example 1:** Terry was approved for catastrophic disability. The final average salary (FAS) was \$10,000. Terry was not receiving benefits from LNI or Social Security disability insurance (SSDI). Terry had 20 years of service credit at the time of retirement. To determine the catastrophic benefit amount:

1.  $70\% \text{ of FAS} = \text{Monthly disability benefit}$   
 $.70 \times \$10,000 = \$7,000$
2.  $2\% \times \text{FAS} \times \text{Service Years} = \text{Earned benefit}$   
 $.02 \times \$10,000 \times 20 = \$4,000$

Since there is no offset and the monthly disability benefit is greater than the earned benefit, Terry's benefit will be \$7,000 a month.

**Example 2:** Pat was approved for catastrophic disability. The final average salary (FAS) was \$10,000. Pat was receiving benefits from LNI and Social Security disability insurance (SSDI) in the amounts of \$5,000 and \$2,000. Pat had 2 years of service credit at the time of retirement. To determine the catastrophic benefit amount:

1.  $70\% \text{ of FAS} = \text{Monthly disability benefit}$   
 $.70 \times \$10,000 = \$7,000$
2.  $\text{Monthly disability benefit} + \text{LNI benefits} + \text{SSDI benefit} = \text{Total of all benefits}$   
 $\$7,000 + \$5,000 + \$2,000 = \$14,000$
3.  $\text{Total of all benefits} - \text{FAS} = \text{Reduction amount}$   
 $\$14,000 - \$10,000 = \$4,000$
4.  $\text{Monthly disability benefit} - \text{Reduction Amount} = \text{Reduced monthly benefit}$   
 $\$7,000 - \$4,000 = \$3,000$
5.  $2\% \times \text{FAS} \times \text{Service Years} = \text{Earned benefit}$   
 $.02 \times \$10,000 \times 2 = \$400$

Since the reduced monthly benefit amount is greater than the earned benefit, Pat's benefit will be \$3,000 a month.

**Example 3:** Chris was approved for catastrophic disability. The final average salary (FAS) was \$10,000. Chris was receiving benefits from LNI (Title 51 RCW) and Social Security disability insurance (SSDI) in the amounts of \$5,000 and \$2,000 respectively. Chris had 20 years of service credit at the time of retirement. To determine the catastrophic benefit amount:

1.  $70\% \text{ of FAS} = \text{Monthly disability benefit}$   
 $.70 \times \$10,000 = \$7,000$
2.  $\text{Monthly disability benefit} + \text{LNI benefits} + \text{SSDI benefit} = \text{Total of all benefits}$   
 $\$7,000 + \$5,000 + \$2,000 = \$14,000$
3.  $\text{Total of all benefits} - \text{FAS} = \text{Reduction amount (to not exceed 100\% of FAS)}$   
 $\$14,000 - \$10,000 = \$4,000$
4.  $\text{Monthly disability benefit} - \text{Reduction Amount} = \text{Reduced monthly benefit}$   
 $\$7,000 - \$4,000 = \$3,000$
5.  $2\% \times \text{FAS} \times \text{Service Years} = \text{Earned benefit}$

$$.02 \times \$10,000 \times 20 = \$4,000$$

Chris is entitled to the greater of the catastrophic retirement calculation or the earned benefit. Since the earned benefit is greater than the reduced catastrophic benefit, Chris' benefit will be \$4,000 a month.

(3) Nonduty disability: As a nonduty disability retiree, you receive a benefit of two percent times your final average salary times your service credit years. This disability benefit will be actuarially reduced to reflect the difference in age at the time of disability retirement and age fifty-three.

**Calculation of monthly disability benefit:**

**Example 1 - Full actuarial reduction:**

Chris, age 47, was approved for a nonduty disability. The final average salary (FAS) was \$10,000. Chris had 20 years of service credit at the time of retirement. To determine the nonduty disability benefit amount:

$$2\% \times \text{FAS} \times \text{Service Years} \times \text{early retirement factor (2018 table)} = \text{Benefit amount}$$

$$.02 \times \$10,000 \times 20 \times 0.5980 = \$2,392$$

**NEW SECTION**

**WAC 415-104-483 Is my disability benefit affected by choosing a survivor option?** If you choose a benefit option with a survivor feature at the time of retirement, your survivor beneficiary will receive an ongoing monthly disability benefit after your death. Your disability benefit will be actuarially reduced to offset the cost of providing payments over two lifetimes. The survivor options are further described in WAC 415-104-215. See WAC 415-02-380 for more information and examples on how the actuarial reduction is applied to your disability benefit.

**NEW SECTION**

**WAC 415-104-484 Is my disability benefit reduced for early retirement?** If you retire for line of duty disability or catastrophic duty disability, your disability benefit will not be reduced for early retirement. If you retire for nonduty disability, your disability benefit will be actuarially reduced to reflect the difference in age at the time of disability retirement and age fifty-three. See WAC 415-02-320 for more information and examples on how the actuarial reduction is applied to your disability benefit.

**AMENDATORY SECTION** (Amending WSR 13-18-034, filed 8/28/13, effective 10/1/13)

**WAC 415-104-485 ((LEOFF nonduty disability benefits.)) How do I apply for a disability benefit?** ((This section applies to you if you are a LEOFF Plan 2 member who incurs a disability not in the line of duty. If your disability or injury was incurred in the line of duty, see WAC 415-104-480.

**(1) Who is entitled to nonduty disability benefits?** Any member of LEOFF Plan 2 who the department determines has:

(a) Incurred a physical or mental disability while not in the line of duty;

(b) Become totally incapacitated for continued employment in a LEOFF eligible position; and

(c) Separated from a LEOFF-eligible position due to the disability.

(2) **How is "line of duty" defined?** Line of duty means any action or activity occurring in conjunction with your employment or your status as a law enforcement officer or firefighter and required or authorized by law, rule, regulations, or condition of employment or service.

(3) **How do I apply for nonduty disability benefits?** The department must receive:

(a) A completed three-part disability retirement application on the form provided by the department.

(i) Part 1: Disability retirement application. You, or a person with legal authority to apply on your behalf, must complete and sign the application. If you are married, your spouse must sign consenting to the retirement payment option you choose. Your signature(s) must be notarized.

(ii) Part 2: Employer's statement and report. Your employer must complete, sign and return it directly to the department.

(iii) Part 3: Medical report. You must complete Section 1. The remainder must be completed and signed by a person licensed according to Washington state law to practice medicine and surgery, osteopathic medicine and surgery, chiropractic, clinical psychology, podiatry, dentistry, or optometry;

(b) Additional information requested by the department; and

(c) Any other material you want the department to consider.

(4) **Is there a time limit for filing an application for nonduty disability benefits?** No. There is no time limit for applying for benefits. However, if you have separated from employment, your application must be based on your condition at the time of separation.

(5) **What evidence will the department use to determine whether I am entitled to benefits under this section?** The department will consider any relevant information submitted by you or your employer, or otherwise available to the department, including:

(a) Information and determinations by the department of labor and industries (L&I) or a self-insurer;

(b) Medical, vocational, and other information about your disability;

(c) Your job description;

(d) Your membership records, maintained by the department; and

(e) Any other relevant evidence.

(6) **What would disqualify me for nonduty disability benefits?** You are not eligible for nonduty disability benefits if any of the following apply:

(a) Your application does not provide adequate proof that you are totally incapacitated for continued employment in a LEOFF-eligible position;

(b) Your disability is the result of your criminal conduct committed after April 21, 1997. See RCW 41.26.061.

(7) **Who decides if I meet the requirements for benefits under this section?** The LEOFF plan administrator.

(8) **May I petition a decision made by the LEOFF plan administrator?** Yes. If the LEOFF plan administrator denies your request for a disability benefit under this section, you may petition for review under chapter 415-04 WAC.

(9) **What are the nonduty disability retirement benefits?** As a nonduty disability retiree, your retirement benefit is a monthly allowance equal to:

(a) Two percent times your final average salary times your service credit years. This allowance will be actuarially reduced to reflect the difference in age at the time of disability retirement and age 53. If you qualify for alternative early retirement per RCW 41.26.430(3), your reduction will be three percent per year before age 53.

(b) If you choose a benefit option with a survivor feature as described in WAC 415-104-215, your monthly allowance will be actuarially reduced to offset the cost. See WAC 415-104-380 for more information on how your monthly allowance is affected by choosing a survivor feature.

**Example:** Tom incurs a nonduty disability at age 42 after twenty years of service. His final average salary (FAS) is \$5,000 per month. Tom's wife is also age 42. He chooses Benefit Option Two so that, after his death, his wife will receive a monthly allowance equal to the gross monthly allowance he was receiving. For illustration purposes in this example only, we will use 0.39 as the corresponding factor for retiring 11 years early, and 0.87 as the Option Two factor (actuarial factors change periodically). As a result, Tom's monthly allowance will be \$678.60.

The department will use the following formula to determine Tom's monthly allowance:  $20 \text{ (years of service)} \times 2\% \times \$5,000 \text{ (FAS)} \times 0.39 \text{ (early retirement factor)} \times 0.87 \text{ (Option Two factor)} = \$678.60$ .

(10) **Are my nonduty disability benefits taxable?** The department reports disability benefits to the Internal Revenue Service as required by federal law. Based on current federal law, your benefit may be taxable. You should consult with your own tax advisor regarding all questions of federal or state income, payroll, personal property or other tax consequences regarding any payments you receive from the department.

The department does not:

(a) Guarantee that payments are exempt from federal income tax;

(b) Guarantee that it was correct in withholding or not withholding taxes from benefit payments to you;

(c) Represent or guarantee that any particular federal or state income, payroll, personal property or other tax consequence will occur because of its determination; or

(d) Assume any liability for your compliance with the Internal Revenue Code.

~~(11) If I previously retired for service under the alternative early retirement provisions of RCW 41.26.430(3), but I qualified for a disability retirement, can I apply for duty or nonduty disability benefits? Yes. If you retired under the alternative early retirement provisions of RCW 41.26.430(3) on or before January 1, 2001, you can apply to retire under the disability provisions of RCW 41.26.470. Your benefit will be reduced by three percent per year before age 53 instead of actuarially reduced by the early retirement factors in WAC 415-02-320.~~

~~(12) If I previously retired for disability but was otherwise qualified for a service retirement under the alternative early retirement provisions of RCW 41.26.430(3), can I have my benefit recalculated to reflect a three percent reduction instead of being actuarially reduced by the early retirement reduction factors in WAC 415-102-320? Yes. If you retired on or after January 1, 2001, and met the requirements of RCW 41.26.430(3), you can have your disability benefit recalculated under those provisions.~~

~~(13) When does a nonduty disability retirement benefit end? The department may require comprehensive medical examinations to reevaluate your eligibility for continued disability benefits according to the provisions of RCW 41.26.470(2). Your nonduty disability benefit will cease if:~~

- ~~(a) You return to work in a LEOFF-eligible position; or~~
- ~~(b) Medical examination reveals that you are no longer totally incapacitated for employment in a LEOFF-eligible position and you are no longer entitled to workers' compensation benefits under Title 51 RCW.~~

~~(14) If I retire for a nonduty disability and die, will my survivor beneficiary receive a monthly allowance? If you choose a benefit option with a survivor feature under WAC 415-104-215(2) at the time of retirement, your survivor beneficiary will receive a monthly allowance after your death.~~

~~(15) What happens if I return to a LEOFF-eligible position? If you return to a LEOFF-eligible position, your monthly allowance will stop.~~

~~(16) If I return to a LEOFF-eligible position, how will my future retirement benefit be affected? When you re-retire, your monthly allowance will be calculated pursuant to RCW 41.26.500 and WAC 415-104-111.) (1) The department must receive:~~

- ~~(a) A completed DRS disability retirement application;~~
  - ~~(b) Additional information required by the department;~~
- ~~and~~
- ~~(c) Any other material you want the department to consider.~~

~~(2) The process for determining eligibility for a disability benefit can be lengthy and may require additional documentation to complete.~~

#### NEW SECTION

**WAC 415-104-486 When does my disability benefit end?** The department may require comprehensive medical or psychological examinations to reevaluate your continued eligibility for disability benefits. For catastrophic benefits the department may also require or offer to provide comprehensive vocational examinations and/or submission of earnings

information to evaluate your continued eligibility. You are required to contact the department if your medical/vocational or financial situation changes.

- (1) Your duty or nonduty disability benefit will cease if:
  - (a) You return to work in a LEOFF-eligible position; or
  - (b) Medical examination reveals that you are no longer totally incapacitated for employment in a LEOFF-eligible position and you are no longer entitled to workers' compensation benefits under Title 51 RCW.
- (2) Your catastrophic disability benefit will cease if:
  - (a) You return to work in a LEOFF-eligible position;
  - (b) Medical/vocational examination, or other information commonly available or provided to the department by an employer, reveals that your disability no longer prevents you from performing substantial gainful activity; or
  - (c) Your earnings exceed the threshold for substantial gainful activity.

#### NEW SECTION

**WAC 415-104-487 Can my disability retirement type change?** Your disability retirement type may change depending upon the circumstances.

If your original disabling condition or conditions worsen, improve, or recover, the department may adjust your benefit.

(1) **Worsening** - If the condition or conditions that caused your duty disability worsen, your retirement may be changed to a catastrophic disability. You must submit an application and provide sufficient medical evidence to support a claim that your condition or conditions qualify you for a catastrophic disability. The worsening must be caused by or directly related to the original injury or injuries or illness and not due to the natural aging process or a succeeding cause.

**Example:** A member retires on a duty-related disability retirement due to a knee injury. The member has surgery related to the knee injury after retirement and suffers side effects from the surgery that prevent the member from performing any substantial gainful employment. The member is eligible to have their benefit adjusted because the aggravation is directly related to the original injury.

**Example:** A member retires on a duty-related disability retirement due to a knee injury. The member reinjures the knee in a skiing accident and is rendered unable to perform any substantial gainful employment. The member is not eligible to have their benefit adjusted because the aggravation is the result of a succeeding cause and not the original injury.

**Example:** A member retires on a duty-related disability retirement due to a knee injury. The condition gradually worsens over time until the member is no longer capable of substantial gainful employment. The member is not eligible to have their benefit adjusted because the aggravation is due to aging.

(2) **Improvement** - If your condition or conditions improve such that you are capable of substantial gainful employment, the department will adjust your catastrophic disability benefit to a duty disability benefit.

(3) **Recovery** - If your condition or conditions improve such that you are able to return to work in a LEOFF-eligible position, the department will terminate your disability retire-

ment or convert you to a normal retirement benefit if you are eligible.

**WSR 18-13-092**  
**PERMANENT RULES**  
**DEPARTMENT OF**  
**EARLY LEARNING**

[Filed June 18, 2018, 3:39 p.m., effective July 19, 2018]

Effective Date of Rule: Thirty-one days after filing.

Purpose: Explain procedures for third-party requests for otherwise confidential records from the department of children, youth, and families and how requests will be processed.

Citation of Rules Affected by this Order: New WAC 170-01-0205 and 170-01-0206.

Statutory Authority for Adoption: RCW 43.215.070; chapter 42.56 RCW.

Adopted under notice filed as WSR 18-09-110 on April 18, 2018.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at the Request of a Non-governmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's own Initiative: New 2, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 2, Amended 0, Repealed 0.

Number of Sections Adopted using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: June 18, 2018.

Heather Moss  
Director

NEW SECTION

**WAC 170-01-0205 Third-party requests for otherwise confidential records.** (1) A third party, such as a department client's attorney or lay representative, may access otherwise confidential records about a department client with a valid authorization.

(2) The authorization should:

- (a) Identify the client;
- (b) Identify the individual(s) or organization(s) authorized to receive the records;
- (c) State that the department may disclose the information to the requestor;
- (d) Identify the record(s) that the client wants the department to release;
- (e) State the date the authorization expires or an expiration event that relates to the client or the purpose of the use of disclosure;
- (f) State the reason for disclosure;

- (g) State the right to revoke;
- (h) State the potential for redisclosure;
- (i) As appropriate, include specific language authorizing the department to release any one or more of the following to the requestor: Substance use disorder records, child welfare records, adoption records, records concerning reproductive health and sexually transmitted diseases, and mental health records; and
- (j) Include a dated, verified signature of the individual with legal authority to authorize the release of records.

(3) The department may ask for additional proof to verify the third-party's authority to access confidential records when required by law.

(4) In general, a parent may access confidential records about a child under age eighteen. A child must consent to disclosure of the following confidential records:

- (a) At any age, birth control, and abortion records (see RCW 9.02.100);
- (b) If over age thirteen, substance use disorder and mental health records (see 42 C.F.R., Part 2 and RCW 71.34.530);
- (c) If over age fourteen, sexually transmitted disease records (see RCW 70.24.110); and
- (d) If over age eighteen, all client records held by the department.
- (5) Legal guardians under Title 13 RCW and legal custodians under chapter 26.10 RCW are not considered third parties for the purposes of accessing records pertaining to children in their care and custody.

NEW SECTION

**WAC 170-01-0206 Notifying third parties of a request.** (1) If records responsive to a public records request identify or pertain directly to an individual or organization other than the requestor, the department may notify the named individual or organization about the request.

(2) The department's third-party notice may include:

- (a) A copy of the original request;
- (b) If appropriate, a copy of the records that identify or pertain to the third party;
- (c) The date the department intends to release the record; and
- (d) A statement that the third party may prevent release of the record by agreement or by bringing a lawsuit and getting an injunction against the department and the requestor under RCW 42.56.540 prior to the intended release date.

(3) The department may inform the requestor that:

- (a) A third party has been notified of the request;
- (b) The department provided the third party with a due date for objecting to disclosure; and
- (c) The third party may bring a lawsuit against the requestor and the department under RCW 42.56.540 to prohibit disclosure.

**WSR 18-13-094**  
**PERMANENT RULES**  
**DEPARTMENT OF REVENUE**

[Filed June 19, 2018, 7:52 a.m., effective July 20, 2018]

Effective Date of Rule: Thirty-one days after filing.

Purpose: The department is amending Rules 267 and 268 to conform to changes required by ESHB 1296, 2017 regular session (chapter 135, Laws of 2017). This legislation replaces the annual report and annual survey used for economic development activities with an annual tax performance report. The department is also amending the following rules to update references changed by this legislation: WAC 458-20-143, 458-20-144, 458-20-169, 458-20-176, 458-20-179, 458-20-210, 458-20-24001, 458-20-24003, and 458-20-263. The department is also renumbering the current Rule 267 as Rule 267A, which will cover periods prior to the effective date of the new Rule 267.

Citation of Rules Affected by this Order: Amending WAC 458-20-267 (Rule 267) Annual tax performance reports for certain tax preferences, explains how taxpayers claiming tax preferences are required to report information to the department of revenue; 458-20-267A (Rule 267A), (Rule 267A is not an existing rule; rather, current Rule 267 is renumbered as Rule 267A, which will cover periods prior to the effective date of the new Rule 267); 458-20-268 (Rule 268) Annual surveys for certain tax preferences; 458-20-143 (Rule 143) Printers and publishers of newspapers, magazines, and periodicals; 458-20-144 (Rule 144) Printing industry; 458-20-169 (Rule 169) Nonprofit organizations; 458-20-176 (Rule 176) Commercial deep sea fishing—Commercial passenger fishing—Diesel fuel; 458-20-179 (Rule 179) Public utility tax; 458-20-210 (Rule 210) Sales of tangible personal property for farming—Sales of agricultural products by farmers; 458-20-24001 (Rule 24001) Sales and use tax deferral—Manufacturing and research/development activities in high unemployment counties—Applications filed after June 30, 2010; 458-20-263 (Rule 263) Exemptions from retail sales and use taxes for qualifying electric generating and thermal heat producing systems using renewable energy sources; and 458-20-24003 (Rule 24003) Tax incentives for high technology businesses.

Statutory Authority for Adoption: RCW 82.32.300 and 82.01.060(2).

Other Authority: RCW 82.32.534, 82.32.585, 82.32.590, 82.32.600, 82.32.605, 82.32.607, 82.32.710, 82.32.790, 82.32.808, 82.04.240, 82.04.2404, 82.04.260, 82.04.2909, 82.04.426, 82.04.4277, 82.04.4461, 82.04.4463, 82.04.448, 82.04.4481, 82.04.4483, 82.04.449, 82.08.805, 82.08.965, 82.08.9651, 82.08.970, 82.08.980, 82.08.986, 82.12.022, 82.12.025651, 82.12.805, 82.12.965, 82.12.9651, 82.12.970, 82.12.980, 82.16.0421, 82.29A.137, 82.60.070, 82.63.020, 82.63.045, 82.74.040, 82.74.050, 82.75.040, 82.75.070, 82.82.020, 82.82.040, 84.36.645, and 84.36.655.

Adopted under notice filed as WSR 18-09-103 on April 18, 2018.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at the Request of a Non-governmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's own Initiative: New 0, Amended 12, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 12, Repealed 0.

Number of Sections Adopted using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 12, Repealed 0.

Date Adopted: June 19, 2018.

Erin T. Lopez  
Rules Coordinator

AMENDATORY SECTION (Amending WSR 10-18-067, filed 8/30/10, effective 9/30/10)

**WAC 458-20-143 Printers and publishers of newspapers, magazines, and periodicals.** (1) **Introduction.** This section explains the application of the business and occupation (B&O), retail sales, and use taxes to printers and/or publishers of newspapers, magazines, periodicals, and other printed materials. The department of revenue (department) has adopted other sections providing tax reporting information to persons printing, publishing, or selling these publications and other printed materials.

- Persons selling newspapers, magazines, and periodicals that are not printed and/or published by the seller should also refer to WAC 458-20-127;

- For information regarding the printing industry in general, see WAC 458-20-144;

- For information regarding the tax-reporting responsibilities of persons selling direct mail or engaging in business as a mailing bureau, see WAC 458-20-141;

- For information regarding the tax-reporting responsibilities of persons duplicating printed materials for others, see WAC 458-20-141;

- For information regarding potential litter tax liability, see WAC 458-20-243.

(2) **Definitions.** The following definitions apply throughout this section:

(a) **"Newspaper."**

(i) Effective July 1, 2008, "newspaper" means a publication issued regularly at stated intervals at least twice a month and printed on newsprint in tabloid or broadsheet format folded loosely together without stapling, glue, or any other binding of any kind, including any supplement of a printed newspaper; and an electronic version of a printed newspaper that:

- Shares content with the printed newspaper; and

- Is prominently identified by the same name as the printed newspaper or otherwise conspicuously indicates that it is a complement to the printed newspaper. See RCW 82.04.214.

(ii) Prior to July 1, 2008, "newspaper" means a publication issued regularly at stated intervals at least twice a month and printed on newsprint in tabloid or broadsheet format folded loosely together without stapling, glue, or any other binding of any kind.

(b) **"Supplement"** means a printed publication, including a magazine or advertising section, that is:

(i) Labeled and identified as part of the printed newspaper; and

(ii) Circulated or distributed:

- As an insert or attachment to the printed newspaper; or
- Separate and apart from the printed newspaper so long as the distribution is within the general circulation area of the newspaper.

(c) **"Periodical or magazine"** means a printed publication, other than a newspaper, issued regularly at stated interval at least once every three months, including any supplement or special edition of the publication.

(d) For purposes of this section, **"other printed material"** refers to printed materials other than newspapers, magazines, or periodicals.

**(3) General tax guidance.**

(a) **Publishing newspapers.** Effective July 1, 2009, publishers of newspapers are taxable under the publication of newspapers classification of the B&O tax upon the gross income (including advertising income) derived from publishing newspapers. See (d) of this subsection and RCW 82.04.260(13). Prior to July 1, 2009, publishers of newspapers are taxable under the printing and publishing classification of the B&O tax upon the gross income (including advertising income) derived from publishing newspapers.

Persons reporting income under the publication of newspapers classification of the B&O tax must file a complete annual tax performance report with the department. In addition, such persons must electronically file with the department all (~~surveys~~) reports, returns, and any other forms. Refer to RCW 82.32.600 and WAC 458-20-267 for the specific guidelines and requirements.

Retail sales of newspapers, whether by publishers or others, are exempt from retail sales tax. See RCW 82.08.0253.

(b) **Publishing periodicals or magazines.** Publishers of periodicals or magazines are taxable under the printing and publishing classification of the B&O tax upon the gross income (including advertising income) derived from publishing periodicals or magazines. See (d) of this subsection and RCW 82.04.280(1).

Retail sales of printed magazines and periodicals are subject to retail sales tax. Magazines and periodicals transferred electronically to the end user are also subject to the retail sales tax regardless of how they are accessed. For more information on the sale of digital products, refer to RCW 82.04.050, 82.04.192, and 82.04.257.

(c) **Publishing other printed materials.** Retail and wholesale sales of other printed materials by persons who both print and publish the items, are taxable under the printing and publishing classification. Persons who publish but do not print other printed materials, are subject to:

- Either the wholesaling or retailing B&O tax, measured by gross sales of the other printed materials; and
- The service and other activities B&O tax, measured by the gross income received from advertising.

(d) **Doing business inside and outside the state.** RCW 82.04.460 requires that advertising income earned by printers and by publishers of newspapers, periodicals, and magazines derived from business activities performed within Washing-

ton be apportioned to this state for tax purposes. Refer to chapter 23 (E2SSB 6143), Laws of 2010 1st sp. sess. Part I for information on apportioning advertising income.

(e) **Wholesale sales of printed materials.** Sales of magazines, periodicals, and other printed materials by the publisher to newsstands, book stores, department stores, and others who resell such items are wholesale sales. Such sales are not subject to retail sales tax when the buyer provides a resale certificate (WAC 458-20-102A) for sales made before January 1, 2010, or a reseller permit (WAC 458-20-102) for sales made on or after January 1, 2010, to the seller.

**(4) Sales to publishers.**

(a) Sales to newspaper, magazine and periodical publishers of paper and printers ink which become a part of the publications sold, and sales by printers of printed publications to publishers for sale, are wholesale sales and are not subject to the retail sales tax when the buyer provides a resale certificate (WAC 458-20-102A) for sales made before January 1, 2010, or a reseller permit (WAC 458-20-102) for sales made on or after January 1, 2010, to the seller.

(b) With respect to community newspapers which are distributed free of charge, where the publisher has a contract with his advertisers to distribute the newspaper to the subscriber in consideration for the payments made by the advertisers, it will be construed that the publisher sells the newspaper to the advertiser, and, therefore, the retail sales tax will not apply with respect to the charge made by the printer to the publisher for printing the newspaper or with respect to the purchase of ink and paper when the publisher prints his own newspaper.

(c) Sales to newspaper, magazine or periodical publishers of equipment and of supplies and materials which do not become a part of the finished publication that is sold are subject to the retail sales tax unless specifically exempt (see subsection (5) of this section). This includes, among others, sales of fuel, furniture, lubricants, and office supplies.

(d) Sales to newspaper, magazine or periodical publishers of baseball bats, bicycles, dolls and other articles of tangible personal property which are to be distributed by the publisher as gifts, premiums or prizes are sales for consumption and subject to the retail sales tax.

(e) Sales by authors and artists to publishers of the right to publish scripts, paintings, illustrations and cartoons are mere licenses to use, not sales of tangible personal property and are not subject to the retail sales tax.

(5) **Exemption for sales of computer equipment to printers and/or publishers.** RCW 82.08.806 and 82.12.806 provide printers and publishers retail sales and use tax exemptions for computer equipment that is used primarily in the printing or publishing of any printed material. The exemption includes repair parts and replacement parts for such equipment and sales of or charges made for labor and services rendered in respect to installing, repairing, cleaning, altering, or improving the computer equipment. The exemption also includes maintenance agreements (service contracts), as defined in WAC 458-20-257, on such equipment. This exemption applies only to computer equipment not otherwise exempt under RCW 82.08.02565.

(6) **Use tax.** Publishers of newspapers, magazines and periodicals are subject to tax upon the value of articles

printed or produced for use in conducting such business. Tax also applies to materials, supplies, and other items which do not become part of the finished publication or which are not resold. Where retail sales tax is not paid, the publisher must remit the retail sales tax (commonly referred to as "deferred sales tax") or use tax directly to the department unless specifically exempt by law. Deferred sales or use tax should be reported on the use tax line of the buyer's excise tax return. For detailed information about use tax, refer to WAC 458-20-178, Use tax.

**AMENDATORY SECTION** (Amending WSR 11-04-010, filed 1/21/11, effective 2/21/11)

**WAC 458-20-144 Printing industry.** (1) **Introduction.** This section discusses the taxability of the printing industry. For information on the taxability of mailing bureau services and a discussion of direct mail, refer to WAC 458-20-141. For information on the taxability of printers and publishers of newspapers, magazines, and periodicals, refer to WAC 458-20-143.

(2) **Definition.** The phrase "printing industry" includes letterpress, offset-lithography, and gravure processes as well as multigraph, mimeograph, autotyping, addressographing and similar activities.

(3) **Business and occupation tax.**

(a) Printers are subject to the business and occupation tax under the printing and publishing classification upon the gross income of the business.

(b) Effective July 1, 2009, printers of newspapers are taxable under the publication of newspapers classification of the B&O tax upon the gross income of the business. Persons reporting income under the publication of newspapers classification of the B&O tax must file a complete annual tax performance report with the department. In addition, such persons must electronically file with the department all ((surveys;)) reports, returns, and any other forms. Refer to RCW 82.32.600 and WAC 458-20-267 for the specific guidelines and requirements.

(c) **Doing business inside and outside the state.** RCW 82.04.460 requires that advertising income earned by printers derived from business activities performed within Washington be apportioned to this state for tax purposes. Refer to chapter 23 (E2SSB 6143), Laws of 2010 1st sp. sess. Part I for information on apportioning advertising income.

(4) **Retail sales tax.**

(a) The printing or imprinting of advertising circulars, books, briefs, envelopes, folders, posters, racing forms, tickets, and other printed matter, whether upon special order or upon materials furnished either directly or indirectly by the customer is a retail sale and subject to the retail sales tax, providing the customer either consumes, or distributes such articles free of charge, and does not resell such articles in the regular course of business. The retail sales tax is computed upon the total charge for printing, and the printer may not deduct the cost of labor, author's alterations, or other service charges in performing the printing, even though such charges may be stated or shown separately on invoices.

(b) Sales of printed matter to advertising agencies who purchase for their own use or for the use of their clients, and

not for resale in the regular course of business, are sales for consumption and subject to the retail sales tax.

(c) Sales of tickets to theater owners, amusement operators, transportation companies and others are sales for consumption and subject to the retail sales tax. Such tickets are not resold by the theater owners or amusement proprietors as tangible personal property but are used merely as a receipt to the patrons for payment and as evidence of the right to admission or transportation.

(d) Sales of school annuals and similar publications by printers to school districts, private schools or student organizations therein are subject to the retail sales tax.

(e) Sales by printers of books, envelopes, folders, posters, racing forms, stationery, tickets and other printed matter to dealers for resale in the regular course of business are wholesale sales. Such sales are not subject to retail sales tax when seller obtains a resale certificate for sales made before January 1, 2010, or a reseller permit for sales made on or after January 1, 2010, from the buyer to document the wholesale nature of the sale as provided in WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits). Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by the seller for five years from the date of last use or December 31, 2014.

(f) Charges made by bookbinders or printers for imprinting, binding or rebinding of materials for consumers are subject to the retail sales tax.

(g) Sales to printers of equipment, supplies and materials which do not become a component part or ingredient of the finished printed matter sold or which are put to "intervening use" before being resold are subject to the retail sales tax unless specifically exempt (see subsection (5) of this section). This includes, among others, sales of fuel, furniture, and lubricants.

(h) Sales to printers of paper stock and ink which become a part of the printed matter sold are sales for resale and are not subject to retail sales tax when the buyer provides a resale certificate (WAC 458-20-102A) for sales made before January 1, 2010, or a reseller permit (WAC 458-20-102) for sales made on or after January 1, 2010, to the seller.

(5) **Exemption for sales of computer equipment to printers.** RCW 82.08.806 and 82.12.806 provide a retail sales and use tax exemption to a printer or publisher, of computer equipment, including repair parts and replacement parts for such equipment, when the computer equipment is used primarily in the printing or publishing of any printed material, or to sales of or charges made for labor and services rendered in respect to installing, repairing, cleaning, altering, or improving the computer equipment. This exemption applies only to computer equipment not otherwise exempt under RCW 82.08.02565.

(6) **Commissions and discounts.**

(a) There is a general trade practice in the printing industry of making allowances to advertising agencies of a certain percentage of the gross charge made for printed matter ordered by the agency either in its own name or in the name of the advertiser. This allowance may be a "commission" or may be a "discount."

(b) A "commission" paid by a seller constitutes an expense of doing business and is not deductible from the

measure of tax under either business and occupation tax or retail sales tax. On the other hand, a "discount" is a deduction from an established selling price allowed to buyers, and a bona fide discount is deductible under both these classifications.

(c) In order that there may be a definite understanding, printers, advertising agencies and advertisers are advised that tax liability in such cases is as follows:

(i) The allowance taken by an advertising agency will be deductible as a discount in the computation of the printer's liability only in the event that the printer bills the charge on a net basis; i.e., less the discount.

(ii) Where the printer bills the gross charge to the agency, and the advertiser pays the sales tax measured by the gross charge, no deduction will be allowed, irrespective of the fact that in payment of the account the printer actually receives from the agency the net amount only; i.e., the gross billing, less the commission retained by the agency. In all cases the commission received is taxable to the agency.

**AMENDATORY SECTION** (Amending WSR 16-20-011, filed 9/23/16, effective 10/24/16)

**WAC 458-20-169 Nonprofit organizations.** (1) **Introduction.** Unlike the tax systems of most states and the federal government, Washington's tax system, including its primary business tax, applies to the activities of nonprofit organizations. Washington's business and occupation (B&O) tax is imposed on all entities that generate gross receipts or proceeds, unless there is a specific statutory exemption or deduction. This rule explains how the B&O, retail sales, and use taxes apply to activities often performed by nonprofit organizations. Although some nonprofit organizations may be subject to other taxes (e.g., public utility or insurance premium taxes on income from utility or insurance activities), these taxes are not discussed in this rule. The rule describes the most common B&O, retail sales, and use tax exemptions and deductions that are specifically provided to nonprofit organizations by state law. Other exemptions or deductions not specific to nonprofit organizations may also apply.

(a) **Examples.** This rule contains examples that identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax results of other situations must be determined after a review of all facts and circumstances.

(b) **Other rules that may be relevant.** Rules in the following list may contain additional relevant information for nonprofit organizations:

(i) WAC 458-20-167 Educational institutions, school districts, student organizations, and private schools;

(ii) WAC 458-20-168 Hospitals, nursing homes, assisted living facilities, adult family homes and similar health care facilities;

(iii) WAC 458-20-183 Amusement, recreation, and physical fitness services;

(iv) WAC 458-20-249 Artistic or cultural organizations; and

(v) WAC 458-20-256 Trade shows, conventions and seminars.

(2) **Registration requirements.** Nonprofit organizations with \$12,000 or more per year in gross receipts from sales, and/or gross income from services subject to the B&O tax, or that are required to collect or pay to the department of revenue (department) retail sales tax or any other tax or fee which the department administers (regardless of the level of annual gross receipts) must register with the department. Nonprofit organizations with less than twelve thousand dollars per year in gross receipts and that are not required to collect retail sales tax or any other tax or fee administered by the department are not required to register with the department. For more information on whether registration with the department is required see WAC 458-20-101.

(3) **Filing excise tax returns.** Nonprofit organizations making retail sales that require the collection of retail sales tax must file an excise tax return, regardless of the annual level of gross receipts or gross income and whether or not any B&O tax is due. For information on when a taxpayer may qualify for a small business B&O tax credit, see WAC 458-20-104. The excise tax return with payment is generally filed on a monthly basis. Under certain conditions the department may authorize taxpayers to file and remit payment on either a quarterly or an annual basis. For information on how reporting frequencies are assigned to taxpayers see WAC 458-20-22801.

Nonprofit organizations that do not have retail sales tax to remit, but are required to register, do not have to file an excise tax return if they meet certain statutory requirements (e.g., annual gross income of less than \$28,000) and are placed on an "active nonreporting" status by the department. For additional information on whether an organization qualifies for the "active nonreporting" status see WAC 458-20-101.

(4) **General tax reporting responsibilities.** While Washington state law provides some tax exemptions and deductions specifically for nonprofit organizations, these organizations otherwise have the same tax-reporting responsibilities as for-profit organizations.

(a) **Business and occupation tax.** Chapter 82.04 RCW imposes a B&O tax on every person with substantial nexus in Washington (see RCW 82.04.067) engaged in business activities within this state, unless the income is specifically exempt or deductible under state law. The B&O tax applies to the value of products, gross proceeds of sales, or gross income of the business, as the case may be. RCW 82.04.220.

(i) **Common B&O tax classifications.** Chapter 82.04 RCW provides a number of classifications that apply to specific activities. The most common B&O tax classifications applying to income received by nonprofit organizations are the retailing, wholesaling, and service and other activities classifications. RCW 82.04.250, 82.04.270, and 82.04.290. If an organization engages in more than one kind of business activity, it must report the gross income from each activity under the appropriate tax classification. RCW 82.04.440(1).

(ii) **Measure of tax.** The most common measures of the B&O tax are "gross proceeds of sales" and "gross income of the business." RCW 82.04.070 and 82.04.080, respectively. These measures include the value proceeding or accruing from the sale of tangible personal property or services rendered without any deduction for the cost of property sold,

cost of materials used, labor costs, discounts paid, delivery costs, taxes, losses, or any other expenses.

(b) **Retail sales tax.** A nonprofit organization must collect and remit retail sales tax on all retail sales, unless the sale is specifically exempt by statute. Examples of retail sales tax exemptions that may apply to nonprofit organizations are those for sales of certain food products (see WAC 458-20-244, Food and food ingredients), construction materials purchased by a health or social welfare organization for new construction of alternative housing to be licensed as a family foster home for youth in crisis (see RCW 82.08.02915), and fund-raising activities (see subsection (5)(g) of this rule). New construction includes renovating an existing structure to provide new housing for youth in crisis.

A nonprofit organization must pay retail sales tax when it purchases goods or retail services for its own use as a consumer, unless the purchase is specifically exempt by statute. Items purchased for resale without intervening use are purchases at wholesale and are not subject to the retail sales tax if the seller takes from the buyer a copy of the buyer's reseller permit. The reseller permit documents the wholesale nature of any sale. Reseller permits replaced resale certificates effective January 1, 2010. For additional information on reseller permits see WAC 458-20-102.

(c) **Use tax.** The use tax is imposed on every person, including nonprofit organizations, using tangible personal property within this state as a consumer, unless such use is specifically exempt by statute. The use tax applies only if retail sales tax has not previously been paid on the item. The rate of tax is the same as the sales tax rate that applies at the location where the property is first used.

A common application of the use tax occurs when items are purchased from an out-of-state seller who has no presence in Washington. When the out-of-state seller does not collect Washington's retail sales or use tax, the buyer is statutorily required to remit use tax directly to the department. For more information on use tax and the use of tangible personal property see WAC 458-20-178.

Except for fund-raising, use tax exemptions generally correspond to retail sales tax exemptions. For example, the use tax exemption for construction materials acquired by a health or social welfare organization for new construction of alternative housing for youth in crisis, to be licensed as a family foster home (RCW 82.12.02915) corresponds with the retail sales tax exemption described in subsection (4)(b) of this rule for purchasing these construction materials.

(i) **Use tax exemption for donated items.** RCW 82.12.-02595 provides a use tax exemption for personal property donated to a nonprofit charitable organization. This exemption is available for the nonprofit charitable organization and the donor, if the donor did not previously use the personal property as a consumer. It also applies to the use of property by a donor who is incorporating the property into a nonprofit organization's real or personal property for no charge.

The exemption also applies to another person using property originally donated to a charitable nonprofit organization that is subsequently donated or bailed to that person by the charitable nonprofit organization, provided that person uses the property in furtherance of the charitable purpose for which the property was originally donated to the charitable

nonprofit organization. For example, a hardware store donates an industrial pressure washer to a nonprofit community center for neighborhood cleanup, the community center bails this washer to people enrolled in its neighborhood improvement group for neighborhood clean-up projects. No use tax is due from any of the participants in these transactions. An example of a gift that would not qualify is when a car is donated to a church for its staff and the church gives that car to its pastor. The pastor must pay use tax on the car because it serves multiple purposes. It serves the church's charitable purpose, but it also acts as compensation to the pastor and is available for the pastor's personal use. The subsequent donation of property from the charity to another person must be solely for a charitable purpose. If the property is donated or bailed to the third party for a charitable purpose in line with the nonprofit organization's charitable activities, generally, no additional proof is required that this was the charitable purpose for which the property was originally donated.

(ii) **Use tax implications with respect to fund-raising activities.** Subsection (5)(g) of this rule explains that a retail sales tax exemption is available for certain fund-raising sales. However, there is usually no comparable use tax exemption provided to the buyer/user of property purchased at these fund-raising sales. While the nonprofit organization is not obligated to collect use tax from the buyer, the organization is encouraged to inform the buyer of the buyer's possible use tax obligation.

(iii) From October 1, 2013, through October 8, 2015, RCW 82.12.225 provided a use tax exemption for the use of any article of personal property, valued at less than ten thousand dollars, purchased or received as a prize in a contest of chance, as defined in RCW 82.04.285, from a nonprofit organization or a library. Effective October 9, 2015, chapter 32, Laws of 2015 3rd Sp. Sess. (ESB 6013), the exemption applies to qualifying personal property valued at less than twelve thousand dollars. This exemption only applies if the gross income from the sale by the nonprofit organization or library is exempt under RCW 82.04.3651. This exemption is scheduled to expire July 1, 2020.

(5) **Exemptions.** The following sources of income are specifically exempt from tax. As such, they should not be included or reported as gross income if the organization is required to file an excise tax return.

(a) **Adult family homes.** RCW 82.04.327 exempts from B&O tax amounts received by licensed adult family homes or adult family homes that are exempt from licensing under rules of the department of social and health services.

(b) **Nonprofit assisted living facilities.** RCW (~~82.04.4262~~ [RCW 82.04.4264]) 82.04.4264 exempts from B&O tax amounts received by a nonprofit assisted living facility licensed under chapter 18.20 RCW for providing room and domiciliary care to residents of the assisted living facility. Nonprofit assisted living facilities were formerly known as "nonprofit boarding homes" in the statute.

(c) **Camp or conference centers.** RCW 82.04.363 and 82.08.830 respectively exempt from B&O tax and retail sales tax amounts received by a nonprofit organization from the sale or furnishing of certain items or services at a camp or conference center conducted on property exempt from the

property tax under RCW 84.36.030 (1), (2), or (3). For information about property tax exemptions that may apply see: WAC 458-16-210 (Nonprofit organizations or associations organized and conducted for nonsectarian purposes); WAC 458-16-220 (Church camps); and WAC 458-16-230 (Character building organizations).

Amounts received from the sale of the following items and services are exempt:

(i) Lodging, conference and meeting rooms, camping facilities, parking, and similar licenses to use real property;

(ii) Food and meals;

(iii) Books, tapes, and other products, including electronically transferred items, available exclusively to the participants at the camp, conference, or meeting and not available to the public at large.

(d) **Child care resource and referral services.** RCW 82.04.3395 exempts from B&O tax amounts received by nonprofit organizations for providing child care resource and referral services. Child care resource and referral services do not include child care services provided directly to children.

(e) **Credit and debt services.** RCW 82.04.368 exempts from B&O tax amounts received by nonprofit organizations for providing specialized credit and debt services. These services include:

(i) Presenting individual and community credit education programs including credit and debt counseling;

(ii) Obtaining creditor cooperation allowing a debtor to repay debt in an orderly manner;

(iii) Establishing and administering negotiated repayment programs for debtors; and

(iv) Providing advice or assistance to a debtor with regard to (i), (ii), or (iii) of this subsection.

(f) **Day care provided by churches.** RCW 82.04.339 exempts from B&O tax amounts received by a church for the care of children of any age for periods of less than twenty-four hours, provided the church is exempt from property tax under RCW 84.36.020.

(g) **Fund-raising.** RCW 82.04.3651 and 82.08.02573, respectively, exempt from B&O tax and retail sales tax amounts received from certain fund-raising activities.

These exemptions apply only to the fund-raising income received by the nonprofit organization. For example, commission income received by a nonprofit organization selling books owned by a for-profit entity on a consignment basis is exempt from tax only if the statutory requirements are satisfied. The nonprofit organization is generally responsible for collecting and remitting retail sales tax on the gross proceeds of sales when selling items for another person. For additional information on the taxability of sales by agents, auctioneers and other similar types of sellers see WAC 458-20-159.

(i) **What nonprofit organizations qualify?** Nonprofit organizations that qualify for this exemption are those that are:

(A) A tax-exempt nonprofit organization described by section 501 (c)(3) (educational and charitable), 501 (c)(4) (social welfare), or 501 (c)(10) (fraternal societies operating as lodges) of the Internal Revenue Code; or

(B) A nonprofit organization that would qualify for tax exemption under section 501 (c)(3), (4), or (10) except that it is not organized as a nonprofit corporation; or

(C) A nonprofit organization that does not pay its members, stockholders, officers, directors, or trustees any amounts from its gross income, except as payment for services rendered, does not pay more than reasonable compensation to any person for services rendered, and does not engage in a substantial amount of political activity. Political activity includes, but is not limited to, influencing legislation and participating in any campaign on behalf of any candidate for political office.

(ii) **Qualifying fund-raising activities.** For the purpose of this exemption, "fund-raising activity" means soliciting or accepting contributions of money or other property, or activities involving the anticipated exchange of goods or services for money between the soliciting organization and the organization or person solicited, for furthering the goals of the nonprofit organization.

(A) Money raised by a nonprofit charitable group from its annual telephone fund drive to fund its homeless shelters where nothing is promised in return for a donor's pledge is exempt as fund-raising contributions of money to further the goals of the nonprofit organization.

(B) A nonprofit group organized as a community playhouse has an annual telephone fund drive. The group gives the caller a mug, jacket, dinner, or vacation trip depending on the amount of pledge made over the phone. The community playhouse does not sell or exchange the mugs, jackets, dinners, or trips for cash or property, except during this pledge drive. The money is used to produce the next season's plays. The money earned from the pledges is exempt from both B&O tax and retail sales tax to the extent these amounts represent an exchange of goods and services for money to further the goals of the nonprofit group. The money earned from the pledges above the value of the goods and services exchanged is exempt as a fund-raising contribution of money to further the goals of the nonprofit organization.

(C) A nonprofit group sells ice cream bars at booths leased during the two-week runs of three county fairs, for a total of six weeks during the year, to fund youth camps maintained by the nonprofit group. The money earned from the booths is exempt from both B&O tax and retail sales tax as a fund-raising exchange of goods for money to further the goals of the nonprofit group.

(ii) **Contributions of money or other property.** The term contributions includes grants, donations, endowments, scholarships, gifts, awards, and any other transfer of money or other property by a donor, provided the donor receives no significant goods, services, or benefits in return for making the gift. For example, an amount received by a nonprofit educational broadcaster from a group that conditions receipt on the nonprofit broadcaster airing its seminars is not a contribution regardless of how the amount paid is titled by the two organizations.

It is not unusual for the person making a gift to require some accountability for how the gift is used as a condition for receiving the gift or future gifts. Such gifts remain exempt, provided the "accountability" required does not result in a direct benefit to the donor (examples of direct benefits to a donor are: Money given for a report on the soil contamination levels of land owned by the donor, medical services provided to the donor or the donor's family, or market research benefit-

ing the donor directly). This "accountability" can take the form of conditions or restrictions on the use of the gift for specific charitable purposes or can take the form of written reports accounting for the use of the gift. Public acknowledgment of a donor for the gift is not a significant service or benefit.

(iv) **Nonqualifying activities.** Fund-raising activity does not include the operation of a regular place of business in which services are provided or sales are made during regular hours such as a bookstore, thrift shop, restaurant, legal or health clinic, or similar business. It also does not include the operation of a regular place of business from which services are provided or performed during regular hours such as the provision of retail, personal, or professional services. A regular place of business and the regular hours of that business depend on the type of business being conducted.

(A) In the example demonstrating that an amount received by a nonprofit broadcaster was not a contribution because services were given in return for the funds, this activity must also be examined to see whether the exchange was for services as part of a fund-raising activity. The broadcaster is in the business of broadcasting programs. It has a regular site for broadcasting programs and broadcasts twenty-four hours every day. Broadcasting is a part of its business activity performed from a regular place of business during regular hours. The money received from the group with the requirement that its seminars be broadcast would not qualify as money received from a fund-raising activity even though the parties viewed the money as a "donation."

(B) A nonprofit organization that makes catalog sales throughout the year with a twenty-four hour telephone line for taking orders has a regular place of business at the location where the sales orders are processed and regular hours of twenty-four hours a day. Catalog sales are not exempt as fund-raising amounts even though the funds are raised for a nonprofit purpose.

(C) A nonprofit group organized as a community playhouse has three plays during the year at a leased theatre. The plays run for a total of six weeks and the group provides concessions at each of the performances. The playhouse has a regular place of business with regular hours for that type of business. The concessions are done at that regular place of business during regular hours. The concessions are not exempt as fund-raising activities even though amounts raised from the concessions may be used to further the nonprofit purpose of that group.

(D) A nonprofit student group, that raises money for scholarships and other educational needs, sets up an espresso stand that is open for two hours every morning during the school year. The espresso stand is a regular place of business with regular hours for that type of business. The money earned from the espresso stand is not exempt, even though the amounts are raised to further the student group's nonprofit purpose.

(v) **Fund-raising sales by libraries.** RCW 82.04.3651 provides that the sale of used books, used videos, used sound recording, or similar used information products in a library is not the operation of a regular place of business, if the proceeds are used solely to support the library. The library must be a free public library supported in whole or in part with

money derived from taxes. RCW 27.12.010. In addition to the B&O tax exemption under RCW 82.04.3651, RCW 82.08.02573 provides a comparable retail sales tax exemption for the same sales made by a library.

(h) **Group training homes.** RCW 82.04.385 exempts from B&O tax amounts received from the department of social and health services for operating a nonprofit group training home. The amounts excluded from gross income must be used for the cost of care, maintenance, support, and training of developmentally disabled individuals. As defined in RCW 71A.22.020, a nonprofit group training home is an approved facility equipped, supervised, managed, and operated on a full-time nonprofit basis for the full-time care, treatment, training, and maintenance of individuals with developmental disabilities.

(i) **Sheltered workshops.** RCW 82.04.385 also exempts from B&O tax amounts received by a nonprofit organization for operating a sheltered workshop.

(i) **What is a sheltered workshop?** A sheltered workshop is that part of the nonprofit organization engaged in business activities that are performed primarily to provide evaluation and work adjusted services for a handicapped person or to provide gainful employment or rehabilitation services to a handicapped person. The sheltered workshop can be maintained on or off the premises of the nonprofit organization.

(ii) **What is meant by "gainful employment or rehabilitation services to a handicapped person"?** Gainful employment or rehabilitation services must be an interim step in the rehabilitation process that is provided because the person cannot be readily absorbed into the competitive labor market or because employment opportunities for the person do not exist during that time in the competitive labor market.

"Handicapped," for the purposes of this exemption, means a physical or mental disability that restricts normal achievement, including medically recognized addictions and learning disabilities. However, this term does not include social or economic disadvantages that restrict normal achievement (e.g., prior criminal history or low-income status).

(j) **Student loan services.** RCW 82.04.367 exempts from B&O tax amounts received by nonprofit organizations that are exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code that:

(i) Are guarantee agencies under the federal guaranteed student loan program or that issue debt to provide or acquire student loans; or

(ii) Provide guarantees for student loans made through programs other than the federal guaranteed student loan program.

(k) **Grants received to fund education programs pertaining to litter control, waste reduction, recycling, and composting.** Effective July 24, 2015, RCW 82.04.755 provides a B&O tax exemption for grants received by a nonprofit organization from the matching fund competitive grant program established in RCW 70.93.180 (1)(b)(ii). This program provides funding for local or statewide education programs designed to help the public with litter control, waste reduction, recycling, and composting of primarily products upon which litter tax is imposed. For information on the state litter

tax program, see chapter 82.19 RCW. The requirements for the grants are listed in RCW 70.93.180 (1)(b)(ii). Chapter 15, Laws of 2015 (ESHB 1060).

**(6) B&O tax deduction of payments made to health or social welfare organizations.**

**(a) Compensation from public entities.** RCW 82.04.4297 provides a B&O tax deduction to health or social welfare organizations for amounts received from the United States, any instrumentality of the United States, the state of Washington, or any municipal corporation or political subdivision of the state of Washington as compensation for or to support health or social welfare services, rendered by a health or social welfare organization, as defined in RCW 82.04.431, or by a municipal corporation or political subdivision. These deductible amounts should be included in the gross income reported on the excise tax return, entered on the deduction page, and then deducted on the return when determining the amount of the organization's taxable income. A deduction is not allowed, however, for amounts that are received under an employee benefit plan.

**(b) Mental health services or chemical dependency services under a government-funded program.** RCW 82.04.4277 provides a B&O tax deduction for health or social welfare organizations for amounts received as compensation for providing mental health services or chemical dependency services under a government-funded program.

(i) The following definitions apply to (b) of this subsection unless the context clearly requires otherwise:

(A) "Chemical dependency" has the same meaning as provided in RCW 70.96A.020;

(B) "Health and social welfare organization" has the meaning provided in RCW 82.04.431; and

(C) "Mental health services" and "behavioral health organization" have the meanings provided in RCW 71.24.025.

(ii) The deduction for amounts received as compensation for providing chemical dependency services under a government-funded program is effective April 1, 2016. Regional support networks, which are renamed behavioral health organizations effective April 1, 2016, may also deduct from the measure of tax amounts received from the state of Washington for distribution to health or social welfare organizations eligible to deduct the distribution under RCW 82.04.4277.

(iii) Persons claiming deductions under RCW 82.04.4277 must file an annual tax performance report with the department. Refer to RCW 82.32.534 and WAC 458-20-267 for information regarding filing an annual tax performance report.

(iv) These deductions are scheduled to expire January 1, 2020.

**(c) Child welfare services.** RCW 82.04.4275 provides a B&O tax deduction for health or social welfare organizations for amounts received as compensation for providing child welfare services under a government-funded program. Persons may also deduct from the measure of tax amounts received from the state of Washington for distribution to health or social welfare organizations eligible to deduct the distribution under RCW 82.04.4275(1).

**(d) What is a health or social welfare organization?** A health or social welfare organization is an organization,

including any community action council, providing health or social welfare services as defined in subsection (6)(e) of this rule. To be exempt under RCW 82.04.4297, a corporation must satisfy all of the following conditions:

(i) Be a corporation sole under chapter 24.12 RCW or a domestic or foreign not-for-profit corporation under chapter 24.03 RCW. A corporation providing professional services as authorized under chapter 18.100 RCW does not qualify as a health or social welfare organization;

(ii) Be governed by a board of not less than eight individuals who are not paid corporate employees when the organization is a not-for-profit corporation;

(iii) Not pay any part of its corporate income directly or indirectly to its members, stockholders, officers, directors, or trustees except as executive or officer compensation or as services rendered by the corporation in accordance with its purposes and bylaws to a member, stockholder, officer, or director or as an individual;

(iv) Only pay compensation to corporate officers and executives for actual services rendered. This compensation must be at a level comparable to like public service positions within Washington;

(v) Have irrevocably dedicated its corporate assets to health or social welfare activities. Upon corporate liquidation, dissolution, or abandonment, any distribution or transfer of corporate assets may not inure directly or indirectly to the benefit of any member or individual, except for another health or social welfare organization;

(vi) Be duly licensed or certified as required by law or regulation;

(vii) Use government payments to provide health or social welfare services;

(viii) Make its services available regardless of race, color, national origin, or ancestry; and

(ix) Provide access to the corporation's books and records to the department's authorized agents upon request.

**(e) Qualifying health or welfare services.** The term "health or social welfare services" includes and is limited to:

(i) Mental health, drug, or alcoholism counseling or treatment;

(ii) Family counseling;

(iii) Health care services;

(iv) Therapeutic, diagnostic, rehabilitative, or restorative services for the care of the sick, aged, physically-disabled, developmentally-disabled, or emotionally-disabled individuals;

(v) Activities, including recreational activities, intended to prevent or ameliorate juvenile delinquency or child abuse;

(vi) Care of orphans or foster children;

(vii) Day care of children;

(viii) Employment development, training, and placement;

(ix) Legal services to the indigent;

(x) Weatherization assistance or minor home repairs for low-income homeowners or renters;

(xi) Assistance to low-income homeowners and renters to offset the cost of home heating energy, through direct benefits to eligible households or to fuel vendors on behalf of eligible households; and

(xii) Community services to low-income individuals, families and groups that are designed to have a measurable and potentially major impact on causes of poverty in communities of the state of Washington; and

(xiii) Temporary medical housing, as defined in RCW 82.08.997, if the housing is provided only:

(A) While the patient is receiving medical treatment at a hospital required to be licensed under RCW 70.41.090 or at an outpatient clinic associated with such hospital, including any period of recuperation or observation immediately following such medical treatment; and

(B) By a person that does not furnish lodging or related services to the general public.

AMENDATORY SECTION (Amending WSR 16-02-059, filed 1/4/16, effective 2/4/16)

**WAC 458-20-176 Commercial deep sea fishing—Commercial passenger fishing—Diesel fuel.** (1) **Introduction.** This rule explains the business and occupation (B&O) tax, sales tax and use tax responsibilities of those engaged in commercial deep sea fishing, and suppliers selling to those persons.

**Other rules that may apply.** Readers may want to refer to other rules for additional information, including those in the following list:

(a) WAC 458-20-119 Sales by caterers and food service contractors;

(b) WAC 458-20-135 Extracting natural products;

(c) WAC 458-20-178 Use tax and the use of tangible personal property;

(d) WAC 458-20-193 Interstate sales of tangible personal property;

(e) WAC 458-20-244 Food and food ingredients.

(2) **Definitions.** The following definitions apply to this rule.

(a) **Commercial deep sea fishing.** "Commercial deep sea fishing" means fishing done for profit outside the territorial waters of the state of Washington. It does not include sport fishing or the operation of charter boats for sport fishing. Nor does the phrase include the operation or purchase of watercraft for kelping, purse seining, or gill netting, because such fishing methods can be legally performed in Washington only within the territorial waters of the state (the three-mile limit). Therefore, watercraft rigged for fishing by any of these methods will be deemed for use in other than commercial deep sea fishing unless proof, including documentation to be retained by sellers, is furnished that said watercraft will be used for these purposes exclusively outside the Washington territorial limit.

(b) **Commercial passenger fishing.** "Commercial passenger fishing" means that done from charter boats for sport outside the territorial waters of the state of Washington.

(c) **Component part.** "Component part" includes all tangible personal property that is attached to and a part of a watercraft. It includes dories, gurdies and accessories, bait tanks, baiting tables and turntables. It also includes spare parts that are designed for ultimate attachment to a watercraft. The term "component part" does not include equipment or furnishings of any kind that are not attached to a water-

craft, nor does it include consumable supplies. Thus, it does not include, among other things, bedding, table and kitchen wares, fishing nets, hooks, lines, floats, hand tools, ice, fuel or lubricants.

(d) **Watercraft.** "Watercraft" means every type of floating equipment that is designed for carrying fishing gear, fish catch or fishing crews, and used primarily in commercial deep sea fishing operations.

(3) **Business and occupation tax.**

(a) Persons engaged in commercial deep sea fishing are not taxable under the extracting classification with respect to catches obtained outside the territorial waters of this state.

(b) Such persons are taxable under either the retailing or the wholesaling classification with respect to sales made within this state, unless entitled to exemption by reason of the commerce clauses of the federal constitution.

(c) Such persons may qualify for a B&O tax exemption under RCW 82.04.4269. This exemption pertains to the value of products or the gross proceeds of sales derived from:

(i) Manufacturing seafood products that remain in a raw, raw frozen, or raw salted state at the completion of the manufacturing by that person; or

(ii) In the ordinary course of business, manufactured seafood products that remain in a raw, raw frozen or raw salted state to buyers that transport the goods out of the state of Washington. A person taking an exemption must keep and preserve records for the period required by RCW 82.32.070 establishing that the goods were transported by the buyer in the ordinary course of business out of the state of Washington.

(d) Persons claiming the exemption in (c) of this subsection must file a completed annual ~~((survey))~~ tax performance report with the department under RCW ~~((82.32.585))~~ 82.32.534. In addition, persons claiming this tax preference must report the amount of the exemption on their monthly or quarterly excise tax return. For more information on reporting requirements for this tax preference see RCW 82.32.808.

(e) The exemption provided by RCW 82.04.4269 is scheduled to expire on July 1, 2025.

(4) **Retail sales tax.**

(a) Under RCW 82.08.0262, the retail sales tax does not apply to sales of watercraft (including component parts thereof) which are primarily for use in conducting commercial deep sea fishing operations, nor does retail sales tax apply to sales of or charges made for labor and services rendered in respect to the constructing, repairing, cleaning, altering or improving of such property.

(b) The retail sales tax applies to sales made to persons engaged in commercial deep sea fishing of every type of tangible personal property (except only sales of watercraft and component parts thereof) and to sales of or charges made for labor and services rendered in respect to the construction, repairing, cleaning, altering or improving of such types of property. Thus, the retail sales tax applies to sales to such persons of such things as fishing nets, hooks, lines, floats and bait; table and kitchen wares; hand tools, ice, fuel except diesel fuel as noted in subsection (7) of this rule, and lubricants for use or consumption. For sales of food and food ingredients see WAC 458-20-119 and 458-20-244.

**(5) Exemption certificates required.**

(a) Persons selling watercraft or component parts thereof to persons engaged in commercial deep sea fishing or performing services with respect to such craft or parts, are required to obtain from the buyer a certificate evidencing the exempt nature of the transaction.

(b) Buyers claiming the exemption may use the department's Buyers' Retail Sales Tax Exemption Certificate. The certificate can be found on the department's web site at dor.wa.gov. Sellers must retain certificates in its records as evidence of the exempt nature of the sales to eligible buyers.

(c) Fishing boats used primarily in commercial deep sea fishing operations that are incidentally used within the waters of this state are still eligible for the exemption from retail sales tax.

(d) Sales of fishing boats, that are the types used in the waters of Puget Sound or the Columbia River and the tributaries thereof, and are not practical for use in deep sea fishing, are subject to the retail sales tax including sales of component parts thereof and on charges made for the repair of the same.

(e) It is a gross misdemeanor for a buyer to make a false certificate of exemption for the purpose of avoiding the tax.

**(6) Use tax.**

(a) The use tax does not apply to the use of watercraft or component parts thereof. RCW 82.12.0254.

(b) The use tax applies to the actual use within this state of all other types of tangible personal property purchased at retail where the sales tax has not been paid and no exemption exists.

**(7) Diesel fuel.**

(a) RCW 82.08.0298 and 82.12.0298 provide sales and use tax exemptions on diesel fuel for both commercial passenger fishing (charter boats for sport fishing) and commercial deep sea fishing operations.

(b) Neither retail sales nor use tax applies with respect to sales or use of diesel fuel in the operation of watercraft in commercial deep sea fishing operations or commercial passenger fishing operations by persons who are regularly engaged in the business of such operations outside the territorial waters (three-mile limit) of this state. For purposes of this exemption, a person is not regularly engaged in either business if the person has gross receipts from the extra territorial operations of less than five thousand dollars a year. For persons involved in both commercial deep sea fishing operations and commercial passenger fishing operations, the receipts from both will be added together to determine eligibility for this exemption.

(c) If a person qualifies for the exemptions by virtue of operating a deep sea fishing vessel, and has the requisite amount of gross receipts from that activity, all diesel fuel purchases and uses by such person for such vessel are tax exempt. It is not required that all the diesel fuel purchased be used outside the territorial waters of this state.

(d) **Diesel fuel exemption certificates required.** Persons selling diesel fuel to such persons are required to obtain from the buyer a certificate evidencing the exempt nature of the transaction. This certificate must identify the buyer by name and address, and by the registered name and number of the watercraft with respect to which the purchase is made. Blanket certificates covering all diesel fuel purchases for

specified watercraft may be used, where appropriate. A seller of diesel fuel who accepts such a certificate is not liable for sales tax on the diesel fuel sold. Certificates must be retained by the sellers in their permanent records as evidence of the exempt nature of diesel sales to eligible buyers. It is a gross misdemeanor for a buyer to make a false certificate of exemption for the purpose of avoiding the tax. Buyers may use the Buyers' Retail Sales Tax Exemption Certificate found on the department's web site at dor.wa.gov.

**AMENDATORY SECTION** (Amending WSR 16-01-037, filed 12/9/15, effective 1/9/16)

**WAC 458-20-179 Public utility tax. Introduction.**

This rule explains the public utility tax (PUT) imposed by chapter 82.16 RCW. The PUT is a tax for engaging in certain public service and transportation businesses within this state.

The department of revenue (department) has adopted other rules that relate to the application of PUT. Readers may want to refer to rules in the following list:

- (1) WAC 458-20-104 Small business tax relief based on income of business;
- (2) WAC 458-20-121 Sales of heat or steam—Including production by cogeneration;
- (3) WAC 458-20-13501 Timber harvest operations;
- (4) WAC 458-20-175 Persons engaged in the business of operating as a private or common carrier by air, rail or water in interstate or foreign commerce;
- (5) WAC 458-20-180 Motor carriers;
- (6) WAC 458-20-192 Indians—Indian country;
- (7) WAC 458-20-193D Transportation, communication, public utility activities, or other services in interstate or foreign commerce; and
- (8) WAC 458-20-251 Sewerage collection and other related activities.

This rule contains examples that identify a number of facts and then state a conclusion. The examples should be used only as a general guide. The tax results of other situations must be determined after a review of all of the facts and circumstances.

**Part I - General Information**

(101) **Persons subject to the public utility tax.** The PUT is imposed by RCW 82.16.020 on certain public service and transportation businesses including railroad, express, railroad car, water distribution, sewerage collection, light and power, telegraph, gas distribution, motor transportation, urban transportation, log transportation, vessels under sixty-five feet in length operating upon the waters within the state of Washington, and tugboat businesses.

(a) **Hauling by watercraft.** Income from hauling persons or property for hire by watercraft between points in Washington is subject to one of two PUT classifications, depending on the nature of the service. Income from:

- Operating tugboats of any size, and the sale of transportation services by vessels sixty-five feet and over, is subject to tax under the "other public service business" PUT classification.

- The sale of transportation services using vessels under sixty-five feet, other than tugboats, is subject to tax under the "vessels under sixty-five feet" public utility tax classification.

These classifications do not include sightseeing tours, fishing charters, or activities that are in the nature of guided tours where the tour may include some water transportation. Persons engaged in providing tours should refer to WAC 458-20-258, Travel agents and tour operators.

(b) **Other businesses subject to the public utility tax.** The PUT also applies to any other public service business subject to control by the state, or having the powers of eminent domain, or any business declared by the legislature to be of a public service nature, unless the activity is subject to tax under chapter 82.04 RCW, Business and occupation (B&O) tax.

(i) The phrase "subject to control by the state" means control by the utilities and transportation commission or any other state agency required by law to exercise control of a business of a public service nature regarding rates charged or services rendered. Examples of other public service businesses include, but are not limited to: Airplane transportation, boom, dock, ferry, pipeline, toll bridge, water transportation, and wharf businesses. RCW 82.16.010.

(ii) Persons engaged in the same business activities as the businesses described above are subject to the PUT even if they are not publicly recognized as providing that type of service or the amount of income from these activities is not substantial. For example, an industrial manufacturing company that owns and operates a well, and that sells a relatively small amount of water to its wholly owned subsidiary, is subject to the PUT as a water distribution business on its sales of water.

(c) **Are amounts derived from interest and penalties taxable?** Amounts charged to customers as interest or penalties are generally subject to the service and other activities B&O tax. This includes interest charged for failure to timely pay for utility services or for incidental services. Incidental services include for example meter installation or other activities which are performed prior to the customer receiving utility services. Any interest or penalty resulting from the failure to timely pay a local improvement district or utility local improvement district assessment is not subject to public utility or B&O taxes.

(102) **Tax rates and measure of tax.** The rates of tax for each business activity subject to the PUT are imposed under RCW 82.16.020 and set forth on appropriate lines of the state public utility tax addendum for the excise tax return. The measure of the PUT is the gross income of the business. The term "gross income" means the value proceeding or accruing from the performance of the particular public service or transportation business involved, including operations incidental to that business. No deduction may be taken on account of the cost of the commodity furnished or sold, the cost of materials used, labor costs, interest, discounts, delivery costs, taxes, or any other expense whatsoever paid or accrued, nor on account of losses. RCW 82.16.010(3).

(103) **Persons subject to public utility tax may also be subject to B&O tax.** The B&O tax does not apply to any business activities for which PUT is specifically imposed, including amounts derived from activities for which a deduction from the PUT is available under RCW 82.16.050. RCW

82.04.310(1). However, many persons engaged in business activities subject to the PUT are also engaged in other business activities subject to B&O tax.

For example, a gas distribution company operating a system for the distribution of natural gas for sale may also make retail sales of gas appliances. The gas distribution company is subject to the PUT on its distribution of natural gas to consumers. It is also subject to retailing B&O tax and must collect and remit retail sales tax on its retail sales of gas appliances. Repairs of customer owned appliances are also a retailing activity subject to retail sales tax.

In distinguishing gross income taxable under the PUT from gross income taxable under the B&O tax, the department is guided by the uniform system of accounts established for the specific type of utility concerned. Because of differences in the uniform systems of accounts established for various types of utility businesses, such guides are not controlling for the purposes of classifying revenue under the Revenue Act.

(104) **Charges for service connections, line extensions, and other similar services.**

(a) For existing customers, amounts derived from services that are incidental to a public utility activity are subject to PUT. Thus, amounts received for the following are subject to PUT:

- (i) Service connection, start-up, and testing fees;
- (ii) Charges for line extensions, repairs, raisings, and/or drops;
- (iii) Meter or pole replacement;
- (iv) Meter reading or load factor charges; and
- (v) Connecting or disconnecting.

(b) For new customers, amounts received for any of the services noted above in Part (104)(a) of this rule are subject to service and other activities B&O tax.

A "new customer" is a customer who previously has not received the utility service at the location. For example, a customer of a water distribution company who currently receives water at a residence and constructs a new residence at a different location is considered a "new customer" with respect to any meter installation services performed at the new residence, until the customer actually receives water at that location. It is immaterial that this customer may be receiving water at the old residence. The charge for installing the meter for this customer at the new location is subject to service and other activities B&O tax.

(105) **Contributions of equipment or facilities.** Contributions to a utility business in the form of equipment or facilities are not considered income to the utility business, if the contribution is a condition of receiving service.

(a) **Example 1.** An industrial customer purchases and pays sales tax on transformers it installs. The customer then provides the transformers to a public utility district as a condition of receiving future service. The public utility district is not subject to the PUT or B&O tax on the receipt of the transformers. Use tax is not owed by the utility district as the customer paid sales tax at the time of purchase.

(b) **Example 2.** For a water or sewerage collection business, the value of pipe, valves, pumps, or similar items provided by a developer for purposes of servicing the developed area is likewise not subject to PUT or B&O tax.

## Part II - Exemptions, Deductions, and Nontaxable Receipts

(201) **Exemptions.** This subsection describes PUT exemptions. Also see subsections in this rule that discuss specific utilities.

(a) **Income exemption.** Persons subject to the PUT are exempt from the payment of the tax if their taxable income from utility activities does not meet a minimum threshold. RCW 82.16.040. For detailed information about this exemption, refer to WAC 458-20-104, Small business tax relief based on income of business.

(b) **Ride sharing.** RCW 82.16.047 exempts amounts received in the course of commuter ride sharing or ride sharing for persons with special transportation needs in accordance with RCW 46.74.010. For detailed information about this exemption, refer to WAC 458-20-261, Commute trip reduction incentives.

(c) **State route number 16.** RCW 82.16.046 exempts amounts received from operating state route number 16 corridor transportation systems and facilities constructed and operated under chapter 47.46 RCW.

(202) **Deductions.** In general, costs of doing business are not deductible under the PUT. However, RCW 82.16.050 provides for limited deductions. This subsection describes a number of those deductions. The deductible amounts should be included in the gross income reported on the state public utility tax addendum for the excise tax return and then deducted on the deduction detail page to determine the amount of taxable income. Deductions taken but not identified on the appropriate deduction detail page may be disallowed. Also see Parts III and IV of this rule, which identify additional deductions available to power and light, gas distribution, and water distribution businesses.

(a) **Cash discounts.** The amount of cash discount actually taken by the purchaser or customer is deductible under RCW 82.16.050(4).

(b) **Credit losses.** The amount of credit losses actually sustained by taxpayers whose regular books of account are kept on an accrual basis is deductible under RCW 82.16.050(5). For additional information regarding credit losses see WAC 458-20-196, Bad debts.

(c) **Taxes.** Amounts derived by municipally owned or operated public service businesses directly from taxes levied for their support are deductible under RCW 82.16.050(1). However, service charges that are spread on the property tax rolls and collected as taxes are not deductible.

Local improvement district and utility local improvement district assessments, including interest and penalties on such assessments, are not income because they are exercises of the jurisdiction's taxing authority. These assessments may be composed of a share of the costs of capital facilities, installation labor, connection fees, etc.

(d) **Prohibitions imposed by federal law or the state or federal constitutions.** Amounts derived from business that the state is prohibited from taxing under federal law or the state or federal constitutions are deductible under RCW 82.16.050(6).

(e) **Sales of commodities for resale.** Amounts derived from the sale of commodities to persons in the same public

service business as the seller, for resale within this state, are deductible under RCW 82.16.050(2). This deduction is allowed only with respect to water distribution, gas distribution, or other public service businesses that furnish water, gas, or any other commodity in the performance of a public service business. For example, income from the sale of natural gas by a gas distributing company to natural gas companies located in Washington, who resell the gas to their customers, is deductible from the gas distributing company's gross income.

(f) **Services furnished jointly.** In general, costs of doing business are not deductible under the PUT. However, RCW 82.16.050(3) allows a deduction for amounts actually paid by a taxpayer to another person taxable under the PUT as the latter's portion of the consideration due for services furnished jointly by both, provided the full amount paid by the customer for the service is received by the taxpayer and reported as gross income subject to the PUT. The services must be furnished jointly by both the taxpayer and another person taxable under the PUT.

**Example 1.** Manufacturing Company hires ABC Transport (ABC) to haul goods from Tacoma to a manufacturing facility in Bellingham. ABC subcontracts part of the haul to XYZ Freight (XYZ) and has XYZ haul the goods from Tacoma to Everett, where the goods are loaded into ABC's truck and transported to Bellingham. Assuming all other requirements of the deduction are met, ABC may deduct the payments it makes to XYZ from its gross income as XYZ's portion of the consideration paid by Manufacturing Company for transportation services furnished jointly by both ABC and XYZ. See WAC 458-20-180 for additional information on motor carriers.

**Example 2.** Dakota Electricity Generator (DEG) sells electricity to Mod Industrial Firm (MIF). DEG hires Wheeler #1 to transmit the electricity from DEG to MIF. Wheeler #1 subcontracts a portion of the transmission service to Wheeler #2.

- Wheeler #1 and Wheeler #2 are jointly furnishing transmission services to DEG. Assuming all other requirements of the deduction are met, Wheeler #1 may claim a "services jointly provided" deduction in the amount paid to Wheeler #2.

- DEG may not claim a "services jointly provided" deduction for the amount DEG paid Wheeler #1. DEG and Wheeler #1 are *not* jointly furnishing a service to MIF. DEG is selling electricity to MIF, and Wheeler #1 is selling transmission services to DEG.

**Example 3.** City A's water department purchases water from City B's water department. City A sells the water to its customers. City A may not take a deduction for its payment to City B's water department as "services jointly provided." The sale of water by City A to its customers is not a service jointly provided to City A's customers by both City A and City B.

City B, however, may take a deduction under RCW 82.16.050(2) for its sales of water to City A since this is a sale of commodities to a person in the same public service business, for resale within this state.

(203) **Nontaxable amounts.** The following amounts are not considered taxable income.

(a) **Insurance claim amounts.** Amounts received from insurance companies in payment of losses, which are distinguishable from amounts received to settle contract payment disagreements.

(b) **Payment of damages.** Amounts received from individuals and others in payment of damages caused by them to the utility's plant or equipment.

(c) **Amounts from eminent domain proceedings or governmental action.** Amounts received as compensation for compensatory or involuntary taking of facilities of a public utility, by the exercise of eminent domain or governmental action, are considered liquidated damages.

### Part III - Light and Power Business

(301) **Light and power business.** Public utility tax is imposed by RCW 82.16.020 on gross income from providing light and power services. Light and power business means the business of operating a plant or system for the generation, production or distribution of electrical energy for hire or sale. RCW 82.16.010.

(302) **Requirements for light and power businesses.** RCW 82.16.090 requires that customer billings issued by light and power businesses serving more than twenty thousand customers include the following information:

(a) The rates and amounts of taxes paid directly by the customer on products or services rendered by such business; and

(b) The rate, origin, and approximate amount of each tax levied on the revenue of such business which has been added as a component of the amount charged to the customer. This does not include taxes levied by the federal government or taxes levied under chapters 54.28, 80.24, or 82.04 RCW.

(303) **Wheeling of electricity.** "Wheeling of electricity" is the activity of delivering or distributing electricity owned by others using power lines and equipment of the person doing the wheeling. Income from wheeling electricity is subject to the PUT.

(304) **Exchanges of electricity by light and power businesses.** There is no specific exemption that applies to an "exchange" of electrical energy or its rights. However, exchanges of electrical energy between light and power businesses qualify for deduction in computing the PUT as sales of power to another light and power business for resale. RCW 82.16.050(11). An exchange is a transaction that is considered to be a sale and involves a delivery or transfer of energy or its rights by one party to another for which the second party agrees, subject to the terms and conditions of the agreement, to deliver electrical energy at the same or another time. Examples of deductible exchange transactions include, but are not limited to, the following:

(a) The exchange of electric power for electric power between one light and power business and another light and power business;

(b) The transmission of electric power by one light and power business to another light and power business pursuant to the agreement for coordination of operations among power systems of the Pacific Northwest executed as of September 15, 1964;

(c) The acquisition of electric power by the Bonneville Power Administration (BPA) for resale to its Washington customers in the light and power business;

(d) The residential exchange of electric power entered into between a light and power business and the administrator of the BPA pursuant to the Pacific Northwest Electric Power Planning and Conservation Act, P.L. 96-501, Sec. 5(c), 16 U.S.C. Sec. 839c. In some cases, power is not physically transferred, but the purpose of the residential exchange is for BPA to pay a "subsidy" to the exchanging utilities. These subsidies are considered a nontaxable adjustment (rebate or discount) for purchases of power from BPA.

(305) **Exemptions.** The following exemptions are available for sales of electricity, and are in addition to the general exemptions found in Part II of this rule.

(a) **Sales of electricity to an electrolytic processor.** RCW 82.16.0421 provides an exemption for sales of electricity made by light and power businesses to chlor-alkali electrolytic processing businesses or sodium chlorate electrolytic processing businesses for the electrolytic process. This exemption, which is scheduled to expire June 30, 2019, applies to sales of electricity made by December 31, 2018.

The exemption does not apply to amounts received from the remarketing or resale of electricity originally obtained by contract for the electrolytic process.

(i) **Exemption certificate required.** To claim the exemption, the chlor-alkali electrolytic processing business or the sodium chlorate electrolytic processing business must provide the light and power business with an exemption certificate. RCW 82.16.0421. A certificate can be obtained from the department's web site at: [dor.wa.gov](http://dor.wa.gov).

(ii) **Annual tax performance report requirement.** RCW 82.16.0421 requires taxpayers receiving the benefit of this tax preference to file an annual tax performance report by (~~April 30th~~) May 31st of the year following any calendar year in which a taxpayer becomes eligible to claim the tax preference. See RCW 82.32.534 for more information on the annual tax performance report requirement for tax preferences.

(iii) **Qualification requirements.** To qualify all the following requirements must be met:

(A) The electricity used in the electrolytic process must be separately metered from the electricity used for the general operations of the business;

(B) The price charged for the electricity used in the electrolytic process must be reduced by an amount equal to the tax exemption available to the light and power business; and

(C) Disallowance of all or part of the exemption is a breach of contract and the damages to be paid by the chlor-alkali electrolytic processing business or the sodium chlorate electrolytic processing business is the amount of the tax exemption disallowed.

(b) **Sales of electricity to aluminum smelters.** RCW 82.16.0498 provides an exemption to be taken in the form of a credit. The credit is allowed if the contract for sale of electricity to an aluminum smelter specifies that the price charged for the electricity will be reduced by an amount equal to the credit. The exemption does not apply to amounts received from the remarketing or resale of electricity originally obtained by contract for the smelting process. The credit

allowed is the same amount as the utility tax that would otherwise have been due under RCW 82.16.020.

(c) **BPA credits or funds.** Effective June 10, 2010, through June 30, 2015, RCW 82.04.310 exempted from the B&O tax credits or payments received by persons from the BPA, for the purpose of implementing energy conservation programs or demand-side management programs. This exemption expired June 30, 2015, and credits or payments received on or after July 1, 2015, are subject to the B&O tax under the service and other activities classification.

(306) **Deductions.** The following deductions are available for sales of electricity, and are in addition to the general deductions found in Part II of this rule.

(a) **Sales of electricity for resale or for consumption outside Washington.** Amounts derived from the production, sale, or transfer of electrical energy for resale within or outside the state of Washington or for consumption outside the state are deductible under RCW 82.16.050(11). These sales of electricity are also not subject to the manufacturing B&O tax. RCW 82.04.310.

(b) **Low density light and power businesses.** RCW 82.16.053 provides a deduction for light and power businesses having seventeen or fewer customers per mile of distribution power lines with retail power rates that exceed the state average power rate. The statute requires the department to determine the state average electric power rate each year and make this rate available to these businesses. This rate and additional information regarding this deduction can be found on the department's web site at: [dor.wa.gov](http://dor.wa.gov).

(c) **Conservation - Electrical energy and gas.** RCW 82.16.055 provides deductions relating to the production or generation of energy from cogeneration or renewable resources, and for measures to improve the efficiency of energy end-use.

(i) **Restrictions.** Use of the deductions is subject to the following restrictions:

(A) They apply only to new facilities for the production or generation of energy from cogeneration or renewable energy resources or measures to improve the efficiency of energy end-use on which construction or installation was begun after June 12, 1980, and before January 1, 1990;

(B) The measures or projects must be, at the time they are placed in service, reasonably expected to save, produce, or generate energy at a total incremental system cost per unit of energy delivered to end-use which is less than or equal to the incremental system cost per unit of energy delivered to end-use from similarly available conventional energy resources that utilize nuclear energy or fossil fuels and that the gas or electric utility could acquire to meet energy demand in the same time period; and

(C) They may be taken for a period not exceeding thirty years after the project is placed in operation. Any recurring costs determined to be eligible for deduction under this rule will cease to be eligible in whole or part at the time of termination of any energy conservation measure or project that originally authorized the deduction under RCW 82.16.055.

(ii) **What can be deducted.** The following may be deducted from a taxpayer's gross income:

(A) Amounts equal to the cost of production at the plant for consumption within the state of Washington of electrical

energy produced or generated from cogeneration as defined in RCW 82.08.02565;

(B) Amounts equal to the cost of production at the plant for consumption within the state of Washington of electrical energy or gas produced or generated from renewable energy resources such as solar energy, wind energy, hydroelectric energy, geothermal energy, wood, wood wastes, municipal wastes, agricultural products and wastes, and end-use waste heat;

(C) Amounts expended to improve consumers' efficiency of energy end-use or to otherwise reduce the use of electrical energy or gas by the consumer;

(D) Amounts received by a utility as a contribution for the installation of service, and later refunded to the customer, are deductible from gross income at the time the amounts are refunded;

(E) Production expenses, eligible fuel costs and book depreciation of capital costs. Eligible fuel costs are all fuels if used for cogeneration or nonfossil fuel costs if not a cogeneration facility.

(307) **Credits.** Credit is available to light and power businesses that make contributions to an electric utility rural economic development revolving fund. The credit is equal to fifty percent of contributions made during a fiscal year to an electric utility rural economic development revolving fund.

(a) Light and power businesses may take a credit up to twenty-five thousand dollars, not to exceed the PUT that would normally be due, against their public utility tax liability each fiscal year for contributions made.

(b) Expenditures from the electric utility rural economic development revolving fund must be made solely on qualifying projects, in a designated qualifying rural area. For additional information see RCW 82.16.0491.

(c) The total amount of credits available statewide on a fiscal year basis for all qualified businesses is three hundred fifty thousand dollars. The department will allow earned credits on a first-come, first-served basis. The right to earn these tax credits expired June 30, 2011. Unused earned credits may be carried forward to subsequent years provided the department has given prior approval.

#### Part IV - Gas and Water Distribution Businesses

(401) **Gas distribution.** Gross income received for the distribution of gas is taxable under PUT as provided by RCW 82.16.020. Gas distribution business means the business of operating a plant or system for the production or distribution for hire or sale of gas, whether manufactured or natural. RCW 82.16.010. See Part II for general exemptions and deductions that may apply to gas distribution.

(402) **Requirements for gas distribution businesses.** RCW 82.16.090 requires that customer billings issued by gas distribution businesses serving more than twenty thousand customers include the following information:

(a) The rates and amounts of taxes paid directly by the customer on products or services rendered by such business; and

(b) The rate, origin, and approximate amount of each tax levied on the revenue of such business which has been added as a component of the amount charged to the customer. This

does not include taxes levied by the federal government or taxes levied under chapters 54.28, 80.24, or 82.04 RCW.

(c) In addition to the general exemptions and deductions noted in Part II of this rule, the law provides the following:

(i) **Sales of natural or manufactured gas to aluminum smelters.** RCW 82.16.0498 provides an exemption to be taken in the form of a credit for sales of natural or manufactured gas to aluminum smelters. The credit is allowed if the contract for sale of gas to an aluminum smelter specifies that the price charged for the gas will be reduced by an amount equal to the credit. The credit allowed is the same amount as the utility tax that would otherwise have been due under RCW 82.16.020.

(ii) **Conservation - Energy from gas.** RCW 82.16.055 provides deductions for the production or generation of energy from cogeneration or renewable resources and for measures to improve the efficiency of energy end-use. See subsection (306)(c) of this rule.

(iii) **Compressed natural gas and liquefied natural gas used as transportation fuel.**

(A) Effective July 1, 2015, RCW 82.16.310 provides an exemption for sales by a gas distribution business of natural gas, compressed natural gas, and liquefied natural gas if the:

(I) Compressed natural gas or liquefied natural gas is sold or used as transportation fuel; or

(II) Buyer uses natural gas to manufacture compressed natural gas or liquefied natural gas to be sold or used as transportation fuel.

(B) The buyer must provide and the seller must retain an exemption certificate. See the department's web site at: [dor.wa.gov](http://dor.wa.gov) for the "Purchases of Natural Gas for Use as Transportation Fuel" form. RCW 82.16.310.

(C) Although sales of natural gas, compressed natural gas, and liquefied natural gas may be exempt under RCW 82.16.310, the income from such sales may be subject to other taxes such as business and occupation tax and retail sales tax.

(D) For the purpose of this subsection, "transportation fuel" means fuel for the generation of power to propel a motor vehicle as defined in RCW 46.04.320, a vessel as defined in RCW 88.02.310, or a locomotive or railroad car.

(403) **Water distribution.** PUT is imposed on amounts derived from the distribution of water under RCW 82.16.020. Water distribution business means the business of operating a plant or system for the distribution of water for hire or sale. RCW 82.16.010. In addition to the general exemptions and deductions noted in Part II of this rule, the law provides the following:

(a) **Water distribution by a nonprofit water association.** Amounts derived from the distribution of water by a nonprofit water association and used for capital improvements, related to the water distribution service, by that association are deductible under RCW 82.16.050(12).

(b) **Distribution of irrigation water.** Amounts derived from the distribution of water through an irrigation system, for irrigation purposes, are deductible under RCW 82.16.050 (7). The phrase "for irrigation purposes" means water used solely for nourishing plant life. Thus, when a water distribution business supplies potable water and some of the water is segregated and separately supplied solely for the nourishing

of plant life as opposed to water supplied for domestic, municipal, or industrial uses, charges for such separately supplied irrigation water may be deducted from gross income subject to PUT.

To meet the "irrigation system" requirement, a water distribution business must demonstrate that its distribution system has turnouts or similar connections for irrigation purposes that are separate from service hookups or similar connections for domestic, industrial, or municipal uses. Under the appropriate circumstances, the use of separate meters and cross-connection or back flow devices may be evidence of such separate connections.

AMENDATORY SECTION (Amending WSR 16-03-002, filed 1/6/16, effective 2/6/16)

**WAC 458-20-210 Sales of tangible personal property for farming—Sales of agricultural products by farmers.**

(1) **Introduction.** This rule explains the application of business and occupation (B&O), retail sales, and use taxes to the sale and/or use of feed, seed, fertilizer, spray materials, and other tangible personal property for farming. This rule also explains the application of B&O, retail sales, and litter taxes to the sale of agricultural products by farmers. Farmers should refer to WAC 458-20-101 (Tax registration and tax reporting) to determine whether they must obtain a tax registration endorsement or a temporary registration certificate from the department of revenue (department).

(a) **Examples.** This rule contains examples that identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax results of other situations must be determined after a review of all facts and circumstances.

(b) **Other rules that may be relevant.** Farmers and persons making sales to farmers may also want to refer to rules in the following list for additional information:

(i) WAC 458-20-178 Use tax and the use of tangible personal property;

(ii) WAC 458-20-209 Farming for hire and horticultural services performed for farmers;

(iii) WAC 458-20-222 Veterinarians;

(iv) WAC 458-20-239 Sales to nonresidents of farm machinery or implements, and related services;

(v) WAC 458-20-243 Litter tax; and

(vi) WAC 458-20-262 Retail sales and use tax exemptions for agricultural employee housing.

(2) **Who is a farmer?** A "farmer" is any person engaged in the business of growing, raising, or producing, on the person's own lands or on the lands in which the person has a present right of possession, any agricultural product to be sold. Effective July 1, 2015, a "farmer" also includes eligible apiarists that grow, raise, or produce honey bee products for sale, or provide bee pollination services. A "farmer" does not include a person growing, raising, or producing agricultural products for the person's own consumption; a person selling any animal or substance obtained therefrom in connection with the person's business of operating a stockyard, slaughterhouse, or packing house; or a person in respect to the business of taking, cultivating, or raising timber. RCW 82.04.-213.

(3) **What is an agricultural product?** An "agricultural product" is any product of plant cultivation or animal husbandry including, but not limited to: A product of horticulture, grain cultivation, vermiculture, viticulture, or aquaculture as defined in RCW 15.85.020; plantation Christmas trees; short-rotation hardwoods as defined in RCW 84.33.035; turf; or any animal, including, but not limited to, an animal that is a private sector cultured aquatic product as defined in RCW 15.85.020, a bird, an insect, or the substances obtained from such animals. Effective July 1, 2015, "agricultural product" includes honey bee products. An "agricultural product" does not include animals defined under RCW 16.70.020 as "pet animals." Effective June 12, 2014, RCW 82.04.213 excludes marijuana from the definition of "agricultural product." Marijuana is any product with a THC concentration greater than .03 percent. RCW 82.04.213.

(4) **Who is an eligible apiarist?** An "eligible apiarist" is a person who owns or keeps one or more bee colonies and who grows, raises, or produces honey bee products for sale at wholesale and is registered under RCW 15.60.021.

(5) **What are honey bee products?** "Honey bee products" are queen honey bees, packaged honey bees, honey, pollen, bees wax, propolis, or other substances obtained from honey bees. "Honey bee products" do not include manufactured substances or articles.

(6) **What is marijuana?** "Marijuana" is any product with a THC concentration greater than .03 percent. For additional information on marijuana see RCW 69.50.101.

(7) **Sales to farmers.** Persons making sales of tangible personal property to farmers are generally subject to wholesaling or retailing B&O tax, as the case may be, on the gross proceeds of sales. Sales of some services performed for farmers, such as installing or repairing tangible personal property, are retail sales and subject to retailing B&O tax on the gross proceeds of such sales. Persons making retail sales must collect retail sales tax from the buyer, unless the sale is specifically exempt by law. Refer to subsection (9) of this rule for information about specific sales tax exemptions available for sales to farmers.

(a) **Documenting wholesale sales.** A seller must take and retain from the buyer a copy of the buyer's reseller permit, or a completed "Farmers' Certificate for Wholesale Purchases and Sales Tax Exemptions" to document the wholesale nature of any transaction.

(b) **Buyer's responsibility when the seller does not collect retail sales tax on a retail sale.** If the seller does not collect retail sales tax on a retail sale, the buyer must pay the retail sales tax (commonly referred to as "deferred sales tax") or use tax directly to the department, unless the sale is specifically exempt by law. The excise tax return does not have a separate line for reporting deferred sales tax. Consequently, deferred sales tax liability should be reported on the use tax line of the buyer's excise tax return. If a deferred sales tax or use tax liability is incurred by a farmer who is not required to obtain a tax registration endorsement from the department, the farmer must report the tax on a "Consumer Use Tax Return" and remit the appropriate tax to the department. For detailed information regarding use tax see WAC 458-20-178.

The Consumer Use Tax Return may be obtained by calling the department's telephone information center at 1-800-647-7706. The return may also be obtained from the department's web site at dor.wa.gov.

(c) **Feed, seed, seedlings, fertilizer, spray materials, and agents for enhanced pollination.** Sales to farmers of feed, seed, seedlings, fertilizer, spray materials, and agents for enhanced pollination, including insects such as bees, to be used for the purpose of producing an agricultural product, whether for wholesale or retail sale, are wholesale sales.

However, when these items are sold to consumers for purposes other than producing agricultural products for sale, the sales are retail sales. For example, sales of feed to riding clubs, racetrack operators, boarders, or similar persons who do not resell the feed at a specific charge are retail sales. Sales of feed for feeding pets or work animals, or for raising animals for the purpose of producing agricultural products for personal consumption are also retail sales. Sales of seed, fertilizer, and spray materials for use on lawns and gardens, or for any other personal use, are likewise retail sales.

(i) **What is feed?** "Feed" is any substance used as food to sustain or improve animals, birds, fish, bees, or other insects, including whole and processed grains or mixtures thereof, hay and forages or meals made therefrom, mill feeds and feeding concentrates, stock salt, hay salt, sugar, pollen patties, bone meal, fish meal, cod liver oil, double purpose limestone grit, oyster shell, and other similar substances. Food additives that are given for their beneficial growth or weight effects are "feed."

Hormones or similar products that do not make a direct nutritional or energy contribution to the body are not "feed," nor are products used as medicines.

(ii) **What is seed?** "Seed" is the propagative portions of plants commonly used for seeding or planting whether true seed, bulbs, plants, seed-like fruits, seedlings, or tubers. For purposes of this rule, "seed" does not include seeds or propagative portions of plants used to grow marijuana.

(iii) **What is fertilizer?** "Fertilizer" is any substance containing one or more recognized plant nutrients and is used for its plant nutrient content and/or is designated for use in promoting plant growth. "Fertilizer" includes limes, gypsum, and manipulated animal and vegetable manures. There is no requirement that fertilizers be applied directly to the soil.

(iv) **What are spray materials?** "Spray materials" are any substance or mixture of substances in liquid, powder, granular, dry flowable, or gaseous form, which is intended to prevent, destroy, control, repel, or mitigate any insect, rodent, nematode, mite, mollusk, fungus, weed, and any other form of plant or animal life normally considered to be a pest. The term includes treated materials, such as grains, that are intended to destroy, control, or repel such pests. "Spray materials" also include substances that act as plant regulators, defoliants, desiccants, or spray adjuvants.

(v) **Examples.**

(A) **Example 1.** Sue grows vegetables for retail sale at a local market. Sue purchases fertilizers and spray materials that she applies to the vegetable plants. She also purchases feed for poultry that she raises to produce eggs for her personal consumption. Because the vegetables are an agricultural product produced for sale, retail sales tax does not apply

to Sue's purchases of fertilizers and spray materials, provided she gives the seller a copy of her reseller permit, or a completed Farmers' Certificate for Wholesale Purchases and Sales Tax Exemptions. Retail sales tax applies to her purchases of poultry feed, as the poultry is raised to produce eggs for Sue's personal consumption.

(B) **Example 2.** WG Vineyards (WG) grows grapes that it uses to manufacture wine for sale. WG purchases pesticides and fertilizers that are applied to its vineyards. WG may purchase these pesticides and fertilizers at wholesale, provided WG gives the seller a copy of their reseller permit, or a completed Farmers' Certificate for Wholesale Purchases and Sales Tax Exemptions.

(C) **Example 3.** Seed Co. contracts with farmers to raise seed. Seed Co. provides the seed and agrees to purchase the crop if it meets specified standards. The contracts provide that ownership of the crop is retained by Seed Co., and the risk of crop loss is borne by the farmers. The farmers must pay for the seed whether or not the crop meets the specified standard. The transfer of the possession of the seed to each farmer is a wholesale sale, provided Seed Co. obtains a copy of their reseller permit, or a completed Farmers' Certificate for Wholesale Purchases and Sales Tax Exemptions from that farmer.

(d) **Chemical sprays or washes.** Sales of chemical sprays or washes, whether to farmers or other persons, for the purpose of post-harvest treatment of fruit for the prevention of scald, fungus, mold, or decay are wholesale sales.

(e) **Farming equipment.** Sales to farmers of farming equipment such as machinery, machinery parts and repair, tools, and cleaning materials are retail sales and subject to retailing B&O and retail sales taxes, unless specifically exempt by law. Refer to subsections (7)(i) and (9) of this rule for information about sales tax exemptions available to farmers.

(f) **Packing materials and containers.** Sales of packing materials and containers, or tangible personal property that will become part of a container, to a farmer who will sell the property to be contained therein are wholesale sales, provided the packing materials and containers are not put to intervening use by the farmer. Thus, sales to farmers of binder twine for binding bales of hay that will be sold or wrappers for fruit and vegetables to be sold are subject to wholesaling B&O tax. However, sales of packing materials and containers to a farmer who will use the items as a consumer are retail sales and subject to retailing B&O and retail sales taxes. Thus, sales of binder twine to a farmer for binding bales of hay that will be used to feed the farmer's livestock are retail sales.

(g) **Purchases for dual purposes.** A buyer normally engaged in both consuming and reselling certain types of tangible personal property who is unable to determine at the time of purchase whether the particular property purchased will be consumed or resold must purchase according to the general nature of his or her business. RCW 82.08.130. If the buyer principally consumes the articles in question, the buyer should not give a copy of its reseller permit for any part of the purchase. If the buyer principally resells the articles, the buyer may provide a copy of its reseller permit for the entire purchase. For the purposes of this subsection, the term "principally" means greater than fifty percent.

If a buyer makes a purchase for dual purposes and does not give a copy of their reseller permit for any of the purchase and thereafter resells some of the articles purchased, the buyer may claim a "taxable amount for tax paid at source" deduction. For additional information regarding purchases for dual purposes and the "taxable amount for tax paid at source" deduction see WAC 458-20-102.

(i) **Potential deferred sales tax liability.** If the buyer gives a copy of its reseller permit for all purchases and thereafter consumes some of the articles purchased, the buyer is liable for deferred sales tax and must remit the tax directly to the department. Refer to (b) of this subsection, WAC 458-20-102 and 458-20-178 for more information regarding deferred sales tax and use tax.

(ii) **Example 4.** A farmer purchases binder twine for binding bales of hay. Some of the hay will be sold and some will be used to feed the farmer's livestock. More than fifty percent of the binder twine is used for binding bales of hay that will be sold. Because the farmer principally uses the binder twine for binding bales of hay that will be sold, the farmer may provide a copy of their reseller permit, or a completed Farmers' Certificate for Wholesale Purchases and Sales Tax Exemptions to the seller for the entire purchase. The farmer is liable for deferred sales tax on the binder twine used for binding bales of hay that are used to feed the farmer's livestock and must remit the tax directly to the department.

(h) **"Fruit bin rentals" by fruit packers.** Fruit packers often itemize their charges to farmers for various services related to the packing and storage of fruit. An example is a charge for the bins that the packer uses in the receiving, sorting, inspecting, and storing of fruit (commonly referred to as "bin rentals"). The packer delivers the bins to the grower, who fills them with fruit for eventual storage in the packer's warehouse. Charges by fruit packers to farmers for such bin rentals do not constitute the rental of tangible personal property to the farmer where the bins are under the control of the packer for use in the receiving, sorting, inspecting, and storing of fruit. These charges are income to the packer related to the receipt or storage of fruit. The packer, as the consumer of the bins, is subject to retail sales or use tax on the purchase or use of the bins. For information regarding the taxability of fruit packing by cooperative marketing associations and independent dealers acting as agents for others in the sales of fruit and produce see WAC 458-20-214.

(i) **Machinery and equipment used directly in a manufacturing operation.** Machinery and equipment used directly in a manufacturing operation by a manufacturer or processor for hire is exempt from sales and use taxes provided that all requirements for the exemptions are met. RCW 82.08.02565 and 82.12.02565. These exemptions are commonly referred to as the M&E exemption. Farmers who use agricultural products that they have grown, raised, or produced as ingredients in a manufacturing process may be entitled to the M&E exemption on the acquisition of machinery and equipment used directly in their manufacturing operation. For more information on the M&E exemption see WAC 458-20-13601.

(8) **Sales by farmers.** Farmers are not subject to B&O tax on wholesale sales of agricultural products. Effective July 1, 2015, bee pollination services provided to farmers by eligi-

ble apiarists also qualify for the exemption provided by RCW 82.04.330. Farmers who manufacture products using agricultural products that they have grown, raised, or produced should refer to (b) of this subsection for tax-reporting information.

Farmers are subject to retailing B&O tax on retail sales of agricultural products and retailing or wholesaling B&O tax on sales of nonagricultural products, as the case may be, unless specifically exempt by law. Also, B&O tax applies to sales of agricultural products that the seller has not grown, raised, or produced on the seller's own land or on land in which the seller has a present right of possession, whether these products are sold at wholesale or retail. Likewise, B&O tax applies to sales of animals or substances derived from animals in connection with the business of operating a stockyard, slaughterhouse, or packing house. Farmers may be eligible to claim a small business B&O tax credit if the amount of B&O tax liability in a reporting period is under a certain amount. For more information about the small business B&O tax credit see WAC 458-20-104.

(a) **Litter tax.** The gross proceeds of sales of certain products, including food for human or pet consumption, are subject to litter tax. RCW 82.19.020. Litter tax does not apply to sales of agricultural products that are exempt from B&O tax under RCW 82.04.330. RCW 82.19.050. Thus, farmers are not subject to litter tax on wholesale sales of agricultural products but are liable for litter tax on the gross proceeds of retail sales of agricultural products that constitute food for human or pet consumption. In addition, farmers that manufacture products for use and consumption within this state (e.g., a farmer who produces wine from grapes that the farmer has grown) may be liable for litter tax measured by the value of the products manufactured. For more information about the litter tax see chapter 82.19 RCW and WAC 458-20-243.

**Example 5.** RD Orchards (RD) grows apples at its orchards. Most apples are sold at wholesale, but RD operates a seasonal roadside fruit stand from which it sells apples at retail. The wholesale sales of apples are exempt from both B&O and litter taxes. The retail sales of apples are subject to retailing B&O and litter taxes but are exempt from sales tax because the apples are sold as a food product for human consumption. Refer to subsection (9)(d) of this rule for more information about the retail sales tax exemption applicable to sales of food products for human consumption.

(b) **Farmers using agricultural products in a manufacturing process.** The B&O tax exemption provided by RCW 82.04.330 does not apply to any person selling manufactured substances or articles. Thus, farmers who manufacture products using agricultural products that they have grown, raised, or produced are subject to manufacturing B&O tax on the value of products manufactured. Farmers who sell their manufactured products at retail or wholesale in the state of Washington are also generally subject to the retailing or wholesaling B&O tax, as the case may be. In such cases, a multiple activities tax credit (MATC) may be available. Refer to WAC 458-20-136 (Manufacturing, processing for hire, fabricating) and WAC 458-20-19301 (Multiple activities tax credits), respectively, for more information about the manufacturing B&O tax and the MATC.

(i) **Manufacturing fresh fruits and vegetables.** RCW 82.04.4266 provides a B&O tax exemption to persons manufacturing fresh fruits or vegetables by canning, preserving, freezing, processing, or dehydrating fresh fruits or vegetables. For purposes of this rule, "fruits" and "vegetables" does not include marijuana.

Wholesale sales of fresh fruits or vegetables canned, preserved, frozen, processed, or dehydrated by the seller and sold to purchasers who transport the goods out of this state in the ordinary course of business are also eligible for this exemption. A seller must keep and preserve records for the period required by RCW 82.32.070 establishing that the purchaser transported the goods out of Washington state.

(A) A person claiming the exemption must file a complete annual ((survey)) **tax performance report** with the department under RCW ((82.32.585)) **82.32.534**. In addition, persons claiming this tax preference must report the amount of the exemption on their monthly or quarterly excise tax return. For more information on reporting requirements for this tax preference see RCW 82.32.808.

(B) RCW 82.04.4266 is scheduled to expire July 1, 2025, at which time the preferential B&O tax rate under RCW 82.04.260 will apply.

(ii) **Manufacturing dairy products.** RCW 82.04.4268 provides a B&O tax exemption to persons manufacturing dairy products, not including any marijuana-infused product, that as of September 20, 2001, are identified in 21 C.F.R., chapter 1, parts 131, 133, and 135. These products include milk, buttermilk, cream, yogurt, cheese, and ice cream, and also include by-products from the manufacturing of dairy products such as whey and casein.

The exemption also applies to persons selling manufactured dairy products to purchasers who transport the goods out of Washington state in the ordinary course of business. Unlike the exemption for certain wholesale sales of fresh fruits or vegetables (see (b)(i) of this subsection), the exemption for sales of qualifying dairy products does not require that the sales be made at wholesale.

A seller must keep and preserve records for the period required by RCW 82.32.070 establishing that the purchaser transported the goods out of Washington state or the goods were sold to a manufacturer for use as an ingredient or component in the manufacturing of a dairy product.

(A) A person claiming the exemption must file a complete annual ((survey)) **tax performance report** with the department under RCW ((82.32.585)) **82.32.534**. In addition, persons claiming this tax preference must report the amount of the exemption on their monthly or quarterly excise tax return. For more information on reporting requirements for this tax preference see RCW 82.32.808.

(B) RCW 82.04.4268 is scheduled to expire July 1, 2025, at which time the preferential B&O tax rate under RCW 82.04.260 will apply.

(C) Effective October 1, 2013, the exemption provided by RCW 82.04.4268 expanded to include wholesale sales by a dairy product manufacturer to a purchaser who uses the dairy products as an ingredient or component in the manufacturing in Washington of another dairy product. The definition of dairy products was expanded to include products com-

prised of not less than seventy percent dairy products measured by weight or volume.

(c) **Raising cattle for wholesale sale.** RCW 82.04.330 provides a B&O tax exemption to persons who raise cattle for wholesale sale provided that the cattle are held for at least sixty days prior to the sale. Persons who hold cattle for fewer than sixty days before reselling the cattle are not considered to be engaging in the normal activities of growing, raising, or producing livestock for sale.

**Example 6.** A feedlot operation purchases cattle and feeds them until they attain a good market condition. The cattle are then sold at wholesale. The feedlot operator is exempt from B&O tax on wholesale sales of cattle if it held the cattle for at least sixty days while they were prepared for market. However, the feedlot operator is subject to wholesaling B&O tax on wholesale sales of cattle held for fewer than sixty days prior to the sale.

(d) **B&O tax exemptions available to farmers.** In addition to the exemption for wholesale sales of agricultural products, several other B&O tax exemptions available to farmers are discussed in this subsection.

(i) **Growing, raising, or producing agricultural products owned by other persons.** RCW 82.04.330 exempts amounts received by a farmer for growing, raising, or producing agricultural products owned by others, such as custom feed operations.

**Example 7.** A farmer is engaged in the business of raising cattle owned by others (commonly referred to as "custom feeding"). After the cattle attain a good market condition, the owner sells them. Amounts received by the farmer for custom feeding are exempt from B&O tax under RCW 82.04.330, provided that the farmer held the cattle for at least sixty days. Farmers are not considered to be engaging in the activity of raising cattle for sale unless the cattle are held for at least sixty days while the cattle are prepared for market. (See (c) of this subsection.)

(ii) **Processed hops shipped outside Washington for first use.** RCW 82.04.337 exempts amounts received by hop growers or dealers for hops shipped outside the state of Washington for first use, if those hops have been processed into extract, pellets, or powder in this state. However, the processor or warehouse of such products is not exempt on amounts charged for processing or warehousing such products.

(iii) **Sales of hatching eggs or poultry.** RCW 82.04.410 exempts amounts received for the sale of hatching eggs or poultry by farmers producing hatching eggs or poultry, when these agricultural products are for use in the production for sale of poultry or poultry products.

(9) **Retail sales tax and use tax exemptions.** This subsection provides information about a number of retail sales tax and corresponding use tax exemptions available to farmers and persons buying tangible personal property at retail from farmers. Some exemptions require the buyer to provide the seller with an exemption certificate. Refer to subsection (10) of this rule for additional information regarding exemption certificates.

(a) **Pollen.** RCW 82.08.0277 and 82.12.0273 exempt the sale and use of pollen from retail sales and use taxes.

(b) **Semen.** RCW 82.08.0272 and 82.12.0267 exempt the sale and use of semen used in the artificial insemination of livestock from retail sales and use taxes.

(c) **Feed for livestock at public livestock markets.** RCW 82.08.0296 and 82.12.0296 exempt the sale and use of feed to be consumed by livestock at a public livestock market from retail sales and use taxes.

(d) **Food products.** RCW 82.08.0293 and 82.12.0293 exempt the sale and use of food products for human consumption from retail sales and use taxes. These exemptions also apply to the sale or use of livestock for personal consumption as food. For more information about food products that qualify for this exemption see WAC 458-20-244.

(e) **Auction sales of farm property.** RCW 82.08.0257 and 82.12.0258 exempt from retail sales and use taxes tangible personal property, including household goods, which has been used in conducting a farm activity, if the property is purchased from a farmer, as defined in RCW 82.04.213, at an auction sale held or conducted by an auctioneer on a farm. Effective June 12, 2014, these exemptions do not apply to personal property used by a person in the production of marijuana.

(f) **Poultry.** RCW 82.08.0267 and 82.12.0262 exempt from retail sales and use taxes the sale and use of poultry used in the production for sale of poultry or poultry products.

**Example 8.** A poultry hatchery produces poultry from eggs. The resulting poultry are sold to egg producers. These sales are exempt from retail sales tax under RCW 82.08.-0267. (They are also exempt from B&O tax. See subsection (8)(d)(iii) of this rule.)

(g) **Leases of irrigation equipment.** RCW 82.08.0288 and 82.12.0283 exempt the lease or use of irrigation equipment from retail sales and use taxes, but only if:

(i) The lessor purchased the irrigation equipment for the purpose of irrigating land controlled by the lessor;

(ii) The lessor has paid retail sales or use tax upon the irrigation equipment;

(iii) The irrigation equipment is attached to the land in whole or in part;

(iv) Effective June 12, 2014, the irrigation equipment is not used in the production of marijuana; and

(v) The irrigation equipment is leased to the lessee as an incidental part of the lease of the underlying land and is used solely on such land.

(h) **Beef and dairy cattle.** RCW 82.08.0259 and 82.12.-0261 exempt the sale and use of beef and dairy cattle, to be used by a farmer in producing an agricultural product, from retail sales and use taxes.

**Example 9.** John operates a farm where he raises beef and dairy cattle for sale. He also raises other livestock for sale including hogs, sheep, and goats. John's sales of beef and dairy cattle for use on a farm are exempt from retail sales tax. However, John must collect retail sales tax on all retail sales of sheep, goats, and hogs unless the sales qualify for either the food products exemption described in (d) of this subsection, or the exemption for sales of livestock for breeding purposes described in this subsection (9)(i) of this rule.

(i) **Livestock for breeding purposes.** RCW 82.08.0259 and 82.12.0261 exempt the sale or use of livestock, as defined in RCW 16.36.005, for breeding purposes where the

animals are registered in a nationally recognized breed association from retail sales and use taxes.

**Example 10.** ABC Farms raises and sells quarter horses registered in the American Quarter Horse Association (AQHA). Quarter horses are generally recognized as a definite breed of horse, and the AQHA is a nationally recognized breed association. Therefore, ABC Farms is not required to collect sales tax on retail sales of quarter horses for breeding purposes, provided it receives and retains a completed exemption certificate from the buyer.

(j) **Bedding materials for chickens.** RCW 82.08.920 and 82.12.920 exempt from retail sales and use taxes the sale to and use of bedding materials by farmers to accumulate and facilitate the removal of chicken manure, provided the farmer is raising chickens that are sold as agricultural products.

(i) **What are bedding materials?** "Bedding materials" are wood shavings, straw, sawdust, shredded paper, and other similar materials.

(ii) **Example 11.** Farmer raises chickens for use in producing eggs for sale. When the chickens are no longer useful for producing eggs, Farmer sells them to food processors for soup and stew meat. Farmer purchases bedding materials used to accumulate and facilitate the removal of chicken manure. The purchases of bedding materials by Farmer are exempt from retail sales tax as long as Farmer provides the seller with a completed Farmers' Certificate for Wholesale Purchases and Sales Tax Exemptions. See subsection (10) of this rule for where to find an exemption certificate. The seller must retain a copy of the exemption certificate for its records.

The exemption merely requires that the chickens be sold as agricultural products. It is immaterial that Farmer primarily raises the chickens to produce eggs.

(k) **Propane or natural gas used to heat structures housing chickens.** RCW 82.08.910 and 82.12.910 exempt from retail sales and use taxes the sale to and use of propane or natural gas by farmers to heat structures used to house chickens. The propane or natural gas must be used exclusively to heat the structures, and the structures must be used exclusively to house chickens that are sold as agricultural products.

(i) **What are "structures"?** "Structures" are barns, sheds, and other similar buildings in which chickens are housed.

(ii) **Example 12.** Farmer purchases natural gas that is used to heat structures housing chickens. The natural gas is used exclusively to heat the structures, and the structures are used exclusively to house chickens. The chickens are used to produce eggs. When the chickens are no longer useful for producing eggs, Farmer sells the chickens to food processors for soup and stew meat. The purchase of natural gas by Farmer is exempt from retail sales tax as long as Farmer provides the seller with a completed Farmers' Certificate for Wholesale Purchases and Sales Tax Exemptions. See subsection (10) of this rule for where to find an exemption certificate. The seller must retain a copy of the exemption certificate for its records.

The exemption merely requires that the chickens be sold as agricultural products. It is immaterial that Farmer primarily houses these chickens to produce eggs.

(ii) **Example 13.** Farmer purchases natural gas that is used to heat structures used in the incubation of chicken eggs and structures used for washing, packing, and storing eggs. The natural gas used to heat these structures is not exempt from retail sales tax because the structures are not used exclusively to house chickens that are sold as agricultural products.

(l) **Farm fuel used for agricultural purposes.**

(i) **Diesel, biodiesel and aircraft fuels.** RCW 82.08.865 and 82.12.865 exempt from retail sales and use taxes the sale and use of diesel fuel, biodiesel fuel, and aircraft fuel, to farm fuel users for agricultural purposes. The exemptions apply to a fuel blend if all of the component fuels of the blend would otherwise be exempt if the component fuels were sold as separate products. The buyer must provide the seller with a completed Farmers' Certificate for Wholesale Purchases and Sales Tax Exemptions. See subsection (10) of this rule for where to find an exemption certificate. The seller must retain a copy of the exemption certificate for its records.

(A) The exemptions apply to nonhighway uses for production of agricultural products and for providing horticultural services to farmers. Horticultural services include:

- (I) Soil preparation services;
- (II) Crop cultivation services;
- (III) Crop harvesting services.

(B) The exemptions do not apply to uses other than for agricultural purposes. Agricultural purposes do not include:

(I) Heating space for human habitation or water for human consumption; or

(II) Transporting on public roads individuals, agricultural products, farm machinery or equipment, or other tangible personal property, except when the transportation is incidental to transportation on private property and the fuel used for such transportation is not subject to tax under chapter 82.38 RCW.

(ii) **Propane and natural gas used in distilling mint on a farm.** Effective October 1, 2013, RCW 82.08.220 and 82.12.220 exempt from retail sales and use taxes sales to and use by farmers of propane or natural gas used exclusively to distill mint on a farm. The buyer must provide the seller with a completed Farmers' Certificate for Wholesale Purchases and Sales Tax Exemptions. The seller must retain a copy of the exemption certificate for its records. See subsection (10) of this rule for where to find an exemption certificate. The seller must also report amounts claimed for exemption when electronically filing excise tax returns. This exemption is scheduled to expire July 1, 2017.

(m) **Nutrient management equipment and facilities.** RCW 82.08.890 and 82.12.890 provide retail sales and use tax exemptions for the sale to or use by eligible persons of:

(i) Qualifying livestock nutrient management equipment;

(ii) Labor and services rendered in respect to installing, repairing, cleaning, altering, or improving qualifying livestock nutrient management equipment; and

(iii) Labor and services rendered in respect to repairing, cleaning, altering, or improving qualifying livestock nutrient management facilities, or to tangible personal property that becomes an ingredient or component of qualifying livestock nutrient management facilities in the course of repairing, cleaning, altering, or improving such facilities.

(iv) Nonqualifying labor and services. This subsection (9)(m)(iii) of this rule does not include the sale of or charge made for labor and services rendered in respect to the constructing of new, or replacing previously existing, qualifying livestock nutrient management facilities, or tangible personal property that becomes an ingredient or component of qualifying livestock nutrient management facilities during the course of constructing new, or replacing previously existing qualifying livestock nutrient management facilities.

(v) Nutrient management plan must be certified or approved. The exemptions provided by RCW 82.08.890 and 82.12.890 apply to sales made after the livestock nutrient management plan is:

(A) Certified under chapter 90.64 RCW;

(B) Approved as part of the permit issued under chapter 90.48 RCW; or

(C) Approved by a conservation district and who qualifies for the exemption provided under RCW 82.08.855. Effective June 12, 2014, the requirement for the department to issue exemption certificates was removed. A Farmers' Certificate for Wholesale Purchases and Sales Tax Exemptions should be completed and provided to the seller.

(vi) **Definitions. For the purpose of these exemptions, the following definitions apply:**

(A) **"Animal feeding operation"** means a lot or facility, other than an aquatic animal production facility, where the following conditions are met:

- Animals, other than aquatic animals, have been, are, or will be stabled or confined and fed or maintained for a total of forty-five days or more in any twelve-month period; and
- Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

(B) **"Conservation district"** means a subdivision of state government organized under chapter 89.08 RCW.

(C) **"Eligible person"** means a person:

- Licensed to produce milk under chapter 15.36 RCW who has a certified dairy nutrient management plan, as required by chapter 90.64 RCW; or
- Who owns an animal feeding operation and has a permit issued under chapter 90.48 RCW; or
- Who owns an animal feeding operation and has a nutrient management plan approved by a conservation district as meeting natural resource conservation service field office technical guide standards and who qualifies for the exemption provided under RCW 82.08.855.

(D) **"Handling and treatment of livestock manure"** means the activities of collecting, storing, moving, or transporting livestock manure, separating livestock manure solids from liquids, or applying livestock manure to the agricultural lands of an eligible person other than through the use of pivot or linear type traveling irrigation systems.

(E) **"Permit"** means either a state waste discharge permit or a National Pollutant Discharge Elimination System permit, or both.

(F) **"Qualifying livestock nutrient management equipment"** means the tangible personal property listed below for exclusive use in the handling and treatment of livestock manure, including repair and replacement parts for the same equipment:

Aerators  
 Agitators  
 Augers  
 Conveyers  
 Gutter cleaners  
 Hard-hose reel traveler irrigation systems  
 Lagoon and pond liners and floating covers  
 Loaders  
 Manure composting devices  
 Manure spreaders  
 Manure tank wagons  
 Manure vacuum tanks  
 Poultry house cleaners  
 Poultry house flame sterilizers  
 Poultry house washers  
 Poultry litter saver machines  
 Pipes  
 Pumps  
 Scrapers  
 Separators  
 Slurry injectors and hoses  
 Wheelbarrows, shovels, and pitchforks.

(G) **"Qualifying livestock nutrient management facilities"** means the exclusive use in the handling and treatment of livestock manure of the facilities listed below:

Flush systems  
 Lagoons  
 Liquid livestock manure storage structures, such as concrete tanks or glass-lined steel tanks  
 Structures used solely for dry storage of manure, including roofed stacking facilities.

(n) **Anaerobic digesters.** RCW 82.08.900 and 82.12.-900 provide retail sales and use tax exemptions for purchases and uses by eligible persons establishing or operating anaerobic digesters or to services rendered in respect to installing, constructing, repairing, cleaning, altering, or improving an anaerobic digester. The exemptions include sales of tangible personal property that becomes an ingredient or component of the anaerobic digester. The anaerobic digester must be used primarily (more than fifty percent measured by volume or weight) to treat livestock manure. Anaerobic digester is a facility that processes manure from livestock into biogas and dried manure using microorganisms in a decomposition process within a closed, oxygen-free container.

(i) **Exemption certificate.** Effective July 24, 2015, eligible persons no longer need to apply for an exemption certificate. An "eligible person" is any person establishing or operating an anaerobic digester to treat primarily livestock manure.

(ii) **Records retention.** Persons claiming the exemptions under RCW 82.08.900 and 82.12.900 must keep records necessary for the department to verify eligibility. Sellers may make tax exempt sales only if the buyer provides the seller with a completed Farmers' Certificate for Wholesale Purchases and Sales Tax Exemptions, and the seller retains a copy of the certificate for its files. See subsection (10) of this rule for where to find an exemption certificate.

(o) **Animal pharmaceuticals.** RCW 82.08.880 and 82.12.880 exempt from retail sales and use taxes the sale of

and use of certain animal pharmaceuticals when sold to, or used by, farmers or veterinarians. To qualify for the exemption, the animal pharmaceutical must be administered to an animal raised by a farmer for the purpose of producing an agricultural product for sale. In addition, the animal pharmaceutical must be approved by the United States Department of Agriculture (USDA) or the United States Food and Drug Administration (FDA).

(i) **Who is a veterinarian?** A "veterinarian" means a person who is licensed to practice veterinary medicine, surgery, or dentistry under chapter 18.92 RCW.

(ii) **How can I determine whether the FDA or USDA has approved an animal pharmaceutical?** The FDA and USDA have an established approval process set forth in federal regulations. The FDA maintains a list of all approved animal pharmaceuticals called the "*Green Book*." The USDA maintains a list of approved biotechnology products called the "*Veterinary Biologics Product Catalogue*." Pharmaceuticals that are not on either of these lists have not been approved and are not eligible for the exemption.

(iii) **Example 17.** Dairy Farmer purchases sterilizing agents. The sterilizing agents are applied to the equipment and facilities where Dairy Farmer's cows are milked. Dairy Farmer also purchases teat dips, antiseptic udder washes, and salves that are not listed in either the FDA's *Green Book* of approved animal pharmaceuticals or the USDA's *Veterinary Biologics Product Catalogue* of approved biotechnology products. The purchases of sterilizing agents are not exempt as animal pharmaceuticals because the sterilizing agents are not administered to animals. The teat dips, antiseptic udder washes, and salves are likewise not exempt because they have not been approved by the FDA or USDA.

(iv) **What type of animal must the pharmaceutical be administered to?** As explained above, the exemptions are limited to the sale and use of animal pharmaceuticals administered to an animal that is raised by a farmer for the purpose of producing an agricultural product for sale. The conditions under which a farmer may purchase and use tax-exempt animal pharmaceuticals are similar to those under which a farmer may purchase and use feed at wholesale. Both types of purchases and uses require that the particular product be sold to or used by a farmer (or a veterinarian in the case of animal pharmaceuticals), and that the product be given or administered to an animal raised by a farmer for the purpose of producing an agricultural product for sale.

(v) **Examples of animals raised for the purpose of producing agricultural products for sale.** For purposes of the exemptions, the following is a nonexclusive list of examples of animals that are being raised for the purpose of producing an agricultural product for sale, presuming all other requirements for the exemption are met:

(A) Horses, cattle, or other livestock raised by a farmer for sale;

(B) Cattle raised by a farmer for the purpose of slaughtering, if the resulting products are sold;

(C) Milk cows raised and/or used by a dairy farmer for the purpose of producing milk for sale;

(D) Horses raised by a farmer for the purpose of producing foals for sale;

(E) Sheep raised by a farmer for the purpose of producing wool for sale; and

(F) "Private sector cultured aquatic products" as defined by RCW 15.85.020 (e.g., salmon, catfish, and mussels) raised by an aquatic farmer for the purpose of sale.

(vi) **Examples of animals that are not raised for the purpose of producing agricultural products for sale.** For purposes of the exemptions, the following nonexclusive list of examples do not qualify because the animals are not being raised for the purpose of producing an agricultural product for sale:

(A) Cattle raised for the purpose of slaughtering if the resulting products are not produced for sale;

(B) Sheep and other livestock raised as pets;

(C) Dogs or cats, whether raised as pets or for sale. Dogs and cats are pet animals; therefore, they are not considered to be agricultural products. (See subsection (3) of this rule); and

(D) Horses raised for the purpose of racing, showing, riding, and jumping. However, if at some future time the horses are no longer raised for racing, showing, riding, or jumping and are instead being raised by a farmer for the purpose of producing foals for sale, the exemption will apply if all other requirements for the exemption are met.

(vii) **Do products that are used to administer animal pharmaceuticals qualify for the exemption?** Sales and uses of products that are used to administer animal pharmaceuticals (e.g., syringes) do not qualify for the exemptions, even if they are later used to administer a tax-exempt animal pharmaceutical. However, sales and uses of tax-exempt animal pharmaceuticals contained in a product used to administer the animal pharmaceutical (e.g., a dose of a tax-exempt pharmaceutical contained in a syringe or cotton applicator) qualify for the exemption.

(p) **Replacement parts for qualifying farm machinery and equipment.** RCW 82.08.855 and 82.12.855 exempt from retail sales and use taxes sales to and uses by eligible farmers of replacement parts for qualifying farm machinery and equipment. Also included are: Labor and services rendered during the installation of repair parts; and labor and services rendered during repair as long as no tangible personal property is installed, incorporated, or placed in, or becomes an ingredient or component of the qualifying equipment other than replacement parts.

(i) **The following definitions apply to this subsection:**

(A) "Eligible farmer" as defined in RCW 82.08.855(4).

(B) "Qualifying farm machinery and equipment" means machinery and equipment used primarily by an eligible farmer for growing, raising, or producing agricultural products, and effective July 1, 2015, providing bee pollination services, or both.

(C) "Qualifying farm machinery and equipment" does not include:

- Vehicles as defined in RCW 46.04.670, other than farm tractors as defined in RCW 46.04.180, farm vehicles and other farm implements. "Farm implements" means machinery or equipment manufactured, designed, or reconstructed for agricultural purposes and used primarily by an eligible farmer to grow, raise, or produce agricultural products, but does not include lawn tractors and all-terrain vehicles;

- Aircraft;

- Hand tools and hand-powered tools; and
- Property with a useful life of less than one year.

(D) "Replacement parts" means those parts that replace an existing part, or which are essential to maintain the working condition, of a piece of qualifying farm machinery or equipment. Paint, fuel, oil, hydraulic fluids, antifreeze, and similar items are not replacement parts except when installed, incorporated, or placed in qualifying farm machinery and equipment during the course of installing replacement parts as defined here or making repairs as described above in (p) of this subsection.

(ii) **Exemption certificate.** Prior to June 12, 2014, the department was required to provide an exemption certificate to an eligible farmer or renew an exemption certificate when the eligible farmer applied for a renewal.

(A) Persons claiming the exemptions must keep records necessary for the department to verify eligibility. Sellers making tax-exempt sales must obtain, and retain in its files, a completed Farmers' Certificate for Wholesale Purchases and Sales Tax Exemptions from the farmer. In lieu of the exemption certificate, a seller may capture the relevant data elements as allowed under the streamlined sales and use tax agreement.

(B) The exemptions provided by RCW 82.08.890 and 82.12.890 do not apply to sales made from July 1, 2010, through June 30, 2013.

(10) **Sales tax exemption certificates.** As indicated in subsection (9) of this rule, certain sales of tangible personal property and retail services either to or by farmers are exempt from retail sales tax. A person claiming an exemption must keep records necessary for the department to verify eligibility for each claimed exemption. Effective June 12, 2014, the requirement for the department to issue certificates to qualified farmers was removed. Instead, farmers may complete and use the department's Farmers' Certificate for Wholesale Purchases and Sales Tax Exemptions. Refer to the department's web site at [dor.wa.gov](http://dor.wa.gov) for the exemption certificate. In lieu of an exemption certificate, a seller may capture the relevant data elements as provided under the streamlined sales and use tax agreement as allowed under RCW 82.08.050. Sellers must retain a copy of the exemption certificate or the data elements in their files. Without proper documentation, sellers are liable for payment of the retail sales tax on sales claimed as exempt.

AMENDATORY SECTION (Amending WSR 15-13-109, filed 6/16/15, effective 7/17/15)

**WAC 458-20-24001 Sales and use tax deferral—Manufacturing and research/development activities in high unemployment counties—Applications filed after June 30, 2010. (1) Introduction.**

Chapter 82.60 RCW established a limited sales and use tax deferral program. The purpose of the program is to promote economic stimulation, create new employment opportunities in distressed areas, and reduce poverty in certain distressed counties of the state. RCW 82.60.010.

(a) **Deferral program.** This deferral program applies to an eligible investment project for sales and use taxes imposed on the construction, expansion, or renovation of qualified

buildings or acquisition of qualified machinery and equipment. The program requires the recipient of the deferral to maintain the manufacturing or research and development activity for an eight-year period.

This rule does not address specific requirements of RCW 82.08.02565 and 82.12.02565 that provide statewide sales and use tax exemptions for machinery and equipment used directly in a manufacturing operation. Repayment of tax deferred under chapter 82.60 RCW is not required, and interest and penalties under RCW 82.60.070 will not be imposed, on machinery and equipment that qualifies for exemption under RCW 82.08.02565 or 82.12.02565. For additional information on statewide sales and use tax exemptions for machinery and equipment refer to WAC 458-20-13601.

(b) **Program enacted.** The legislature first enacted this program in 1985. It has since made major revisions to the program criteria, specifically to the definitions of "eligible area," "eligible investment project," and "qualified building." For applications made prior to July 1, 2010, see WAC 458-20-24001A.

(c) **Administration of employment and related programs.** The employment security department and the department of commerce administer programs for high unemployment counties and job training and should be contacted directly for information concerning these programs.

(d) **Examples.** Examples found in this rule identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax results of other situations must be determined after a review of all facts and circumstances.

(2) **Definitions.** For the purposes of this rule, the following definitions apply:

(a) **"Acquisition of machinery and equipment"** means the machinery and equipment is under the dominion and control of the recipient or its agent.

(b) **"Applicant"** means a person applying for a tax deferral under chapter 82.60 RCW.

(c) **"Certificate holder"** means an applicant to whom a tax deferral certificate has been issued.

(d) **"Community empowerment zone (CEZ)"** means an area meeting the requirements of RCW 43.31C.020 and officially designated as a CEZ by the director of the department of community, trade, and economic development.

(e) **"Date of application"** means the date of the U.S. Post Office postmark, fax, or electronic transmittal, or when the application is hand delivered to the department. The statute in effect on the "date of application" will determine the program criteria the applicant must satisfy.

(f) **"Department"** means the department of revenue.

(g) **"Eligible area"** means:

(i) Beginning July 1, 2010, an eligible area is a county that has an unemployment rate, as determined by the employment security department, which is at least twenty percent above the state average for the three calendar years immediately preceding the year in which the list of qualifying counties is established or updated, as the case may be. RCW 82.60.020.

The department, with the assistance of the employment security department, established a list of qualifying counties effective July 1, 2010. RCW 82.60.120. The list of qualifying

counties is effective for a twenty-four-month period and must be updated by July 1st of the year that is two calendar years after the list was established or last updated, as the case may be; or

(ii) A designated community empowerment zone approved under RCW 43.31C.020. RCW 82.60.049.

(h) "**Eligible investment project**" means an investment project that is located, as of the date the application required by RCW 82.60.030 is received by the department, in an eligible area. "Eligible investment project" does not include any portion of an investment project undertaken by a light and power business as defined in RCW 82.16.010, other than that portion of a cogeneration project that is used to generate power for consumption within the manufacturing site where the cogeneration project is an integral part. It also does not include investment projects that have already received deferrals under chapter 82.60 RCW. RCW 82.60.020 and 82.60.049.

(i) "**Industrial fixture**" means an item attached to a building or to land. Examples of "industrial fixtures" are fuel oil lines, boilers, craneways, and improvements to land such as concrete slabs.

(j) "**Initiation of construction**" means the date that a building permit is issued under the building code adopted under RCW 19.27.031 for:

(i) Construction of the qualified building, if the underlying ownership of the building vests exclusively with the person receiving the economic benefit of the deferral;

(ii) Construction of the qualified building when the lessor pays, if the economic benefits of the deferral are passed to a lessee as provided in subsection (3) of this rule; or

(iii) Tenant improvements for a qualified building when the owner/lessor pays, if the economic benefits of the deferral are passed to a lessee as provided in subsection (3) of this rule; or

(iv) Tenant improvements for a qualified building when the lessee pays and receives the benefit of the deferral.

"Initiation of construction" does not include soil testing, site clearing and grading, site preparation, or any other related activities that are initiated before the issuance of a building permit for the construction of the foundation of the building.

If the investment project is a phased project, "initiation of construction" shall apply separately to each phase.

(k) "**Investment project**" means an investment in qualified buildings or qualified machinery and equipment, including labor and services rendered in the planning, installation, and construction of the project.

(l) "**Manufacturing**" has the meaning given in RCW 82.04.120. Manufacturing, in addition, includes the activities performed by research and development laboratories and commercial testing laboratories, and the conditioning of vegetable seeds.

For purposes of this rule, both manufacturers and processors for hire may qualify for the deferral program as being engaged in manufacturing activities. For additional information on processors for hire, refer to WAC 458-20-136.

For purposes of this rule, "vegetable seeds" include the seeds of those crops that are grown in gardens and on truck farms and are generally known and sold under the name of

vegetable or herb seeds in this state. "Vegetable seeds" include, but are not limited to, cabbage seeds, carrot seeds, onion seeds, tomato seeds, and spinach seeds. Vegetable seeds do not include grain seeds, cereal seeds, fruit seeds, flower seeds, tree seeds, and other similar properties.

(m) "**Office**" means space used by professional, clerical, or administrative staff. For plant office space to be a qualified building its use must be essential or integral to the manufacturing or research and development operation. Office space that is used by supervisors and their staff, by technicians, by payroll staff, by the safety officer, and by the training staff are examples of qualifying office space. An office may be located in a separate building from the building used for manufacturing or research and development activities, but the office must be located at the same site as the qualified building to qualify. Each individual office may qualify or disqualify only in its entirety.

(n) "**Operationally complete**" means the project is capable of being used for its intended purpose as described in the application.

(o) "**Person**" has the meaning given in RCW 82.04.030. "Person" does not include the state of Washington or its institutions. "Person" may be either a lessee or a lessor/owner, who can apply separately for individual investment projects at the same site, if they comply with the other requirements of chapter 82.60 RCW.

(p) "**Qualified buildings**" means construction of new structures, and expansion or renovation of existing structures for the purpose of increasing floor space or production capacity, used for manufacturing or research and development activities. "Qualified buildings" includes plant offices and warehouses or other facilities for the storage of raw material or finished goods if such facilities are an essential or an integral part of a factory, mill, plant, or laboratory used for manufacturing or research and development. "Qualified buildings" include construction of:

- Specialized sewerage pipes connected to a qualified building that are specifically designed and used exclusively for manufacturing or research and development; and

- Parking lots connected to or adjacent to the building if the parking lots are for the use of workers performing manufacturing or research and development in the building. Parking lots may be apportioned based on qualifying use.

"Qualified buildings" does not include construction of landscaping or most other work outside the building itself, even though the landscaping or other work outside the building may be required by the city or county government in order for the city or county to issue a permit for the construction of a building.

(q) "**Qualified employment position**" means a permanent full-time employee employed in the eligible investment project during the entire tax year. The "entire tax year" means the full-time position is filled for a period of twelve consecutive months. "Full-time" means at least thirty-five hours a week, four hundred fifty-five hours a quarter, or one thousand eight hundred twenty hours a year.

(r) "**Qualified machinery and equipment**" means all new industrial and research fixtures, equipment, and support facilities that are an integral and necessary part of a manufacturing or research and development operation. "Qualified

machinery and equipment" also includes computers; desks; filing cabinets; photocopiers; printers; software; data processing equipment; laboratory equipment; manufacturing components such as belts, pulleys, shafts and moving parts; molds, tools and dies; operating structures; and all equipment used to control or operate machinery. It also includes machinery and equipment acquired under the terms of a lease by the recipient. "New" as used in this subsection means either new to the taxing jurisdiction of the state or new to the certificate holder.

(s) **"Qualifying county"** means a county that has an unemployment rate, as determined by the employment security department, which is at least twenty percent above the state average for the three calendar years immediately preceding the year in which the list of qualifying counties is established or updated, as the case may be.

(t) **"Recipient"** means a person receiving a tax deferral under this program.

(u) **"Research and development"** means the development, refinement, testing, marketing, and commercialization of a product, service, or process before commercial sales have begun, but only when such activities are intended to ultimately result in the production of a new, different, or useful substance or article of tangible personal property for sale. For purposes of this rule, "commercial sales" excludes sales of prototypes or sales for market testing if the total gross receipts from such sales of the product, service, or process do not exceed one million dollars.

(v) **"Site"** means one or more immediately adjacent parcels of real property. Adjacent parcels of real property separated only by a public road comprise a single site.

(w) **"Warehouse"** means buildings or facilities used for the storage of raw materials or finished goods. A warehouse may be located in a separate building from the building used for manufacturing or research and development activities, but to qualify the warehouse must be located at the same site as the qualified building. Warehouse space may be apportioned based on qualifying use.

**(3) Who is eligible for the sales and use tax deferral program?** A person engaged in manufacturing or research and development activity is eligible for this deferral program for its eligible investment project.

(a) The lessor or owner of the qualified building is not eligible for deferral unless:

(i) The underlying ownership of the buildings, machinery, and equipment vests exclusively in the same person; or

(ii) The lessor, by written contract, has agreed to pass the economic benefit of the deferral to the lessee;

(iii) The lessee that receives the economic benefit of the deferral agrees in writing with the department to complete the annual ~~((survey))~~ tax performance report required under RCW 82.60.070; and

(iv) The economic benefit of the deferral passed to the lessee is no less than the amount of tax deferred by the lessor and is evidenced by written documentation of any type of payment, credit, or other financial arrangement between the lessor or owner of the qualified building and the lessee.

For example, the economic benefit of the deferral can be passed through to the lessee when evidenced in writing that the amounts paid to the lessor for construction of tenant

improvements are reduced by the amount of the sales tax deferred. Another method of passing the economic benefit is if the lessee receives a credit for tenant improvements or other mechanism in the lease, equal to the amount of the sales tax deferred.

(b) The lessor of the qualified building who receives a letter of intent from a qualifying lessee may be eligible for deferral, assuming that all other requirements of chapter 82.60 RCW are met. At the time of application, the lessor, or another qualifying lessee must provide to the department a letter of intent by the lessee to lease the qualified building and any other information to prove that the lessee will engage in qualified manufacturing or research and development once the building construction is complete. After the investment project is certified as operationally complete, the lessee must actually occupy the building as a lessee and engage in qualified manufacturing or research and development. Otherwise, deferred taxes will be immediately due from the lessor.

The following examples illustrate the application process with lessors and lessees.

**Example 1.** Prior to the initiation of construction, Owner/Lessor AA enters into an agreement with Lessee BB, a company engaged in qualified manufacturing or research and development. Under the agreement, AA will build a building to house BB's research and development activities, will apply for a tax deferral on construction of the building, will lease the building to BB, and will pass on the economic benefit in the amount of the deferral to BB. BB agrees in writing with the department to complete annual tax ~~((incentive surveys))~~ performance reports. AA applies for the deferral before the initiation of construction that is prior to the date the building permit is issued. AA is entitled to a deferral on building construction costs assuming all eligibility qualifications are met.

**Example 2.** The following example assumes no deferral on initial construction activity. After the building construction has begun, Lessee CC asks that certain tenant improvements be added to the building. Lessor DD and Lessee CC each agree to pay a portion of the cost of the improvements. DD agrees with CC in writing that DD will pass on the entire value of DD's portion of the tax deferral to CC, and CC agrees in writing with the department to complete annual tax ~~((incentive surveys))~~ performance reports. CC and DD each apply for a deferral on the costs of the tenant improvements they are legally responsible for before the date the building permit is issued for the tenant improvements. The department will approve both applications assuming all eligibility qualifications are met. While construction of the building was initiated before submission of the applications, tenant improvements on a building under construction are deemed to be the expansion or renovation of an existing structure. In addition, lessees are entitled to the deferral only if they are legally responsible and actually pay contractors for the improvements, rather than merely reimbursing lessors for the costs.

**Example 3.** After building construction has begun but before machinery or equipment has been acquired, Lessee EE applies for a deferral on machinery and equipment. The department will approve the application assuming all eligibility qualifications are met, and EE will be required to complete annual tax ~~((incentive surveys))~~ performance reports.

Even though it is too late to apply for a deferral of tax on building costs, it is not too late to apply for a deferral for the machinery and equipment.

**(4) What if an investment project is located in an area that qualifies as a high unemployment county and as a CEZ?** If an investment project is located in an area that qualifies under more than one type of eligible area, the department will automatically assign the project to the eligible area that imposes the least burden on the taxpayer and with the greatest benefit to the taxpayer. If the applicant elects to be bound by the requirements of the other potential eligible area, the applicant must make a written statement to that effect.

**Example 4.** On October 1, 2014, a city in a high unemployment county qualifies as a CEZ, and the high unemployment county is on the list as a qualifying county. The CEZ employment requirements are more restrictive than those for qualifying counties. The department will assign the project to the qualifying county designation unless the applicant elects in writing to be bound by the CEZ employment requirements. Refer to subsection (7) of this rule for more information on the application process.

**(5) When is apportionment of qualified buildings appropriate?** The deferral is allowable only in respect to investment in the construction of a new building or the expansion or renovation of an existing building used in manufacturing or research and development. Where a building(s) is used partly for manufacturing or research and development and partly for purposes that do not qualify for deferral under this rule, apportionment is necessary.

**(a) What are the apportionment methods?** The deferral is determined by one of the following two apportionment methods. The first method of apportionment is based on square footage and does not require tracking the costs of materials for the qualifying/nonqualifying areas of a building. The second method of apportionment tracks the costs of materials used in the qualifying/nonqualifying areas, and it is primarily used by those industries with specialized building requirements.

**(i) First method.** The applicable tax deferral is determined by apportionment according to the ratio of the square footage of that portion of the building(s) directly used for manufacturing or research and development purposes bears to the square footage of the total building(s).

Apportionment formula:

$$\frac{\text{Eligible square feet of building(s)}}{\text{Total square feet of building(s)}} = \text{Percent of building eligible}$$

Percent of building eligible x Total Project Costs = Eligible Costs.

"Total Project Costs" is the cost of multipurpose buildings and other improvement costs associated with the deferral project. Machinery and equipment are not included in this calculation.

Eligible Costs (as determined above) x Tax Rate = Eligible Tax Deferred.

**Example 5.** A taxpayer is constructing a 10,000 square foot building, of which 8,000 square feet will be eligible for

tax deferral. The cost of the project is \$1,000,000. The combined sales/use tax rate at this location is 9.2%.

$$\frac{8,000 \text{ qualifying square feet}}{10,000 \text{ total square feet}} = 80 \text{ percent of the building is eligible}$$

Based on the above apportionment formula, 80% of the building is eligible for deferral. By multiplying the qualifying percentage 80% by the cost of \$1,000,000 to determine eligible costs of \$800,000. Multiply the eligible cost of \$800,000 by the sales/use tax rate of 9.2% to determine a sales/use tax deferral of \$73,600.

**(ii) Second method.** If the applicable tax deferral is not determined by the first method, it will be determined by calculating the cost of construction of qualifying/nonqualifying areas as follows:

**(A)** Tax on the cost of construction of areas devoted solely to manufacturing or research and development may be deferred.

**(B)** Tax on the cost of construction of areas not used at all for manufacturing or research and development may not be deferred.

**(C)** Tax on the cost of construction of areas used in common for manufacturing or research and development and for other purposes, such as hallways, bathrooms, and conference rooms, may be deferred by apportioning the costs of construction on a square footage basis. The apportioned costs of construction eligible for deferral are established by using the ratio, expressed as a percentage, of the square feet of the construction, expansion, or renovation devoted to manufacturing or research and development, excluding areas used in common, to the total square feet of the construction, expansion, or renovation, excluding areas used in common. That percentage is applied to the cost of construction of the common areas to determine the costs of construction eligible for tax deferral. Expressed as a formula, apportionment of the common areas is determined by:

$$\frac{\text{Square feet devoted to manufacturing or research and development, excluding square feet of common areas}}{\text{Total square feet, excluding square feet of common areas}} = \text{Percentage of common areas eligible for deferral}$$

**Example 6.** Taxpayer is planning to build a 10,000 square foot building of which 7,000 square feet will be used for manufacturing and 1,000 square feet will be common area. The remaining portion of the building will not be eligible for any deferral. The cost of the project will be \$850,000 for the manufacturing area, \$260,000 for the common area, and \$140,000 for the remaining portion of the building, for a total cost of construction of \$1,250,000. The combined sales/use tax rate at this location is 8.8%.

7,000 square feet devoted to manufacturing, excluding square feet of common areas	=	78% of common areas eligible for deferral
9,000 total square feet, excluding square feet of common areas		

Based on the apportionment formula: 78% of common area costs are eligible. Multiply the common area costs of \$260,000 by 78% to determine that \$202,800 of common area costs are eligible for deferral. Therefore the \$850,000 for the manufacturing portion of the building plus the \$202,800 for common areas total \$1,052,800 of eligible project costs. Multiply the eligible project costs of \$1,052,800 by the tax rate of 8.8% to determine a sales/use tax deferral of \$92,646.

**(b) Are qualified machinery and equipment subject to apportionment?** Unlike buildings, machinery and equipment cannot be apportioned if used for both qualifying and nonqualifying purposes.

**(c) To what extent is leased equipment eligible for the deferral?** The amount of tax deferral allowable for leased equipment is the amount of the consideration paid by the recipient to the lessor over the initial term of the lease, excluding any period of extension or option to renew, up to the last date for repayment of the deferred taxes. After that date, the recipient must pay the appropriate sales taxes to the lessor for the remaining term of the lease.

**(6) Are there any hiring requirements for an investment project?** There may or may not be a hiring requirement, depending on the location of the project.

**(a) High unemployment county.** There are no hiring requirements for qualifying projects located in high unemployment counties.

**(b) Community empowerment zone (CEZ).** There are hiring requirements for qualifying projects located in CEZs or in counties containing CEZs. The applicant applies for a deferral of investment that correlates to the estimated number of persons to be hired based on a formula. The applicant will create a position and hire at least one qualified employee for each seven hundred fifty thousand dollars of qualified investment in the project. Refer to subsection (7) of this rule for more information on the application process. The recipient must fill the positions with persons who at the time of hire are residents of the CEZ. The persons must be hired after the date the application is filed with the department. As used in this subsection, "resident" means the person makes his or her home in the CEZ or the county in which the zone is located. A mailing address alone is insufficient to establish that a person is a resident. For example, a "P.O. Box" is not a valid address as it does not establish residence at a physical location where the person actually lives. A street address would be an example of a valid address.

The department has instituted a geographic information system (GIS) to assist taxpayers in determining taxing jurisdiction boundaries, local tax rates, and a mapping and address lookup system to determine whether a specific address is within a CEZ. The system is available on the department's web site at dor.wa.gov. A recipient must fill the qualified employment positions by the end of the calendar year following the year in which the project is certified as

operationally complete and retain the positions during the entire tax year. Refer to subsection (12) of this rule for more information on certification of an investment project as operationally complete. If the recipient does not fill the qualified employment positions by the end of the second calendar year following the year in which the project is certified as operationally complete, all deferred taxes are immediately due.

**(7) What are the application and review processes?** An application for sales and use tax deferral under this program must be made prior to the initiation of construction, prior to taking possession of machinery and equipment, and prior to the filling of qualified employment positions. Persons, applying after construction is initiated or finished or after taking possession of machinery and equipment, are not eligible for the program. When an application for sales and use tax deferral is timely submitted, costs incurred before the application date are allowable, if they otherwise qualify. Applications for persons subject to hiring requirements must include information regarding the estimated total project cost and the qualified employment positions.

**(a) How does a taxpayer obtain an application form?** Application forms may be obtained at department district offices, by downloading from the department's web site at dor.wa.gov, by telephoning the telephone information center at 800-647-7706, or by contacting the department's special programs division at:

Special Programs Division  
Department of Revenue  
P.O. Box 47477  
Olympia, WA 98504-7477  
Fax: 360-534-1498  
Email: DORdeferrals@dor.wa.gov.

Applicants must mail, email, or fax applications to the special programs division at the address, email address, or fax number given above. Applications approved by the department under chapter 82.60 RCW are not confidential and are subject to disclosure. RCW 82.60.100.

**(b) Will the department approve the deferral application?** In considering whether to approve or deny an application for a deferral, the department will not approve an application for a project involving construction unless:

(i) The construction will begin within one year from the date of the application; or

(ii) The applicant shows proof that, if the construction will not begin within one year of application, there is a specific and active program to begin construction of the project within two years from the date of application. Proof may include, but is not limited to:

(A) Affirmative action by the board of directors, governing body, or other responsible authority of the applicant toward an active program of construction;

(B) Itemized reasons for the proposed construction;

(C) Clearly established plans for financing the construction; or

(D) Building permits.

Similarly, after an application has been granted, a deferral certificate is no longer valid and should not be used if construction has not begun within one year from the date of application or there is not a specific and active program to

begin construction within two years from the date of application. However, the department will grant requests to extend the period for which the certificate is valid if the holder of the certificate can demonstrate that the delay in starting construction is due to circumstances beyond the certificate holder's control such as the acquisition of building permit(s). Refer to subsection (9) of this rule for more information on the use of tax deferral certificates.

(c) **When will the department notify approval or disapproval of the deferral application?** The department will verify the information contained in the application and approve or disapprove the application within sixty days. If approved, the department will issue a tax deferral certificate. If disapproved, the department will notify the applicant as to the reason(s) for disapproval.

(d) **May an applicant request a review of department disapproval of the deferral application?** The applicant may request administrative review of the department's disapproval of an application, within thirty days from the date of notice of the disallowance, pursuant to the provisions of WAC 458-20-100, Appeals. The filing of a petition for review with the department starts a review of departmental action.

(8) **What happens after the department approves the deferral application?** The department will issue a sales and use tax deferral certificate for state and local sales and use taxes due under chapters 82.08, 82.12, and 82.14 RCW for an eligible investment project. The department will state on the certificate the amount of tax deferral the recipient is eligible for. Recipients must keep track of how much tax is deferred.

(9) **How should a tax deferral certificate be used?** A tax deferral certificate issued under this program is for the use of the recipient for deferral of sales and use taxes due on each eligible investment project. Deferral is limited only to investment in qualified buildings or qualified machinery and equipment as defined in this rule. Thus, sales and use taxes cannot be deferred on items that do not become part of the qualified buildings, machinery, or equipment. In addition, the deferral is not to be used to defer the taxes of the persons with whom the recipient does business, persons the recipient hires, or employees of the recipient.

The certificate holder must provide a copy of the tax deferral certificate to the seller at the time goods or services are purchased. The seller will be relieved of the responsibility for collecting sales or use tax upon presentation of the certificate. The seller must retain a copy of the certificate as part of its permanent records for a period of at least five years. A blanket certificate may be provided by the certificate holder and accepted by the seller covering all such purchases relative to the eligible project. The seller is liable for business and occupation tax on all tax deferral sales.

(10) **May an applicant apply for multiple deferrals at the same project location?** The department may not issue a certificate for an investment project that has already received a deferral under chapter 82.60 RCW. For example, replacement machinery and equipment that replaces qualified machinery and equipment is not eligible for the deferral. In addition, if an existing building that received a deferral under chapter 82.60 RCW for the construction of the building is renovated, the renovation is not eligible for the deferral

unless the original deferral project is closed and has no more deferral requirements.

(a) If expansion is made from an existing building that has already received a deferral under chapter 82.60 RCW for the construction of the building, the expanded portion of the building may be eligible for the deferral. The expansion must be made for new square footage, either vertically or horizontally. Acquisition of machinery and equipment to be used in the expanded portion of the qualified building may also be eligible.

(b) A certificate may be amended or a certificate issued for a new investment project at an existing facility if all eligibility requirements are met.

(11) **May an applicant or recipient amend an application or certificate?** Applicants and recipients may make a written request to the special programs division to amend an application or certificate when the original estimates change.

(a) Assuming the project continues to meet all eligibility requirement, grounds for requesting amendment include, but are not limited to:

(i) The project will exceed the costs originally stated;

(ii) The project will take more time to complete than originally stated;

(iii) The original application is no longer accurate because of changes in the project;

(iv) The project location changes (only applicable to machinery and equipment); and

(v) Transfer of ownership of the project.

(b) An application may not be amended if the location of the qualified building changes. Taxes become immediately due if the project location changes after the application has been approved.

(c) The department must rule on the request within sixty days. If the request is denied, the department must explain in writing the basis for the denial. An applicant or recipient may appeal a denial within thirty days under WAC 458-20-100, Appeals.

(12) **What are the processes for an investment project?** An applicant must provide the department with the estimated cost of the investment project at the time the application is made. Following approval of the application and issuance of a tax deferral certificate, a certificate holder must notify the department, in writing, when the value of the investment project reaches the estimated cost as stated on the tax deferral certificate.

(a) **What should a certificate holder do if its investment project reaches the estimated costs but the project is not yet operationally complete?** If an investment project has reached its estimated costs and the project is not operationally complete, the certificate holder may request an amended certificate stating a revised amount on which the deferral taxes are requested along with an explanation for the increase in estimated costs. Requests must be mailed, emailed, or faxed to the department.

(b) **What should a certificate holder do if its investment project reaches the completion date but the project is not yet operationally complete?** If an investment project has reached the completion date and the project is not operationally complete, the certificate holder may request an amended certificate stating a revised completion date along

with an explanation for the new completion date. Requests must be mailed, emailed, or faxed to the department prior to the expiration date on the certificate.

(c) **What should a certificate holder do when its investment project is operationally complete?** The certificate holder must notify the department in writing when the investment project is operationally complete. The project is operationally complete once it can be used for its intended purpose as described in the application. The department will certify the qualifying costs and the date when the project became operationally complete. The certificate holder of the deferral must maintain the manufacturing or research and development activity beginning the year the project is operationally complete and the following seven calendar years. It is important to remember that annual tax ((survey)) performance report reporting requirements begin the year following the operationally complete date, even though the audit certification may not be complete. For information on submitting annual ((surveys)) tax performance reports, see subsection (13) of this rule.

**Example 7.** Taxpayer estimated a project end date of June ((2015)) 2018, but the project was actually operationally complete in November ((2014)) 2017. Taxpayer must submit the ((2014)) 2017 annual tax ((incentive survey by April 30, 2015)) performance report by May 31, 2018. Taxpayer is responsible for notifying the department when the project is operationally complete regardless of the estimated completion date. If the ((2014)) 2017 annual tax ((incentive survey)) performance report is not submitted timely, taxpayer will be assessed 12.5% of the deferred sales/use tax for this project.

**Example 8.** Taxpayer estimated a project end date of May ((2014)) 2017, but the project was actually not operationally complete until December ((2014)) 2017. Taxpayer must submit the ((2014)) 2017 annual tax ((incentive survey by April 30, 2015)) performance report by May 31, 2018. Taxpayer is responsible for notifying the department when the project is operationally complete regardless of the estimated completion date. If the ((2014)) 2017 annual tax ((incentive survey)) performance report is not submitted timely, taxpayer will be assessed 12.5% of the deferred sales/use tax for this project.

(i) If all or any portion of the project does not qualify, the recipient must repay all or a proportional part of the deferred taxes. The department will notify the recipient of the amount due and the due date.

(ii) The department must explain in writing the basis for not qualifying all or any portion of a project. The decision of the department to not qualify all or a portion of a project may be appealed under WAC 458-20-100, Appeals, within thirty days.

(13) **Is a recipient of a tax deferral required to submit annual ((surveys)) tax performance report?** RCW ((82.32.585)) 82.32.534 requires each recipient of a tax deferral to complete an annual tax ((incentive survey)) performance report, every year, by ((April 30th)) May 31st for eight years following the year in which the project is operationally complete, regardless if the department has audited the project. If the economic benefits of the deferral are passed to a lessee as provided in RCW 82.60.025, the lessee must agree in writing to complete the annual tax ((incentive sur-

vey)) performance report and the applicant is not required to complete the annual tax ((incentive survey)) performance report. If the ((survey)) annual tax performance report is not submitted by the due date, or any extension under RCW 82.32.590, the recipient of the tax deferral or lessee, if required to submit, will be billed 12.5% of the deferred tax amount. For example, the deferral project is operationally complete in ((2014)) 2017. The recipient is required to submit the ((2014-2021)) 2017-2024 annual tax ((incentive surveys)) performance reports that are due by ((April 30, 2015-2022)) May 31, 2018-2025, respectively. For more information on the requirements to file annual tax ((incentive surveys)) performance reports refer to WAC ((458-20-268)) 458-20-267.

(14) **Is a recipient of a tax deferral required to repay deferred taxes for reasons other than not submitting the annual tax ((incentive survey)) performance report?** Repayment of tax deferred under chapter 82.60 RCW is waived, as long as all eligibility requirements are met, except as provided in RCW 82.60.070 and this subsection (14).

The following describes the various circumstances under which repayment of the deferral may occur. Outstanding taxes are determined as of December 31st of each year by reference to the following table. No proration is allowed for completing a partial year of the deferral use requirement.

Repayment Year	Percentage of Deferred Tax Waived
1 (Year operationally complete)	0%
2	0%
3	0%
4	10%
5	15%
6	20%
7	25%
8	30%

Any action taken by the department to disqualify a recipient for tax deferral or assess interest will be subject to administrative review pursuant to the provisions of WAC 458-20-100, Appeals. The filing of a petition for review with the department starts a review of departmental action.

(a) **Failure of investment project to satisfy general conditions.** If based on the recipient's annual tax ((incentive survey)) performance report or other information, including that submitted by the employment security department, the department finds that an investment project is not eligible for tax deferral for reasons other than failure to create the required number of qualified employment positions, including failure to continue qualifying activity, the department will declare the amount of deferred taxes outstanding to be immediately due. There is no proration of the amount owed under this subsection. No penalties or interest will be assessed on the deferred sales or use taxes; however, all other penalties and interest applicable to excise tax assessments may be assessed and imposed.

(b) **Failure of investment project to satisfy required employment positions conditions.** If based on the recipient's

annual tax (~~(incentive survey)~~) performance report or other information, the department finds that an investment project has been operationally complete and has failed to create the required number of qualified employment positions the amount of taxes deferred will be immediately due. There is no proration of the amount owed under this subsection. No penalties or interest will be assessed on the deferred sales or use taxes; however, all other penalties and interest applicable to excise tax assessments may be assessed and imposed.

(15) **When will the tax deferral program expire?** This tax deferral program is scheduled to expire July 1, 2020. No applications for deferral of taxes will be accepted after June 30, 2020. Businesses wishing to take advantage of this program are advised to apply to the department by April 30, 2020. While the department will make every effort to process applications in a timely manner, the department is allowed sixty days to review applications and issue deferral certificates. Applications received after April 30, 2020, may not be processed in time for the business to receive a deferral certificate and would not be eligible for the program. In addition, incomplete applications may be denied or not processed in time for the business to be issued a deferral certificate before July 1, 2020.

(16) **Is debt extinguishable because of insolvency or sale?** Insolvency or other failure of the recipient does not extinguish the debt for deferred taxes nor will the sale, exchange, or other disposition of the recipient's business extinguish the debt for the deferred taxes.

(17) **Does transfer of ownership terminate tax deferral?** Transfer of ownership does not terminate the deferral. The deferral is transferred, subject to the successor meeting the eligibility requirements of chapter 82.60 RCW, for the remaining periods of the deferral. Any person who becomes a successor to such investment project is liable for the full amount of any unpaid, deferred taxes under the same terms and conditions as the original recipient of the deferral. For additional information on successorship or quitting business refer to WAC 458-20-216.

Any questions regarding the potential eligibility of deferrals to be transferred on the sale of a business, should be directed to the special programs division as provided for in subsection (7)(a) of this rule.

AMENDATORY SECTION (Amending WSR 16-12-075, filed 5/27/16, effective 6/27/16)

**WAC 458-20-24003 Tax incentives for high technology businesses.** (1) **Introduction.** This rule explains the tax incentives, contained in chapter 82.63 RCW and RCW 82.04.4452, which apply to businesses engaged in research and development or pilot scale manufacturing in Washington in five high technology areas: Advanced computing, advanced materials, biotechnology, electronic device technology, and environmental technology. Eligibility for high technology or research and development tax incentives offered by the federal government or any other jurisdiction does not establish eligibility for Washington's programs.

This rule contains examples that identify a number of facts and then state a conclusion. The examples should be used only as a general guide. The tax results in all situations

must be determined after a review of all facts and circumstances. Assume all the examples below occur on or after June 10, 2004, unless otherwise indicated.

(2) **Organization of the rule.** The information provided in this rule is divided into three parts.

(a) Part I provides information on the sales and use tax deferral program under chapter 82.63 RCW.

(b) Part II provides information on the sales and use tax exemption available for persons engaged in certain construction activities for the federal government under RCW 82.04-190(6).

(c) Part III provides information on the business and occupation tax credit on research and developing spending under RCW 82.04.4452.

#### PART I

##### SALES AND USE TAX DEFERRAL PROGRAM

(3) **Who is eligible for the sales and use tax deferral program?** A person engaged in qualified research and development or pilot scale manufacturing in Washington in the five high technology areas is eligible for this deferral program for its eligible investment project.

(a) **What does the term "person" mean for purposes of this deferral program?** "Person" has the meaning given in RCW 82.04.030. Effective June 10, 2004, "person" also includes state universities as defined in RCW 28B.10.016. "Person" can be either a lessee or a lessor, who can apply separately for individual investment projects at the same site, if they comply with the other requirements of chapter 82.63 RCW.

(i) Effective June 10, 2004, the lessor or owner of the qualified building is not eligible for a deferral unless:

(A) The underlying ownership of the buildings, machinery, and equipment vests exclusively in the same person; or

(B) All of the following conditions are met:

(I) The lessor by written contract agrees to pass the economic benefit of the deferral to the lessee;

(II) The lessee that receives the economic benefit of the deferral agrees in writing with the department to complete the annual (~~(survey)~~) tax performance report required under RCW 82.63.020(2);

(III) The lessee must receive an economic benefit from the lessor no less than the amount of tax deferred by the lessor; and

(IV) Upon request, the lessor must provide the department with written documentation to support the eligibility of the deferral, including any type of payment, credit, or other financial arrangement between the lessor or owner of the qualified building and the lessee.

For example, economic benefit of the deferral is passed through to the lessee when evidenced by written documentation that the amounts paid to the lessor for construction of tenant improvements are reduced by the amount of the sales tax deferred, or that the lessee receives more tenant improvements through a credit for tenant improvements or other mechanism in the lease equal to the amount of the sales tax deferred.

(ii) Prior to June 10, 2004, the lessor or owner of the qualified building is not eligible for a deferral unless the underlying ownership of the buildings, machinery, and

equipment vests exclusively in the same person, or unless the lessor by written contract agrees to pass the economic benefit of the deferral to the lessee in the form of reduced rent payments.

(iii) The lessor of the qualified building who receives a letter of intent from a qualifying lessee may be eligible for deferral, assuming that all other requirements of chapter 82.63 RCW are met. At the time of application, the lessor must provide to the department a letter of intent by the lessee to lease the qualified building and any other information to prove that the lessee will engage in qualified research and development or pilot scale manufacturing once the building construction is complete. After the investment project is certified as operationally complete, the lessee must actually occupy the building as a lessee and engage in qualified research and development or pilot scale manufacturing. Otherwise, deferred taxes will be immediately due to the lessor, and interest will be assessed retroactively from the date of deferral.

**(b) What is "qualified research and development" for purposes of this rule?** "Qualified research and development" means research and development performed within this state in the fields of advanced computing, advanced materials, biotechnology, electronic device technology, and environmental technology.

**(c) What is "research and development" for purposes of this rule?** "Research and development" means activities performed to discover technological information, and technical and nonroutine activities concerned with translating technological information into new or improved products, processes, techniques, formulas, inventions, or software.

The term includes exploration of a new use for an existing drug, device, or biological product if the new use requires separate licensing by the Federal Food and Drug Administration under chapter 21 C.F.R., as amended.

The term does not include adaptation or duplication of existing products where the products are not substantially improved by application of the technology, nor does the term include surveys and studies, social science and humanities research, market research or testing, quality control, sale promotion and service, computer software developed for internal use, and research in areas such as improved style, taste, and seasonal design.

(i) A person need not both discover technological information and translate technological information into new or improved products, processes, techniques, formulas, inventions, or software in order to engage in research and development. A person may perform either activity alone and be engaged in research and development.

(ii) To discover technological information means to gain knowledge of technological information through purposeful investigation. The knowledge sought must be of something not previously known or, if known, only known by persons who have not made the knowledge available to the public.

(iii) Technological information is information related to the application of science, especially with respect to industrial and commercial objectives. Industrial and commercial objectives include both sale and internal use (other than internal use software). The translation of technological information into new or improved products, processes, techniques,

formulas, inventions, or software does not require the use of newly discovered technological information to qualify as research and development.

(iv) The translation of technological information requires both technical and nonroutine activities.

(A) An activity is technical if it involves the application of scientific, engineering, or computer science methods or principles.

(B) An activity is nonroutine if it:

(I) Is undertaken to achieve a new or improved function, performance, reliability, or quality; and

(II) Is performed by engineers, scientists, or other similarly qualified professionals or technicians; and

(III) Involves a process of experimentation designed to evaluate alternatives where the capability or the method of achieving the new or improved function, performance, reliability, or quality, or the appropriate design of the desired improvement, is uncertain at the beginning of the taxpayer's research activities. A process of experimentation must seek to resolve specific uncertainties that are essential to attaining the desired improvement.

(v) A product is substantially improved when it functions fundamentally differently because of the application of technological information. This fundamental difference must be objectively measured. Examples of objective measures include increased value, faster operation, greater reliability, and more efficient performance. It is not necessary for the improvement to be successful for the research to qualify.

(vi) Computer software development may qualify as research and development involving both technical and nonroutine activities concerned with translating technological information into new or improved software, when it includes the following processes: Software concept, software design, software design implementation, conceptual freeze, alpha testing, beta testing, international product localization process, and other processes designed to eliminate uncertainties prior to the release of the software to the market for sale. Research and development ceases when the software is released to the market for sale.

Postrelease software development may meet the definition of research and development under RCW 82.63.010(16), but only if it involves both technical and nonroutine activities concerned with translating technological information into improved software. All facts and circumstances are considered in determining whether postrelease software development meets the definition of research and development.

(vii) Computer software is developed for internal use if it is to be used only by the person by whom it is developed. If it is to be available for sale, lease, or license, it is not developed for internal use, even though it may have some internal applications. If it is to be available for use by persons, other than the person by whom it is developed, who access or download it remotely, such as through the internet, it is not usually deemed to be developed for internal use. However, remotely accessed software is deemed to be developed for internal use if its purpose is to assist users in obtaining goods, services, or information provided by or through the person by whom the software is developed. For example, software is developed for internal use if it enables or makes easier the ordering of goods from or through the person by whom the software is

developed. On the other hand, a search engine used to search the world wide web is an example of software that is not developed for internal use because the search engine itself is the service sought.

(viii) Research and development is complete when the product, process, technique, formula, invention, or software can be reliably reproduced for sale or commercial use. However, the improvement of an existing product, process, technique, formula, invention, or software may qualify as research and development.

**(d) What is "pilot scale manufacturing" for purposes of this rule?** "Pilot scale manufacturing" means design, construction, and testing of preproduction prototypes and models in the fields of biotechnology, advanced computing, electronic device technology, advanced materials, and environmental technology other than for commercial sale. "Commercial sale" excludes sales of prototypes or sales for market testing if the total gross receipts from such sales of the product, service, or process do not exceed one million dollars.

**(e) What are the five high technology areas?** The five high technology areas are as follows:

(i) **Advanced computing.** "Advanced computing" means technologies used in the designing and developing of computing hardware and software, including innovations in designing the full spectrum of hardware from hand-held calculators to super computers, and peripheral equipment.

(ii) **Advanced materials.** "Advanced materials" means materials with engineered properties created through the development of specialized processing and synthesis technology, including ceramics, high value-added metals, electronic materials, composites, polymers, and biomaterials.

(iii) **Biotechnology.** "Biotechnology" means the application of technologies, such as recombinant DNA techniques, biochemistry, molecular and cellular biology, genetics, including genomics, gene expression and genetic engineering, cell fusion techniques, and new bioprocesses, using living organisms, or parts of organisms, to produce or modify products, to improve plants or animals, to develop microorganisms for specific uses, to identify targets for small molecule pharmaceutical development, or to transform biological systems into useful processes and products or to develop microorganisms for specific uses.

(iv) **Electronic device technology.** "Electronic device technology" means technologies involving microelectronics; semiconductors; electronic equipment and instrumentation; radio frequency, microwave, and millimeter electronics; optical and optic-electrical devices; and data and digital communications and imaging devices.

(v) **Environmental technology.** "Environmental technology" means assessment and prevention of threats or damage to human health or the environment, environmental cleanup, and the development of alternative energy sources.

(A) The assessment and prevention of threats or damage to human health or the environment concerns assessing and preventing potential or actual releases of pollutants into the environment that are damaging to human health or the environment. It also concerns assessing and preventing other physical alterations of the environment that are damaging to human health or the environment.

For example, a research project related to salmon habitat restoration involving assessment and prevention of threats or damages to the environment may qualify as environmental technology, if such project is concerned with assessing and preventing potential or actual releases of water pollutants and reducing human-made degradation of the environment.

(I) Pollutants include waste materials or by-products from manufacturing or other activities.

(II) Environmental technology includes technology to reduce emissions of harmful pollutants. Reducing emissions of harmful pollutants can be demonstrated by showing the technology is developed to meet governmental emission standards. Environmental technology also includes technology to increase fuel economy, only if the taxpayer can demonstrate that a significant purpose of the project is to increase fuel economy and that such increased fuel economy does in fact significantly reduce harmful emissions. If the project is intended to increase fuel economy only minimally or reduce emissions only minimally, the project does not qualify as environmental technology. A qualifying research project must focus on the individual components that increase fuel economy of the product, not the testing of the entire product when everything is combined, unless the taxpayer can separate out and identify the specific costs associated with such testing.

(III) Environmental technology does not include technology for preventive health measures for, or medical treatment of, human beings.

(IV) Environmental technology does not include technology aimed to reduce impact of natural disasters such as floods and earthquakes.

(V) Environmental technology does not include technology for improving safety of a product.

(B) Environmental cleanup is corrective or remedial action to protect human health or the environment from releases of pollutants into the environment.

(C) Alternative energy sources are those other than traditional energy sources such as fossil fuels, nuclear power, and hydroelectricity. However, when traditional energy sources are used in conjunction with the development of alternative energy sources, all the development will be considered the development of alternative energy sources.

**(4) What is eligible for the sales and use tax deferral program?** This deferral program applies to an eligible investment project for sales and use taxes imposed on the construction, expansion, or renovation of qualified buildings and acquisition of qualified machinery and equipment.

**(a) What is an "eligible investment project" for purposes of this rule?** "Eligible investment project" means an investment project which either initiates a new operation, or expands or diversifies a current operation by expanding, renovating, or equipping an existing facility.

**(b) What is an "investment project" for purposes of this rule?** "Investment project" means an investment in qualified buildings or qualified machinery and equipment, including labor and services rendered in the planning, installation, and construction or improvement of the project. When an application for sales and use tax deferral is timely submitted, costs incurred before the application date are allowable, if they otherwise qualify.

(c) **What is "qualified buildings" for purposes of this rule?** "Qualified buildings" means construction of new structures, and expansion or renovation of existing structures for the purpose of increasing floor space or production capacity, used for pilot scale manufacturing or qualified research and development.

(i) "Qualified buildings" is limited to structures used for pilot scale manufacturing or qualified research and development. "Qualified buildings" includes plant offices and other facilities that are an essential or an integral part of a structure used for pilot scale manufacturing or qualified research and development.

(A) "Office" means space used by professional, clerical, or administrative staff. For plant office space to be a qualified building, its use must be essential or integral to pilot scale manufacturing or qualified research and development. An office may be located in a separate building from the building used for pilot scale manufacturing or qualified research and development, but the office must be located at the same site as the qualified building in order to qualify. Each individual office may only qualify or disqualify in its entirety.

(B) A site is one or more immediately adjacent parcels of real property. Adjacent parcels of real property separated only by a public road comprise a single site.

(ii) "Qualified buildings" does not include construction of landscaping or most other work outside the building itself, even though the landscaping or other work outside the building may be required by the city or county government in order for the city or county to issue a permit for the construction of a building.

However, "qualified buildings" includes construction of specialized sewerage pipes connected to a qualified building that are specifically designed and used exclusively for pilot scale manufacturing or qualified research and development.

Also, "qualified buildings" includes construction of parking lots connected to or adjacent to the building if the parking lots are for the use of workers performing pilot scale manufacturing or qualified research and development in the building. Parking lots may be apportioned based upon its qualifying use.

(d) **What is "multiple qualified buildings" for purposes of this rule?** "Multiple qualified buildings" means "qualified buildings" leased to the same person when such structures:

- (i) Are located within a five-mile radius; and
- (ii) The initiation of construction of each building begins within a sixty-month period.

(e) **When is apportionment of qualified buildings appropriate?** The deferral is allowable only in respect to investment in the construction of a new building or the expansion or renovation of an existing building used in pilot scale manufacturing or qualified research and development. Where a building(s) is used partly for pilot scale manufacturing or qualified research and development and partly for purposes that do not qualify for deferral under this rule, apportionment is necessary.

(f) **What is the apportionment method?** The applicable tax deferral will be determined as follows:

(i) Tax on the cost of construction of areas devoted solely to pilot scale manufacturing or qualified research and development may be deferred.

(ii) Tax on the cost of construction of areas not used at all for pilot scale manufacturing or qualified research and development may not be deferred.

(iii) Tax on the cost of construction of areas used in common for pilot scale manufacturing or qualified research and development and for other purposes, such as hallways, bathrooms, and conference rooms, may be deferred by apportioning the costs of construction on a square footage basis. The apportioned costs of construction eligible for deferral are established by using the ratio, expressed as a percentage, of the square feet of the construction, expansion, or renovation devoted to pilot scale manufacturing or qualified research and development, excluding areas used in common to the total square feet of the construction, expansion, or renovation, excluding areas used in common. That percentage is applied to the cost of construction of the common areas to determine the costs of construction eligible for tax deferral. Expressed as a formula, apportionment of the cost of the common areas is determined by:

$$\frac{\text{Square feet devoted to research and development or pilot scale manufacturing, excluding square feet of common areas}}{\text{Total square feet, excluding square feet of common areas}} = \text{Percentage of total cost of construction of common areas eligible for deferral}$$

(iv) The apportionment method described in (f)(i), (ii), and (iii) of this subsection must be used unless the applicant or recipient can demonstrate that another method better represents a reasonable apportionment of costs, considering all the facts and circumstances. An example is to use the number of employees in a qualified building that is engaged in pilot scale manufacturing or qualified research and development as the basis for apportionment, if this method is not easily manipulated to reflect a desired outcome, and it otherwise represents a reasonable apportionment of costs under all the facts and circumstances. This method may take into account qualified research and development or pilot scale manufacturing activities that are shifted within a building or from one building to another building. If assistance is needed to a tax-related question specific to your business under this subsection, you may request a tax ruling. To make a request contact the department's taxpayer information and education division at:

Washington State Department of Revenue  
 Taxpayer Information and Education  
 P.O. Box 47478  
 Olympia, WA 98504-7478  
 fax 360-586-2463

(v) Example. A building to be constructed will be partially devoted to research and development and partially devoted to marketing, a nonqualifying purpose. The total area of the building is 100,000 square feet. Sixty thousand square feet are used only for research and development, 20,000 square feet are used only for marketing, and the remaining

20,000 square feet are used in common by research and development employees and marketing employees. Tax on the cost of constructing the 60,000 square feet used only for research and development may be deferred. Tax on the cost of constructing the 20,000 square feet used only for marketing may not be deferred. Tax on 75% of the cost of constructing the common areas may be deferred. (Sixty thousand square feet devoted solely to research and development divided by 80,000 square feet devoted solely to research and development and marketing results in a ratio expressed as 75%.)

(g) **What is "qualified machinery and equipment" for purposes of this rule?** "Qualified machinery and equipment" means fixtures, equipment, and support facilities that are an integral and necessary part of a pilot scale manufacturing or qualified research and development operation. "Qualified machinery and equipment" includes: Computers; software; data processing equipment; laboratory equipment, instrumentation, and other devices used in a process of experimentation to develop a new or improved pilot model, plant process, product, formula, invention, or similar property; manufacturing components such as belts, pulleys, shafts, and moving parts; molds, tools, and dies; vats, tanks, and fermenters; operating structures; and all other equipment used to control, monitor, or operate the machinery. For purposes of this rule, qualified machinery and equipment must be either new to the taxing jurisdiction of the state or new to the certificate holder, except that used machinery and equipment may be treated as qualified machinery and equipment if the certificate holder either brings the machinery and equipment into Washington or makes a retail purchase of the machinery and equipment in Washington or elsewhere.

(i) **What are "integral" and "necessary"?** Machinery and equipment is an integral and necessary part of pilot scale manufacturing or qualified research and development if the pilot scale manufacturing or qualified research and development cannot be accomplished without it. For example, a laboratory table is integral and necessary to qualified research and development. Likewise, telephones, computer hardware (e.g., cables, scanners, printers, etc.), and computer software (e.g., Word, Excel, Windows, Adobe, etc.) used in a typical workstation for an R&D personnel are integral and necessary to qualified research and development. Decorative artwork, on the other hand, is not integral and necessary to qualified research and development.

(ii) **Must qualified machinery and equipment be used exclusively for qualifying purposes in order to qualify?** Qualified machinery and equipment must be used exclusively for pilot scale manufacturing or qualified research and development to qualify for the deferral. Operating system software shared by accounting personnel, for example, is not used exclusively for qualified research and development. However, *de minimis* nonqualifying use will not cause the loss of the deferral. An example of *de minimis* use is the occasional use of a computer for personal email.

(iii) **Is qualified machinery and equipment subject to apportionment?** Unlike buildings, if machinery and equipment is used for both qualifying and nonqualifying purposes, the costs cannot be apportioned. Sales or use tax cannot be

deferred on the purchase or use of machinery and equipment used for both qualifying and nonqualifying purposes.

(iv) **To what extent is leased equipment eligible for the deferral?** In cases of leases of qualifying machinery and equipment, deferral of tax is allowed on payments made during the initial term of the lease, but not for extensions or renewals of the lease. Deferral of tax is not allowed for lease payments for any period after the seventh calendar year following the calendar year for which the project is certified as operationally complete.

(5) **What are the application and review processes?** Applicants must apply for deferral to the department of revenue before the initiation of construction of, or acquisition of equipment or machinery for the investment project. When an application for sales and use tax deferral is timely submitted, costs incurred before the application date are allowable, if they otherwise qualify. In the case of an investment project consisting of "multiple qualified buildings," applications must be made for, and before the initiation of construction of, each qualified building.

(a) **What is "initiation of construction" for purposes of this rule?**

(i) Initiation of construction means the date that a building permit is issued under the building code adopted under RCW 19.27.031 for:

(A) Construction of the qualified building, if the underlying ownership of the building vests exclusively with the person receiving the economic benefit of the deferral;

(B) Construction of the qualified building, if a lessor passes the economic benefits of the deferral to a lessee as provided in RCW 82.63.010(7); or

(C) Tenant improvements for a qualified building, if a lessor passes the economic benefits of the deferral to a lessee as provided in RCW 82.63.010(7).

(ii) Initiation of construction does not include soil testing, site clearing and grading, site preparation, or any other related activities that are initiated before the issuance of a building permit for the construction of the foundation of the building.

(iii) If the investment project is a phased project, initiation of construction must apply separately to each building. For purposes of this rule, a "phased project" means construction of multiple buildings in different phases over the life of a project. A taxpayer may file a separate application for each qualified building, or the taxpayer may file one application for all qualified buildings. If a taxpayer files one application for all qualified buildings, initiation of construction must apply separately to each building.

(b) **What is "acquisition of machinery and equipment" for purposes of this rule?** "Acquisition of machinery and equipment" means the machinery and equipment is under the dominion and control of the recipient or its agent.

(c) **Lessor and lessee examples.**

(i) Prior to the initiation of construction, Owner/Lessor A enters into an agreement with Lessee B, a company engaged in qualified research and development. Under the agreement, A will build a building to house B's research and development activities, will apply for a tax deferral on construction of the building, will lease the building to B, and will pass on the entire value of the deferral to B. B agrees in writ-

ing with the department to complete annual ((surveys)) tax performance reports. A applies for the deferral before the date the building permit is issued. A is entitled to a deferral on building construction costs.

(ii) After construction has begun, Lessee C asks that certain tenant improvements be added to the building. Lessor D and Lessee C each agree to pay a portion of the cost of the improvements. D agrees with C in a written agreement that D will pass on the entire value of D's portion of the tax deferral to C, and C agrees in writing with the department to complete annual ((surveys)) tax performance reports. C and D each apply for a deferral on the costs of the tenant improvements they are legally responsible for before the date the building permit is issued for such tenant improvements. Both applications will be approved. While construction of the building was initiated before the applications were submitted, tenant improvements on a building under construction are deemed to be the expansion or renovation of an existing structure. Also, lessees are entitled to the deferral only if they are legally responsible and actually pay contractors for the improvements, rather than merely reimbursing lessors for the costs.

(iii) After construction has begun but before machinery or equipment has been acquired, Lessee E applies for a deferral on machinery and equipment. The application will be approved, and E is required to complete annual ((surveys)) tax performance reports. Even though it is too late to apply for a deferral of tax on building costs, it is not too late to apply for a deferral for the machinery and equipment.

**(d) How may a taxpayer obtain an application form?** Application forms may be obtained at department of revenue district offices, by downloading from the department's web site ([dor.wa.gov](http://dor.wa.gov)), by telephoning the telephone information center (800-647-7706), or by contacting the department's special programs division at:

Washington State Department of Revenue  
Special Programs Division  
Post Office Box 47477  
Olympia, WA 98504-7477  
fax 360-586-2163

Applicants must mail or fax applications to the special programs division at the address or fax number given above. Only those applications which are approved by the department in connection with the deferral program are not confidential and are subject to public disclosure.

For purposes of this rule, "applicant" means a person applying for a tax deferral under chapter 82.63 RCW, and "department" means the department of revenue.

**(e) What should an application form include?** The application form should include information regarding the location of the investment project, the applicant's average employment in Washington for the prior year, estimated or actual new employment related to the project, estimated or actual wages of employees related to the project, estimated or actual costs, and time schedules for completion and operation. The application form may also include other information relevant to the project and the applicant's eligibility for deferral.

**(f) What is the date of application?** The date of application is the earlier of the postmark date or the date of receipt by the department.

**(g) When will the department notify approval or disapproval of the deferral application?** The department must rule on an application within sixty days. If an application is denied, the department must explain in writing the basis for the denial. An applicant may seek review of a denial within thirty days under WAC 458-20-100 (Informal administrative reviews).

**(6) Can a lessee leasing "multiple qualified buildings" elect to treat the "multiple qualified buildings" as a single investment project?** Yes. If a lessee will conduct qualified research and development or pilot scale manufacturing within the "multiple qualified buildings" and desires to treat the "multiple qualified buildings" as a single investment project, the lessee may do so by making both a preliminary election and a final election therefore.

**(a) When must the lessee make the preliminary election to treat the "multiple qualified buildings" as a single investment project?** The lessee must make the preliminary election before a temporary certificate of occupancy, or its equivalent, is issued for any of the buildings within the "multiple qualified buildings."

**(b) When must the lessee make the final election to treat the "multiple qualified buildings" as a single investment project?** All buildings included in the final election must have been issued a temporary certificate of occupancy or its equivalent. The lessee must then make the final election for such buildings by the date that is the earlier of:

(i) Sixty months following the date that the lessee made the preliminary election; or

(ii) Thirty days after the issuance of the temporary certificate of occupancy, or its equivalent, for the last "qualified building" to be completed that will be included in the final election.

**(c) What occurs if the final election is not made by the deadline?** When a final election is not made by the deadline in (b)(i) or (ii) of this subsection, the qualified buildings will each be treated as individual investment projects under the original applications for those buildings.

**(d) How are preliminary and final elections made?** The preliminary and final elections must be made in the form and manner prescribed by the department. For information concerning the form and manner for making these elections contact the department's special programs division at:

Washington State Department of Revenue  
Special Programs Division  
Post Office Box 47477  
Olympia, WA 98504-7477  
fax 360-586-2163

**(e) Before the final election is made, can the lessee choose to exclude one or more of the buildings included in its preliminary election?** Yes. Before the final election is made, the lessee may remove one or more of the qualified buildings included in the preliminary election from the investment project. When a qualified building under the preliminary election is, for any reason, not included in the final election, the qualified building will be treated as an individ-

ual investment project under the original application for that building.

(f) **Application.** This subsection (6) applies to deferral applications received by the department after June 30, 2007.

(7) **What happens after the department approves the deferral application?** If an application is approved, the department must issue the applicant a sales and use tax deferral certificate.

The certificate provides for deferral of state and local sales and use taxes on the eligible investment project. The certificate will state the amount of tax deferral for which the recipient is eligible. It will also state the date by which the project will be operationally complete. The deferral is limited to investment in qualified buildings or qualified machinery and equipment. The deferral does not apply to the taxes of persons with whom the recipient does business, persons the recipient hires, or employees of the recipient.

For purposes of this rule, "recipient" means a person receiving a tax deferral under chapter 82.63 RCW.

(8) **How should a tax deferral certificate be used?** A successful applicant, hereafter referred to as a recipient, must present a copy of the certificate to sellers of goods or retail services provided in connection with the eligible investment project in order to avoid paying sales or use tax. Sellers who accept these certificates in good faith are relieved of the responsibility to collect sales or use tax on transactions covered by the certificates. Sellers must retain copies of certificates as documentation for why sales or use tax was not collected on a transaction.

The certificate cannot be used to defer tax on repairs to, or replacement parts for, qualified machinery and equipment.

(9) **May an applicant apply for new deferral at the site of an existing deferral project?**

(a) The department must not issue a certificate for an investment project that has already received a deferral under chapter 82.60, 82.61, or 82.63 RCW. For example, replacement machinery and equipment that replaces qualified machinery and equipment is not eligible for the deferral. Also, if renovation is made from an existing building that has already received a deferral under chapter 82.60, 82.61, or 82.63 RCW for the construction of the building, the renovation is not eligible for the deferral.

(b) If expansion is made from an existing building that has already received a deferral under chapter 82.60, 82.61, or 82.63 RCW for the construction of the building, the expanded portion of the building may be eligible for the deferral. Acquisition of machinery and equipment to be used for the expanded portion of the qualified building may also be eligible.

(c) An investment project for qualified research and development that has already received a deferral may also receive an additional deferral certificate for adapting the investment project for use in pilot scale manufacturing.

(d) A certificate may be amended or a certificate issued for a new investment project at an existing facility.

(10) **May an applicant or recipient amend an application or certificate?** Applicants and recipients may make written requests to the special programs division to amend an application or certificate.

(a) Grounds for requesting amendment include, but are not limited to:

(i) The project will exceed the costs originally stated;

(ii) The project will take more time to complete than originally stated;

(iii) The original application is no longer accurate because of changes in the project; and

(iv) Transfer of ownership of the project.

(b) The department must rule on the request within sixty days. If the request is denied, the department must explain in writing the basis for the denial. An applicant or recipient may seek review of a denial within thirty days under WAC 458-20-100 (Informal administrative reviews).

(11) **What should a recipient of a tax deferral do when its investment project is operationally complete?**

(a) When the building, machinery, or equipment is ready for use, or when a final election is made to treat "multiple qualified buildings" as single investment project, the recipient must notify the special programs division in writing that the eligible investment project is operationally complete. The department must, after appropriate investigation: Certify that the project is operationally complete; not certify the project; or certify only a portion of the project. The certification will include the year in which the project is operationally complete. If the department certifies as an operationally complete investment project consisting of "multiple qualifying buildings," the certification is deemed to have occurred in the calendar year in which the final election is made.

(b) If all or any portion of the project is not certified, the recipient must repay all or a proportional part of the deferred taxes. The department will notify the recipient of the amount due, including interest, and the due date.

(c) The department must explain in writing the basis for not certifying all or any portion of a project. The decision of the department to not certify all or a portion of a project may be reviewed under WAC 458-20-100 (Informal administrative reviews) within thirty days.

(d) An investment project consisting of "multiple qualifying buildings" may not be certified as operationally complete unless the lessee furnishes the department with a bond, letter of credit, or other security acceptable to the department in an amount equal to the repayment obligation as determined by the department. The department may decrease the secured amount each year as the repayment obligation decreases under the provisions of RCW 82.63.045. If the lessee does not furnish the department with a bond, letter of credit, or other acceptable security equal to the amount of deferred tax, the qualified buildings will each be treated as individual investment projects under the original applications for those buildings.

(12) **Is a recipient of a tax deferral required to submit annual ((surveys)) tax performance reports?** Each recipient of a tax deferral granted under chapter 82.63 RCW must complete an annual ((survey)) tax performance report. If the economic benefits of the deferral are passed to a lessee as provided in RCW 82.63.010(7), the lessee must agree to complete the annual ((survey)) tax performance report and the applicant is not required to complete the annual ((survey)) tax performance report. See WAC ((458-20-268)) 458-20-267 (Annual ((surveys)) tax performance reports for certain

tax ((adjustments)) preferences) for more information on the requirements to file annual ((surveys)) tax performance reports.

**(13) Is a recipient of tax deferral required to repay deferred taxes?**

(a) **When is repayment required?** Deferred taxes must be repaid if an investment project is used for purposes other than qualified research and development or pilot scale manufacturing during the calendar year for which the department certifies the investment project as operationally complete or at any time during any of the succeeding seven calendar years. Taxes are immediately due according to the following schedule:

Year in which nonqualifying use occurs	% of deferred taxes due
1	100%
2	87.5%
3	75%
4	62.5%
5	50%
6	37.5%
7	25%
8	12.5%

Interest on the taxes, but not penalties, must be paid retroactively to the date of deferral. For purposes of this rule, the date of deferral is the date tax-deferred items are purchased.

The lessee of an investment project consisting of "multi-qualified buildings" is solely liable for payment of any deferred tax determined to be due and payable beginning on the date the department certifies the product as operationally complete. This does not relieve any lessor of its obligation under RCW 82.63.010(7) and subsection (3)(a) of this rule to pass the economic benefit of the deferral to the lessee.

**(b) When is repayment not required?**

(i) Deferred taxes need not be repaid if the investment project is used only for qualified research and development or pilot scale manufacturing during the calendar year for which the department certifies the investment project as operationally complete and during the succeeding seven calendar years.

(ii) Deferred taxes need not be repaid on particular items if the purchase or use of the item would have qualified for the machinery and equipment sales and use tax exemptions provided by RCW 82.08.02565 and 82.12.02565 (discussed in WAC 458-20-13601) at the time of purchase or first use.

(iii) Deferred taxes need not be repaid if qualified machinery and equipment on which the taxes were deferred is destroyed, becomes inoperable and cannot be reasonably repaired, wears out, or becomes obsolete and is no longer practical for use in the project. The use of machinery and equipment which becomes obsolete for purposes of the project and is used outside the project is subject to use tax at the time of such use.

**(14) When will the tax deferral program expire?** The authority of the department to issue deferral certificates expires January 1, 2015.

**(15) Is debt extinguishable because of insolvency or sale?** The debt for deferred taxes will not be extinguished by the insolvency or other failure of the recipient.

**(16) Does transfer of ownership terminate tax deferral?** Transfer of ownership does not terminate the deferral. The deferral may be transferred to the new owner if the new owner meets all eligibility requirements for the remaining periods of the deferral. The new owner must apply for an amendment to the deferral certificate. If the deferral is transferred, the new owner is liable for repayment of deferred taxes under the same terms as the original owner. If the new owner is a successor to the previous owner under the terms of WAC 458-20-216 (Successors, quitting business) and the deferral is not transferred, the new owner's liability for deferred taxes is limited to those that are due for payment at the time ownership is transferred.

**PART II**

**SALES AND USE TAX EXEMPTION FOR PERSONS ENGAGED IN CERTAIN CONSTRUCTION ACTIVITIES FOR THE FEDERAL GOVERNMENT**

**(17) Persons engaged in construction activities for the federal government.** Effective June 10, 2004, persons engaged in the business of constructing, repairing, decorating, or improving new or existing buildings or other structures under, upon, or above real property of or for the United States, or any instrumentality thereof, are not liable for sales and use tax on tangible personal property incorporated into, installed in, or attached to such building or other structure, if the investment project would qualify for sales and use tax deferral under chapter 82.63 RCW if undertaken by a private entity. RCW 82.04.190(6).

**PART III**

**BUSINESS AND OCCUPATION TAX CREDIT FOR RESEARCH AND DEVELOPMENT SPENDING**

**(18) Who is eligible for the business and occupation tax credit?** RCW 82.04.4452 provides for a business and occupation tax credit for persons engaging in research and development in Washington in five areas of high technology: Advanced computing, advanced materials, biotechnology, electronic device technology, and environmental technology.

A person is eligible for the credit if its research and development spending in the calendar year for which credit is claimed exceeds 0.92 percent of the person's taxable amount for the same calendar year.

**(a) What does the term "person" mean for purposes of this credit?** "Person" has the meaning given in RCW 82.04.030.

**(b) What is "research and development spending" for purposes of this rule?** "Research and development spending" means qualified research and development expenditures plus eighty percent of amounts paid to a person other than a public educational or research institution to conduct qualified research and development.

**(c) What is "taxable amount" for purposes of this rule?** "Taxable amount" means the taxable amount subject to business and occupation tax required to be reported on the person's combined excise tax returns for the year for which the credit is claimed, less any taxable amount for which a

multiple activities tax credit is allowed under RCW 82.04.-440. See WAC 458-20-19301 (Multiple activities tax credits) for information on the multiple activities tax credit.

(d) **What are "qualified research and development expenditures" for purposes of this rule?** "Qualified research and development expenditures" means operating expenses, including wages, compensation of a proprietor or a partner in a partnership, benefits, supplies, and computer expenses, directly incurred in qualified research and development by a person claiming the business and occupation tax credit provided by RCW 82.04.4452. The term does not include amounts paid to a person other than a public educational or research institution to conduct qualified research and development. Nor does the term include capital costs and overhead, such as expenses for land, structures, or depreciable property.

(i) In order for an operating expense to be a qualified research and development expenditure, it must be directly incurred in qualified research and development. If an employee performs qualified research and development activities and also performs other activities, only the wages and benefits proportionate to the time spent on qualified research and development activities are qualified research and development expenditures under this rule. The wages of employees who supervise or are supervised by persons performing qualified research and development are qualified research and development expenditures to the extent the work of those supervising or being supervised involves qualified research and development.

(ii) The compensation of a proprietor or a partner is determined in one of two ways:

(A) If there is net income for federal income tax purposes, the amount reported subject to self-employment tax is the compensation.

(B) If there is no net income for federal income tax purposes, reasonable cash withdrawals or cash advances are the compensation.

(iii) Depreciable property is any property with a useful life of at least a year. Expenses for depreciable property will not constitute qualified research and development expenditures even if such property may be fully deductible for federal income tax purposes in the year of acquisition.

(iv) Computer expenses do not include the purchase, lease, rental, maintenance, repair or upgrade of computer hardware or software. They do include internet subscriber fees, run time on a mainframe computer, and outside processing.

(v) Training expenses for employees are qualified research and development expenditures if the training is directly related to the research and development being performed. Training expenses include registration fees, materials, and travel expenses. Although the research and development must occur in Washington, training may take place outside of Washington.

(vi) Qualified research and development expenditures include the cost of clinical trials for drugs and certification by Underwriters Laboratories.

(vii) Qualified research and development expenditures do not include legal expenses, patent fees, or any other

expense not incurred directly for qualified research and development.

(viii) Stock options granted as compensation to employees performing qualified research and development are qualified research and development expenditures to the extent they are reported on the W-2 forms of the employees and are taken as a deduction for federal income tax purposes by the employer.

(ix) Preemployment expenses related to employees who perform qualified research and development are qualified research and development expenditures. These expenses include recruiting and relocation expenses and employee placement fees.

(e) **What does it mean to "conduct" qualified research and development for purposes of this rule?** A person is conducting qualified research and development when:

(i) The person is in charge of a project or a phase of the project; and

(ii) The activities performed by that person in the project or the phase of the project constitute qualified research and development.

(iii) Examples.

(A) Company C is conducting qualified research and development. It enters into a contract with Company D requiring D to provide workers to perform activities under the direction of C. D is not entitled to the credit because D is not conducting qualified research and development. Its employees work under the direction of C. C is entitled to the credit if all other requirements of the credit are met.

(B) Company F enters into a contract with Company G requiring G to perform qualified research and development on a phase of its project. The phase of the project constitutes qualified research and development. F is not entitled to the credit because F is not conducting qualified research and development on that phase of the project. G, however, is entitled to the credit if all other requirements of the credit are met.

(f) **What is "qualified research and development" for purposes of this rule?** "Qualified research and development" means research and development performed within this state in the fields of advanced computing, advanced materials, biotechnology, electronic device technology, and environmental technology.

(g) **What is "research and development" for purposes of this rule?** See subsection (3)(c) of this rule for more information on the definition of research and development.

(i) Example. A company that engages in environmental cleanup contracted to clean up a site. It had never faced exactly the same situation before, but guaranteed at the outset that it could do the job. It used a variety of existing technologies to accomplish the task in a combination it had never used before. The company was not engaged in qualified research and development in performing this contract. While the company applied existing technologies in a unique manner, there was no uncertainty to attain the desired or necessary specifications, and therefore the outcome of the project was certain.

(ii) Example. Same facts as (g)(i) of this subsection, except that the company performed research on a technology that had been applied in other contexts but never in the con-

text where the company was attempting to use it, and it was uncertain at the outset whether the technology could achieve the desired outcome in the new context. If the company failed, it would have to apply an existing technology that is much more costly in its cleanup effort. The company was engaged in qualified research and development with respect to the research performed in developing the technology.

(iii) Example. Company A is engaged in research and development in biotechnology and needs to perform standard blood tests as part of its development of a drug. It contracts with a lab, B, to perform the tests. The costs of the tests are qualified research and development expenditures for A, the company engaged in the research and development. Although the tests themselves are routine, they are only a part of what A is doing in the course of developing the drug. B, the lab contracted to perform the testing, is not engaged in research and development with respect to the drug being developed. B is neither discovering technological information nor translating technological information into new or improved products, processes, techniques, formulas, inventions, or software. B is not entitled to a credit on account of the compensation it receives for conducting the tests.

(h) **What are the five high technology areas?** See subsection (3)(e) of this rule for more information.

**(19) How is the business and occupation tax credit calculated?**

(a) **On or after July 1, 2004.** The amount of the credit is calculated as follows:

(i) A person must first determine the greater of:  
The person's qualified research and development expenditures;  
or

Eighty percent of amounts received by a person other than a public educational or research institution as compensation for conducting qualified research and development.

(ii) Then the person subtracts, from the amount determined under (a)(i) of this subsection, 0.92 percent of its taxable amount. If 0.92 percent of the taxable amount exceeds the amount determined under (a)(i) of this subsection, the person is not eligible for the credit.

(iii) The credit is calculated by multiplying the amount determined under (a)(ii) of this subsection by the following:

(A) For the periods of July 1, 2004, to December 31, 2006, the person's average tax rate for the calendar year for which the credit is claimed;

(B) For the periods of January 1, 2007, to December 31, 2007, the greater of the person's average tax rate for the calendar year or 0.75 percent;

(C) For the periods of January 1, 2008, to December 31, 2008, the greater of the person's average tax rate for the calendar year or 1.0 percent;

(D) For the periods of January 1, 2009, to December 31, 2009, the greater of the person's average tax rate for the calendar year or 1.25 percent; and

(E) For the periods after December 31, 2009, 1.50 percent.

(iv) For the purposes of this rule, "average tax rate" means a person's total business and occupation tax liability for the calendar year for which the credit is claimed, divided

by the person's total taxable amount for the calendar year for which the credit is claimed.

(v) For purposes of calculating the credit, if a person's reporting period is less than annual, the person may use an estimated average tax rate for the calendar year for which the credit is claimed, by using the person's average tax rate for each reporting period. When the person files its last return for the calendar year, the person must make an adjustment to the total credit claimed for the calendar year using the person's actual average tax rate for the calendar year.

(vi) Examples.

(A) A business engaging in qualified research and development has a taxable amount of \$10,000,000 in a year. It pays \$80,000 in that year in wages and benefits to employees directly engaged in qualified research and development. The business has no other qualified research and development expenditures. Its qualified research and development expenditures of \$80,000 are less than \$92,000 (0.92 percent of its taxable amount of \$10,000,000). If a business's qualified research and development expenditures (or eighty percent of amounts received for the conduct of qualified research and development) are less than 0.92 percent of its taxable amount, it is not eligible for the credit.

(B) A business engaging in qualified research and development has a taxable amount of \$10,000,000 in 2005. Seven million dollars of this amount is taxable at the rate of 0.015 under the B&O tax classification for services and \$3,000,000 is taxable at the rate of 0.00484 under the B&O tax classification for royalties. The business pays \$119,520 in B&O tax for this reporting period. It pays \$200,000 in that year to employees directly engaged in qualified research and development. The business has no other qualified research and development expenditures.

In order to determine the amount of its credit, the business subtracts \$92,000 (0.92 percent of its taxable amount of \$10,000,000) from \$200,000, its qualified research and development expenditures. The resulting amount of \$108,000 multiplied by the business's average tax rate equals the amount of the credit.

The business's average tax rate in 2005 is determined by dividing its B&O tax of \$119,520 by its taxable amount of \$10,000,000. The result, 0.01195, is multiplied by \$108,000 to determine the amount of the credit. The credit is \$1,291 (\$1,290.60 rounded to the nearest whole dollar).

(b) **From July 1, 1998 to June 30, 2004.** The amount of the credit is equal to the greater of:

The person's qualified research and development expenditures;  
or

Eighty percent of amounts received by a person other than a public educational or research institution as compensation for conducting qualified research and development

multiplied by 0.00484 in the case of a nonprofit corporation or association; and multiplied by 0.015 in the case of all other persons.

(c) **Prior to July 1, 1998.** The amount of the credit is equal to the greater of:

The person's qualified research and development expenditures;

or

Eighty percent of amounts received by a person other than a public educational or research institution as compensation for conducting qualified research and development

multiplied by 0.00515 in the case of a nonprofit corporation or association; and

multiplied by 0.025 in the case of all other persons.

(d) The credit for any calendar year may not exceed the lesser of two million dollars or the amount of business and occupation tax otherwise due for the calendar year.

(e) Credits may not be carried forward or carried back to other calendar years.

**(20) Is the person claiming the business and occupation tax credit required to submit annual ((surveys)) tax performance reports?** Each person claiming the credit granted under RCW 82.04.4452 must complete an annual ((survey)) tax performance report. See WAC ((458-20-268)) 458-20-267 (Annual ((surveys)) tax performance reports for certain tax ((adjustments)) preferences) for more information on the requirements to file annual ((surveys)) tax performance reports.

**(21) Is the business and occupation tax credit assignable?** A person entitled to the credit because of qualified research and development conducted under contract for another person may assign all or a portion of the credit to the person who contracted for the performance of the qualified research and development.

(a) Both the assignor and the assignee must be eligible for the credit for the assignment to be valid.

(b) The total of the credit claimed and the credit assigned by a person assigning credit may not exceed the lesser of two million dollars or the amount of business and occupation tax otherwise due from the assignor in any calendar year.

(c) The total of the credit claimed, including credit received by assignment, may not exceed the lesser of two million dollars or the amount of business and occupation tax otherwise due from the assignee in any calendar year.

**(22) What happens if a person has claimed the business and occupation tax credit earlier but is later found ineligible?** If a person has claimed the credit earlier but is later found ineligible for the credit, then the department will declare the taxes against which the credit was claimed to be immediately due and payable. Interest on the taxes, but not penalties, must be paid retroactively to the date the credit was claimed.

**(23) When will the business and occupation tax credit program expire?** The business and occupation tax credit program for high technology businesses expires January 1, 2015.

**(24) Do staffing companies qualify for the business and occupation tax credit program?** A staffing company may be eligible for the credit if its research and development spending in the calendar year for which credit is claimed exceeds 0.92 percent of the person's taxable amount for the same calendar year.

(a) **Qualifications of the credit.** In order to qualify for the credit, a staffing company must meet the following criteria:

(i) It must conduct qualified research and development through its employees;

(ii) Its employees must perform qualified research and development activities in a project or a phase of the project, without considering any activity performed:

(A) By the person contracting with the staffing company for such performance; or

(B) By any other person;

(iii) It must complete an annual ((survey)) tax performance report by March 31st following any year in which the credit was taken; and

(iv) It must document any claim of the B&O tax credit.

(b) Examples.

(i) Company M, a staffing company, furnishes three employees to Company N for assisting a research project in electronic device technology. N has a manager and five employees working on the same project. The work of M's employees and N's employees combined as a whole constitutes qualified research and development. M's employees do not perform sufficient activities themselves to be considered performing qualified research and development. M does not qualify for the credit.

(ii) Company V, a staffing company, furnishes three employees to Company W for performing a phase of a research project in advanced materials. W has a manager and five employees working on other phases of the same project. V's employees are in charge of a phase of the project that results in discovery of technological information. The work of V's employees alone constitutes qualified research and development. V qualifies for the credit if all other requirements of the credit are met.

(iii) Same as (b)(ii) of this subsection, except that the phase of the research project involves development of computer software for W's internal use. The work of V's employees alone constitutes qualified research and development. V qualifies for the credit if all other requirements of the credit are met.

AMENDATORY SECTION (Amending WSR 14-14-078, filed 6/27/14, effective 7/28/14)

**WAC 458-20-263 Exemptions from retail sales and use taxes for qualifying electric generating and thermal heat producing systems using renewable energy sources.** RCW 82.08.962, 82.08.963, 82.12.962, and 82.12.963 provide exemptions from the "retail sales tax" described in chapter 82.08 RCW and the "use tax" described in chapter 82.12 RCW paid with respect to the sale or use of machinery and equipment used directly in generating electricity or producing thermal heat using qualified renewable energy sources. This rule explains how these exemptions apply and is divided into four parts as follows:

PART 1: Exemptions as Applied to Qualified Solar Systems.

PART 2: Exemptions as Applied to Qualified Nonsolar Renewable Energy Systems.

PART 3: Exemptions as Applied to Qualifying Solar-Heat Systems.

PART 4: General Provisions.

**PART 1****Exemptions as Applied to Qualified Solar Systems**

(101) **Solar systems that generate ten kilowatts or less.**

(a) **Exemptions.** RCW 82.08.963 and 82.12.963 provide exemptions from retail sales and use taxes paid with the respect to the sale or use of machinery and equipment that is used directly in a solar energy system capable of generating ten kilowatts of electricity or less. The nameplate DC power rating of a system, which is an industry standard, is used to determine whether the energy system is capable of generating ten kilowatts of electricity or less. Labor charges to install the qualified machinery and equipment are also exempt from retail sales and use taxes. Both state and local retail sales and use taxes are exempt. These exemptions are effective from July 1, 2009, and expire June 30, 2018.

(b) **Exemption certificate required.** The buyer must document this exemption at the time of sale by providing the seller (and installer, if different from the seller), a completed *Buyers' Retail Sales Tax Exemption Certificate*. The seller or installer must keep the completed form in its records for five years.

(c) **Instructions for sellers that E-file.** For sellers that E-file, the exemption permitted under Part 1, subsection (101)(a) of this rule should be listed on the line entitled *Sales of Solar Machinery/Equipment; Install Labor* on the retail sales tax deduction page of E-file.

(102) **Solar systems that generate more than ten kilowatts.**

(a) **Partial exemptions.** For buyers that do not qualify for the full exemption described in Part 1, subsection (101)(a) of this rule, there is an alternative partial exemption. RCW 82.08.962 and 82.12.962 provide an exemption, in the form of a remittance (refund) from the department, equal to seventy-five percent of the retail sales and use taxes paid with respect to the sale or use of machinery and equipment used directly in solar energy systems capable of generating at least 1000 watts (one kilowatt) of electricity. The exemption also applies to amounts paid for labor and services rendered in respect to installing such machinery and equipment, and may only be claimed if the exemption permitted in Part 1, subsection (101)(a) of this rule has not been claimed. The nameplate DC power rating of a system, which is an industry standard, is used to determine whether the solar energy system is capable of generating 1000 watts (one kilowatt) or more of electricity. The buyer must pay the total amount of the retail sales or use taxes paid with the respect to the sale or use of the qualifying machinery, equipment, and labor charges to install the same. The buyer may then apply to the department for a refund of seventy-five percent of the state and local retail sales and use taxes paid. This partial exemption is effective from July 1, 2011, and expires January 1, 2020.

(b) From July 1, 2009, through June 30, 2011, these systems qualified for a one hundred percent exemption for retail sales and use taxes paid with the respect to the sale and use of qualified machinery, equipment, and labor charges to install the same at the point of sale. For documentation requirements see Part 1, subsection (101) of this rule.

(c) **Required annual ~~((survey))~~ tax performance report.** Beginning ~~((July 1, 2013))~~ January 1, 2018, buyers

applying for a refund must complete and submit an annual tax ~~((incentive survey))~~ performance report. The ~~((survey))~~ annual tax performance report must be filed with the department by ~~((April 30th))~~ May 31st, following the year for which the refund is claimed. For more information see Part 4, subsection (401)(c) of this rule.

**PART 2****Exemptions as Applied to Qualified Nonsolar Renewable Energy Systems**

(201) **Qualified nonsolar renewable energy systems generating one kilowatt or more.**

(a) **Partial exemptions.** RCW 82.08.962 and 82.12.962 provide an exemption equal to seventy-five percent of the retail sales and use taxes paid with respect to the sale or use of machinery and equipment used directly in a renewable energy system employing a qualified power source that generates at least 1000 watts (one kilowatt) or more of electricity. This exemption also applies to amounts paid for labor and services rendered in respect to installing such machinery and equipment. The buyer is eligible for the exemption in the form of a remittance (refund) from the department and must have paid to the seller or to the department the total amount of retail sales or use taxes paid with the respect to the sale or use of the machinery, equipment, and labor charges to install the same. To claim the exemption, the buyer must apply to the department for a refund. See Part 4, subsection (401) of this rule for instructions on how to file a claim for refund. This partial exemption is effective from July 1, 2011, and expires January 1, 2020.

(b) **Refund procedure.** Beginning July 1, 2011, the buyer is eligible for the exemption in the form of a remittance (refund) from the department. The buyer must pay the total amount of the retail sales or use taxes due with the respect to the sale or use of qualifying machinery or equipment and labor charges to install the same. The buyer may then apply to the department for a refund of seventy-five percent of the state and local retail sales and use taxes paid. These exemptions expire on January 1, 2020.

(c) **Required ~~((survey))~~ tax performance report.** Beginning ~~((July 1, 2013))~~ January 1, 2018, buyers applying for a refund must complete and submit an annual tax ~~((incentive survey))~~ performance report. The ~~((survey))~~ annual tax performance report must be filed with the department by ~~((April 30th))~~ May 31st, following the year for which the refund is claimed. For more information see Part 4, subsection (401)(c) of this rule.

(202) **Qualified power sources.** The partial exemption permitted under Part 2, subsection (201)(a) of this rule applies only with respect to a renewable energy system that employs one of the following qualified power sources:

- Fuel cells;
- Wind;
- Biomass energy;
- Tidal or wave energy;
- Geothermal resources;
- Anaerobic digestion;
- Technology that converts otherwise lost energy from exhaust; and
- Landfill gas.

(203) **Definitions for these power sources.** For purposes of Part 2, the terms below are defined as or include within their definition the following:

- (a) **Biomass energy.** "Biomass energy" includes:
- (i) By-products of pulping and wood manufacturing processes;
- (ii) Animal waste;
- (iii) Solid organic fuels from wood;
- (iv) Forest or field residues;
- (v) Wooden demolition or construction debris;
- (vi) Food waste;
- (vii) Liquors derived from algae and other sources;
- (viii) Dedicated energy crops;
- (ix) Biosolids; and
- (x) Yard waste.

"Biomass energy" does not include wood pieces that have been treated with chemical preservatives such as creosote, pentachlorophenol, or copper-chrome-arsenic; wood from old growth forests; or municipal solid waste.

(b) **Fuel cell.** "Fuel cell" means an electrochemical reaction that generates electricity by combining atoms of hydrogen and oxygen in the presence of a catalyst.

(c) **Landfill gas.** "Landfill gas" means biomass fuel, of the type that qualifies for federal tax credits under Title 26 U.S.C. § 45K (formerly Title 26 U.S.C. § 29) of the federal Internal Revenue Code, collected from a "landfill" as defined in RCW 70.95.030.

### PART 3

#### Exemptions as Applied to Qualifying Solar-Heat Systems

##### (301) Solar-heat systems.

(a) **Exemption.** RCW 82.08.963 and 82.12.963 provide exemptions from retail sales and use taxes paid with the respect to the sale and use of machinery and equipment used directly in producing thermal heat using solar energy and the labor charges to install the qualified equipment, if the buyer installs a system capable of producing no more than three million BTU per day. These exemptions are valid July 1, 2013, and expire June 30, 2018.

(b) **Exemption certificate required.** The buyer must document this exemption at the time of sale by providing the seller (and installer if different from the seller) a completed *Buyers' Retail Sales Tax Exemption Certificate*. The seller or installer must keep the completed form in its records for five years.

(c) **Instructions for sellers that E-file.** For sellers that E-file, the exemption permitted under Part 3, subsection (301)(a) of this rule should be listed on the line entitled *Sales of Solar Machinery/Equipment; Install Labor* on the retail sales tax deduction page of E-file.

### PART 4

#### General Provisions

##### (401) Requirements for a refund from the department of taxes paid, referred to as the seventy-five percent remittance.

(a) **Required application.** This exemption, in the form of a remittance (refund) from the department, equals seventy-five percent of the retail sales and use taxes paid with respect to the sale or use of the qualifying machinery and equipment.

The form that the buyer must submit to the department is the *Application for Sales Tax Refund on Purchases & Installation of Qualified Renewable Energy Equipment*. This form is available through the department's web site at dor.wa.gov under *Get a form or publication*. The application must be completed in full and mailed to the address provided on the form.

(b) **Required records.** The purchaser must provide records that will allow the department to determine whether the purchaser is entitled to a refund. The records include:

- Invoices;
  - Proof of tax paid;
  - Documents describing the machinery and equipment;
- and
- Electrical capacity of the system.

(c) **File annual tax (~~(incentive survey)~~) performance report.** Effective (~~(July 1, 2013)~~) January 1, 2018, any person claiming a seventy-five percent refund must electronically file an annual tax (~~(incentive survey)~~) performance report with the department each year. This applies to buyers of solar systems generating electricity of more than ten kilowatts and other qualified renewable energy systems generating electricity of one kilowatt or more.

(d) **Separate (~~(survey)~~) tax performance report for each system.** The buyer must file a separate (~~(survey)~~) tax performance report for each system owned or operated in Washington. The annual (~~(survey)~~) tax performance report is due (~~(April 30th)~~) May 31st, following the year for which the exemption is claimed. (Systems installed in (~~(2013)~~) 2017 require a (~~(survey)~~) tax performance report to be completed by (~~(April 30, 2014)~~) May 31, 2018.)

(e) **Limitation on frequency for claiming exemption.** A buyer may not apply to the department for a remittance (refund) more frequently than once a quarter.

(f) **Qualified retail sales and use taxes.** These exemptions apply to both state and local retail sales and use taxes.

(402) **What is "machinery and equipment"?** For purposes of RCW 82.08.962 and 82.12.963, "machinery and equipment" means fixtures, devices, and support facilities that are integral and necessary to the generation of electricity from qualifying sources of power. For purposes of RCW 82.08.963 and 82.12.963, "machinery and equipment" means fixtures, devices, and support facilities that are integral to the generation of electricity or production and use of thermal heat from solar energy.

A "support facility" is a part of a building, structure, or improvement used to contain or steady a fixture or device. A support facility must be specially designed and necessary for the proper functioning of the fixture or device and must perform a function beyond being a building, structure, or improvement. It must have a function relative to a fixture or a device. To determine if some portion of a building is a support facility, the parts of the building are examined. For example, a highly specialized structure, like a vibration reduction slab under generators in a landfill gas generating facility, is a support facility. Without the slab, the generators would not function properly. The ceiling and walls of the building housing the generator are not support facilities if they only serve to define the space and do not have a function relative to a fixture or a device.

"Machinery and equipment" does not include:

- (a) The utility grid system;
- (b) Hand-powered tools;
- (c) Property with a useful life of less than one year;
- (d) Repair parts required to restore machinery and equipment to normal working order;
- (e) Replacement parts that do not increase productivity, improve efficiency, or extend the useful life of the machinery and equipment;
- (f) Buildings; or
- (g) Building fixtures that:
  - (i) Are permanently affixed to and become a physical part of a building; but
  - (ii) Are not integral and necessary to the generation of electricity.

(403)(a) **When is machinery and equipment "used directly" in generating electricity?** Machinery and equipment is used directly to generate electricity when it is used to:

- (i) Capture the energy of the qualifying source of power;
- (ii) Convert that energy to electricity; and
- (iii) Store, transform, or transmit that electricity for entry into or operation in parallel with electric transmission and distribution systems.

(b) **When is machinery and equipment "used directly" in producing thermal heat?** Machinery and equipment is "used directly" in producing thermal heat with solar energy if it uses a solar collector or a solar hot water system that:

- (i) Meets the certification standards for solar collectors and solar hot water systems developed by the solar rating and certification corporation; or
- (ii) The Washington State University extension energy program determines a solar collector or solar hot water system is an equivalent collector or system.

(404) **Examples of qualifying machinery and equipment.** This section provides examples of machinery and equipment that may be used directly in generating electricity and could qualify for the exemptions from retail sales and use taxes. This list is illustrative only and is not intended to provide an exhaustive list of possible qualifying machinery and equipment.

(a) **Solar.** Where solar energy is the principal source of power: Solar modules; inverters; Stirling converters; power conditioning equipment; batteries; transformers; power poles; power lines; and connectors to the utility grid system or point of use.

(b) **Wind.** Where wind is the principal source of power: Turbines; blades; generators; towers and tower pads; substations; guy wires and ground stays; power conditioning equipment; anemometers; recording meters; transmitters; power poles; power lines; and connectors to the utility grid system or point of use.

(c) **Landfill.** Where landfill gas is the principal source of power: Turbines; blades; blowers; burners; heat exchangers; generators; towers and tower pads; substations; guy wires and ground stays; pipe; valves; power conditioning equipment; pressure control equipment; recording meters; transmitters; power poles; power lines; and connectors to the utility grid system or point of use.

(d) **Fuel cells.** Where fuel cells are the principal source of power: Fuel cell assemblies; fuel storage and delivery systems; power inverters; transmitters; transformers; power poles; power lines; and connectors to the utility grid system or point of use.

(405) **Installation charges.** The exemptions from retail sales and use taxes addressed in this rule apply to installation charges for qualifying machinery and equipment, including charges for labor and services. There are no exemptions from retail sales and use taxes for charges for labor and services rendered in respect to constructing buildings or access roads that may be necessary to install or use qualifying machinery and equipment. Further, there are no exemptions from retail sales and use taxes paid with respect to tangible personal property, such as a crane or forklift, purchased or rented by the buyer, the contractor, or the installer to be used to install qualifying machinery and equipment. Further, there are no exemptions from retail sales and use taxes for services that were included in the construction contract for design, planning, studies, project management, or other charges not directly related to the actual labor for installing the qualifying machinery and equipment.

AMENDATORY SECTION (Amending WSR 17-09-086, filed 4/19/17, effective 5/20/17)

**WAC 458-20-267 Annual tax performance reports for certain tax preferences.** (1) **Introduction.** Effective for tax reporting periods beginning January 1, 2018, taxpayers taking certain tax preferences must file an annual tax performance report with the department of revenue (department) providing information about their business. This rule explains how to file a report, the information that must be included in the report, due dates for filing, and other filing requirements.

(a) **References to related rules.** For tax reporting periods through December 31, 2017, readers may want to refer to the following rules:

(i) WAC 458-20-267A Annual reports for certain tax preferences;

(ii) WAC 458-20-268 Annual surveys for certain tax preferences.

(b) **Definitions.** For purposes of this rule the following definitions apply:

(i) **Person.** "Person" has the meaning under RCW 82.04.030 and also includes the state and its departments and institutions.

(ii) **Tax preference.** As defined under RCW 43.136.021, "tax preference" means:

(A) An exemption, exclusion, or deduction from the base of a state tax; a credit against a state tax; a deferral of a state tax; or a preferential state tax rate; and

(B) For purposes of this rule, tax preference includes only the tax preferences requiring ((a)) an annual tax performance report under RCW 82.32.534.

~~((b))~~ (c) **Elimination of annual survey.** For tax preferences claimed for tax reporting periods beginning in January 2018 and later, taxpayers ((taking certain tax preferences may be)) are no longer required to complete both an annual report and an annual survey. ((For information on the annual survey

requirements, refer to RCW 82.32.585 and WAC 458-20-268.

(e))

(d) **Examples.** This rule includes examples that identify a set of facts and then state a conclusion. These examples should only be used as a general guide. The department will evaluate each case on its particular facts and circumstances.

(2) **Tax preferences requiring an annual tax performance report.** Taxpayers may refer to the department's web site at dor.wa.gov for the "Annual Tax (~~Incentive~~) Performance Report for Preferential Tax Rates/Credits/Exemptions/Deferrals Worksheet." This worksheet lists tax preferences that require an annual tax performance report. Taxpayers may also contact the telephone information center at 800-647-7706 to determine whether they must file an annual tax performance report.

(3) **How to file annual tax performance reports.**

(a) **Electronic filing.** Annual tax performance reports must be filed electronically unless the department waives this requirement upon a showing of good cause. A report is filed electronically when the department receives the report in an electronic format (~~A person accesses electronic filing through their department "My Account")~~ through the "MyDOR" system at dor.wa.gov.

(b) **Required paper form.** If the department waives the electronic filing requirement for a person who shows good cause, that person must use the annual tax performance report form developed by the department unless that person obtains prior written approval from the department to file an annual tax performance report in an alternative format.

(c) **How to obtain the form.** Persons who have received a waiver of the electronic filing requirement from the department or who otherwise would like a paper copy of the report may obtain the annual tax performance report form from the department's web site at dor.wa.gov. It may also be obtained by calling the telephone information center at 800-647-7706, or by contacting the department at:

Attn: Tax Incentive Team  
Taxpayer Account Administration  
Department of Revenue  
Post Office Box 47476  
Olympia, WA 98504-7476

(d) **Special requirement for persons who did not file an annual tax performance report during the previous calendar year.** If a person is a first-time filer or otherwise did not file an annual tax performance report with the department during the previous calendar year, or prior to 2019 did not file an annual report or annual survey, the annual tax performance report must include information on employment (~~)~~ and wages (~~, and employer provided health and retirement benefits~~) for the two calendar years immediately preceding the due date of the report.

(e) **Due date of annual tax performance report for tax preferences other than deferrals.** Every person claiming a tax preference that requires (~~)~~ an annual tax performance report under RCW 82.32.534 must file the report annually with the department in the year following the calendar year in which the person becomes eligible to claim the tax preference. The due date for filing the report is (~~as follows:~~

(i) April 30th for reports due prior to 2017.

(ii) May 31st for reports due in or after 2017)) May 31st.

(f) **Due date of annual tax performance report for tax preferences that are deferrals.** If the tax preference is a deferral of tax, an annual tax performance report must be filed by May 31st in the year following the calendar year in which the investment project is certified by the department as operationally complete, and by May 31st of each of the seven succeeding calendar years.

(g) **Due date extensions.** The department may extend the due date for filing annual tax performance reports as provided in subsection (~~(18)~~) (15) of this rule.

(~~(g)~~) (h) **Example 1.** An aerospace firm first claimed the B&O tax rate provided by RCW 82.04.260(11) for manufacturers and processors for hire of commercial airplanes and component parts on April 1, (~~2015~~) 2017. By (~~April 30, 2016~~) May 31, 2018, the aerospace firm (~~must~~) was required to submit an annual report covering calendar years (2014 and 2015) 2016 and 2017. If the aerospace firm continues to claim the B&O tax rate provided by RCW 82.04.260(11) during calendar year (~~2016~~) 2018, an annual tax performance report is due by May 31, (~~2017~~) 2019, covering calendar year (~~2016~~) 2018.

(~~(h)~~) (i) **Example 2.** An aluminum smelter first claimed the B&O tax rate provided by RCW 82.04.2909 for aluminum smelters on July 31, (~~2015~~) 2017. By (~~April 30, 2016~~) May 31, 2018, the aluminum smelter must provide an annual report covering calendar years (~~2014 and 2015~~) 2016 and 2017. If the aluminum smelter continues to claim the B&O tax rate provided by RCW 82.04.2909 during calendar year (~~2016~~) 2018, an annual tax performance report is due by May 31, (~~2017~~) 2019, covering calendar year (~~2016~~) 2018.

(4) **Amount of tax preference.** The annual tax performance report must include the amount of the tax preference claimed for the calendar year covered by the report.

(5) **What employment positions are included in the annual tax performance report?**

(a) **General rule.** Except as provided in (a)(i), (ii), or (b) of this subsection, the report must include information detailing employment positions in the state of Washington.

(i) **Alternative to reporting employment and wage data.** A person may elect to allow, on their behalf, the employment security department to release wage and employment data to the department and the joint legislative audit and review committee. Each taxpayer electing this option must affirm that election in accordance with procedures approved by the employment security department.

(ii) **Additional reporting requirements for public research institutions claiming an exemption for machinery and equipment.** For a person that claimed an exemption provided in RCW 82.08.025651 or RCW 82.12.025651, the report must include the amount of tax exempted under those sections in the prior calendar year for each general area or category of research and development for which exempt machinery and equipment and labor and services were acquired in the prior calendar year.

(b) **Alternative method.** Persons engaged in manufacturing commercial airplanes or their components may report employment positions per job at the manufacturing site.

(i) **What is a "manufacturing site"?** For purposes of the annual tax performance report, a "manufacturing site" is one or more immediately adjacent parcels of real property located in Washington state on which manufacturing occurs that support activities qualifying for a tax preference. Adjacent parcels of real property separated only by a public road comprise a single site. A manufacturing site may include real property that supports the qualifying activity, such as administration offices, test facilities, warehouses, design facilities, and shipping and receiving facilities. It may also include portions of the manufacturing site that support nonqualifying activities.

(ii) **If the person files per job at the manufacturing site, which manufacturing site is included in the annual tax performance report for the aerospace manufacturing industry tax preferences?** The location(s) where a person is manufacturing commercial airplanes or components of such airplanes within this state is the manufacturing site(s) included in the annual tax performance report. A "commercial airplane" has its ordinary meaning, which is an airplane certified by the Federal Aviation Administration (FAA) for transporting persons or property, and any military derivative of such an airplane. A "component" means a part or system certified by the FAA for installation or assembly into a commercial airplane.

(iii) **Are there alternative methods for reporting separately for each manufacturing site?** For purposes of completing the annual tax performance report, the department may agree to allow a person whose manufacturing sites are within close geographic proximity to consolidate its manufacturing sites onto a single annual tax performance report provided that the jobs located at the manufacturing sites have equivalent employment positions, and wages (~~and employer-provided health and retirement benefits~~). A person may request written approval to consolidate manufacturing sites by contacting the department at:

Attn: Tax Incentive Team  
Taxpayer Account Administration  
Department of Revenue  
Post Office Box 47476  
Olympia, WA 98504-7476

(c) **Example 3.** ABC Airplanes, a company manufacturing FAA certified airplane landing gear, conducts activities at three locations in Washington state. ABC Airplanes is reporting tax under the B&O tax rate provided by RCW 82.04.260(11) for manufacturers and processors for hire of commercial airplanes and component parts. In Seattle, WA, ABC Airplanes maintains its corporate headquarters and administrative offices. In Spokane, WA, ABC Airplanes manufactures the brake systems for the landing gear. In Vancouver, WA, ABC Airplanes assembles the landing gear using the components manufactured in Spokane, WA. If filing per manufacturing site, ABC Airplanes must file separate annual tax performance reports for employment positions at its manufacturing sites in Spokane and Vancouver because these are the Washington state locations in which manufacturing occurs that supports activities qualifying for a tax preference.

(d) **Example 4.** Acme Engines, a company manufacturing engine parts, conducts manufacturing in five locations in

Washington state. Acme Engines is reporting tax under the B&O tax rate provided by RCW 82.04.260 (11) for manufacturers and processors for hire of commercial airplanes and component parts. It manufactures FAA certified engine parts at its Puyallup, WA location. Acme Engines' four other locations manufacture non-FAA certified engine parts. If filing per manufacturing site, Acme Engines must file an annual tax performance report for employment positions at its manufacturing site in Puyallup because it is the only location in Washington state in which manufacturing occurs that supports activities qualifying for a tax preference.

(e) **Example 5.** Tacoma Rivets, with one in-state manufacturing site located in Tacoma, WA, manufactures rivets used in manufacturing airplanes. Half of the rivets Tacoma Rivets manufactures are FAA certified to be used on commercial airplanes. The remaining rivets Tacoma Rivets manufactures are not FAA certified and are used on military airplanes. Tacoma Rivets is reporting tax on its sales of FAA certified rivets under the B&O tax rate provided by RCW 82.04.260(11) for manufacturers and processors for hire of commercial airplanes and component parts. If filing per manufacturing site, Tacoma Rivets must file an annual tax performance report for employment positions at its manufacturing site in Tacoma because it is the location in Washington state in which manufacturing occurs that supports activities qualifying for a tax preference.

(f) **Example 6.** Dynamic Aerospace Composites is a company that manufactures only FAA certified airplane fuselage materials. Dynamic Aerospace Composites conducts activities at three separate locations within Kent, WA. Dynamic Aerospace Composites is reporting tax under the B&O tax rate provided by RCW 82.04.260(11) for manufacturers and processors for hire of commercial airplanes and component parts. If filing per manufacturing site, Dynamic Aerospace Composites must file separate annual tax performance reports for each of its three manufacturing sites.

(g) **Example 7.** Worldwide Aerospace, an aerospace company, manufactures wing systems for commercial airplanes in twenty locations around the world, but none located in Washington state. Worldwide Aerospace manufactures wing surfaces in San Diego, CA. Worldwide Aerospace sells the wing systems to an airplane manufacturer located in Moses Lake, WA and is reporting tax on these sales under the B&O tax rate provided by RCW 82.04.260(11) for sales, at retail or wholesale, of commercial airplanes, or components of such airplanes, manufactured by that person. Worldwide Aerospace is required to complete the annual tax performance report for any employment positions in Washington that are directly related to the qualifying activity.

~~((5))~~ **(6) What jobs are included in the annual tax performance report?** The annual tax performance report covers all full-time, part-time, and temporary jobs in this state or, for persons filing as provided in subsection ~~((4))~~ (5)(b) of this rule, at the manufacturing site as of December 31st of the calendar year for which an applicable tax preference is claimed. Jobs that support nonqualifying activities or support both nonqualifying and qualifying activities for a tax preference are included in the report if the job is located in Washington state or, for persons filing as provided in subsection ~~((4))~~ (5)(b) of this rule, at the manufacturing site.

(a) **Example 8.** XYZ Aluminum, an aluminum smelter company, manufactures aluminum in Tacoma, WA. The company is reporting tax under the B&O tax rate provided by RCW 82.04.2909 for aluminum smelters. XYZ Aluminum's annual tax performance report for its Tacoma, WA location will include all of its employment positions in this state, including its nonmanufacturing employment positions.

(b) **Example 9.** AAA Tire Company manufactures tires at one manufacturing site located in Centralia, WA. The company is reporting tax under the B&O tax rate provided by RCW 82.04.260(11) for manufacturers and processors for hire of commercial airplanes and component parts. FAA certified tires comprise only 20% of the products it manufactures and are manufactured in a separate building at the manufacturing site. If filing under the method described in subsection ~~((4))~~ (5)(b) of this rule, AAA Tire Company must report all jobs at the manufacturing site, including the jobs engaged in the nonqualifying activities of manufacturing non-FAA certified tires.

~~((6))~~ (7) **How is employment detailed in the annual tax performance report?** The annual tax performance report ~~(is organized by employee occupational groups, consistent with the United States Department of Labor's Standard Occupation Codes (SOC) System. The SOC System is a universal occupational classification system used by government agencies and private industries to produce comparable occupational data. The SOC classifies occupations at four levels of aggregation:~~

- ~~(a) Major group;~~
- ~~(b) Minor group;~~
- ~~(c) Broad occupation; and~~
- ~~(d) Detailed occupation.~~

~~All occupations are clustered into one of twenty-three major groups. The annual report uses the SOC major groups to detail the levels of employment, wages, and employer provided health and retirement benefits at the manufacturing site. A detailed description of the SOC System is available by consulting the United States Department of Labor, Bureau of Labor Statistics online at [www.bls.gov/soc](http://www.bls.gov/soc). The annual report does not require names of employees.~~

~~(7))~~ requires reporting of the total hours and wages for employees in Washington for each quarter or for the calendar year, as determined by the department.

~~(8))~~ (8) **What is total employment?** The annual tax performance report must ~~((state the total number of employees for each SOC major group that are currently employed on December 31st of the calendar year for which an applicable tax preference is taken))~~ provide information on all full-time, part-time, and temporary employment positions located in Washington. Total employment includes employees who are on authorized leaves of absences such as sick leave, vacation, disability leave, jury duty, military leave, regardless of whether those employees are receiving wages. Leaves of absences do not include separations of employment such as layoffs or reductions in force. Vacant positions are not included in total employment.

~~((8))~~ (9) **What are full-time, part-time, and temporary employment positions?** An employer must provide information on the total number of employees~~((, as a percentage of total employment in the SOC major group,))~~ that are

employed in full-time, part-time, or temporary employment positions on December 31st of the calendar year for which an applicable tax preference is claimed. ~~((Percentages should be rounded to the nearest 1/10th of 1% (XX.X%).))~~

(a) **Full-time and part-time employment positions.** For a position to be treated as full time or part time, the employer must intend for the position to be filled for at least fifty-two consecutive weeks or twelve consecutive months. A full-time position is a position that satisfies any one of the following minimum thresholds:

- (i) Works thirty-five hours per week for fifty-two consecutive weeks;
- (ii) Works four hundred fifty-five hours, excluding overtime, each quarter for four consecutive quarters; or
- (iii) Works one thousand eight hundred twenty hours, excluding overtime, during a period of twelve consecutive months.

A part-time position is a position in which the employee works less than the hours required for a full-time position. In some instances, an employee may not be required to work the hours required for full-time employment because of paid rest and meal breaks, health and safety laws, disability laws, shift differentials, or collective bargaining agreements, but receives wages equivalent to a full-time job. If, in the absence of these factors, the employee would be required to work the number of hours for a full-time position to receive full-time wages, the position should be reported as a full-time employment position.

(b) **Temporary positions.** A temporary position is a position that is intended to be filled for period of less than twelve consecutive months. Positions in seasonal employment are temporary positions. Temporary positions include workers furnished by staffing companies regardless of the duration of the placement with the person required to file the annual tax performance report.

(c) **The following facts apply to the examples in (c) of this subsection.** National Airplane Inc. manufactures FAA certified navigation systems at a manufacturing site located in Tacoma, WA. National Airplane Inc. is claiming all the tax preferences available for manufacturers and processors for hire of commercial airplanes and component parts. National Airplane Inc. employs one hundred people. Seventy-five of the employees work directly in the manufacturing operation and are classified as (U.S. Department of Labor Standard Occupation Code) SOC Production Occupations. Five employees work in the engineering and design division and are classified as SOC Architect and Engineering Occupations. Five employees are sales representatives and are classified as SOC Sales and Related Occupations. Five employees are service technicians and are classified as SOC Installation, Maintenance, and Repair Occupations. Five employees are administrative assistants and are classified as SOC Office and Administrative Support. Five executives are classified as SOC Management Occupations.

(i) **Example 10.** Through a college work-study program, National Airplane Inc. employs six interns from September through June in its engineering department. The interns each work twenty hours a week. The six interns are reported as temporary employees, and not as part-time employees, because the intern positions are intended to be filled for a

period of less than twelve consecutive months. Assuming the five employees classified as SOC Architect and Engineering Occupations are full-time employees, National Airplane Inc. will report a total of eleven employment positions in SOC Architect and Engineering Occupations with ~~((45%))~~ five in full-time employment positions and ~~((55%))~~ six in temporary employment positions.

(ii) **Example 11.** National Airplane Inc. manufactures navigation systems in two shifts of production. The first shift works eight hours from 8:00 a.m. to 5:00 p.m. Monday ~~((thru))~~ through Friday. The second shift works six hours from 6:00 p.m. to midnight Monday ~~((thru))~~ through Friday. The second shift works fewer hours per week (thirty hours) than the first shift (forty hours) as a pay differential for working in the evening. If a second shift employee transferred to the first shift, the employee would be required to work forty hours with no overall increase in wages. The second shift employees should be reported as full-time employment positions, rather than part-time employment positions.

(iii) **Example 12.** On December 1st, ten National Airplane Inc. full-time employees classified as SOC Production Occupations take family and medical leave for twelve weeks. National Airplane Inc. hires five people to perform the work of the employees on leave. Because the ten employees classified as SOC Production Occupations are on authorized leave, National Airplane Inc. will include those employees in the annual tax performance report as full-time employment positions. The five people hired to replace the absent employees classified as SOC Production Occupations will be included in the report as temporary employees. National Airplane Inc. will report a total of eighty employment positions in SOC Production Occupations with ~~((93.8%))~~ seventy-five in full-time employment positions and ~~((6.2%))~~ five in temporary employment positions.

(iv) **Example 13.** On December 1st, one full-time employee classified as SOC Sales and Related Occupations resigns from her position. National Airplane Inc. contracts with Jane Smith d/b/a Creative Enterprises, Inc. to finish an advertising project assigned to the employee who resigned. Because Jane Smith is an independent contractor, National Airplane Inc. will not include her employment in the annual tax performance report. Because the resignation has resulted in a vacant position, the total number of employment positions National Airplane Inc. will report in SOC Sales and Related Occupations is reduced to four employment positions.

(v) **Example 14.** All National Airplane Inc. employees classified as SOC Office and Administrative Support Occupations work forty hours a week, fifty-two weeks a year. On November 1st, one employee must limit the number of hours worked to thirty hours each week to accommodate a disability. The employee receives wages based on the actual hours worked each week. Because the employee works less than thirty-five hours a week and is not paid a wage equivalent to a full-time position, the employee's position is a part-time employment position. National Airplane Inc. will report a total of five employment positions in SOC Office and Administrative Support Occupations with ~~((80%))~~ four in full-time employment positions and ~~((20%))~~ one in part-time employment positions.

~~((9))~~ **(10) What are wages?** For the purposes of the annual tax performance report, "wages" means the base compensation paid to an individual for personal services rendered to an employer, whether denominated as wages, salary, commission, or otherwise. Generally, compensation in the form of overtime, tips, bonuses, benefits (insurance, paid leave, meals, etc.), stock options, and severance pay are not "wages." For employees that earn an annual salary, hourly wages are determined by dividing annual salary by 2080. If an employee is paid by commission, hourly wages are determined by dividing the total amount of commissions paid during the calendar year by 2080.

~~((10))~~ **(11) How are wages detailed for the annual tax performance report?**

(a) An employer must ~~((provide information on the number of employees, as a percentage of the total employment in the SOC major group, paid a wage within the following five hourly wage bands:~~

~~Up to \$10.00 an hour;  
\$10.01 an hour to \$15.00 an hour;  
\$15.01 an hour to \$20.00 an hour;  
\$20.01 an hour to \$30.00 an hour; and  
\$30.01 an hour or more.~~

~~Percentages should be rounded to the nearest 1/10th of 1% (XX.X%) report the total wages for employees in Washington for each quarter or for the calendar year, as determined by the department.~~

(b) For purposes of the annual tax performance report, wages are measured on December 31st of the calendar year for which an applicable tax preference is claimed.

~~((b) The following facts apply to the examples in (b) of this subsection. Washington Airplane Inc. manufactures FAA-certified navigation systems at a manufacturing site located in Tacoma, WA. Washington Airplane Inc. is claiming all the tax preferences available for manufacturers and processors for hire of commercial airplanes and component parts. Washington Airplane Inc. employs five hundred people at the manufacturing site, which constitutes its entire work force in this state. Four hundred employees engage in activities that are classified as SOC Production Occupations. Fifty employees engage in activities that are classified as SOC Architect and Engineer Occupations. Twenty-five employees are engaged in activities classified as SOC Management Occupations. Twenty employees are engaged in activities classified as SOC Office and Administrative Support Occupations. Five employees are engaged in activities classified as SOC Sales and Related Occupations.~~

~~(i) Example 15. One hundred employees classified as SOC Production Occupations are paid \$12.00 an hour. Two hundred employees classified as SOC Production Occupations are paid \$17.00 an hour. One hundred employees classified as SOC Production Occupations are paid \$25.00 an hour. For SOC Production Occupations, Washington Airplane Inc. will report 25% of employment positions are paid \$10.01 an hour to \$15.00 an hour; 50% are paid \$15.01 an hour to \$20.00 an hour; and 25% are paid \$20.01 an hour to \$30.00 an hour.~~

(ii) ~~Example 16.~~ Ten employees classified as SOC Architect and Engineering Occupations are paid an annual salary of \$42,000; another ten employees are paid \$50,000 annually; and the remaining employees are all paid over \$70,000 annually. To report wages, the annual salaries must be converted to hourly amounts by dividing the annual salary by 2080 hours. For SOC Architect and Engineering Occupations, Washington Airplane Inc. will report 40% of employment positions are paid \$20.01 an hour to \$30.00 an hour and 60% are paid \$30.00 an hour or more.

(iii) ~~Example 17.~~ All the employees classified as SOC Sales and Related Occupations are sales representatives that are paid on commission. They receive \$10.00 commission for each navigation system sold. Three sales representatives sell 2,500 navigation systems during the calendar year. Two sales representatives sell 3,500 navigation systems during the calendar year and receive a \$10,000 bonus for exceeding company's sales goals. To report wages, the employee's commissions must be converted to hourly amounts by dividing the total commissions by 2080 hours. Washington Airplane Inc. will report that 60% of employment positions classified as SOC Sales and Related Occupations are paid \$10.01 an hour to \$15.00 an hour. Because bonuses are not included in wages, Washington Airplane Inc. will report 40% of employment positions classified as SOC Sales and Related Occupations are paid \$15.01 an hour to \$20.00 an hour.

(iv) ~~Example 18.~~ Ten of the employees classified as SOC Office and Administrative Support Occupations earn \$9.50 an hour. The remaining ten employees classified as SOC Office and Administrative Support Occupations earn wages between \$10.01 an hour to \$15.00 an hour. On December 1st, Washington Airplane Inc. announces that effective December 15th, all employees classified as SOC Office and Administrative Support Occupations will earn wages of at least \$10.50 an hour, but no more than \$15.00 an hour. Because wages are measured on December 31st, Washington Airplane Inc. will report 100% of employment positions classified as SOC Office and Administrative Support Occupations are paid \$10.01 an hour to \$15.00 an hour.

~~(11))~~ **(12) Reporting workers furnished by staffing companies.** For temporary positions filled by workers that are furnished by staffing companies, the person filling out the annual tax performance report must provide the following information:

(a) Total number of staffing company employees furnished by staffing companies;

(b) ((Top three occupational codes of all staffing company employees; and

(e)) Average duration of all staffing company employees.

~~((12) What are employer provided health benefits?~~ For purposes of the annual report, "health benefits" means compensation, not paid as wages, in the form of a health plan offered by an employer to its employees. A health plan that is equally available to employees and the general public is not an "employer provided" health benefit.

(a) "Dental care services" means services offered or provided by health care facilities and health care providers relating to the prevention, cure, or treatment of illness, injury, or disease of human teeth, alveolar process, gums, or jaw.

(b) "Dental care plan" means a health plan for the purpose of providing for its employees or their beneficiaries' dental care services.

(c) "Health plan" means any plan, fund, or program established, maintained, or funded by an employer for the purpose of providing for its employees or their beneficiaries, through the purchase of insurance or otherwise, medical care and dental care services. Health plans include any "employee welfare benefit plan" as defined by the Employee Retirement Income Security Act (ERISA), any "health plan" or "health benefit plan" as defined in RCW 48.43.005, any self-funded multiple employer welfare arrangement as defined in RCW 48.125.010, any "qualified health insurance" as defined in Section 35 of the Internal Revenue Code, an "Archer MSA" as defined in Section 220 of the Internal Revenue Code, a "health savings plan" as defined in Section 223 of the Internal Revenue Code, any "health plan" qualifying under Section 213 of the Internal Revenue Code, governmental plans, and church plans.

(d) "Medical care services" means services offered or provided by health care facilities and health care providers relating to the prevention, cure, or treatment of illness, injury, or disease.

(e) "Medical care plan" means a health plan for the purpose of providing for its employees or their beneficiaries' medical care services.

~~(13) How are employer provided health benefits detailed in the annual report?~~ The annual report is organized by SOC major group and by type of health plan offered to or with enrolled employees on December 31st of the calendar year for which an applicable tax preference is claimed.

~~(a) Detail by SOC major group.~~ For each SOC major group, report the number of employees, as a percentage of total employment in the SOC major group, eligible to participate in an employer provided medical care plan. An employee is "eligible" if the employee can currently participate in a medical care plan provided by the employer. Waiting periods, tenure requirements, minimum work hour requirements, preexisting conditions, and other limitations may prevent an employee from being eligible for coverage in an employer's medical care plan. If an employer provides multiple medical care plans, an employee is "eligible" if the employee can currently participate in one of the medical care plans. Percentages should be rounded to the nearest 1/10th of 1% (XX.X%).

(i) ~~Example 19.~~ On December 31st, Acme Engines has one hundred employees classified as SOC Production Occupations. It offers these employees two medical care plans: Plan A is available to all employees at the time of hire. Plan B is available to employees after working ninety days. For SOC Production Occupations, Acme Engines will report 100% of its employees are eligible for employer provided medical benefits because all of its employees are eligible for at least one medical care plan offered by Acme Engines.

(ii) ~~Example 20.~~ Apex Aluminum has fifty employees classified as SOC Transportation and Material Moving Occu-

pations, all of whom have worked for Apex Aluminum for over five years. Apex Aluminum offers one medical care plan to its employees. Employees must work for Apex Aluminum for six months to participate in the medical care plan. On October 1st, Apex Aluminum hires ten new employees classified as SOC Transportation and Material Moving Occupations. For SOC Transportation and Material Moving Occupations, Apex Aluminum will report 83.3% of its employees are eligible for employer provided medical benefits.

**(b) Detail by type of health plan.** The report also requires detailed information about the types of health plans the employer provides. If an employer has more than one type of health plan, it must report each health plan separately. If a person offers more than one of the same type of health plan as described in (b)(i) of this subsection, the person may consolidate the detail required in (b) through (d) of this subsection by using ranges to describe the information. The details include:

(i) A description of the type of plan in general terms such as self-insured, fee for service, preferred provider organization, health maintenance organization, health savings account, or other general description. The report does not require a person to disclose the name(s) of their health insurance carrier(s).

(ii) The number of employees eligible to participate in the health plan, as a percentage of total employment at the manufacturing site or as otherwise reported. Percentages should be rounded to the nearest 1/10th of 1% (XX.X%).

(iii) The number of employees enrolled in the health plan, as a percentage of employees eligible to participate in the health plan at the manufacturing site or as otherwise reported. An employee is "enrolled" if the employee is currently covered by or participating in an employer-provided health plan. Percentages should be rounded to the nearest 1/10th of 1% (XX.X%).

(iv) The average percentage of premium paid by employees enrolled in the health plan. "Premium" means the cost incurred by the employer to provide a health plan or the continuance of a health plan, such as amounts paid to health carriers or costs incurred by employers to self-insure. Employers are generally legally responsible for payment of the entire cost of the premium for enrolled employees, but may require enrolled employees to share in the cost of the premium to obtain coverage. State the amount of premium, as a percentage, employees must pay to maintain enrollment under the health plan. Percentages should be rounded to the nearest 1/10th of 1% (XX.X%).

(v) If necessary, the average monthly contribution to enrolled employees. In some instances, employers may make contributions to an employee health plan, but may not be aware of the percentage of premium cost borne by the employee. For example, employers may contribute to a health plan sponsored by an employee organization, or may sponsor a medical savings account or health savings account. Under those circumstances in which the employee's contribution to the health plan is unknown, an employer must report its average monthly contribution to the health plan by dividing the employer's total monthly costs for the health plan by the total number of employees enrolled in the health plan.

(vi) Whether legal spouses, state registered domestic partners, and unmarried dependent children can obtain coverage under the health plan and if there is an additional premium for such coverage.

(vii) Whether part time employees are eligible to participate in the health plan.

**(c) Medical care plans.** In addition to the detailed information required for each health plan, report the amount of enrolled employee point of service cost sharing for hospital services, prescription drug benefits, and primary care physician services for each medical care plan. If differences exist within a medical care plan, the lowest cost option to the enrolled employee must be stated in the report. For example, if employee point of service cost sharing is less if an enrolled employee uses a network of preferred providers, report the amount of point of service cost sharing using a preferred provider. Employee point of service cost sharing is generally stated as a percentage of cost, a specific dollar amount, or both.

(i) "Employee point of service cost sharing" means amounts paid to health carriers directly providing medical care services, health care providers, or health care facilities by enrolled employees in the form of copayments, co-insurance, or deductibles. Copayments and co-insurance mean an amount specified in a medical care plan that is an obligation of enrolled employees for a specific medical care service which is not fully prepaid. A deductible means the amount an enrolled employee is responsible to pay before the medical care plan begins to pay the costs associated with treatment.

(ii) "Hospital services" means covered in patient medical care services performed in a hospital licensed under chapter 70.41 RCW.

(iii) "Prescription drug benefit" means coverage to purchase a thirty-day or less supply of generic prescription drugs from a retail pharmacy.

(iv) "Primary care provider services" means non-emergency medical care services provided in an office setting by the employee's primary care provider.

**(d) Dental care plans.** In addition to the health plan information required for each dental care plan, the annual maximum benefit for each dental care plan must be stated in the report. Most dental care plans have an annual dollar maximum benefit. This is the maximum dollar amount a dental care plan will pay toward the cost of dental care services within a specific benefit period, generally one year. The enrolled employee is personally responsible for paying costs above the annual maximum.

**(e) The following facts apply to the examples in (e) of this subsection.** Mosaic Aerospace employs one hundred employees and offers two medical care plans as health benefits to employees at the time of hire. Plan A is a managed care plan (HMO). Plan B is a fee for service medical care plan.

(i) **Example 21.** Forty Mosaic Aerospace employees are enrolled in Plan A. It costs Mosaic Aerospace \$750 a month for each employee covered by Plan A. Enrolled employees must pay \$150 each month to participate in Plan A. If an enrolled employee uses its network of physicians, Plan A will cover 100% of the cost of primary care provider services with employees paying a \$10.00 copayment per visit. If an enrolled employee uses its network of hospitals, Plan A will

cover 100% of the cost of hospital services with employees paying a \$200 deductible. If an enrolled employee does not use a network provider, Plan A will cover only 50% of the cost of any service with a \$500 employee deductible. An enrolled employee must use a network of retail pharmacies to receive any prescription drug benefit. Plan A will cover the cost of prescription drugs with enrolled employees paying a \$10.00 copayment. If an enrolled employee uses the mail-order pharmacy option offered by Plan A, copayment for prescription drug benefits is not required.

Mosaie Aerospace will report Plan A separately as a managed care plan. One hundred percent of its employees are eligible to participate in Plan A. The percentage of eligible employees enrolled in Plan A is 40%. The percentage of premium paid by an employee is 20%. Mosaie Aerospace will also report that employees have a \$10.00 copayment for primary care provider services and a \$200 deductible for hospital services because this is the lowest cost option within Plan A. Mosaie Aerospace will report that employees have a \$10.00 copayment for prescription drug benefit. Mosaie Aerospace cannot report that employees do not have a prescription drug benefit copayment because "prescription drug benefit" is defined as coverage to purchase a thirty-day or less supply of generic prescription drugs from a retail pharmacy, not a mail-order pharmacy.

(ii) **Example 22.** Fifty Mosaie Aerospace employees are enrolled in Plan B. It costs Mosaie Aerospace \$1,000 a month for each employee covered by Plan B. Enrolled employees must pay \$300 a month to participate in Plan B. Plan B covers 100% of the cost of primary care provider services and 100% of the cost of prescription drugs with employees paying a \$200 annual deductible for each covered service. Plan B covers 80% of the cost of hospital services with employees paying a \$250 annual deductible.

Mosaie Aerospace will report Plan B separately as a fee for service medical care plan. One hundred percent of its employees are eligible to participate in Plan B. The percentage of eligible employees enrolled in Plan B is 50%. The percentage of premium paid by an employee is 30%. Mosaie Aerospace will also report that employees have a \$200 annual deductible for both primary care provider services and prescription drug benefits. Hospital services have a \$250 annual deductible and 20% co-insurance obligation.

(iii) **Example 23.** On December 1st, Mosaie Aerospace acquires General Aircraft Inc., a company claiming all the tax preferences available for manufacturers and processors for hire of commercial airplanes and component parts. General Aircraft Inc. had fifty employees, all of whom were retained by Mosaie Aerospace. At General Aircraft Inc., employees were offered one managed care plan (HMO) as a benefit. The former General Aircraft Inc. employees will retain their current managed care plan until the following June when employees would be offered Mosaie Aerospace benefits. On December 31st, Mosaie Aerospace is offering employees two managed care plans. Mosaie Aerospace may report each managed care plan separately or may consolidate the detail required in (b) through (d) of this subsection for this type of medical care plan by using ranges to report the information.

(iv) **Example 24.** Aero Turbines employs one hundred employees. It offers employees health savings accounts as a

benefit to employees who have worked for the company for six months. Aero Turbines established the employee health savings accounts with a local bank and makes available to employees a high deductible medical care plan to be used in conjunction with the account. Aero Turbines deposits \$500 a month into each employee's health savings account. Employees deposit a portion of their pretax earnings into a health savings account to cover the cost of primary care provider services, prescription drug purchases, and the high deductible medical care plan for hospital services. The high deductible medical care plan has an annual deductible of \$2,000 and covers 75% of the cost of hospital services. Sixty-six employees open health savings accounts. Four employees have not worked for Aero Turbines for six months.

Aero Turbines will report the medical care plan as a health savings account. Ninety-six percent of employees are eligible to participate in health savings accounts. The percentage of eligible employees enrolled in health savings accounts is 68.8%. Because the amount of employee deposits into their health savings accounts will vary, Aero Turbines will report the average monthly contribution of \$500 rather than the percentage of premium paid by enrolled employees. Because employees are responsible for covering their primary care provider services and prescription drugs costs, Aero Turbines will report that this health plan does not include these services. Because the high deductible medical care plan covers the costs of hospital services, Aero Turbines will report that the medical care plan has an annual deductible of \$2,000 and employees have 25% co-insurance obligation.

**(14) What are employer-provided retirement benefits?** For purposes of the annual report, "retirement benefits" mean compensation, not paid as wages, in the form of a retirement plan offered by an employer to its employees. A "retirement plan" means any plan, account, deposit, annuity, or benefit, other than a life insurance policy, that provides for retirement income or deferred income to employees for periods extending to the termination of employment or beyond. Retirement plans include pensions, annuities, stock bonus plans, employee stock ownership plans, profit sharing plans, self-employed retirement plans, individual retirement accounts, individual retirement annuities, and retirement bonds, as well as any other plan or program, without regard to its source of funding, and without regard to whether the retirement plan is a qualified plan meeting the guidelines established in the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code. A retirement plan that is equally available to employees and the general public is not an "employer-provided" retirement benefit.

**(15) How are employer-provided retirement benefits detailed in the annual report?** The annual report is organized by SOC major group and by type of retirement plans offered to employees or with enrolled employees on December 31st of the calendar year for which an applicable tax preference is claimed. Inactive or terminated retirement plans are excluded from the annual report. An inactive retirement plan is a plan that is not offered to new employees, but has enrolled employees, and neither enrolled employees nor the employer are making contributions to the retirement plan.

(a) **Detail by SOC major group.** For each SOC major group, report the number of employees, as a percentage of total employment in the SOC major group, eligible to participate in an employer-provided retirement plan. An employee is "eligible" if the employee can currently participate in a retirement plan provided by the employer. Waiting periods, tenure requirements, minimum work hour requirements, and other limitations may prevent an employee from being eligible for coverage in an employer's retirement plan. If an employer provides multiple retirement plans, an employee is "eligible" if the employee can currently participate in one of the retirement plans. Percentages should be rounded to the nearest 1/10th of 1% (XX.X%).

(i) **Example 25.** Lincoln Airplane has one hundred employees classified as SOC Production Occupations. Fifty employees were enrolled in defined benefit pension at the time of hire. All employees are eligible to participate in a 401(k) Plan. For SOC Production Occupations, Lincoln Airplane will report 100% of its employees are eligible for employer-provided retirement benefits because all of its employees are eligible for at least one retirement plan offered by Lincoln Airplane.

(ii) **Example 26.** Fly Rite Airplanes has fifty employees classified in SOC Computer and Mathematical Occupations. Fly Rite Airplane offers a SIMPLE IRA to its employees after working for the company one year. Forty-five employees classified in SOC Computer and Mathematical Occupations have worked for the company more than one year. For SOC Computer and Mathematical Occupations, Fly Rite Airplanes will report 90% of its employees are eligible for retirement benefits.

(b) **Detail by retirement plan.** The report also requires detailed information about the types of retirement plans an employer offers employees. If an employer offers multiple retirement plans, it must report each type of retirement plan separately. If an employer offers more than one of the same type of retirement plan, but with different levels of employer contributions, it may consolidate the detail required in (i) through (iv) of this subsection by using ranges to describe the information. The report includes:

(i) The type of plan in general terms such as 401(k) Plan, SEP IRA, SIMPLE IRA, cash balance pension, or defined benefit plan.

(ii) The number of employees eligible to participate in the retirement plan, as a percentage of total employment at the manufacturing site, or as otherwise reported. Percentages should be rounded to the nearest 1/10th of 1% (XX.X%).

(iii) The number of employees enrolled in the retirement plan, as a percentage of employees eligible to participate in the retirement plan at the manufacturing site. An employee is "enrolled" if the employee currently participates in an employer-provided retirement plan, regardless of whether the employee has a vested benefit. Percentages should be rounded to the nearest 1/10th of 1% (XX.X%).

(iv) The maximum benefit the employer will contribute into the retirement plan for enrolled employees. The maximum benefit an employer will contribute is generally stated as a percentage of salary, specific dollar amount, or both. This information is not required for a defined benefit plan meeting the qualification requirements of Employee Retirement

Income Security Act (ERISA) that provides benefits according to a flat benefit, career average, or final pay formula.

(A) **Example 27.** General Airspace is a manufacturer of airplane components located in Centralia, WA. General Airspace employs one hundred employees. Fifty employees are eligible for and enrolled in a defined benefit pension with a flat benefit at the time of retirement. Twenty-five employees are eligible for and enrolled in a cash balance pension with General Airspace contributing 7% of an employee's annual compensation with a maximum annual contribution of \$10,000. All General Airspace employees can participate in a 401(k) Plan. Sixty-five employees are participating in the 401(k) Plan. General Airspace does not make any contributions into the 401(k) Plan. Five employees are former employees of United Skyways, a company General Airspace acquired. United Skyways employees were enrolled in a cash balance pension at the time of hire. When General Airspace acquired United Skyways, it did not terminate or liquidate the United Skyways cash balance plan. Rather, General Airspace maintains cash balance plan only for former United Skyways employees, allowing only interest to accrue to the plan.

(I) General Airspace will report that it offers three retirement plans—A defined benefit pension, a cash balance pension, and a 401(k) Plan. General Airspace will not report the inactive cash balance pension it maintains for former United Skyways employees.

(II) For the defined benefit pension, General Airspace will report 50% of its total employment positions are eligible to participate. Of the employment positions eligible to participate, 100% are enrolled.

(III) For the cash balance pension, General Airspace will report 25% of its total employment positions are eligible to participate. Of the employment positions eligible to participate, 100% are enrolled. General Airspace will report a maximum contribution of \$10,000 or 7% of an employee's annual compensation.

(IV) For the 401(k) Plan, General Airspace will report 100% of its total employment positions are eligible to participate in the retirement plan. Of the employment positions eligible to participate, 65% are enrolled. General Airspace will report that it does not make any contributions into the 401(k) Plan.

(B) **Example 28.** Washington Alloys is an aluminum smelter located in Grandview, WA. Washington Alloys employs two hundred employees. Washington Alloys offers a 401(k) Plan to its employees after one year of hire. One hundred seventy-five employees have worked for Washington Alloys for one year or more. Of that amount, seventy-five have worked more than five years. Washington Alloys will match employee contributions up to a maximum 3% of annual compensation. If an employee has worked for Washington Alloys for more than five years, Washington Alloys will contribute 5% of annual compensation regardless of the employee's contribution. One hundred employees receive a 3% matching contribution from Washington Alloys. Fifty employees receive a contribution of 5% of annual compensation.

(I) Washington Alloys may report each 401(k) Plan separately—A 401(k) Plan with a maximum employer contribu-

tion of 3% of annual compensation and a 401(k) Plan with a maximum employer contribution to 5% of annual compensation. Alternatively, Washington Alloys may report that it offers a 401(k) Plan with a maximum employer contribution ranging from 3% to 5% of annual compensation.

(H) If Washington Alloys reports each 401(k) Plan separately, for the 401(k) Plan with a maximum employer contribution of 3% of annual compensation, Washington Alloys will report 50% of its total employment positions are eligible to participate. Of the employment positions eligible to participate, 100% are enrolled.

For the 401(k) Plan with a maximum employer contribution of 5% of annual compensation, Washington Alloys will report 37.5% of its total employment positions are eligible to participate. Of the employment positions eligible to participate, 66.6% are enrolled.

(III) If Washington Alloys consolidates its detailed information about its 401(k) Plans, it will report that 87.5% of its total employment positions are eligible to participate in 401(k) Plans. Of the employment positions eligible to participate in the 401(k) Plans, 85.7% are enrolled.

(16)) (13) **Additional reporting for aluminum smelters and electrolytic processing businesses.** For an aluminum smelter or electrolytic processing business, the annual tax performance report must indicate the quantity of product produced in this state during the time period covered by the report.

((17)) (14) **Are annual tax performance reports confidential?** Except for the additional information that the department and the joint legislative audit and review committee may request which it deems necessary to measure the results of, or to determine eligibility for the tax preference, annual tax performance reports are not subject to the confidentiality provisions of RCW 82.32.330 and may be disclosed to the public upon request.

((18)) (15) **What are the consequences for failing to file a complete annual tax performance report?**

(a) **What is a "complete annual tax performance report"?** An annual tax performance report is complete if:

(i) The annual tax performance report is filed on the form required by this rule or in an electronic format as required by law; and

(ii) The person makes a good faith effort to substantially respond to all report questions required by this rule.

Responses such as "varied," "various," or "please contact for information" are not considered good faith responses to a question.

(b) **Amounts due for late filing.** Except ~~((as otherwise provided by law))~~ for deferrals, if a person ~~((claims a tax preference that requires an))~~ **does not timely file a required annual tax performance report** ~~((under this rule, but fails to submit a complete report by the due dates described in subsection (3)(c) of this section, or any extension under RCW 82.32.590)),~~ then the following amounts are immediately due and payable:

~~((i) For reports due prior to July 1, 2017, one hundred percent of the amount of the tax preference claimed for the previous calendar year. Interest, but not penalties, will be assessed on the amounts due at the rate provided for under RCW 82.32.050, retroactively to the date the tax preference~~

~~was claimed, and accruing until the taxes for which the tax preference was claimed are repaid.~~

~~((i))~~ For reports due on or after July 1, 2017 or annual tax performance reports due on or after May 31, 2019:

~~((A))~~ (i) Thirty-five percent of the amount of the tax preference claimed for the previous calendar year; and

~~((B))~~ (ii) An additional fifteen percent of the amount of the tax preference claimed for the previous calendar year if the person has previously been assessed under (b)~~((i))~~ of this subsection for failure to timely submit a report for the same tax preference.

(c) **Tax deferrals.** If the tax preference is a deferral of tax, twelve and one-half percent of the deferred tax is immediately due. If the economic benefits of the deferral are passed to a lessee, the lessee is responsible for payment to the extent the lessee has received the economic benefit.

(d) **Interest and penalties.** The department may not assess interest or penalties on amounts due under (b)~~((i))~~ and (c) of this subsection.

~~((d))~~ (e) **Extension for circumstances beyond the control of the taxpayer.** If the department finds the failure of a taxpayer to file an annual tax performance report by the due date was the result of circumstances beyond the control of the taxpayer, the department will extend the time for filing the report. The extension will be for a period of thirty days from the date the department issues its written notification to the taxpayer that it qualifies for an extension under this rule. The department may grant additional extensions as it deems proper under RCW 82.32.590.

In determining whether the failure of a taxpayer to file an annual tax performance report by the due date was the result of circumstances beyond the control of the taxpayer, the department will apply the provisions in WAC 458-20-228 for the waiver or cancellation of penalties when the underpayment or untimely payment of any tax was due to circumstances beyond the control of the taxpayer.

~~((e))~~ (f) **One-time only extension.** A taxpayer who fails to file an annual tax performance report, as required under this rule, by the due date of the report is entitled to an extension of the due date. A request for an extension under this subsection must be made in writing to the department.

(i) To qualify for an extension, a taxpayer must have filed all annual tax performance reports, annual reports and annual surveys, if any, due in prior years by their respective due dates, beginning with annual reports and annual surveys due in the calendar year 2010.

(ii) The extension is for ninety days from the original due date of the annual tax performance report.

(iii) No taxpayer may be granted more than one ninety-day extension.

## NEW SECTION

**WAC 458-20-267A Annual reports for certain tax preferences.** (1) **Introduction.** Effective for calendar years in which a taxpayer claims a tax preference beginning January 1, 2018, Washington changed its annual reporting requirements. This rule addresses how taxpayers taking certain tax preferences must file an annual report with the department of revenue (department) providing information

about their business for tax periods through December 31, 2017, only. See WAC 458-20-267 Annual tax performance reports for certain tax preferences for the proper way to report tax preferences for periods beginning January 1, 2018.

(a) **Definitions.** For purposes of this rule the following definitions apply:

(i) **Person.** "Person" has the meaning under RCW 82.04.030 and also includes the state and its departments and institutions.

(ii) **Tax preference.** As defined under RCW 43.136.021, "tax preference" means:

(A) An exemption, exclusion, or deduction from the base of a state tax; a credit against a state tax; a deferral of a state tax; or a preferential state tax rate; and

(B) Includes only the tax preferences requiring a report under RCW 82.32.534.

(b) **Annual survey.** Taxpayers taking certain tax preferences may be required to complete both an annual report and an annual survey. For information on the annual survey requirements, refer to RCW 82.32.585 and WAC 458-20-268.

(c) **Examples.** This rule includes examples that identify a set of facts and then state a conclusion. These examples should only be used as a general guide. The department will evaluate each case on its particular facts and circumstances.

(2) **Tax preferences requiring an annual report.** Taxpayers may refer to the department's web site at [dor.wa.gov](http://dor.wa.gov) for the "Annual Tax Incentive Report for Preferential Tax Rates/Credits/Exemptions/Deferrals Worksheet." This worksheet lists tax preferences that require an annual report. Taxpayers may also contact the telephone information center at 800-647-7706 to determine whether they must file an annual report.

(3) **How to file annual reports.**

(a) **Electronic filing.** Reports must be filed electronically unless the department waives this requirement upon a showing of good cause. A report is filed electronically when the department receives the report in an electronic format. A person accesses electronic filing through their department "My Account" at [dor.wa.gov](http://dor.wa.gov).

(b) **Required paper form.** If the department waives the electronic filing requirement for a person who shows good cause, that person must use the annual report form developed by the department unless that person obtains prior written approval from the department to file an annual report in an alternative format.

(c) **How to obtain the form.** Persons who have received a waiver of the electronic filing requirement from the department or who otherwise would like a paper copy of the report may obtain the annual report form from the department's web site at [dor.wa.gov](http://dor.wa.gov). It may also be obtained by calling the telephone information center at 800-647-7706, or by contacting the department at:

Attn: Tax Incentive Team  
Taxpayer Account Administration  
Department of Revenue  
Post Office Box 47476  
Olympia, WA 98504-7476

(d) **Special requirement for persons who did not file an annual report during the previous calendar year.** If a person is a first-time filer or otherwise did not file an annual report with the department during the previous calendar year, the report must include information on employment, wages, and employer-provided health and retirement benefits for the two calendar years immediately preceding the due date of the report.

(e) **Due date of annual report.** Every person claiming a tax preference that requires a report under RCW 82.32.534 must file the report annually with the department in the year following the calendar year in which the person becomes eligible to claim the tax preference. The due date for filing the report is as follows:

(i) April 30th for reports due prior to 2017.

(ii) May 31st for reports due in or after 2017.

(f) **Due date extensions.** The department may extend the due date for filing annual reports as provided in subsection (18) of this rule.

(g) **Example 1.** An aerospace firm first claimed the B&O tax rate provided by RCW 82.04.260(11) for manufacturers and processors for hire of commercial airplanes and component parts on April 1, 2015. By April 30, 2016, the aerospace firm must submit an annual report covering calendar years 2014 and 2015. If the aerospace firm continues to claim the B&O tax rate provided by RCW 82.04.260(11) during calendar year 2016, an annual report is due by May 31, 2017, covering calendar year 2016.

(h) **Example 2.** An aluminum smelter first claimed the B&O tax rate provided by RCW 82.04.2909 for aluminum smelters on July 31, 2015. By April 30, 2016, the aluminum smelter must provide an annual report covering calendar years 2014 and 2015. If the aluminum smelter continues to claim the B&O tax rate provided by RCW 82.04.2909 during calendar year 2016, an annual report is due by May 31, 2017, covering calendar year 2016.

(4) **What employment positions are included in the annual report?**

(a) **General rule.** Except as provided in (b) of this subsection, the report must include information detailing employment positions in the state of Washington.

(b) **Alternative method.** Persons engaged in manufacturing commercial airplanes or their components may report employment positions per job at the manufacturing site.

(i) **What is a "manufacturing site"?** For purposes of the annual report, a "manufacturing site" is one or more immediately adjacent parcels of real property located in Washington state on which manufacturing occurs that support activities qualifying for a tax preference. Adjacent parcels of real property separated only by a public road comprise a single site. A manufacturing site may include real property that supports the qualifying activity, such as administration offices, test facilities, warehouses, design facilities, and shipping and receiving facilities. It may also include portions of the manufacturing site that support nonqualifying activities.

(ii) **If the person files per job at the manufacturing site, which manufacturing site is included in the annual report for the aerospace manufacturing industry tax preferences?** The location(s) where a person is manufacturing commercial airplanes or components of such airplanes

within this state is the manufacturing site(s) included in the annual report. A "commercial airplane" has its ordinary meaning, which is an airplane certified by the Federal Aviation Administration (FAA) for transporting persons or property, and any military derivative of such an airplane. A "component" means a part or system certified by the FAA for installation or assembly into a commercial airplane.

(iii) **Are there alternative methods for reporting separately for each manufacturing site?** For purposes of completing the annual report, the department may agree to allow a person whose manufacturing sites are within close geographic proximity to consolidate its manufacturing sites onto a single annual report provided that the jobs located at the manufacturing sites have equivalent employment positions, wages, and employer-provided health and retirement benefits. A person may request written approval to consolidate manufacturing sites by contacting the department at:

Attn: Tax Incentive Team  
Taxpayer Account Administration  
Department of Revenue  
Post Office Box 47476  
Olympia, WA 98504-7476

(c) **Example 3.** ABC Airplanes, a company manufacturing FAA certified airplane landing gear, conducts activities at three locations in Washington state. ABC Airplanes is reporting tax under the B&O tax rate provided by RCW 82.04.260 (11) for manufacturers and processors for hire of commercial airplanes and component parts. In Seattle, WA, ABC Airplanes maintains its corporate headquarters and administrative offices. In Spokane, WA, ABC Airplanes manufactures the brake systems for the landing gear. In Vancouver, WA, ABC Airplanes assembles the landing gear using the components manufactured in Spokane, WA. If filing per manufacturing site, ABC Airplanes must file separate annual reports for employment positions at its manufacturing sites in Spokane and Vancouver because these are the Washington state locations in which manufacturing occurs that supports activities qualifying for a tax preference.

(d) **Example 4.** Acme Engines, a company manufacturing engine parts, conducts manufacturing in five locations in Washington state. Acme Engines is reporting tax under the B&O tax rate provided by RCW 82.04.260 (11) for manufacturers and processors for hire of commercial airplanes and component parts. It manufactures FAA certified engine parts at its Puyallup, WA location. Acme Engines' four other locations manufacture non-FAA certified engine parts. If filing per manufacturing site, Acme Engines must file an annual report for employment positions at its manufacturing site in Puyallup because it is the only location in Washington state in which manufacturing occurs that supports activities qualifying for a tax preference.

(e) **Example 5.** Tacoma Rivets, with one in-state manufacturing site located in Tacoma, WA, manufactures rivets used in manufacturing airplanes. Half of the rivets Tacoma Rivets manufactures are FAA certified to be used on commercial airplanes. The remaining rivets Tacoma Rivets manufactures are not FAA certified and are used on military airplanes. Tacoma Rivets is reporting tax on its sales of FAA certified rivets under the B&O tax rate provided by RCW

82.04.260(11) for manufacturers and processors for hire of commercial airplanes and component parts. If filing per manufacturing site, Tacoma Rivets must file an annual report for employment positions at its manufacturing site in Tacoma because it is the location in Washington state in which manufacturing occurs that supports activities qualifying for a tax preference.

(f) **Example 6.** Dynamic Aerospace Composites is a company that manufactures only FAA certified airplane fuselage materials. Dynamic Aerospace Composites conducts activities at three separate locations within Kent, WA. Dynamic Aerospace Composites is reporting tax under the B&O tax rate provided by RCW 82.04.260(11) for manufacturers and processors for hire of commercial airplanes and component parts. If filing per manufacturing site, Dynamic Aerospace Composites must file separate annual reports for each of its three manufacturing sites.

(g) **Example 7.** Worldwide Aerospace, an aerospace company, manufactures wing systems for commercial airplanes in twenty locations around the world, but none located in Washington state. Worldwide Aerospace manufactures wing surfaces in San Diego, CA. Worldwide Aerospace sells the wing systems to an airplane manufacturer located in Moses Lake, WA and is reporting tax on these sales under the B&O tax rate provided by RCW 82.04.260(11) for sales, at retail or wholesale, of commercial airplanes, or components of such airplanes, manufactured by that person. Worldwide Aerospace is required to complete the annual report for any employment positions in Washington that are directly related to the qualifying activity.

(5) **What jobs are included in the annual report?** The annual report covers all full-time, part-time, and temporary jobs in this state or, for persons filing as provided in subsection (4)(b) of this rule, at the manufacturing site as of December 31st of the calendar year for which an applicable tax preference is claimed. Jobs that support nonqualifying activities or support both nonqualifying and qualifying activities for a tax preference are included in the report if the job is located in Washington state or, for persons filing as provided in subsection (4)(b) of this rule, at the manufacturing site.

(a) **Example 8.** XYZ Aluminum, an aluminum smelter company, manufactures aluminum in Tacoma, WA. The company is reporting tax under the B&O tax rate provided by RCW 82.04.2909 for aluminum smelters. XYZ Aluminum's annual report for its Tacoma, WA location will include all of its employment positions in this state, including its nonmanufacturing employment positions.

(b) **Example 9.** AAA Tire Company manufactures tires at one manufacturing site located in Centralia, WA. The company is reporting tax under the B&O tax rate provided by RCW 82.04.260(11) for manufacturers and processors for hire of commercial airplanes and component parts. FAA certified tires comprise only 20% of the products it manufactures and are manufactured in a separate building at the manufacturing site. If filing under the method described in subsection (4)(b) of this rule, AAA Tire Company must report all jobs at the manufacturing site, including the jobs engaged in the nonqualifying activities of manufacturing non-FAA certified tires.

**(6) How is employment detailed in the annual report?**

The annual report is organized by employee occupational groups, consistent with the United States Department of Labor's Standard Occupation Codes (SOC) System. The SOC System is a universal occupational classification system used by government agencies and private industries to produce comparable occupational data. The SOC classifies occupations at four levels of aggregation:

- (a) Major group;
- (b) Minor group;
- (c) Broad occupation; and
- (d) Detailed occupation.

All occupations are clustered into one of twenty-three major groups. The annual report uses the SOC major groups to detail the levels of employment, wages, and employer-provided health and retirement benefits at the manufacturing site. A detailed description of the SOC System is available by consulting the United States Department of Labor, Bureau of Labor Statistics online at [www.bls.gov/soc](http://www.bls.gov/soc). The annual report does not require names of employees.

**(7) What is total employment?**

The annual report must state the total number of employees for each SOC major group that are currently employed on December 31st of the calendar year for which an applicable tax preference is taken. Total employment includes employees who are on authorized leaves of absences such as sick leave, vacation, disability leave, jury duty, military leave, regardless of whether those employees are receiving wages. Leaves of absences do not include separations of employment such as layoffs or reductions in force. Vacant positions are not included in total employment.

**(8) What are full-time, part-time, and temporary employment positions?** An employer must provide information on the number of employees, as a percentage of total employment in the SOC major group, that are employed in full-time, part-time, or temporary employment positions on December 31st of the calendar year for which an applicable tax preference is claimed. Percentages should be rounded to the nearest 1/10th of 1% (XX.X%).

**(a) Full-time and part-time employment positions.**

For a position to be treated as full time or part time, the employer must intend for the position to be filled for at least fifty-two consecutive weeks or twelve consecutive months. A full-time position is a position that satisfies any one of the following minimum thresholds:

- (i) Works thirty-five hours per week for fifty-two consecutive weeks;
- (ii) Works four hundred fifty-five hours, excluding overtime, each quarter for four consecutive quarters; or
- (iii) Works one thousand eight hundred twenty hours, excluding overtime, during a period of twelve consecutive months.

A part-time position is a position in which the employee works less than the hours required for a full-time position. In some instances, an employee may not be required to work the hours required for full-time employment because of paid rest and meal breaks, health and safety laws, disability laws, shift differentials, or collective bargaining agreements, but receives wages equivalent to a full-time job. If, in the absence of these factors, the employee would be required to work the

number of hours for a full-time position to receive full-time wages, the position should be reported as a full-time employment position.

**(b) Temporary positions.** A temporary position is a position that is intended to be filled for period of less than twelve consecutive months. Positions in seasonal employment are temporary positions. Temporary positions include workers furnished by staffing companies regardless of the duration of the placement with the person required to file the annual report.

**(c) The following facts apply to the examples in (c) of this subsection.** National Airplane Inc. manufactures FAA certified navigation systems at a manufacturing site located in Tacoma, WA. National Airplane Inc. is claiming all the tax preferences available for manufacturers and processors for hire of commercial airplanes and component parts. National Airplane Inc. employs one hundred people. Seventy-five of the employees work directly in the manufacturing operation and are classified as SOC Production Occupations. Five employees work in the engineering and design division and are classified as SOC Architect and Engineering Occupations. Five employees are sales representatives and are classified as SOC Sales and Related Occupations. Five employees are service technicians and are classified as SOC Installation, Maintenance, and Repair Occupations. Five employees are administrative assistants and are classified as SOC Office and Administrative Support. Five executives are classified as SOC Management Occupations.

**(i) Example 10.** Through a college work-study program, National Airplane Inc. employs six interns from September through June in its engineering department. The interns work twenty hours a week. The six interns are reported as temporary employees, and not as part-time employees, because the intern positions are intended to be filled for a period of less than twelve consecutive months. Assuming the five employees classified as SOC Architect and Engineering Occupations are full-time employees, National Airplane Inc. will report a total of eleven employment positions in SOC Architect and Engineering Occupations with 45% in full-time employment positions and 55% in temporary employment positions.

**(ii) Example 11.** National Airplane Inc. manufactures navigation systems in two shifts of production. The first shift works eight hours from 8:00 a.m. to 5:00 p.m. Monday thru Friday. The second shift works six hours from 6:00 p.m. to midnight Monday thru Friday. The second shift works fewer hours per week (thirty hours) than the first shift (forty hours) as a pay differential for working in the evening. If a second shift employee transferred to the first shift, the employee would be required to work forty hours with no overall increase in wages. The second shift employees should be reported as full-time employment positions, rather than part-time employment positions.

**(iii) Example 12.** On December 1st, ten National Airplane Inc. full-time employees classified as SOC Production Occupations take family and medical leave for twelve weeks. National Airplane Inc. hires five people to perform the work of the employees on leave. Because the ten employees classified as SOC Production Occupations are on authorized leave, National Airplane Inc. will include those employees in the annual report as full-time employment positions. The five

people hired to replace the absent employees classified as SOC Production Occupations will be included in the report as temporary employees. National Airplane Inc. will report a total of eighty employment positions in SOC Production Occupations with 93.8% in full-time employment positions and 6.2% in temporary employment positions.

(iv) **Example 13.** On December 1st, one full-time employee classified as SOC Sales and Related Occupations resigns from her position. National Airplane Inc. contracts with Jane Smith d/b/a Creative Enterprises, Inc. to finish an advertising project assigned to the employee who resigned. Because Jane Smith is an independent contractor, National Airplane Inc. will not include her employment in the annual report. Because the resignation has resulted in a vacant position, the total number of employment positions National Airplane Inc. will report in SOC Sales and Related Occupations is reduced to four employment positions.

(v) **Example 14.** All National Airplane Inc. employees classified as SOC Office and Administrative Support Occupations work forty hours a week, fifty-two weeks a year. On November 1st, one employee must limit the number of hours worked to thirty hours each week to accommodate a disability. The employee receives wages based on the actual hours worked each week. Because the employee works less than thirty-five hours a week and is not paid a wage equivalent to a full-time position, the employee's position is a part-time employment position. National Airplane Inc. will report a total of five employment positions in SOC Office and Administrative Support Occupations with 80% in full-time employment positions and 20% in part-time employment positions.

(9) **What are wages?** For the purposes of the annual report, "wages" means the base compensation paid to an individual for personal services rendered to an employer, whether denominated as wages, salary, commission, or otherwise. Compensation in the form of overtime, tips, bonuses, benefits (insurance, paid leave, meals, etc.), stock options, and severance pay are not "wages." For employees that earn an annual salary, hourly wages are determined by dividing annual salary by 2080. If an employee is paid by commission, hourly wages are determined by dividing the total amount of commissions paid during the calendar year by 2080.

(10) **How are wages detailed for the annual report?**

(a) An employer must provide information on the number of employees, as a percentage of the total employment in the SOC major group, paid a wage within the following five hourly wage bands:

- Up to \$10.00 an hour;
- \$10.01 an hour to \$15.00 an hour;
- \$15.01 an hour to \$20.00 an hour;
- \$20.01 an hour to \$30.00 an hour; and
- \$30.01 an hour or more.

Percentages should be rounded to the nearest 1/10th of 1% (XX.X%). For purposes of the annual report, wages are measured on December 31st of the calendar year for which an applicable tax preference is claimed.

(b) **The following facts apply to the examples in (b) of this subsection.** Washington Airplane Inc. manufactures FAA certified navigation systems at a manufacturing site

located in Tacoma, WA. Washington Airplane Inc. is claiming all the tax preferences available for manufacturers and processors for hire of commercial airplanes and component parts. Washington Airplane Inc. employs five hundred people at the manufacturing site, which constitutes its entire work force in this state. Four hundred employees engage in activities that are classified as SOC Production Occupations. Fifty employees engage in activities that are classified as SOC Architect and Engineer Occupations. Twenty-five employees are engaged in activities classified as SOC Management Occupations. Twenty employees are engaged in activities classified as SOC Office and Administrative Support Occupations. Five employees are engaged in activities classified as SOC Sales and Related Occupations.

(i) **Example 15.** One hundred employees classified as SOC Production Occupations are paid \$12.00 an hour. Two hundred employees classified as SOC Production Occupations are paid \$17.00 an hour. One hundred employees classified as SOC Production Occupations are paid \$25.00 an hour. For SOC Production Occupations, Washington Airplane Inc. will report 25% of employment positions are paid \$10.01 an hour to \$15.00 an hour; 50% are paid \$15.01 an hour to \$20.00 an hour; and 25% are paid \$20.01 an hour to \$30.00 an hour.

(ii) **Example 16.** Ten employees classified as SOC Architect and Engineering Occupations are paid an annual salary of \$42,000; another ten employees are paid \$50,000 annually; and the remaining employees are all paid over \$70,000 annually. To report wages, the annual salaries must be converted to hourly amounts by dividing the annual salary by 2080 hours. For SOC Architect and Engineering Occupations, Washington Airplane Inc. will report 40% of employment positions are paid \$20.01 an hour to \$30.00 an hour and 60% are paid \$30.00 an hour or more.

(iii) **Example 17.** All the employees classified as SOC Sales and Related Occupations are sales representatives that are paid on commission. They receive \$10.00 commission for each navigation system sold. Three sales representatives sell 2,500 navigation systems during the calendar year. Two sales representatives sell 3,500 navigation systems during the calendar year and receive a \$10,000 bonus for exceeding company's sales goals. To report wages, the employee's commissions must be converted to hourly amounts by dividing the total commissions by 2080 hours. Washington Airplane Inc. will report that 60% of employment positions classified as SOC Sales and Related Occupations are paid \$10.01 an hour to \$15.00 an hour. Because bonuses are not included in wages, Washington Airplane Inc. will report 40% of employment positions classified as SOC Sales and Related Occupations are paid \$15.01 an hour to \$20.00 an hour.

(iv) **Example 18.** Ten of the employees classified as SOC Office and Administrative Support Occupations earn \$9.50 an hour. The remaining ten employees classified as SOC Office and Administrative Support Occupations earn wages between \$10.01 an hour to \$15.00 an hour. On December 1st, Washington Airplane Inc. announces that effective December 15th, all employees classified as SOC Office and Administrative Support Occupations will earn wages of at least \$10.50 an hour, but no more than \$15.00 an hour. Because wages are measured on December 31st, Washington

Airplane Inc. will report 100% of employment positions classified as SOC Office and Administrative Support Occupations Sales and Related Occupations are paid \$10.01 an hour to \$15.00 an hour.

(11) **Reporting workers furnished by staffing companies.** For temporary positions filled by workers that are furnished by staffing companies, the person filling out the annual report must provide the following information:

(a) Total number of staffing company employees furnished by staffing companies;

(b) Top three occupational codes of all staffing company employees; and

(c) Average duration of all staffing company employees.

(12) **What are employer-provided health benefits?** For purposes of the annual report, "health benefits" means compensation, not paid as wages, in the form of a health plan offered by an employer to its employees. A health plan that is equally available to employees and the general public is not an "employer-provided" health benefit.

(a) "Dental care services" means services offered or provided by health care facilities and health care providers relating to the prevention, cure, or treatment of illness, injury, or disease of human teeth, alveolar process, gums, or jaw.

(b) "Dental care plan" means a health plan for the purpose of providing for its employees or their beneficiaries' dental care services.

(c) "Health plan" means any plan, fund, or program established, maintained, or funded by an employer for the purpose of providing for its employees or their beneficiaries, through the purchase of insurance or otherwise, medical care and dental care services. Health plans include any "employee welfare benefit plan" as defined by the Employee Retirement Income Security Act (ERISA), any "health plan" or "health benefit plan" as defined in RCW 48.43.005, any self-funded multiple employer welfare arrangement as defined in RCW 48.125.010, any "qualified health insurance" as defined in Section 35 of the Internal Revenue Code, an "Archer MSA" as defined in Section 220 of the Internal Revenue Code, a "health savings plan" as defined in Section 223 of the Internal Revenue Code, any "health plan" qualifying under Section 213 of the Internal Revenue Code, governmental plans, and church plans.

(d) "Medical care services" means services offered or provided by health care facilities and health care providers relating to the prevention, cure, or treatment of illness, injury, or disease.

(e) "Medical care plan" means a health plan for the purpose of providing for its employees or their beneficiaries' medical care services.

(13) **How are employer-provided health benefits detailed in the annual report?** The annual report is organized by SOC major group and by type of health plan offered to or with enrolled employees on December 31st of the calendar year for which an applicable tax preference is claimed.

(a) **Detail by SOC major group.** For each SOC major group, report the number of employees, as a percentage of total employment in the SOC major group, eligible to participate in an employer-provided medical care plan. An employee is "eligible" if the employee can currently participate in a medical care plan provided by the employer. Wait-

ing periods, tenure requirements, minimum work hour requirements, preexisting conditions, and other limitations may prevent an employee from being eligible for coverage in an employer's medical care plan. If an employer provides multiple medical care plans, an employee is "eligible" if the employee can currently participate in one of the medical care plans. Percentages should be rounded to the nearest 1/10th of 1% (XX.X%).

(i) **Example 19.** On December 31st, Acme Engines has one hundred employees classified as SOC Production Occupations. It offers these employees two medical care plans. Plan A is available to all employees at the time of hire. Plan B is available to employees after working ninety days. For SOC Production Occupations, Acme Engines will report 100% of its employees are eligible for employer-provided medical benefits because all of its employees are eligible for at least one medical care plan offered by Acme Engines.

(ii) **Example 20.** Apex Aluminum has fifty employees classified as SOC Transportation and Material Moving Occupations, all of whom have worked for Apex Aluminum for over five years. Apex Aluminum offers one medical care plan to its employees. Employees must work for Apex Aluminum for six months to participate in the medical care plan. On October 1st, Apex Aluminum hires ten new employees classified as SOC Transportation and Material Moving Occupations. For SOC Transportation and Material Moving Occupations, Apex Aluminum will report 83.3% of its employees are eligible for employer-provided medical benefits.

(b) **Detail by type of health plan.** The report also requires detailed information about the types of health plans the employer provides. If an employer has more than one type of health plan, it must report each health plan separately. If a person offers more than one of the same type of health plan as described in (b)(i) of this subsection, the person may consolidate the detail required in (b) through (d) of this subsection by using ranges to describe the information. The details include:

(i) A description of the type of plan in general terms such as self-insured, fee for service, preferred provider organization, health maintenance organization, health savings account, or other general description. The report does not require a person to disclose the name(s) of their health insurance carrier(s).

(ii) The number of employees eligible to participate in the health plan, as a percentage of total employment at the manufacturing site or as otherwise reported. Percentages should be rounded to the nearest 1/10th of 1% (XX.X%).

(iii) The number of employees enrolled in the health plan, as a percentage of employees eligible to participate in the health plan at the manufacturing site or as otherwise reported. An employee is "enrolled" if the employee is currently covered by or participating in an employer-provided health plan. Percentages should be rounded to the nearest 1/10th of 1% (XX.X%).

(iv) The average percentage of premium paid by employees enrolled in the health plan. "Premium" means the cost incurred by the employer to provide a health plan or the continuance of a health plan, such as amounts paid to health carriers or costs incurred by employers to self-insure. Employers are generally legally responsible for payment of the entire

cost of the premium for enrolled employees, but may require enrolled employees to share in the cost of the premium to obtain coverage. State the amount of premium, as a percentage, employees must pay to maintain enrollment under the health plan. Percentages should be rounded to the nearest 1/10th of 1% (XX.X%).

(v) If necessary, the average monthly contribution to enrolled employees. In some instances, employers may make contributions to an employee health plan, but may not be aware of the percentage of premium cost borne by the employee. For example, employers may contribute to a health plan sponsored by an employee organization, or may sponsor a medical savings account or health savings account. Under those circumstances in which the employee's contribution to the health plan is unknown, an employer must report its average monthly contribution to the health plan by dividing the employer's total monthly costs for the health plan by the total number of employees enrolled in the health plan.

(vi) Whether legal spouses, state registered domestic partners, and unmarried dependent children can obtain coverage under the health plan and if there is an additional premium for such coverage.

(vii) Whether part-time employees are eligible to participate in the health plan.

(c) **Medical care plans.** In addition to the detailed information required for each health plan, report the amount of enrolled employee point of service cost-sharing for hospital services, prescription drug benefits, and primary care physician services for each medical care plan. If differences exist within a medical care plan, the lowest cost option to the enrolled employee must be stated in the report. For example, if employee point of service cost-sharing is less if an enrolled employee uses a network of preferred providers, report the amount of point of service cost-sharing using a preferred provider. Employee point of service cost-sharing is generally stated as a percentage of cost, a specific dollar amount, or both.

(i) "Employee point of service cost-sharing" means amounts paid to health carriers directly providing medical care services, health care providers, or health care facilities by enrolled employees in the form of copayments, co-insurance, or deductibles. Copayments and co-insurance mean an amount specified in a medical care plan that is an obligation of enrolled employees for a specific medical care service which is not fully prepaid. A deductible means the amount an enrolled employee is responsible to pay before the medical care plan begins to pay the costs associated with treatment.

(ii) "Hospital services" means covered in-patient medical care services performed in a hospital licensed under chapter 70.41 RCW.

(iii) "Prescription drug benefit" means coverage to purchase a thirty-day or less supply of generic prescription drugs from a retail pharmacy.

(iv) "Primary care provider services" means non-emergency medical care services provided in an office setting by the employee's primary care provider.

(d) **Dental care plans.** In addition to the health plan information required for each dental care plan, the annual maximum benefit for each dental care plan must be stated in the report. Most dental care plans have an annual dollar maximum benefit.

This is the maximum dollar amount a dental care plan will pay toward the cost of dental care services within a specific benefit period, generally one year. The enrolled employee is personally responsible for paying costs above the annual maximum.

(e) **The following facts apply to the examples in (e) of this subsection.** Mosaic Aerospace employs one hundred employees and offers two medical care plans as health benefits to employees at the time of hire. Plan A is a managed care plan (HMO). Plan B is a fee for service medical care plan.

(i) **Example 21.** Forty Mosaic Aerospace employees are enrolled in Plan A. It costs Mosaic Aerospace \$750 a month for each employee covered by Plan A. Enrolled employees must pay \$150 each month to participate in Plan A. If an enrolled employee uses its network of physicians, Plan A will cover 100% of the cost of primary care provider services with employees paying a \$10.00 copayment per visit. If an enrolled employee uses its network of hospitals, Plan A will cover 100% of the cost of hospital services with employees paying a \$200 deductible. If an enrolled employee does not use a network provider, Plan A will cover only 50% of the cost of any service with a \$500 employee deductible. An enrolled employee must use a network of retail pharmacies to receive any prescription drug benefit. Plan A will cover the cost of prescription drugs with enrolled employees paying a \$10.00 copayment. If an enrolled employee uses the mail-order pharmacy option offered by Plan A, copayment for prescription drug benefits is not required.

Mosaic Aerospace will report Plan A separately as a managed care plan. One hundred percent of its employees are eligible to participate in Plan A. The percentage of eligible employees enrolled in Plan A is 40%. The percentage of premium paid by an employee is 20%. Mosaic Aerospace will also report that employees have a \$10.00 copayment for primary care provider services and a \$200 deductible for hospital services because this is the lowest cost option within Plan A. Mosaic Aerospace will report that employees have a \$10.00 copayment for prescription drug benefit. Mosaic Aerospace cannot report that employees do not have a prescription drug benefit copayment because "prescription drug benefit" is defined as coverage to purchase a thirty-day or less supply of generic prescription drugs from a retail pharmacy, not a mail-order pharmacy.

(ii) **Example 22.** Fifty Mosaic Aerospace employees are enrolled in Plan B. It costs Mosaic Aerospace \$1,000 a month for each employee covered by Plan B. Enrolled employees must pay \$300 a month to participate in Plan B. Plan B covers 100% of the cost of primary care provider services and 100% of the cost of prescription drugs with employees paying a \$200 annual deductible for each covered service. Plan B covers 80% of the cost of hospital services with employees paying a \$250 annual deductible.

Mosaic Aerospace will report Plan B separately as a fee for service medical care plan. One hundred percent of its employees are eligible to participate in Plan B. The percentage of eligible employees enrolled in Plan B is 50%. The percentage of premium paid by an employee is 30%. Mosaic Aerospace will also report that employees have a \$200 annual deductible for both primary care provider services and

prescription drug benefits. Hospital services have a \$250 annual deductible and 20% co-insurance obligation.

(iii) **Example 23.** On December 1st, Mosaic Aerospace acquires General Aircraft Inc., a company claiming all the tax preferences available for manufacturers and processors for hire of commercial airplanes and component parts. General Aircraft Inc. had fifty employees, all of whom were retained by Mosaic Aerospace. At General Aircraft Inc., employees were offered one managed care plan (HMO) as a benefit. The former General Aircraft Inc. employees will retain their current managed care plan until the following June when employees would be offered Mosaic Aerospace benefits. On December 31st, Mosaic Aerospace is offering employees two managed care plans. Mosaic Aerospace may report each managed care plan separately or may consolidate the detail required in (b) through (d) of this subsection for this type of medical care plan by using ranges to report the information.

(iv) **Example 24.** Aero Turbines employs one hundred employees. It offers employees health savings accounts as a benefit to employees who have worked for the company for six months. Aero Turbines established the employee health savings accounts with a local bank and makes available to employees a high deductible medical care plan to be used in conjunction with the account. Aero Turbines deposits \$500 a month into each employee's health savings account. Employees deposit a portion of their pretax earnings into a health savings account to cover the cost of primary care provider services, prescription drug purchases, and the high deductible medical care plan for hospital services. The high deductible medical care plan has an annual deductible of \$2,000 and covers 75% of the cost of hospital services. Sixty-six employees open health savings accounts. Four employees have not worked for Aero Turbines for six months.

Aero Turbines will report the medical care plan as a health savings account. Ninety-six percent of employees are eligible to participate in health savings accounts. The percentage of eligible employees enrolled in health savings accounts is 68.8%. Because the amount of employee deposits into their health savings accounts will vary, Aero Turbines will report the average monthly contribution of \$500 rather than the percentage of premium paid by enrolled employees. Because employees are responsible for covering their primary care provider services and prescription drugs costs, Aero Turbines will report that this health plan does not include these services. Because the high deductible medical care plan covers the costs of hospital services, Aero Turbines will report that the medical care plan has an annual deductible of \$2,000 and employees have 25% co-insurance obligation.

(14) **What are employer-provided retirement benefits?** For purposes of the annual report, "retirement benefits" mean compensation, not paid as wages, in the form of a retirement plan offered by an employer to its employees. A "retirement plan" means any plan, account, deposit, annuity, or benefit, other than a life insurance policy, that provides for retirement income or deferred income to employees for periods extending to the termination of employment or beyond. Retirement plans include pensions, annuities, stock bonus plans, employee stock ownership plans, profit sharing plans, self-employed retirement plans, individual retirement accounts, individual retirement annuities, and retirement

bonds, as well as any other plan or program, without regard to its source of funding, and without regard to whether the retirement plan is a qualified plan meeting the guidelines established in the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code. A retirement plan that is equally available to employees and the general public is not an "employer-provided" retirement benefit.

(15) **How are employer-provided retirement benefits detailed in the annual report?** The annual report is organized by SOC major group and by type of retirement plans offered to employees or with enrolled employees on December 31st of the calendar year for which an applicable tax preference is claimed. Inactive or terminated retirement plans are excluded from the annual report. An inactive retirement plan is a plan that is not offered to new employees, but has enrolled employees, and neither enrolled employees nor the employer are making contributions to the retirement plan.

(a) **Detail by SOC major group.** For each SOC major group, report the number of employees, as a percentage of total employment in the SOC major group, eligible to participate in an employer-provided retirement plan. An employee is "eligible" if the employee can currently participate in a retirement plan provided by the employer. Waiting periods, tenure requirements, minimum work hour requirements, and other limitations may prevent an employee from being eligible for coverage in an employer's retirement plan. If an employer provides multiple retirement plans, an employee is "eligible" if the employee can currently participate in one of the retirement plans. Percentages should be rounded to the nearest 1/10th of 1% (XX.X%).

(i) **Example 25.** Lincoln Airplane has one hundred employees classified as SOC Production Occupations. Fifty employees were enrolled in defined benefit pension at the time of hire. All employees are eligible to participate in a 401(k) Plan. For SOC Production Occupations, Lincoln Airplane will report 100% of its employees are eligible for employer-provided retirement benefits because all of its employees are eligible for at least one retirement plan offered by Lincoln Airplane.

(ii) **Example 26.** Fly-Rite Airplanes has fifty employees classified in SOC Computer and Mathematical Occupations. Fly-Rite Airplane offers a SIMPLE IRA to its employees after working for the company one year. Forty-five employees classified in SOC Computer and Mathematical Occupations have worked for the company more than one year. For SOC Computer and Mathematical Occupations, Fly-Rite Airplanes will report 90% of its employees are eligible for retirement benefits.

(b) **Detail by retirement plan.** The report also requires detailed information about the types of retirement plans an employer offers employees. If an employer offers multiple retirement plans, it must report each type of retirement plan separately. If an employer offers more than one of the same type of retirement plan, but with different levels of employer contributions, it may consolidate the detail required in (i) through (iv) of this subsection by using ranges to describe the information. The report includes:

(i) The type of plan in general terms such as 401(k) Plan, SEP IRA, SIMPLE IRA, cash balance pension, or defined benefit plan.

(ii) The number of employees eligible to participate in the retirement plan, as a percentage of total employment at the manufacturing site, or as otherwise reported. Percentages should be rounded to the nearest 1/10th of 1% (XX.X%).

(iii) The number of employees enrolled in the retirement plan, as a percentage of employees eligible to participate in the retirement plan at the manufacturing site. An employee is "enrolled" if the employee currently participates in an employer-provided retirement plan, regardless of whether the employee has a vested benefit. Percentages should be rounded to the nearest 1/10th of 1% (XX.X%).

(iv) The maximum benefit the employer will contribute into the retirement plan for enrolled employees. The maximum benefit an employer will contribute is generally stated as a percentage of salary, specific dollar amount, or both. This information is not required for a defined benefit plan meeting the qualification requirements of Employee Retirement Income Security Act (ERISA) that provides benefits according to a flat benefit, career-average, or final pay formula.

(A) **Example 27.** General Airspace is a manufacturer of airplane components located in Centralia, WA. General Airspace employs one hundred employees. Fifty employees are eligible for and enrolled in a defined benefit pension with a flat benefit at the time of retirement. Twenty-five employees are eligible for and enrolled in a cash balance pension with General Airspace contributing 7% of an employee's annual compensation with a maximum annual contribution of \$10,000. All General Airspace employees can participate in a 401(k) Plan. Sixty-five employees are participating in the 401(k) Plan. General Airspace does not make any contributions into the 401(k) Plan. Five employees are former employees of United Skyways, a company General Airspace acquired. United Skyways employees were enrolled in a cash balance pension at the time of hire. When General Airspace acquired United Skyways, it did not terminate or liquidate the United Skyways cash balance plan. Rather, General Airspace maintains cash balance plan only for former United Skyways employees, allowing only interest to accrue to the plan.

(I) General Airspace will report that it offers three retirement plans - A defined benefit pension, a cash-balance pension, and a 401(k) Plan. General Airspace will not report the inactive cash balance pension it maintains for former United Skyways employees.

(II) For the defined benefit pension, General Airspace will report 50% of its total employment positions are eligible to participate. Of the employment positions eligible to participate, 100% are enrolled.

(III) For the cash-balance pension, General Airspace will report 25% of its total employment positions are eligible to participate. Of the employment positions eligible to participate, 100% are enrolled. General Airspace will report a maximum contribution of \$10,000 or 7% of an employee's annual compensation.

(IV) For the 401(k) Plan, General Airspace will report 100% of its total employment positions are eligible to participate in the retirement plan. Of the employment positions eligible to participate, 65% are enrolled. General Airspace will report that it does not make any contributions into the 401(k) Plan.

(B) **Example 28.** Washington Alloys is an aluminum smelter located in Grandview, WA. Washington Alloys employs two hundred employees. Washington Alloys offers a 401(k) Plan to its employees after one year of hire. One hundred seventy-five employees have worked for Washington Alloys for one year or more. Of that amount, seventy-five have worked more than five years. Washington Alloys will match employee contributions up to a maximum 3% of annual compensation. If an employee has worked for Washington Alloys for more than five years, Washington Alloys will contribute 5% of annual compensation regardless of the employee's contribution. One hundred employees receive a 3% matching contribution from Washington Alloys. Fifty employees receive a contribution of 5% of annual compensation.

(I) Washington Alloys may report each 401(k) Plan separately - A 401(k) Plan with a maximum employer contribution of 3% of annual compensation and a 401(k) Plan with a maximum employer contribution to 5% of annual compensation. Alternatively, Washington Alloys may report that it offers a 401(k) Plan with a maximum employer contribution ranging from 3% to 5% of annual compensation.

(II) If Washington Alloys reports each 401(k) Plan separately, for the 401(k) Plan with a maximum employer contribution of 3% of annual compensation, Washington Alloys will report 50% of its total employment positions are eligible to participate. Of the employment positions eligible to participate, 100% are enrolled.

For the 401(k) Plan with a maximum employer contribution of 5% of annual compensation, Washington Alloys will report 37.5% of its total employment positions are eligible to participate. Of the employment positions eligible to participate, 66.6% are enrolled.

(III) If Washington Alloys consolidates its detailed information about its 401(k) Plans, it will report that 87.5% of its total employment positions are eligible to participate in 401(k) Plans. Of the employment positions eligible to participate in the 401(k) Plans, 85.7% are enrolled.

**(16) Additional reporting for aluminum smelters and electrolytic processing businesses.** For an aluminum smelter or electrolytic processing business, the annual report must indicate the quantity of product produced in this state during the time period covered by the report.

**(17) Are annual reports confidential?** Except for the additional information that the department may request which it deems necessary to measure the results of, or to determine eligibility for the tax preference, annual reports are not subject to the confidentiality provisions of RCW 82.32.-330 and may be disclosed to the public upon request.

**(18) What are the consequences for failing to file a complete annual report?**

(a) **What is a "complete annual report"?** An annual report is complete if:

(i) The annual report is filed on the form required by this rule or in an electronic format as required by law; and

(ii) The person makes a good faith effort to substantially respond to all report questions required by this rule.

Responses such as "varied," "various," or "please contact for information" are not considered good faith responses to a question.

(b) **Amounts due for late filing.** Except as otherwise provided by law, if a person claims a tax preference that requires an annual report under this rule, but fails to submit a complete report by the due dates described in subsection (3)(e) of this section, or any extension under RCW 82.32.590, the following amounts are immediately due and payable:

(i) For reports due prior to July 1, 2017, one hundred percent of the amount of the tax preference claimed for the previous calendar year. Interest, but not penalties, will be assessed on the amounts due at the rate provided for under RCW 82.32.050, retroactively to the date the tax preference was claimed, and accruing until the taxes for which the tax preference was claimed are repaid.

(ii) For reports due on or after July 1, 2017:

(A) Thirty-five percent of the amount of the tax preference claimed for the previous calendar year; and

(B) An additional fifteen percent of the amount of the tax preference claimed for the previous calendar year if the person has previously been assessed under (b)(ii) of this subsection for failure to timely submit a report for the same tax preference.

(c) **Interest and penalties.** The department may not assess interest or penalties on amounts due under (b)(ii) of this subsection.

(d) **Extension for circumstances beyond the control of the taxpayer.** If the department finds the failure of a taxpayer to file an annual report by the due date was the result of circumstances beyond the control of the taxpayer, the department will extend the time for filing the report. The extension will be for a period of thirty days from the date the department issues its written notification to the taxpayer that it qualifies for an extension under this rule. The department may grant additional extensions as it deems proper under RCW 82.32.590.

In determining whether the failure of a taxpayer to file an annual report by the due date was the result of circumstances beyond the control of the taxpayer, the department will apply the provisions in WAC 458-20-228 for the waiver or cancellation of penalties when the underpayment or untimely payment of any tax was due to circumstances beyond the control of the taxpayer.

(e) **One-time only extension.** A taxpayer who fails to file an annual report, as required under this rule, by the due date of the report is entitled to an extension of the due date. A request for an extension under this subsection must be made in writing to the department.

(i) To qualify for an extension, a taxpayer must have filed all annual reports and surveys, if any, due in prior years by their respective due dates, beginning with annual reports and surveys due in the calendar year 2010.

(ii) The extension is for ninety days from the original due date of the annual report.

(iii) No taxpayer may be granted more than one ninety-day extension.

**AMENDATORY SECTION** (Amending WSR 17-09-086, filed 4/19/17, effective 5/20/17)

**WAC 458-20-268 Annual surveys for certain tax preferences.** (1) **Introduction.** Effective for calendar years

in which a taxpayer claims a tax preference beginning January 1, 2018, Washington changed its annual reporting requirements. This rule addresses how taxpayers taking certain tax preferences must file an annual survey as provided under RCW 82.32.585 with the department of revenue (department) providing information about their business((- This rule explains how to file a survey, the information that must be included in the survey, due dates for filing, and other filing requirements)) for tax periods through December 31, 2017, only. See WAC 458-20-267 Annual tax performance reports for certain tax preferences for the proper way to report tax preferences for periods beginning January 1, 2018.

(a) **Definitions.** For purposes of this rule the following definitions apply:

(i) **Person.** "Person" has the meaning under RCW 82.04.030 and also includes the state and its departments and institutions.

(ii) **Tax preference.** As defined under RCW 43.136.021, "tax preference" means:

(A) An exemption, exclusion, or deduction from the base of a state tax; a credit against a state tax; a deferral of a state tax; or a preferential state tax rate; and

(B) Includes only the tax preferences requiring a survey under RCW 82.32.585.

(b) **Annual reports.** Taxpayers taking certain tax preferences may be required to complete both an annual report and an annual survey. For information on the annual report requirements, refer to RCW 82.32.534 and WAC 458-20-267.

(c) **Examples.** This rule includes examples that identify a set of facts and then state a conclusion. These examples should only be used as a general guide. The department will evaluate each case on its particular facts and circumstances.

(2) **Tax preferences requiring an annual survey.** Taxpayers may refer to the department's web site at dor.wa.gov for the "Annual Tax Incentive Survey for Preferential Tax Rates/Credits/Exemptions/Deferrals Worksheet." This worksheet lists tax preferences that require an annual survey. Taxpayers may also contact the telephone information center 800-647-7706 to determine whether they must file an annual survey.

(3) **How to file annual surveys.**

(a) **Electronic filing.** Surveys must be filed electronically unless the department waives this requirement upon a showing of good cause. A survey is filed electronically when the department receives the survey in an electronic format. A person accesses electronic filing through their department "My Account" at dor.wa.gov.

(b) **Required paper form.** If the department waives the electronic filing requirement for a person that shows good cause, that person must use the annual survey form developed by the department unless that person obtains prior written approval from the department to file an annual survey in an alternative format.

(c) **How to obtain the form.** Persons who have received a waiver of the electronic filing requirement from the department or who otherwise would like a paper copy of the survey may obtain the annual survey form from the department's web site at dor.wa.gov. It may also be obtained by calling the

telephone information center at 800-647-7706, or by contacting the department at:

Attn: Tax Incentive Team  
Taxpayer Account Administration  
Department of Revenue  
Post Office Box 47476  
Olympia, WA 98504-7476

(d) **Special requirement for persons who did not file an annual survey during the previous calendar year.** If a person is a first-time filer or otherwise did not file an annual survey with the department during the previous calendar year, the survey must include information on employment, wages, and employer-provided health and retirement benefits for the two calendar years immediately preceding the due date of the survey.

(e) **Due date of annual survey.** Every person claiming a tax preference that requires a survey under RCW 82.32.585 must file the survey annually with the department in the year following the calendar year in which the person becomes eligible to claim the tax preference. The due date for filing the survey is as follows:

(i) April 30th for surveys due prior to 2017.

(ii) May 31st for surveys due in ~~((or after))~~ 2017 or 2018.

(iii) If the tax preference is a deferral of tax, the first survey must be filed by April 30th (if prior to 2017) or by May 31st (if in ~~((or after))~~ 2017) of the calendar year following the calendar year in which the investment project is certified by the department as operationally complete. Thereafter, a survey must also be filed for each of the seven succeeding calendar years by April 30th (if prior to 2017) or by May 31st (if in ~~((or after))~~ 2017), or a tax performance report for tax preferences claimed in tax reporting periods in 2018 and after.

(f) **Due date extensions.** The department may extend the due date for filing annual surveys as provided in subsection (11) of this rule.

(g) **Example 1.** Advanced Computing, Inc. qualified for the B&O tax credit provided by RCW 82.04.4452 and applied it against taxes due in calendar year 2014. Advanced Computing filed an annual survey in March 2014 for credit claimed under RCW 82.04.4452 in 2013. Advanced Computing must electronically file an annual survey with the department by April 30, 2015, for credits taken in calendar year 2014. The tax preference in this example expired January 1, 2015.

(h) **Example 2.** In 2011, Biotechnology, Inc. applied for and received a sales and use tax deferral under chapter 82.63 RCW for an eligible investment project in qualified research and development. The investment project was operationally complete in 2012. Biotechnology filed an annual survey on April 30, 2013, for the sales and use tax deferral under chapter 82.63 RCW. Surveys are due from Biotechnology by April 30th each year through 2016 and by May 31st ~~((beginning))~~ in 2017 ~~((and each subsequent year))~~ and 2018, with ~~((its last survey))~~ tax performance reports due in 2019 through May 31, 2020.

(i) **Example 3.** Advanced Materials, Inc., a new business in 2014, has been conducting manufacturing activities in a building leased from Property Management Services. Property Management Services is a recipient of a deferral under

chapter 82.60 RCW, and the department certified the building as operationally complete in 2014. To pass on the entire economic benefit of the deferral, Property Management Services charges Advanced Materials \$5,000 less in rent each year. Advanced Materials is a first-time filer of annual surveys. Advanced Materials must file its annual survey with the department covering the 2014 calendar year by April 30, 2015. Surveys are due from Advanced Materials by April 30th for 2016 and by May 31st for ~~((each subsequent year))~~ 2017, with ~~((its last survey due))~~ annual tax performance reports due in 2018 through May 31, 2022.

(j) **Example 4.** Fruit Canning, Inc. claims the B&O tax exemption provided in RCW 82.04.4266 for the canning of fruit in 2015. Fruit Canning is a first-time filer of annual surveys. Fruit Canning must file an annual survey with the department by April 30, 2016, covering calendar years 2014 and 2015. If Fruit Canning claims the B&O tax exemption during subsequent years, it must file an annual survey ~~((for each of those years))~~ by May 31st ~~((of))~~ in 2017 and 2018, and an annual tax performance report by May 31st in 2019 and each subsequent year.

(4) **What information does the annual survey require?** The annual survey requires the following:

(a) Amount of tax deferred, the amount of B&O tax exempted, the amount of B&O tax credit taken, or the amount of B&O tax reduced under the preferential rate;

(b) For taxpayers claiming the tax deferral under chapter 82.60 or 82.63 RCW:

(i) The number of new products or research projects by general classification; and

(ii) The number of trademarks, patents, and copyrights associated with activities at the investment project;

(c) For taxpayers claiming the B&O tax credit under RCW 82.04.4452:

(i) The qualified research and development expenditures during the calendar year for which the credit was claimed;

(ii) The taxable amount during the calendar year for which the credit was claimed;

(iii) The number of new products or research projects by general classification;

(iv) The number of trademarks, patents, and copyrights associated with the research and development activities for which the credit was claimed; and

(v) Whether the credit has been assigned and who assigned the credit.

The credit provided under RCW 82.04.4452 expired January 1, 2015.

(d) The following information for employment positions in Washington state:

(i) The total number of employment positions;

(ii) Full-time, part-time, and temporary employment positions as a percent of total employment. Refer to subsection (7) of this rule for information about full-time, part-time, and temporary employment positions;

(iii) The number of employment positions according to the wage bands of less than \$30,000; \$30,000 or greater, but less than \$60,000; and \$60,000 or greater. A wage band containing fewer than three individuals may be combined with the next lowest wage band; and

(iv) The number of employment positions that have employer-provided medical, dental, and retirement benefits, by each of the wage bands; and

(e) Additional information the department requests that is necessary to measure the results of, or determine eligibility for the tax preferences.

(i) Prior to its repeal effective January 1, 2018, RCW 82.32.585 requires the department to report to the legislature summary descriptive statistics by category and the effectiveness of certain tax preferences, such as job creation, company growth, and such other factors as the department selects or as the statutes identify. The department has included questions related to measuring these effects.

(ii) In addition, the department has included questions related to:

(A) The taxpayer's use of the sales and use tax exemption for machinery and equipment used in manufacturing provided in RCW 82.08.025651 and 82.12.025651; and

(B) The Unified Business Identifier used with the Washington state employment security department and all employment security department reference numbers used on quarterly tax reports that cover the employment positions reported in the annual survey.

**(5) What is total employment in the annual survey?**

(a) **Employment as of December 31st.** The annual survey requires information on all full-time, part-time, and temporary employment positions located in Washington state on December 31st of the calendar year covered by the survey. Total employment includes persons who are on leaves of absence such as sick leave, vacation, disability leave, jury duty, military leave, and workers compensation leave, regardless of whether those persons are receiving wages. Total employment does not include separations from employment such as layoffs and reductions in force. Vacant positions are not included in total employment.

(b) **The following facts apply to the examples in (b)(i) through (iv) of this subsection.** National Construction Equipment (NCE) manufactures bulldozers, cranes, and other earth-moving equipment in Ridgefield and Kennewick, WA. NCE received a deferral of taxes under chapter 82.60 RCW for sales and use taxes on its new manufacturing site in Kennewick.

(i) **Example 5.** NCE employs two hundred workers in Ridgefield manufacturing construction cranes. NCE employs two hundred fifty workers in Kennewick manufacturing bulldozers and other earth-moving equipment. Although NCE's facility in Ridgefield does not qualify for any tax preferences, NCE's annual survey must report a total of four hundred fifty employment positions. The annual survey includes all Washington state employment positions, which includes employment positions engaged in activities that do not qualify for tax preferences.

(ii) **Example 6.** On November 20th, NCE lays off seventy-five workers. NCE notifies ten of the laid off workers on December 20th that they will be rehired and begin work on January 2nd. The seventy-five employment positions are excluded from NCE's annual survey, because a separation of employment has occurred. Although NCE intends to rehire ten employees, those employment positions are vacant on December 31st.

(iii) **Example 7.** On December 31st, NCE has one hundred employees on vacation leave, five employees on sick leave, two employees on military leave, one employee who is scheduled to retire as of January 1st, and three vacant employment positions. The employment positions of employees on vacation, sick leave, and military leave must be included in NCE's annual survey. The one employee scheduled to retire must be included in the annual survey because the employment position is filled on December 31st. The three vacant positions are not included in the annual survey.

(iv) **Example 8.** In June, NCE hires two employees from a local college to intern in its engineering department. When the academic year begins in September, one employee ends the internship. The other employee's internship continues until the following June. NCE must report one employment position on the annual survey, representing the intern employed on December 31st.

**(6) When is an employment position located in Washington state?** The annual survey seeks information only about Washington employment positions. An employment position is located in Washington state if:

(a) The service of the employee is performed entirely within the state;

(b) The service of the employee is performed both within and without the state, but the service performed without the state is incidental to the employee's service within the state;

(c) The service of the employee is performed both within and without the state, and the employee's base of operations is within the state;

(d) The service of the employee is performed both within and without the state, but the service is directed or controlled in this state; or

(e) The service of the employee is performed both within and without the state and the service is not directed or controlled in this state, but the employee's individual residence is in this state.

(f) **The following facts apply to the examples in (f)(i) through (iv) of this subsection.** Acme Computer, Inc. develops computer software and receives a deferral of taxes under chapter 82.60 RCW for sales and use taxes on an eligible investment project in a high unemployment county. Acme Computer, headquartered in California, has employees working at four locations in Washington state. Acme Computer also has offices in Oregon and Texas.

(i) **Example 9.** Ed is a software engineer in Acme Computer's Vancouver office. Ed occasionally works at Acme Computer's Portland, Oregon office when other software engineers are on leave. Ed's position must be included in the number of total employment positions in Washington state that Acme Computer reports on the annual survey. Ed performs services both within and without the state, but the services performed without the state are incidental to the employee services within the state.

(ii) **Example 10.** John is an Acme Computer salesperson. John travels throughout Washington, Oregon, and Idaho promoting sales of new Acme Computer products. John's activities are directed by his manager in Acme Computer's Spokane office. John's position must be included in the number of total employment positions in Washington state that Acme Computer reports on the annual survey. John performs

services both within and without the state, but the services are directed or controlled in Washington state.

(iii) **Example 11.** Jane, vice president for product development, works in Acme Computer's Portland, Oregon office. Jane regularly travels to Seattle to review the progress of research and development projects conducted in Washington state. Jane's position should not be included in the number of total employment positions in Washington state that Acme Computer reports on the annual survey. Although Jane regularly performs services within Washington state, her activities are directed or controlled in Oregon.

(iv) **Example 12.** Roberta, a service technician, travels throughout the United States servicing Acme Computer products. Her activities are directed from Acme Computer's corporate offices in California, but she works from her home office in Tacoma. Roberta's position must be included in the number of total employment positions in Washington state that Acme Computer reports on the annual survey. Although Roberta performs services both within and without the state and the service is not directed or controlled in this state, her residence is in Washington state.

(7) **What are full-time, part-time, and temporary employment positions?** The survey must separately identify the number of full-time, part-time, and temporary employment positions as a percent of total employment.

(a) **Full-time and part-time employment positions.** A position is considered full-time or part-time if the employer intends for the position to be filled for at least fifty-two consecutive weeks or twelve consecutive months, excluding any leaves of absence.

(i) **Full-time positions.** A full-time position is a position that requires the employee to work, excluding overtime hours, thirty-five hours per week for fifty-two consecutive weeks, four hundred fifty-five hours a quarter for four consecutive quarters, or one thousand eight hundred twenty hours during a period of twelve consecutive months.

(ii) **Part-time positions.** A part-time position is a position in which the employee may work less than the hours required for a full-time position.

(iii) **Exceptions for full-time positions.** In some instances, an employee may not be required to work the hours required for full-time employment because of paid rest and meal breaks, health and safety laws, disability laws, shift differentials, or collective bargaining agreements. If, in the absence of these factors, the employee would be required to work the number of hours for a full-time position to receive their current wage, the position must be reported as a full-time employment position.

(b) **Temporary positions.** There are two types of temporary positions.

(i) **Employees of the person required to complete the survey.** In the case of a temporary employee directly employed by the person required to complete the survey, a temporary position is a position intended to be filled for a period of less than fifty-two consecutive weeks or twelve consecutive months. For example, seasonal employment positions are temporary positions. These temporary positions must be included in the information required in subsections (5), (8), and (9) of this rule.

(ii) **Workers furnished by staffing companies.** A temporary position also includes a position filled by a worker furnished by a staffing company, regardless of the duration of the placement. These temporary positions must be included in the information required in subsections (5), (8), and (9) of this rule. In addition, the person filling out the annual survey must provide the following additional information:

(A) Total number of staffing company employees furnished by staffing companies;

(B) Top three occupational codes of all staffing company employees; and

(C) Average duration of all staffing company employees.

(c) **The following facts apply to the examples in (c)(i) through (vi) of this subsection.** Worldwide Materials, Inc. is a developer of materials used in manufacturing electronic devices. Worldwide Materials receives a deferral of taxes under chapter 82.60 RCW for sales and use taxes on an eligible investment project in a high unemployment county. Worldwide Materials has one hundred employees.

(i) **Example 13.** On December 31st, Worldwide Materials has five employees on workers' compensation leave. At the time of the work-related injuries, the employees worked forty hours a week and were expected to work for fifty-two consecutive weeks. Worldwide Materials must report these employees as being employed in a full-time position. Although the five employees are not currently working, they are on workers' compensation leave and Worldwide Materials had intended for the full-time positions to be filled for at least fifty-two consecutive weeks.

(ii) **Example 14.** In September, Worldwide Materials hires two employees on a full-time basis for a two-year project to design composite materials to be used in a new airplane model. Because the position is intended to be filled for a period exceeding twelve consecutive months, Worldwide Materials must report these positions as full-time positions.

(iii) **Example 15.** Worldwide Materials has two employees who clean laboratories during the evenings. The employees regularly work 5:00 p.m. to 11:00 p.m., Monday through Friday, fifty-two weeks a year. Because the employees work less than thirty-five hours a week, the employment positions are reported as part-time positions.

(iv) **Example 16.** On November 1st, a Worldwide Materials engineer begins twelve weeks of family and medical leave. The engineer was expected to work forty hours a week for fifty-two consecutive weeks. While the engineer is on leave, Worldwide Materials hires a staffing company to furnish a worker to complete the engineer's projects. Worldwide Materials must report the engineer as a full-time position on the annual survey. Worldwide Materials must also report the worker furnished by the staffing company as a temporary employment position and include the information as required in (b) of this subsection.

(v) **Example 17.** Worldwide Materials allows three of its research employees to work on specific projects with a flexible schedule. These employees are not required to work a set amount of hours each week, but are expected to work twelve consecutive months. The three research employees are paid a comparable wage as other research employees who are required to work a set schedule of forty hours a week. Although the three research employees may work fewer

hours, they are receiving comparable wages as other research employees working forty hours a week. Worldwide Materials must report these positions as full-time employment positions, because each position is equivalent to a full-time employment position.

(vi) **Example 18.** Worldwide Materials has a large order to fulfill and hires ten employees for the months of June and July. Five of the employees leave at the end of July. Worldwide Materials decides to have the remaining five employees work on an on-call basis for the remainder of the year. As of December 31st, three of the employees are working for Worldwide Materials on an on-call basis. Worldwide Materials must report three temporary employment positions on the annual survey and include these positions in the information required in subsections (5), (8), and (9) of this rule.

(8) **What are wages?** For the purposes of the annual survey, "wages" means compensation paid to an individual for personal services, whether denominated as wages, salary, commission, or otherwise as reported on the W-2 forms of employees. Stock options granted as compensation to employees are wages to the extent they are reported on the W-2 forms of the employees and are taken as a deduction for federal income tax purposes by the employer. The compensation of a proprietor or a partner is determined in one of two ways:

(a) If there is net income for federal income tax purposes, the amount reported subject to self-employment tax is the compensation.

(b) If there is no net income for federal income tax purposes, reasonable cash withdrawals or cash advances is the compensation.

(9) **What are employer-provided benefits?** The annual survey requires persons to report the number of employees that have employer-provided medical, dental, and retirement benefits, by each of the wage bands. An employee has employer-provided medical, dental, and retirement benefits if the employee is currently eligible to participate or receive the benefit. A benefit is "employer-provided" if the medical, dental, and retirement benefit is dependent on the employer's establishment or administration of the benefit. A benefit that is equally available to employees and the general public is not an "employer-provided" benefit.

(a) **What are medical benefits?** "Medical benefits" means compensation, not paid as wages, in the form of a health plan offered by an employer to its employees. A "health plan" means any plan, fund, or program established, maintained, or funded by an employer for the purpose of providing for its employees or their beneficiaries, through the purchase of insurance or otherwise, medical and/or dental care services.

(i) Health plans include any:

(A) "Employee welfare benefit plan" as defined by the Employee Retirement Income Security Act (ERISA);

(B) "Health plan" or "health benefit plan" as defined in RCW 48.43.005;

(C) Self-funded multiple employer welfare arrangement as defined in RCW 48.125.010;

(D) "Qualified health insurance" as defined in Section 35 of the Internal Revenue Code;

(E) "Archer MSA" as defined in Section 220 of the Internal Revenue Code;

(F) "Health savings plan" as defined in Section 223 of the Internal Revenue Code;

(G) "Health plan" qualifying under Section 213 of the Internal Revenue Code;

(H) Governmental plans; and

(I) Church plans.

(ii) "Health care services" means services offered or provided by health care facilities and health care providers relating to the prevention, cure, or treatment of illness, injury, or disease.

(b) **What are dental benefits?** "Dental benefits" means a dental health plan offered by an employer as a benefit to its employees. "Dental health plan" has the same meaning as "health plan" in (a) of this subsection, but is for the purpose of providing for employees or their beneficiaries, through the purchase of insurance or otherwise, dental care services. "Dental care services" means services offered or provided by health care facilities and health care providers relating to the prevention, cure, or treatment of illness, injury, or disease of human teeth, alveolar process, gums, or jaw.

(c) **What are retirement benefits?** "Retirement benefits" means compensation, not paid as wages, in the form of a retirement plan offered by an employer to its employees. An employer contribution to the retirement plan is not required for a retirement plan to be employer-provided. A "retirement plan" means any plan, account, deposit, annuity, or benefit, other than a life insurance policy, that provides for retirement income or deferred income to employees for periods after employment is terminated. The term includes pensions, annuities, stock bonus plans, employee stock ownership plans, profit sharing plans, self-employed retirement plans, individual retirement accounts, individual retirement annuities, and retirement bonds, as well as any other plan or program, without regard to its source of funding, and without regard to whether the retirement plan is a qualified plan meeting the guidelines established in the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code.

(d) **The following facts apply to the examples in (d)(i) through (v) of this subsection.** Medical Resource, Inc. is a pharmaceutical manufacturer that receives a deferral of taxes under chapter 82.60 RCW for sales and use taxes on an eligible investment project in a high unemployment county. It employs two hundred full-time employees and fifty part-time employees. Medical Resource also hires a staffing company to furnish seventy-five workers.

(i) **Example 19.** Medical Resource offers its employees two different health plans as a medical benefit. Plan A is available at no cost to full-time employees. Employees are not eligible to participate in Plan A until completing thirty days of employment. Plan B costs employees \$200 each month. Full-time and part-time employees are eligible for Plan B after six months of employment. One hundred full-time employees are enrolled in Plan A. One hundred full-time and part-time employees are enrolled in Plan B. Forty full-time and part-time employees chose not to enroll in either plan. Ten part-time employees are not yet eligible for either Plan A or Plan B. Medical Resource must report two hundred

employees as having employer-provided medical benefits, because that is the number of employees enrolled in the health plans it offers.

(ii) **Example 20.** Medical Resource does not offer medical benefits to the employees of the staffing company. However, twenty-five of these workers have enrolled in a health plan through the staffing company. Medical Resource must report these twenty-five employment positions as having employer-provided medical benefits.

(iii) **Example 21.** Medical Resource does not offer its employees dental insurance, but has arranged with a group of dental providers to provide all employees with a 30% discount on any dental care service. Medical Resource employment is the sole requirement to receive this benefit. Unlike the medical benefit, employees are eligible for the dental benefit as of the first day of employment. This benefit is not provided to the workers furnished by the staffing company. Medical Resource must report two hundred and fifty employment positions as having dental benefits, because that is the number of employees enrolled in this dental plan.

(iv) **Example 22.** Medical Resource offers a 401(k) Plan to its full-time and part-time employees after six months of employment. Medical Resource makes matching contributions to an employee's 401(k) Plan after two years of employment. On December 31st, two hundred and twenty-five workers are eligible to participate in the 401(k) Plan. Two hundred workers are enrolled in the 401(k) Plan. One hundred of these workers receive matching contributions. Medical Resource must report two hundred employment positions as having employer-provided retirement benefits, because that is the number of employees enrolled in the 401(k) Plan.

(v) **Example 23.** Medical Resource coordinates with a bank to insert information in employee paycheck envelopes on the bank's Individual Retirement Account (IRA) options offered to bank customers. Employees who open an IRA with the bank can arrange to have their contributions directly deposited from their paychecks into their accounts. Fifty employees open IRAs with the bank. Medical Resource cannot report that these fifty employees have employer-provided retirement benefits. IRAs are not an employer-provided benefit because the ability to establish the IRA is not dependent on Medical Resource's participation or sponsorship of the benefit.

(10) **Is the annual survey confidential?** The annual survey is subject to the confidentiality provisions of RCW 82.32.330. However, information on the amount of tax preference taken is not subject to the confidentiality provisions of RCW 82.32.330 and may be disclosed to the public, except as provided in (c) of this subsection.

(a) **Failure to timely file a complete annual survey subject to disclosure.** If a taxpayer fails to timely file a complete annual survey, then the amount required to be repaid as a result of the taxpayer's failure to file a complete annual survey is not confidential and may be disclosed to the public.

(b) **Amount reported in annual survey is different from the amount claimed or allowed.** If a taxpayer reports a tax preference amount on the annual survey that is different than the amount actually claimed on the taxpayer's tax returns or otherwise allowed by the department, then the amount actually claimed or allowed may be disclosed.

(c) **Tax preference is less than ten thousand dollars.** If the tax preference is less than ten thousand dollars during the period covered by the annual survey, the taxpayer may request that the department treat the amount of the tax preference as confidential under RCW 82.32.330.

(11) **What are the consequences for failing to timely file a complete annual survey?**

(a) **What is a "complete annual survey"?** An annual survey is complete if:

(i) The annual survey is filed on the form required by this rule or in an electronic format as required by law; and

(ii) The person makes a good faith effort to substantially respond to all survey questions required by this rule.

Responses such as "varied," "various," or "please contact for information" are not considered good faith responses to a question.

(b) **Amounts due for late filing.** Unless the tax preference is a deferral of tax, as described in (c) of this subsection, or as otherwise provided by law, if a person claims a tax preference that requires an annual survey under this rule, but fails to submit a complete survey by the due dates described in subsection (3)(e) of this rule, or any extension under RCW 82.32.590, the following amounts are immediately due and payable:

(i) For surveys due prior to July 1, 2017, one hundred percent of the amount of the tax preference claimed for the previous calendar year. Interest, but not penalties, will be assessed on the amounts due at the rate provided for under RCW 82.32.050, retroactively to the date the tax preference was claimed, and accruing until the taxes for which the tax preference was claimed are repaid.

(ii) For surveys due on or after July 1, 2017:

(A) Thirty-five percent of the amount of the tax preference claimed for the previous calendar year; and

(B) An additional fifteen percent of the amount of the tax preference claimed for the previous calendar year if the person has previously been assessed under (b)(ii) of this subsection for failure to timely submit a survey for the same tax preference.

(c) **Tax deferrals.** If the tax preference is a deferral of tax, twelve and one-half percent of the deferred tax is immediately due. If the economic benefits of the deferral are passed to a lessee, the lessee is responsible for payment to the extent the lessee has received the economic benefit.

(d) **Interest and penalties.** The department may not assess interest or penalties on amounts due under (b)(ii) and (c) of this subsection.

(e) **Extension for circumstances beyond the control of the taxpayer.** If the department finds the failure of a taxpayer to file an annual survey by the due date was the result of circumstances beyond the control of the taxpayer, the department will extend the time for filing the survey. The extension will be for a period of thirty days from the date the department issues its written notification to the taxpayer that it qualifies for an extension under this rule. The department may grant additional extensions as it deems proper under RCW 82.32.590.

In determining whether the failure of a taxpayer to file an annual survey by the due date was the result of circumstances beyond the control of the taxpayer, the department will apply

the provisions in WAC 458-20-228 for the waiver or cancellation of penalties when the underpayment or untimely payment of any tax was due to circumstances beyond the control of the taxpayer.

(f) **One-time only extension.** A taxpayer who fails to file an annual survey, as required under this rule, by the due date of the survey is entitled to an extension of the due date. A request for an extension under this subsection must be made in writing to the department.

(i) To qualify for an extension, a taxpayer must have filed all annual reports and surveys, if any, due in prior years by their respective due dates, beginning with annual reports and surveys due in the calendar year 2010.

(ii) The extension is for ninety days from the original due date of the annual survey.

(iii) No taxpayer may be granted more than one ninety-day extension.

**WSR 18-13-104**  
**PERMANENT RULES**  
**DEPARTMENT OF**  
**FINANCIAL INSTITUTIONS**

[Filed June 19, 2018, 2:13 p.m., effective August 1, 2018]

Effective Date of Rule: August 1, 2018.

Purpose: Chapter 304, Laws of 2017 (EHB 1595), amended the act to require that if an agency uses the act's default copy fee schedule the agency must have a rule declaring it is not calculating the actual copying costs because to do so would be unduly burdensome. The rules are also being amended to make technical changes, and describe the agency public records request process.

Citation of Rules Affected by this Order: New WAC 208-12-075; repealing WAC 208-12-130; and amending WAC 208-12-010, 208-12-020, 208-12-030, 208-12-040, 208-12-050, 208-12-070, 208-12-080, 208-12-090, 208-12-100, 208-12-110, and 208-12-120.

Statutory Authority for Adoption: RCW 43.320.040, 42.56.040, 42.56.100, and 42.56.120.

Adopted under notice filed as WSR 18-09-064 on April 16, 2018.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 1, Amended 11, Repealed 1.

Number of Sections Adopted at the Request of a Non-governmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's own Initiative: New 0, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted using Negotiated Rule Making: New 1, Amended 11, Repealed 1; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: June 19, 2018.

Charles Clark  
Deputy Director  
Director of Consumer Services

AMENDATORY SECTION (Amending WSR 96-14-082, filed 7/1/96, effective 8/1/96)

**WAC 208-12-010 Purpose—Scope—Conflict with other regulations.** (1) The purpose of this chapter is to ensure compliance with RCW 42.56.040; with the applicable provisions of the Public Records Act, chapter ((42.17)) 42.56 RCW((, Disclosure Campaign finances Lobbying Records; and in particular RCW 42.17.250 through 42.17.348 dealing with public records. It)); and to provide notice to the public of the organization and procedure of the department as required by the Administrative Procedure Act, chapter 34.05 RCW.

(2) This chapter establishes general((, consistent)) rules regarding public records in the custody or control of the department.

(3) Department divisions may adopt additional rules to supplement this chapter.

(4) If specific rules adopted by a division conflict with this chapter, the specific rules control in those situations.

AMENDATORY SECTION (Amending WSR 96-14-082, filed 7/1/96, effective 8/1/96)

**WAC 208-12-020 Definitions.** As used in this chapter, unless the language clearly indicates otherwise:

"Department" means the Washington state department of financial institutions.

"Director" means the director of the department, who is a cabinet-level appointee of the governor of the state of Washington.

"Division" means an organizational division of the department as the director, pursuant to his or her authority under chapter 43.320 RCW, has or may hereafter designate and empower including, without limitation, the division of administration, division of banks, division of consumer services, division of credit unions, and division of securities.

"Person" means any individual, partnership, joint venture, public or private corporation, limited liability company, association, federal, state or local government entity or agency however constituted, or any other organization or group of persons, however organized.

((("Public record" means any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used or retained by the department regardless of physical form or characteristics.

"Writing" means handwriting, typewriting, printing, photostating, photographing and every other means of recording any form of communication or representation, including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated.))

AMENDATORY SECTION (Amending WSR 96-14-082, filed 7/1/96, effective 8/1/96)

**WAC 208-12-030 Description of organization of department.** (1) The department is an administrative, supervisory, licensing, regulatory, public outreach, educational, and chartering agency.

~~((4))~~ (2) The department is organized pursuant to chapter 43.320 RCW under a director, appointed by the governor, and ~~((four))~~ assistant directors (also known as "division directors"), appointed by the director.

(3) The director has delegated authority to each assistant director to act in a specific functional area. The ~~((four))~~ functional areas are the: ((The)) Division of administration; division of banks; ((the consumer services and administration)) division of consumer services; ((the)) division of credit unions; and ((the securities)) division of securities.

(4) Four of these divisions regulate various programs ~~((such as))~~ including, but not limited to:

(a) The chartering, licensing, and regulation of state banks((:)); nonbank trust companies((:)) and trust departments of banks; state savings banks((, savings and loan associations, alien banks, bank holdings companies,)); holding companies of state banks and state savings banks; bureaus and other offices; and agricultural credit corporations, federally guaranteed small business loan companies, and business development companies, by and through the division of banks;

(b) The licensing and regulation of consumer loan companies, check cashers and sellers, small loan licensees, mortgage brokers, mortgage loan officers, mortgage loan facilitators, mortgage loan servicers, escrow agents, money transmitters, currency exchangers, and other money services businesses, and tax refund anticipation lenders, by and through the division of consumer services;

(c) The chartering and regulation of state credit unions((:)) and credit union service organizations, which are administered by and through the division of credit unions;

(d) The registering and regulation of securities((, mutual funds)) offerings and broker-dealers, commodities offerings and broker-dealers, franchises and franchise brokers, business opportunities, and investment advisers, by and through the division of securities; and

(e) The licensing and regulation of other similar ((institutions)) or incidental financial businesses or areas of financial regulation by one or more of the divisions enumerated in this section.

~~((2))~~ (5) The division of administration acts as support for the other divisions by providing administrative, fiscal, human resources, information technology, and other services. Included within the division of administration are also executive-level personnel, who report directly to the director of the department, and who provide:

(a) Public policy, regulatory, and other advice to the director and to the assistant directors of each of the divisions; and

(b) Public and media relations and communications services to the department and financial education outreach to the general public.

(6) The mission of the department is to regulate financial services to protect and educate the public and promote economic vitality.

(7) The department is charged with protecting the public interest, protecting the safety and soundness of depository institutions and entities under the jurisdiction of the department, ensuring access to the regulatory process for all concerned parties, and protecting the interests of investors.

~~((3))~~ (8) The governor appoints the director, with the consent of the senate. The director holds office at the pleasure of the governor.

(a) The director has complete charge of the department. The director may deputize one of the assistant directors to exercise the powers and duties of the director in the event of his or her absence. The director may delegate duties to assistant directors((, but there are statutory limitations)) in accordance with RCW 43.320.060 ((to his power to delegate, and the director remains responsible for all official acts of the employees)).

(b) By specific powers of legislation ((and delegation)), including the power to delegate, the director has the responsibility and authority to act and direct in the following areas:

(i) Administer the laws pertaining to chartering, licensing, registration, education, and regulation of ((state banks, savings banks, foreign bank branches, savings and loan associations, credit unions, consumer loan companies, check cashers and sellers, trust companies and departments, securities, mutual funds, franchises, business opportunities, commodities, escrow agents, mortgage brokers, and other similar institutions or areas. A full-time staff, including field examiners, carries out these duties.)) the financial institutions and businesses and areas of financial regulation set forth in subsection (4) of this section; and

(ii) Adopt and enforce rules consistent with and necessary to carry out the provisions of existing laws.

~~((4))~~ (9) Chapter 34.05 RCW, the Administrative Procedure Act, and department-related statutes and rules govern the formal and informal proceedings conducted by the department.

AMENDATORY SECTION (Amending WSR 96-14-082, filed 7/1/96, effective 8/1/96)

**WAC 208-12-040 Location and address of administrative office((s))—Public records officer contact information.** (1) The administrative office((s)) of the department ((and all)), including each of its divisions, are located ((in Room 300 of the General Administration Building, 210—11th Avenue SW, Olympia)) at 150 Israel Road S.W., Tumwater, Washington((:)) 98501.

(2) The mailing address of the department and each of its divisions is P.O. Box 41200, Olympia, WA 98504-1200.

(3) The public records officer may be reached at:

Public Records Officer  
Department of Financial Institutions  
P.O. Box 41200  
Olympia, WA 98504-1200  
Email: dfipublicrecords@dfi.wa.gov

AMENDATORY SECTION (Amending WSR 96-14-082, filed 7/1/96, effective 8/1/96)

**WAC 208-12-050 Office hours.** (1) Public records are available for inspection and copying during customary office hours, consistent with chapter 42.56 RCW, the Public Records Act.

(2) For the purposes of this chapter, the customary office hours of the administrative office are from 8:00 a.m. to noon and from 1:00 p.m. to 4:00 p.m., Monday through Friday, excluding legal holidays.

AMENDATORY SECTION (Amending WSR 96-14-082, filed 7/1/96, effective 8/1/96)

**WAC 208-12-070 Procedure to request public records.** (1) ~~((Members of the public may inspect, copy or obtain copies of))~~ Many public records ((by making a request on the public records request form prescribed by the division holding the record. The form is available at the administrative office and should be given or mailed to the appropriate division. The request shall)) are available for inspection on the department's web site, [www.dfi.wa.gov/public-records-index](http://www.dfi.wa.gov/public-records-index), at no cost. Requestors are encouraged to view the records available on the web site prior to submitting a records request.

(2) Any person seeking to inspect or copy public records of the department should make the request in writing on the department's request form, available at [www.dfi.wa.gov/public-records-index](http://www.dfi.wa.gov/public-records-index), by letter, fax, email addressed to the public records officer at [dfipublicrecords@dfi.wa.gov](mailto:dfipublicrecords@dfi.wa.gov), or by submitting the request in person at the department's administrative office. The request should include the following information:

(a) The name of the ((person requesting the records)) requestor;

(b) ((The date and time of day on which the request was made;

(c) The nature of the request;

(d) Contact information such as address, telephone number, email address, or other preferred contact information;

(e) The address where copies of records are to be mailed or emailed, or notification that the requestor wants to examine the records at the department's administrative office;

(f) An identification or description of the public records adequate for the public records officer or designee to locate the record or, if the record requested is referenced within the department's public records index, a reference to the requested record as it is described in the index; and

(g) ((If the requested matter is not identifiable by reference to the index, an appropriate description of the record requested.

(2) The staff person to whom the request is made will assist in identifying the public record requested.)) The date and time of the request.

(3) The department may inquire about the reason for a request for a list of individuals to determine whether the list will be used for commercial purposes.

(4) ~~((All requests for public records will be acknowledged within five working days after receipt with:~~

~~(a) The information requested;~~

~~(b) An estimated time required to respond to the request;~~

~~or~~

~~(c) A denial of the request.))~~ The department's public records officer or his or her designee may accept, by telephone or in person, requests for public records that contain the above information. If the public records officer or designee accepts such a request, he or she will confirm the receipt and substance of the request in writing.

#### NEW SECTION

**WAC 208-12-075 Processing public records requests.** (1) **Order of processing requests.** The department will process requests in the order that allows requests to be fulfilled in the most efficient manner feasible.

(2) **Acknowledging receipt of a request.** The department will acknowledge a request for public records within five business days after the department receives the request, by:

(a) Making the requested records available for inspection or copying or by providing copies of the records, including:

(i) If records are available on the department's web site, by providing an internet address and link on the web site to specific records requested;

(ii) If copies are requested and all applicable costs and deposits, if any, are paid by the requestor or other terms of payment are agreed upon, sending the copies to the requestor;

(b) Acknowledging receipt of the request and providing a reasonable estimate of when records or an installment of records will be available (the public records officer or designee may revise the estimate of when records will be available); or

(c) Acknowledging receipt of the request and asking the requestor to provide clarification for a request that is unclear, and providing, to the greatest extent possible, a reasonable estimate of time the department will require to respond to the request if it is not clarified;

(i) Such clarification may be requested and provided by telephone, and memorialized in writing;

(ii) If the requestor fails to respond to a request for clarification and the entire request is unclear, the department need not respond to the request; or

(d) Providing a written statement of denial of the request.

(3) **If no response is received.** If the requestor does not receive an acknowledgment of the records request within five business days, the requestor should contact the public records officer to confirm that the department received the request.

(4) **Records exempt from disclosure.** If a record or portion of a record is exempt from disclosure pursuant to chapter 42.56 RCW or as otherwise provided by law, the department may withhold or redact such record. If records are withheld or redacted, the department will, in writing, state the specific exemption and provide a brief explanation of why the record or portion of the record is being withheld or redacted.

(5) **Providing copies of records.** Copies may be provided in either hard copy or electronic format, as requested. The cost for copies is set forth in WAC 208-12-090, and costs must be paid to the department prior to delivery of copies. Copies may be emailed or mailed to the requestor, may be

made available to the requestor for pickup at the department's administrative office, or may be made available via a file sharing service.

(6) **Records may be provided in installments.** When a requestor seeks a large volume of records or collection and review of the records will be resource intensive, the public records officer or designee may provide copies or access for inspection of records in installments. Costs for each installment must be paid prior to delivery of the installment.

(7) **Closing withdrawn or abandoned requests.** The public records officer or designee may close a request when: The request is withdrawn by the requestor; the requestor fails to remit fees or a deposit when due, pursuant to WAC 208-12-090(8); the requestor fails to inspect records or retrieve copies of records within thirty days of notice that the records are available for inspection or retrieval; or the requestor fails to provide requested clarification within thirty days and the entirety of the request is unclear. The requestor will be notified in writing that the request has been closed. If a requestor seeks to reopen a closed request, the request may be opened as a new request.

(8) **Bot requests.** The department may deny a "bot" request, which is one of multiple requests from a requestor to the department within a twenty-four-hour period, if the request causes excessive interference with other essential department functions. RCW 42.56.080(3). A "bot" request means a records request that the department reasonably believes was automatically generated by a computer program or script.

(9) **Protecting the rights of others.** If the requested records contain information that may affect the rights of others, and which may be exempt from disclosure, the public records officer or designee may, prior to providing the records, give notice to such others whose rights may be affected by the disclosure.

AMENDATORY SECTION (Amending WSR 96-14-082, filed 7/1/96, effective 8/1/96)

**WAC 208-12-080 ((Protection)) Inspection of public records.** (1) It is the department's responsibility to ~~((prevent unreasonable invasions of privacy;))~~ protect public records from destruction, damage or disorganization, and prevent excessive interference with essential functions of the department.

(2) Before a person may ~~((review))~~ inspect original records, that person must agree to the following conditions:

~~((1))~~ (a) The records may not be removed from the area designated for review;

~~((2))~~ (b) The records may not be destroyed;

~~((3))~~ (c) The records may not be altered in any way;

~~((4))~~ (d) The records may not be defaced in any way, including marking upon, folding or folding anew if in folded form, tracing or fastening with clips or other fasteners except those that already exist in the file;

~~((5))~~ (e) The records may not be cut, torn or mutilated in any way;

~~((6))~~ (f) The records must be kept in the order in which received; and

~~((7))~~ (g) The records will be returned to the ~~((department))~~ department's public records officer or his or her designee when no longer required by the ~~((requester))~~ requestor, but no later than the end of customary business hours.

(3) If the requestor wishes to receive copies of particular records, they should so indicate to the public records officer or designee. Copies will be provided once payment arrangements are made, pursuant to WAC 208-12-090.

(4) The requestor must review assembled records within thirty days of the department's notification that the records are available for inspection. If the requestor fails to inspect assembled records or make other arrangements within thirty days, the department may close the request.

AMENDATORY SECTION (Amending WSR 96-14-082, filed 7/1/96, effective 8/1/96)

**WAC 208-12-090 ((Copying-)) Fees—Payments.** ~~((The department does not charge a fee for inspecting public records. The department may charge fifteen cents per page for providing copies of public records. If copies are requested, the department will make copies or make the department's copying facilities available.))~~ (1) Copy fees and payment procedures apply to requests to the department under chapter 42.56 RCW received by the department on or after the effective date of these rules.

(2) The department finds that it would be unduly burdensome to calculate the actual costs of providing public records to requestors for the following reasons:

(a) The scope of requests and staff time required to provide records varies widely depending on numerous factors;

(b) The department does not have the resources to conduct a study to determine its actual copying costs;

(c) To conduct such a study would interfere with other essential agency functions; and

(d) Through the 2017 legislative process, the public and requestors have commented on, and been informed of, authorized fees and costs, including for electronic records, provided in RCW 42.56.120 (2)(b) and (c), (3), and (4).

(3) In order to timely implement a fee schedule consistent with the Public Records Act, it is more cost efficient, expeditious, and in the public interest for the department to adopt the state legislature's approved fees and costs for the department's records, as authorized in RCW 42.56.120 and as published in the agency's fee schedule.

(4) The department will charge for copies of records pursuant to the default fees in RCW 42.56.120 (2)(b) and (c). The department will charge for customized services pursuant to RCW 42.56.120(3). Under RCW 42.56.130, the department may charge other copy fees authorized by statutes outside of chapter 42.56 RCW. The department may enter into an alternative fee agreement with a requestor under RCW 42.56.120(4). The charges for copying methods used by the department are summarized in the following fee schedule. Charges may be combined to the extent that more than one type of charge applies to copies produced in response to a particular request.

<b>Public Records Fee Schedule</b>	
<b>Charge:</b>	<b>Record Type:</b>
15 cents/page	Photocopies, printed copies of electronic records when requested by the requestor, or for the use of agency equipment to photocopy public records.
10 cents/page	Records scanned into an electronic format or for the use of agency equipment to scan the records.
5 cents for each 4 electronic files or attachments	Records uploaded to email, cloud-based data storage service, or other means of electronic delivery.
10 cents/giga-byte	Records transmitted in an electronic format or for the use of agency equipment to send the records electronically.
Actual cost	Digital storage media or device; any container or envelope used to mail copies; and postage or delivery charges.
Actual cost	A customized service charge, in addition to the charges set forth above, if the department estimates that the request would require the use of information technology expertise to prepare data compilations, or provide customized electronic access services when such compilations and customized access services are not used by the agency for other agency purposes.
<b>Alternative Fee</b>	
Up to \$2 flat fee	As an alternative to the charges set forth above, the department may charge a flat fee of up to \$2 when the department estimates that the costs are clearly equal to more than \$2.

(5) Fee waivers are an exception and are available for some small requests under the following conditions:

(a) It is within the discretion of the public records officer to waive copying fees when:

(i) All of the records responsive to an entire request are paper copies only and are twenty-five or fewer pages; or

(ii) All of the records responsive to an entire request are electronic and can be provided in a single email with attachments of a size totaling no more than the equivalent of one hundred printed pages. If that email for any reason is not deliverable, records will be provided through another means of delivery, and the requestor will be charged in accordance with this rule.

(b) Fee waivers are not applicable to records provided in installments unless approved by the director.

(6) The department may require an advance deposit of ten percent of the estimated fees when the copying fees for an

installment or an entire request, or customized service charge, exceeds twenty-five dollars.

(7) All required fees and deposits must be paid in advance of release of copies or an installment of copies. Payment will be due within thirty days of notice of the amount due. The department will notify the requestor of when payment is due.

(8) Payment should be delivered to the department by check or money order payable to the Washington state treasurer. The department prefers not to receive cash. For cash payments, it is within the public records officer's discretion to determine the denomination of bills and coins that will be accepted. The department may provide a system that accepts certain forms of electronic payment.

(9) The department will close a request when a requestor fails by the payment date to pay in the manner prescribed by this section.

(10) Upon request, the department will provide a summary of applicable charges before any copies are made. The requestor may revise the request to reduce the number of copies to be made to reduce the charges.

AMENDATORY SECTION (Amending WSR 96-14-082, filed 7/1/96, effective 8/1/96)

**WAC 208-12-100 Exemptions from public records.**

(1) All public records of the department are available for public inspection and copying pursuant to ~~((these rules))~~ this chapter, unless the department determines that a requested public record or portion of a public record is exempt under the provisions of chapter 42.56 RCW ((42.17.310)) or other statute.

~~((+))~~ (2) Various statutes exempt certain records from disclosure~~((;))~~ including, but not limited to: ~~((Securities, RCW 19.100.242, 19.110.140, 21.30.170, 21.30.370, 21.20.480, 21.20.510, 21.20.700, 21.20.855; Banks, RCW 30.04.075; Savings and Loan Associations, RCW 33.04.110; Agricultural Lenders, RCW 31.35.070;))~~

(a) **Division of Banks** - Examination reports and information obtained by the department in relation to:

(i) Washington state commercial banks and their holding companies, RCW 30A.04.075;

(ii) Washington state savings banks and their holding companies, RCW 32.04.220; ~~((and Credit Unions, RCW 31.12.565;~~

~~((2)))~~

(iii) Nondepository trust companies, RCW 30B.04.060;

(iv) Agricultural lenders, chapter 31.35 RCW;

(v) Federally guaranteed small business loan companies, chapter 31.40 RCW; and

(vi) Business development companies, RCW 31.24.120.

(b) **Division of consumer services** - Information obtained by the department in relation to:

(i) The personal residence address and telephone number of applicants for a check casher's and seller's license, RCW 31.45.030(3);

(ii) A trade secret as defined under RCW 19.108.010 regarding an applicant for or holder of a check casher's and seller's license, RCW 31.45.030(3);

(iii) Information or reports obtained by the department or prepared by, on behalf of, or for the use of the department regarding money transmitters, currency exchangers, and other money service businesses subject to licensure by the department, RCW 19.230.190.

(c) Division of credit unions - Examination reports and information obtained by the department in relation to Washington state-chartered credit unions and credit union service organizations, RCW 31.12.565; and

(d) Division of securities - Information obtained by the department in relation to:

(i) Investigation of securities offerors, broker-dealers, and investment advisers, RCW 21.20.480, 20.20.510, 21.20.-700, and, especially, 21.20.855;

(ii) Investigation of commodities offerors or broker-dealers, RCW 21.30.170;

(iii) Investigation of franchisors and franchise brokers, RCW 19.100.242; and

(iv) Investigation of business opportunities offerors, RCW 19.110.140.

(3) Other statutory exemptions may cover records received by the department from another regulatory agency or under interagency agreement.

~~((3) In addition,))~~ (4) Federal statutes and rules, including regulations of the federal reserve board of governors, federal deposit insurance corporation, national credit union administration, consumer financial protection bureau, securities and exchange commission, and other federal financial regulators implementing the Freedom of Information Act, at subsection (b)(8) of Title 5, United States Code, Section 552 (5 U.S.C. Sec. 552 (b)(8)), which:

(a) Exempts from public disclosure examination and investigation information involving financial institutions that are also subject to regulation by the department; and

(b) May be more expansive than or supersede or preempt Washington state law with respect to public disclosure of such information.

(5) Pursuant to RCW ~~((42.17.260))~~ 42.56.050, 42.56.-070, 42.56.210, 42.56.230, and 42.56.240, the department reserves ~~((the right))~~ its authority to delete identifying details when it makes available or publishes any public record, if there is reason to believe that disclosure of such details would be an invasion of personal privacy. All deletions will be justified in writing.

AMENDATORY SECTION (Amending WSR 96-14-082, filed 7/1/96, effective 8/1/96)

**WAC 208-12-110 Denials of public records requests —Review.** (1) ~~((If a request for a public record is denied, the person denying it will send the requester a written statement giving the reason for the denial. If based on an exemption, the written statement will give the specific exemption authorizing the withholding of the record and a brief explanation of how the exemption applies to the record withheld. A copy of the denial will be immediately forwarded to the director or designee for review.~~

~~((2) The director or designee will consider the denial and affirm or reverse it within two business days.))~~ Any person who objects to the initial denial or partial denial of a records

request may petition, in writing (including by email), to the public records officer for a review of that denial. The petition shall include a copy of, or reasonably identify, the written statement by the public records officer or designee denying the request.

(2) The director or director's designee will consider the petition and affirm, reverse, or modify the denial within two business days following the department's receipt of the petition, or within such other time as the department and the requestor mutually agree. The original denial becomes final if the director does not respond within two business days.

(3) Administrative remedies are not exhausted until the ~~((close of the second full business day following the original denial of inspection))~~ denial becomes final.

(4) Pursuant to RCW 42.56.530, if the department denies a requestor access to public records because it claims the record is exempt in whole or in part from disclosure, the requestor may request the attorney general's office to review the matter. The attorney general has adopted rules on such requests in WAC 44-06-160.

AMENDATORY SECTION (Amending WSR 96-14-082, filed 7/1/96, effective 8/1/96)

**WAC 208-12-120 Records index.** ~~((Each division))~~ The department maintains an index of its records available to the public~~((The index is attached to the department's public records request procedure. Current indices are available upon request))~~ on its web site, at [www.dfi.wa.gov/public-records-index](http://www.dfi.wa.gov/public-records-index).

#### REPEALER

The following section of the Washington Administrative Code is repealed:

WAC 208-12-130 Information—Address.

### **WSR 18-13-106 PERMANENT RULES UTILITIES AND TRANSPORTATION COMMISSION**

[Filed June 19, 2018, 3:03 p.m., effective July 20, 2018]

Effective Date of Rule: Thirty-one days after filing.

Purpose: To revise adoption-by-reference dates in Title 480 WAC to incorporate the most recent version of adopted federal rules and other adopted publications.

Citation of Rules Affected by this Order: Amending WAC 480-14-999, 480-15-999, 480-30-999, 480-31-999, 480-70-201, 480-70-999, 480-73-999, 480-75-999, 480-90-999, 480-93-999, 480-100-999, 480-108-999, 480-109-999, and 480-120-999.

Statutory Authority for Adoption: RCW 80.10.040, 80.04.160, 81.04.160, and 34.05.353.

Adopted under notice filed as WSR 18-09-061 on April 16, 2018.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal

Rules or Standards: New 0, Amended 13, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at the Request of a Non-governmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's own Initiative: New 0, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: June 19, 2018.

Mark L. Johnson  
Executive Director  
and Secretary

**AMENDATORY SECTION** (Amending WSR 17-15-054, filed 7/13/17, effective 8/13/17)

**WAC 480-14-999 Adoption by reference.** In this chapter, the commission adopts by reference all or portions of regulations and standards identified below. They are available for inspection at the commission (~~(branch of the Washington state)~~) library. The publication, effective dates, references within this chapter, and availability of the resource is within Title 49 Code of Federal Regulations (C.F.R.), including all appendices and amendments is published by the United States Government Printing Office.

(1) The commission adopts the version in effect on December 31, (~~(2016)~~) 2017, for 49 C.F.R. Parts 171, 172 and 173.

(2) This publication is referenced in WAC 480-14-250 (Insurance requirements).

(3) Copies of Title 49 C.F.R. are available from the U.S. Government Online Bookstore, <http://bookstore.gpo.gov/>, and from various third-party vendors.

**AMENDATORY SECTION** (Amending WSR 17-15-054, filed 7/13/17, effective 8/13/17)

**WAC 480-15-999 Adoption by reference.** In this chapter, the commission adopts by reference all or portions of regulations and standards identified below. They are available for inspection at the commission (~~(branch of the Washington state)~~) library. The publications, effective dates, references within this chapter, and availability of the resources are as follows:

(1) *North American Standard Out-of-Service Criteria* (OOSC) is published by the Commercial Vehicle Safety Alliance (CVSA).

(a) The commission adopts the version in effect on April 1, (~~(2016)~~) 2018.

(b) This publication is referenced in WAC 480-15-560 (Equipment safety requirements).

(c) The *North American Out-of-Service Criteria* is a copyrighted document. Copies are available from CVSA.

(2) **Title 49 Code of Federal Regulations**, cited as 49 C.F.R., including all appendices and amendments is published by the United States Government Printing Office.

(a) The commission adopts the version in effect on December 31, (~~(2016)~~) 2017.

(b) This publication is referenced in WAC 480-15-560 (Equipment safety requirements) and WAC 480-15-570 (Driver safety requirements).

(c) Copies of Title 49 Code of Federal Regulations are available from the U.S. Government Online Bookstore, <http://bookstore.gpo.gov/>, and from various third-party vendors.

**AMENDATORY SECTION** (Amending WSR 17-15-054, filed 7/13/17, effective 8/13/17)

**WAC 480-30-999 Adoption by reference.** In this chapter, the commission adopts by reference all or portions of regulations and standards identified below. They are available for inspection at the commission (~~(branch of the Washington state)~~) library. The publications, effective dates, references within this chapter, and availability of the resources are as follows:

(1) *North American Standard Out-of-Service Criteria* (OOSC) is published by the Commercial Vehicle Safety Alliance (CVSA).

(a) The commission adopts the version in effect on April 1, (~~(2016)~~) 2018.

(b) This publication is referenced in WAC 480-30-221 (Vehicle and driver safety requirements).

(c) The *North American Out-of-Service Criteria* is a copyrighted document. Copies are available from CVSA.

(2) **Title 49 Code of Federal Regulations**, cited as 49 C.F.R., including all appendices and amendments is published by the United States Government Printing Office.

(a) The commission adopts the version in effect on (~~December 31, 2016~~) July 1, 2017.

(b) This publication is referenced in WAC 480-30-221 (Vehicle and driver safety requirements) and WAC 480-30-226 (Intrastate medical waivers).

(c) Copies of Title 49 Code of Federal Regulations are available from the U.S. Government Online Bookstore, <http://bookstore.gpo.gov/>, and from various third-party vendors.

**AMENDATORY SECTION** (Amending WSR 17-15-054, filed 7/13/17, effective 8/13/17)

**WAC 480-31-999 Adoption by reference.** In this chapter, the commission adopts by reference all or portions of regulations and standards identified below. They are available for inspection at the commission (~~(branch of the Washington state)~~) library. The publications, effective dates, references within this chapter, and availability of the resources are as follows:

(1) *North American Standard Out-of-Service Criteria* (OOSC) is published by the Commercial Vehicle Safety Alliance (CVSA).

(a) The commission adopts the version in effect on April 1, (~~(2016)~~) 2018.

(b) This publication is referenced in WAC 480-31-120 (Equipment—Inspection—Ordered for repairs).

(c) The *North American Out-of-Service Criteria* is a copyrighted document. Copies are available from CVSA.

(2) **Title 49 Code of Federal Regulations**, cited as 49 C.F.R., including all appendices and amendments is published by the United States Government Printing Office.

(a) The commission adopts the version in effect on ~~((December 31, 2016))~~ July 1, 2017.

(b) This publication is referenced in WAC 480-31-100 (Equipment—Safety), WAC 480-31-120 (Equipment—Inspection—Ordered for repairs), and WAC 480-31-130 (Operation of motor vehicles).

(c) Copies of Title 49 Code of Federal Regulations are available from the U.S. Government Online Bookstore, <http://bookstore.gpo.gov/>, and from various third-party vendors.

**AMENDATORY SECTION** (Amending WSR 11-04-041, filed 1/25/11, effective 2/25/11)

**WAC 480-70-201 Vehicle and driver safety requirements.** (1) Companies must comply with all state and local laws and rules governing vehicle and driver safety. Companies must also comply with the parts of Title 49, Code of Federal Regulations (49 C.F.R.) shown in the following chart, that are adopted by reference. Information about 49 C.F.R. regarding the version adopted and where to obtain copies is set out in WAC 480-70-999.

49 C.F.R. Part Adopted:		Portions Not Adopted:
Part 40 -	Procedures for Transportation Workplace Drug and Alcohol Testing Programs	n/a
Part 379 -	Preservation of Records	n/a
Part 380 -	Special Training Requirements	n/a
Part 382 -	Controlled Substance and Alcohol Use and Testing	n/a
Part 383 -	Commercial Driver's License Standards; Requirements and Penalties	n/a
Part 385 -	Safety Fitness Procedures	n/a
Part 390 -	Safety Regulations, General	(1) The terms "motor vehicle," "commercial motor vehicle," and "private vehicle" are not adopted. Instead, where those terms are used in Title 49 C.F.R., they shall have the meanings assigned to them in WAC 480-70-041 (private vehicle) and WAC 480-70-196 (commercial motor vehicle).

49 C.F.R. Part Adopted:		Portions Not Adopted:
		(2) Whenever the term "director" is used in Title 49 C.F.R., it shall mean the commission.
Part 391 -	Qualification of Drivers	(1) A driver who operates exclusively within the state of Washington is not subject to the provisions of Part 391.49 (waiver of certain physical defects), if that driver has obtained from the Washington department of licensing a driver's license with endorsements and restrictions allowing operation of the motor vehicle being driven.  (2) A driver who operates exclusively <del>((within the state of Washington))</del> <u>in intrastate commerce</u> is not subject to the provisions of Part 391.11(b)(1) (general qualifications - age). A driver operating exclusively <del>((within the state of Washington))</del> <u>in intrastate commerce</u> may drive a motor vehicle if he or she is at least eighteen years of age.
Part 392 -	Driving of Motor Vehicles	n/a
Part 393 -	Parts and Accessories Necessary for Safe Operation	n/a
Part 395 -	Hours of Service of Drivers	n/a
Part 396 -	Inspection, Repair, and Maintenance	n/a
Part 397 -	Transportation of Hazardous Materials, Driving and Parking Rules	n/a

(2) Companies must:

(a) Maintain all motor vehicles in a safe and sanitary condition;

(b) Ensure that vehicles are free of defects likely to result in an accident or breakdown; and

(c) Make vehicles available for inspection by commission representatives.

(3) The commission will place out-of-service any motor vehicle having safety defects identified in the *North American Uniform Out-Of-Service Criteria*. Information about the *North American Uniform Out-Of-Service Criteria* regarding the version adopted and where to obtain copies is set out in WAC 480-70-999. A company must not operate any vehicle placed out-of-service until after proper repairs have been completed.

(4) The commission will place out-of-service any driver meeting criteria identified in the *North American Uniform Out-Of-Service Criteria*. A company must not allow a driver who has been placed out-of-service to operate a motor vehicle until such time as the conditions causing the driver to be placed out-of-service have been corrected.

**AMENDATORY SECTION** (Amending WSR 17-15-054, filed 7/13/17, effective 8/13/17)

**WAC 480-70-999 Adoption by reference.** In this chapter, the commission adopts by reference all, or portions of, regulations and standards identified below. They are available for inspection at the commission (~~(branch of the Washington state)~~) library. The publications, effective dates, references within this chapter, and availability of the resources are as follows:

(1) **The North American Standard Out-of-Service Criteria** is published by the Commercial Vehicle Safety Alliance (CVSA).

(a) The commission adopts the version in effect on April 1, ~~((2016))~~ 2018.

(b) This publication is referenced in WAC 480-70-201 (Vehicle and driver safety requirements).

(c) The *North American Out-of-Service Criteria* is a copyrighted document. Copies are available from CVSA.

(2) **Title 40 Code of Federal Regulations**, cited as 40 C.F.R., including all appendices and amendments is published by the United States Government Printing Office.

(a) The commission adopts the version in effect on ~~((December 31, 2016))~~ July 1, 2017.

(b) This publication is referenced in WAC 480-70-041 (Definitions, general).

(c) Copies of Title 40 Code of Federal Regulations are available from the U.S. Government Online Bookstore, <http://bookstore.gpo.gov/>, and from various third-party vendors.

(3) **Title 49 Code of Federal Regulations**, cited as 49 C.F.R., including all appendices and amendments is published by the United States Government Printing Office.

(a) The commission adopts the version in effect on ~~((December 31, 2016))~~ July 1, 2017.

(b) This publication is referenced in WAC 480-70-201 (Vehicle and driver safety requirements), WAC 480-70-431 (Biomedical waste, adoption of federal regulations), and WAC 480-70-486 (Hazardous waste, adoption of federal regulations).

(c) Copies of Title 49 Code of Federal Regulations are available from the U.S. Government Online Bookstore, <http://bookstore.gpo.gov/>, and from various third-party vendors.

**AMENDATORY SECTION** (Amending WSR 14-05-001, filed 2/5/14, effective 3/8/14)

**WAC 480-73-999 Adoption by reference.** In this chapter, the commission adopts by reference all or portions of regulations and standards identified below. They are available for inspection at the commission (~~(branch of the Washington state)~~) library. The publications, effective date, references

within this chapter, and availability of the resources are as follows:

(1) **Title 18 Code of Federal Regulations**, cited as 18 C.F.R., is published by the United States Government Printing Office.

(2) The commission adopts the version in effect on ~~((September 23, 2013))~~ April 1, 2017.

(3) This publication is referenced in WAC 480-73-130 (Accounting system requirements), WAC 480-73-150 (Retaining and preserving records and reports), and WAC 480-73-160 (Annual reports).

(4) Copies of Title 18 Code of Federal Regulations are available from the U.S. Government Online Bookstore, <http://bookstore.gpo.gov/>, and from various third-party vendors.

**AMENDATORY SECTION** (Amending WSR 17-15-054, filed 7/13/17, effective 8/13/17)

**WAC 480-75-999 Adoption by reference.** In this chapter, the commission adopts by reference all or portions of regulations and standards identified below. They are available for inspection at the commission (~~(branch of the Washington state)~~) library. The publications, effective dates, references within this chapter, and availability of the resources are as follows:

(1) **Title 49 Code of Federal Regulations**, cited as 49 C.F.R., Parts 195, 198, and 199 including all appendices and amendments except for 49 C.F.R. Sections 195.0 and 195.1, and 49 C.F.R. Sections 199.1 and 199.2, published by the United States Government Printing Office.

(a) The commission adopts the version in effect on ~~((March 6, 2015))~~ January 23, 2017.

(b) This publication is referenced in WAC 480-75-370 (Design factor (*F*) for steel pipe) and WAC 480-75-660 (Procedural manual for operations, maintenance, and emergencies).

(c) Copies of Title 49 Code of Federal Regulations are available from the U.S. Government Online Bookstore, <http://bookstore.gpo.gov/>.

(2) **The American Society of Mechanical Engineers (ASME) B31.4**, 2006 edition, October 20, 2006.

(a) This publication is referenced in WAC 480-75-350 (Design specifications for new pipeline projects), WAC 480-75-440 (Pipeline repairs), and WAC 480-75-450 (Construction specifications).

(b) Copies of ASME B31.4 are available from ASME, <http://www.asme.org/codes/>. It is also available for inspection at the commission.

(3) The 2007 edition, July 2007, of **Section IX of the ASME Boiler and Pressure Vessel Code**.

(a) This publication is referenced in WAC 480-75-430 (Welding procedures).

(b) Copies of the 2007 edition, of *Section IX of the ASME Boiler and Pressure Vessel Code* are available from ASME, <http://www.asme.org/codes/>. It is also available for inspection at the commission.

(4) The commission adopts **American Petroleum Institute (API) standard 1104** (20th edition 2005, including errata/addendum July 2007 and errata 2 (December 2008)).

(a) This publication is referenced in WAC 480-75-430 (Welding procedures) and WAC 480-75-460 (Welding inspection requirements).

(b) Copies of API standard 1104 (20th edition 2005, including errata/addendum July 2007 and errata December 2008) are available from the Office of API Publishing Services, <http://www.api.org/>. It is also available for inspection at the commission.

**AMENDATORY SECTION** (Amending WSR 17-15-054, filed 7/13/17, effective 8/13/17)

**WAC 480-90-999 Adoption by reference.** In this chapter, the commission adopts by reference all or portions of regulations and standards identified below. They are available for inspection at the commission (~~(branch of the Washington state)~~) library. The publications, effective date, references within this chapter, and availability of the resources are as follows:

(1) **Title 18 Code of Federal Regulations**, cited as 18 C.F.R., including all appendices and amendments is published by the United States Government Publishing Office.

(a) The commission adopts the version in effect on April 1, 2015.

(b) The accounting and reporting for the types of transactions and events covered by the amendment should not be construed as indicative of their treatment by this commission for ratemaking purposes.

(c) This publication is referenced in WAC 480-90-203 (Accounting system requirements), WAC 480-90-244 (Transferring cash or assuming obligations), WAC 480-90-252 (Federal Energy Regulatory Commission (FERC) Form No. 2), and WAC 480-90-268 (Essential utilities services contracts report).

(d) Copies of Title 18 Code of Federal Regulations are available from the U.S. Government Publishing Office in Washington, D.C., or online at <http://www.gpo.gov/>, and from various third-party vendors. It is also available for inspection at the commission branch of the state library.

(2) **The Regulations to Govern the Preservation of Records of Electric, Gas, and Water Utilities** is published by the National Association of Regulatory Utility Commissioners (NARUC).

(a) The commission adopts the version in effect in 2007.

(b) This publication is referenced in WAC 480-90-228 (Retention and preservation of records and reports).

(c) The *Regulations to Govern the Preservation of Records of Electric, Gas, and Water Companies* is a copyrighted document. Copies are available from NARUC, in Washington, D.C. or at NARUC publications store online: <http://www.naruc.org/store>. It is also available for inspection at the commission branch of the state library.

**AMENDATORY SECTION** (Amending WSR 17-15-054, filed 7/13/17, effective 8/13/17)

**WAC 480-93-999 Adoption by reference.** In this chapter, the commission adopts by reference each of the regulations and/or standards identified below. Each regulation or standard is listed by publication, publisher, scope of what the commission is adopting, effective date of the regulation or

standard, the place within the commission's rules the regulation or standard is referenced, and where to obtain the regulation or standard.

(1) Parts 191, 192, 193, 198, and 199 of Title 49 Code of Federal Regulations, including all appendices and amendments thereto as published by the United States Government Printing Office.

(a) The commission adopts the version of the above regulations that were in effect on (~~(March 6, 2016))~~ January 23, 2017, except the following sections are not adopted by reference: 191.1, 192.1(a), 193.2001(a), 199.1. In addition, please note that in WAC 480-93-013, the commission includes "new construction" in the definition of "covered task," as defined in 49 C.F.R. § 192.801 (b)(2).

(b) This publication is referenced in WAC 480-93-005 (Definitions), WAC 480-93-080 (Welder and plastic joiner identification and qualification), WAC 480-93-100 (Valves), WAC 480-93-110 (Corrosion control), WAC 480-93-124 (Pipeline markers), WAC 480-93-170 (Tests and reports for gas pipelines), WAC 480-93-180 (Plans and procedures), and WAC 480-93-18601 (Leak classification and action criteria—Grade—Definition—Priority of leak repair).

(c) Copies of Title 49 Code of Federal Regulations are available from the U.S. Government Online Bookstore, <http://bookstore.gpo.gov/>. It is also available for inspection at the commission.

(2) Section IX of the American Society of Mechanical Engineers (ASME) Boiler and Pressure Vessel Code.

(a) The commission adopts the 2007 edition, July 1, 2007, of Section IX of the ASME Boiler and Pressure Vessel Code.

(b) This publication is referenced in WAC 480-93-080.

(c) Copies of Section IX of the ASME Boiler and Pressure Vessel Code (2007 edition, including addenda through July 1, 2005) are available from ASME, <http://www.asme.org/codes/>. It is also available for inspection at the commission.

(3) The American Petroleum Institute (API) standard 1104 (20th edition October 2005, including errata/addendum July 2007 and errata 2 (2008)).

(a) The commission adopts the 20th edition 2005, including errata/addendum July 2007 and errata 2 (2008) of this standard.

(b) This standard is referenced in WAC 480-93-080.

(c) Copies of API standard 1104 (20th edition 2005, including errata/addendum July 2007 and errata December 2008) are available from the Office of API Publishing Services, <http://www.api.org/>. It is also available for inspection at the commission.

**AMENDATORY SECTION** (Amending WSR 17-15-054, filed 7/13/17, effective 8/13/17)

**WAC 480-100-999 Adoption by reference.** In this chapter, the commission adopts by reference all or portions of regulations and standards identified below. The publications, effective date, references within this chapter, and availability of the resources are as follows:

(1) **Title 18 Code of Federal Regulations**, cited as 18 C.F.R., including all appendices and amendments is published by the United States Government Publishing Office.

(a) The commission adopts the version in effect on April 1, 2015.

(b) The accounting and reporting for the types of transactions and events covered by the amendment should not be construed as indicative of their treatment by this commission for ratemaking purposes.

(c) This publication is referenced in WAC 480-100-203 (Accounting system requirements), WAC 480-100-244 (Transferring cash or assuming obligations), WAC 480-100-252 (Federal Energy Regulatory Commission (FERC) Form No. 1), and WAC 480-100-268 (Essential utilities services contracts report).

(d) Copies of Title 18 Code of Federal Regulations are available from the U.S. Government Publishing Office in Washington D.C., or online at <http://www.gpo.gov/>, and from various third-party vendors. It is also available for inspection at the commission (~~branch of the state~~) library.

(2) The **Regulations to Govern the Preservation of Records of Electric, Gas, and Water Utilities** is published by the National Association of Regulatory Utility Commissioners (NARUC).

(a) The commission adopts the version in effect in 2007.

(b) This publication is referenced in WAC 480-100-228 (Retention and preservation of records and reports).

(c) The *Regulations to Govern the Preservation of Records of Electric, Gas, and Water Companies* is a copyrighted document. Copies are available from NARUC in Washington, D.C. or at NARUC publications store online: <http://www.naruc.org/store>. It is also available for inspection at the commission branch of the state library.

(3) The **National Electrical Code** is published by the National Fire Protection Association (NFPA).

(a) The commission adopts the edition effective in 2017, including errata 70-17-1 published September 29, 2016, errata 70-17-2 published December 16, 2016, ~~(and)~~ 70-17-3 published January 11, 2017, and 70-17-4 published March 13, 2017.

(b) This publication is referenced in WAC 480-100-163 (Service entrance facilities).

(c) The National Electrical Code is a copyrighted document. Copies are available from the NFPA at 1 Batterymarch Park, Quincy, Massachusetts 02169, or at internet address <http://www.nfpa.org/>.

(4) The **American National Standard for Electric Meters: Code for Electricity Metering**, ANSI C12.1 is published by the American National Standards Institute.

(a) The commission adopts the version published in 2016.

(b) This publication is referenced in WAC 480-100-318 (Meter readings, multipliers, and test constants), WAC 480-100-338 (Accuracy requirements for electric meters), and WAC 480-100-343 (Statement of meter test procedures).

(c) The ANSI C12.1 is a copyrighted document. ANSI C12.1 - 2016 is available at American National Standards Institute web site <http://webstore.ansi.org/> (PDF) or at IHS Standards Store web site <https://global.ihs.com/> (PDF and print).

AMENDATORY SECTION (Amending WSR 17-15-054, filed 7/13/17, effective 8/13/17)

**WAC 480-108-999 Adoption by reference.** In this chapter, the commission adopts by reference all or portions of regulations and standards identified below. The publications, effective date, references within this chapter, and availability of the resources are as follows:

(1) The National Electrical Code is published by the National Fire Protection Association (NFPA).

(a) The commission adopts the edition effective 2017, including errata 70-17-1 published September 29, 2016, errata 70-17-2 published December 16, 2016, ~~(and)~~ 70-17-3 published January 11, 2017, and 70-17-4 published March 13, 2017.

(b) This publication is referenced in WAC 480-108-040 (General terms and conditions of interconnection).

(c) The National Electrical Code is a copyrighted document. Copies are available from the NFPA at 1 Batterymarch Park, Quincy, Massachusetts, 02169 or at internet address <http://www.nfpa.org/>.

(2) National Electrical Safety Code (NESC).

(a) The commission adopts the 2017 edition.

(b) This publication is referenced in WAC 480-108-040 (General terms and conditions of interconnection).

(c) Copies of the National Electrical Safety Code are available from the Institute of Electrical and Electronics Engineers at <http://standards.ieee.org/nesc>.

(3) Institute of Electrical and Electronics Engineers (IEEE) Standard 1547, Standard for Interconnecting Distributed Resources with Electric Power Systems.

(a) The commission adopts the version published in 2003 and reaffirmed in 2008, including amendment 1547a-2014, published May 21, 2014.

(b) This publication is referenced in WAC 480-108-040 (General terms and conditions of interconnection).

(c) Copies of IEEE Standard 1547 are available from the Institute of Electrical and Electronics Engineers at <http://www.ieee.org>.

(4) American National Standards Institute (ANSI) Standard C37.90, IEEE Standard for Relays and Relay Systems Associated with Electric Power Apparatus.

(a) The commission adopts the version published in 2005 and reaffirmed in 2011.

(b) This publication is referenced in WAC 480-108-040 (General terms and conditions of interconnection).

(c) Copies of IEEE Standard C37.90 are available from the Institute of Electrical and Electronics Engineers at <http://www.ieee.org>.

(5) Institute of Electrical and Electronics Engineers (IEEE) Standard 519, Recommended Practices and Requirements for Harmonic Control in Electrical Power Systems.

(a) The commission adopts the version published June 11, 2014.

(b) This publication is referenced in WAC 480-108-040 (General terms and conditions of interconnection).

(c) Copies of IEEE Standard 519 are available from the Institute of Electrical and Electronics Engineers at <http://www.ieee.org>.

(6) Institute of Electrical and Electronics Engineers (IEEE) Standard 141, Recommended Practice for Electric Power Distribution for Industrial Plants.

(a) The commission adopts the version published in 1993 and reaffirmed in 1999.

(b) This publication is referenced in WAC 480-108-040 (General terms and conditions of interconnection).

(c) Copies of IEEE Standard 141 are available from the Institute of Electrical and Electronics Engineers at <http://www.ieee.org>.

(7) Institute of Electrical and Electronics Engineers (IEEE) Standard 142, Recommended Practice for Grounding of Industrial and Commercial Power Systems.

(a) The commission adopts the version published in 2007.

(b) This publication is referenced in WAC 480-108-040 (General terms and conditions of interconnection).

(c) Copies of IEEE Standard 142 are available from the Institute of Electrical and Electronics Engineers at <http://www.ieee.org>.

(8) Underwriters Laboratories (UL), including UL Standard 1741, Inverters, Converters, Controllers and Interconnection Systems Equipment for Use with Distributed Energy Resources.

(a) The commission adopts the version published January 28, 2010.

(b) This publication is referenced in WAC 480-108-040 (General terms and conditions of interconnection).

(c) UL Standard 1741 is available from Underwriters Laboratory at <http://www.ul.com>.

(9) Occupational Safety and Health Administration (OSHA) Standard at 29 C.F.R. 1910.269.

(a) The commission adopts the version published on November 18, 2016, effective January 17, 2017.

(b) This publication is referenced in WAC 480-108-040 (General terms and conditions of interconnection).

(c) Copies of Title 29 Code of Federal Regulations are available from the U.S. Government Online Bookstore, <http://bookstore.gpo.gov/>, and from various third-party vendors.

**AMENDATORY SECTION** (Amending WSR 17-15-054, filed 7/13/17, effective 8/13/17)

**WAC 480-109-999 Adoption by reference.** In this chapter, the commission adopts by reference all, or portions of, the publications identified below. They are available for inspection at the commission (~~(branch of the Washington state)~~) library. The publications, publication dates, references within this chapter, and availability of the resources are as follows:

(1) *Northwest Conservation and Electric Power Plan* as published by the Northwest Power and Conservation Council.

(a) The commission adopts the seventh version published in 2016.

(b) This publication is referenced in WAC 480-109-100 Energy efficiency resource standard.

(c) Copies of *Seventh Northwest Conservation and Electric Power Plan* are available from the Northwest Power and

Conservation Council at <https://www.nwccouncil.org/energy/powerplan/7/plan/>.

(2) *Weatherization Manual* as published by the Washington state department of commerce.

(a) The commission adopts the version published in July 2015 (with 2016 revisions).

(b) This publication is referenced in WAC 480-109-100 Energy efficiency resource standard.

(c) Copies of *Weatherization Manual* are available from the Washington state department of commerce at (~~<http://www.commerce.wa.gov/wp-content/uploads/2016/07/ws-manual-2016.pdf>~~) <http://www.commerce.wa.gov/wp-content/uploads/2016/07/wx-manual-2016.pdf>.

(3) The unit energy savings values as published by the Northwest Power and Conservation Council's Regional Technical Forum.

(a) The commission adopts the unit energy savings with status of "Active" or "Under Review" on January 10, 2016.

(b) This information is referenced in WAC 480-109-100 Energy efficiency resource standard.

(c) The spreadsheets containing the unit energy savings values are available for download at <https://rtf.nwccouncil.org/measures/Default.asp>.

(4) The standard protocols as published by the Northwest Power and Conservation Council's Regional Technical Forum.

(a) The commission adopts the standard protocols with status of "Active" or "Under Review" on January 10, 2016.

(b) This information is referenced in WAC 480-109-100 Energy efficiency resource standard.

(c) The spreadsheets containing the standard protocols are available for download at <https://rtf.nwccouncil.org/standard-protocols>.

**AMENDATORY SECTION** (Amending WSR 17-15-054, filed 7/13/17, effective 8/13/17)

**WAC 480-120-999 Adoption by reference.** In this chapter, the commission adopts by reference all or portions of regulations and standards identified below. They are available for inspection at the commission (~~(branch of the Washington state)~~) library. The publications, effective dates, references within this chapter, and availability of the resources are as follows:

(1) **American National Standards for Telecommunications** - "*Network Performance Parameters for Dedicated Digital Services for Rates Up To and Including DS3 - Specifications*" (ATIS 0100510) is published by the American National Standards Institute (ANSI).

(a) The commission adopts the version in effect on December 29, 1999, and reaffirmed 2013.

(b) This publication is referenced in WAC 480-120-401 (Network performance standards).

(c) The American National Standards for Telecommunications "*Network Performance Parameters for Dedicated Digital Services for Rates Up To and Including DS3 - Specifications*" is a copyrighted document. Copies are available from ANSI in Washington, D.C. and from various third-party vendors.

(2) **The Institute of Electrical And Electronic Engineers (IEEE) Standard Telephone Loop Performance Characteristics** (ANSI/IEEE Std 820-2005) is published by the ANSI and the IEEE.

(a) The commission adopts the version in effect as published in 2005.

(b) This publication is referenced in WAC 480-120-401 (Network performance standards).

(c) *The IEEE Standard Telephone Loop Performance Characteristics* is a copyrighted document. Copies are available from ANSI and IEEE in Washington, D.C. and from various third-party vendors.

(3) **The National Electrical Safety Code** is published by the IEEE.

(a) The commission adopts the ((2012)) 2017 edition.

(b) This publication is referenced in WAC 480-120-402 (Safety).

(c) *The National Electrical Safety Code* is a copyrighted document. Copies are available from IEEE in Washington, D.C. and from various third-party vendors.

(4) **Title 47 Code of Federal Regulations**, cited as 47 C.F.R., is published by the United States Government Printing Office.

(a) For this publication as referenced in WAC 480-120-359 (Accounting requirements for companies not classified as competitive) and WAC 480-120-349 (Retaining and preserving records and reports), the commission adopts the version of the relevant sections in effect on October 1, 2016.

(b) For this publication as referenced in WAC 480-120-202 (Customer proprietary network information), WAC 480-120-146 (Changing service providers from one local exchange company to another), and any other reference in chapter 480-120 WAC, the commission adopts the version of the relevant sections in effect on October 1, 2016.

(c) The 2016 version of C.F.R. Title 47 is available from the U.S. Government Online Bookstore, <http://bookstore.gpo.gov/>, and from various third-party vendors.

690-035, 208-690-040, 208-690-050, 208-690-060, 208-690-080, 208-690-085, 208-690-090, 208-690-100, 208-690-110, 208-690-150, 208-690-180, 208-690-200, 208-690-240, 208-690-250, and 208-690-280.

Statutory Authority for Adoption: RCW 43.320.040, 19.230.310.

Adopted under notice filed as WSR 18-09-098 on April 17, 2018.

Changes Other than Editing from Proposed to Adopted Version: 1. WAC 208-690-010 Definitions, several definitions were removed because they were contained in the statute.

2. WAC 208-690-015, the lead-in question was amended to more closely describe the content of the rule. In addition, the language relating to payment processors and other exemptions were moved to a new section.

3. WAC 208-690-018, this is a new section made up of language from the prior 208-690-015 and amended for clarity.

4. WAC 208-690-030, this section was amended to remove language that exists verbatim in the statute.

5. WAC 208-690-040, this section was amended to clarify that some activities will not require a company to continue to hold a bond postclosure.

6. WAC 208-690-090, the language was amended to clarify that when certain information provided through the quarterly NMLS reporting will not be required to be resubmitted to the agency during the annual assessment period.

7. WAC 208-690-110, this section was amended to align reporting deadlines with the statute and to remove a description of the reporting requirements of material changes regarding executive officers and others.

8. WAC 208-690-140, this section was moved and renumbered as WAC 208-690-103. Subsection (3) is new language, stored value was changed to prepaid access, and there were no other changes.

9. WAC 208-690-180, language removed that is duplicative to the statute; reference to statute given.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 2, Amended 6, Repealed 0.

Number of Sections Adopted at the Request of a Non-governmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's own Initiative: New 2, Amended 13, Repealed 2.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted using Negotiated Rule Making: New 4, Amended 19, Repealed 2; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: June 19, 2018.

Charles Clark  
Deputy Director  
Director of Consumer Services

## WSR 18-13-108

### PERMANENT RULES

### DEPARTMENT OF

### FINANCIAL INSTITUTIONS

(Division of Consumer Services)

[Filed June 19, 2018, 4:43 p.m., effective August 1, 2018]

Effective Date of Rule: August 1, 2018.

Purpose: The rules must be amended to implement the statutory changes from SSB 5031 (chapter 30, Laws of 2017), to benefit the regulated industries by having clear and consistent rules including taking into account innovations in the industry, informing the industry of obligations under state and federal law, to change the definition of stored value to be consistent with federal law, and to otherwise make necessary technical changes.

Citation of Rules Affected by this Order: New WAC 208-690-041, 208-690-103, 208-690-105 and 208-690-205; repealing WAC 208-690-045 and 208-690-140; and amending WAC 208-690-010, 208-690-015, 208-690-030, 208-

AMENDATORY SECTION (Amending WSR 16-14-022, filed 6/27/16, effective 8/1/16)

**WAC 208-690-010 Definitions.** What definitions are applicable to these rules? In addition to the definitions herein, the definitions in ((RCW 19.230.010 and this section)) chapter 19.230 RCW apply throughout this chapter unless the context clearly requires otherwise.

"Act" means the Uniform Money Services Act, chapter 19.230 RCW.

"Advertise, advertising, or advertising material" means any form of sales or promotional materials used in connection with the business. Advertising material includes, but is not limited to, newspapers, magazines, leaflets, flyers, direct mail, indoor or outdoor signs or displays, point-of-sale literature or educational materials, other printed materials; radio, television, public address system, or other audio broadcasts; internet pages, social media pages, instant messages, or electronic bulletin boards.

"AML compliance officer" means the individual(s) employed by the licensee or licensee's parent or affiliate designated to implement the anti-money laundering (AML) program.

"Audited financial statement" means a statement prepared by an independent accountant according to generally accepted accounting principles.

~~("Authorized delegate" means a person a licensee designates to provide money services on behalf of the licensee. A person that is exempt from licensing under this chapter cannot have an authorized delegate. An authorized delegate must only perform the contractual duties as authorized by the licensee in the contract between the licensee and the authorized delegate.)~~

"Bill payment" service means a type of money transmission when an intermediary accepts funds from a consumer for transmission to a merchant for payment on a consumer's account. The intermediary may or may not charge a fee for this service.

"Department" means the department of financial institutions.

~~("Executive officer" means a president, chairperson of the executive committee, chief financial officer, responsible individual, or other individual who performs similar functions.)~~

"Funds" means money or its equivalent value.

~~("Material litigation" means the same as in RCW 19.230.010.~~

~~"Money transmission" means receiving money or its equivalent value to transmit, deliver, or instruct to be delivered the money or its equivalent value to another location, inside or outside the United States, by any means including, but not limited to, by wire, facsimile, or electronic transfer. Money transmission does not include the provision solely of connection services to the internet, telecommunications services, or network access. Money transmission includes selling, issuing, or acting as an intermediary for open-loop stored value devices and payment instruments, but not closed-loop stored value devices.)~~

"NMLS" means a multistate licensing system developed and maintained by the Conference of State Bank Supervisors for licensing and registration.

~~("Payment instrument" means a check, draft, money order, or traveler's check for the transmission or payment of money or its equivalent value, whether or not negotiable. Payment instrument does not include a credit card voucher, letter of credit, or instrument that is redeemable by the issuer in goods or services.)~~ "Online currency exchanger" means a currency exchanger who transacts business over the internet or other electronic medium, regardless of whether the currency exchanger also has a physical location in Washington state.

"Principal" means any person who controls, directly or indirectly through one or more intermediaries, alone or in concert with others, a ten percent or greater interest in a partnership, company, corporation, or association, or the owner of a sole proprietorship.

"RCW" means the *Revised Code of Washington*.

~~("Stored value" means the recognition of value or credit stored on a device. Stored value is either open loop, meaning the value is redeemable at multiple, unaffiliated merchants or service providers, or closed loop meaning the value is primarily intended to be redeemed for a limited universe of goods, intangibles, services, or other items provided by the issuer of the stored value, its affiliates, or others involved in transactions functionally related to the issuer or its affiliates.~~

~~"Stored value device" means a card or other device that electronically stores or provides access to funds and is available for transferring the funds or value to others.~~

~~"Subdelegate" means a person that provides money services on behalf of an authorized delegate without having a direct contractual relationship with a licensee.~~

~~"Tangible net worth" means the physical worth of a licensee, calculated by taking a licensee's assets and subtracting its liabilities and its intangible assets, such as copyrights, patents, intellectual property, and goodwill.~~

~~"Unsafe or unsound practice" means a practice or conduct by a person licensed or required to be licensed by the act to provide money services, or an authorized delegate of such a person, which creates the likelihood of material loss, insolvency, or dissipation of the licensee's assets, or otherwise materially prejudices the financial condition of the licensee or the interests of its customers.)~~

"Virtual currency storage" means storing access to virtual currency owned by another person.

## PART B

### APPLICATION OF CHAPTER—EXEMPTIONS

AMENDATORY SECTION (Amending WSR 16-14-022, filed 6/27/16, effective 8/1/16)

**WAC 208-690-015** What ~~((are some))~~ activities ((that)) are ((exempt)) excluded from the act? (1) See also RCW 19.230.020.

(2) The issuance, sale, use, redemption, or exchange of closed-loop ((stored value devices)) prepaid access.

((2)) (3) The issuance or sale of open-loop ((stored value devices)) prepaid access when the value ((on the devices are)) is covered by federal deposit insurance immediately upon sale or issue. See the Federal Deposit Insurance

Corporation (FDIC) Financial Institution Letter 129-2008 dated November 13, 2008, to determine if the underlying funds (~~of stored value devices~~) are covered by FDIC insurance immediately upon sale or issue.

~~((3) See also RCW 19.230.020.)~~ (4) Storage of virtual currency by a person when the virtual currency is owned by others and the person storing the virtual currency does not have the unilateral ability to transmit the value being stored.

#### NEW SECTION

**WAC 208-690-018 How does the department interpret the activities that are excluded in RCW 19.230.020?** The following are excluded:

- (1) Pursuant to RCW 19.230.020 (6) and (7):
  - (a) Activities regulated by the Commodities Futures Trading Commission (CFTC) or exempt from registration with the CFTC;
  - (b) Clearance or settlement services provided by a person to a board of trade as designated by the CFTC.
- (2) Pursuant to RCW 19.230.020(8), activities by persons providing clearance or settlement services under a registration as a clearing agency, or an exemption from that registration granted under the federal securities laws. The exclusion applies only to those activities.
- (3) Payment processing by a person meeting the requirements in RCW 19.230.020(9), but not persons engaged in payment processing activities:
  - (a) Using virtual currencies;
  - (b) For the marijuana industry; or
  - (c) Holding consumer funds with no direction from the consumer to pay the funds to a payee.

AMENDATORY SECTION (Amending WSR 16-14-022, filed 6/27/16, effective 8/1/16)

**WAC 208-690-030 License application. What must I do to apply for a license?** You must file:

- (1) A completed application in a form and in a medium prescribed by the director through the NMLS. See RCW 19.230.040 for the required contents of the application. In addition, the application must contain:
  - (a) ~~((The legal name, business and email address, and residential address, if applicable, of the applicant and any fictitious or trade name used by the applicant in conducting its business;~~
  - (b) ~~The legal name, residential and business address, date of birth, Social Security number, employment history for the five year period preceding the submission of the application of the applicant's proposed responsible individual, and documentation that the proposed responsible individual is a citizen of the United States or has obtained legal immigration status to work in the United States. In addition, the applicant must provide))~~ The fingerprints of the proposed responsible individual and a personal credit report from a recognized independent credit reporting agency on the proposed responsible individual;
  - ~~((e) For the ten year period preceding submission of the application, a list of any criminal convictions of the proposed responsible individual of the applicant, any material litigation in which the applicant has been involved, and any litigation~~

~~involving the proposed responsible individual relating to the provision of money services;~~

~~(d) A description of any money services previously provided by the applicant and the money services the applicant seeks to provide in this state;~~

~~(e))~~ (b) A list of the applicant's proposed authorized delegates including the business name and any additional names by which the business may be known, the business address and name of the primary contact person for each authorized delegate, and the locations in this state where the applicant and its authorized delegates propose to engage in the provision of money services;

~~((f) A list of other states in which the applicant is licensed to engage in money transmission, or provide other money services, and any license revocations, suspensions, restrictions, or other disciplinary action taken against the applicant in another state;~~

~~(g) A list of any license revocations, suspensions, restrictions, or other disciplinary action taken against any money services business involving the proposed responsible individual;~~

~~(h) Information concerning any bankruptcy or receivership proceedings involving or affecting the applicant or the proposed responsible individual;~~

~~(i) A sample form of the contract for authorized delegates, if applicable;~~

~~(j) A description of the source of money and credit to be used by the applicant to provide money services;~~

~~(k))~~ (c) A full description of the screening process used by the applicant in selecting authorized delegates, including a sample of any forms used, and the method used to screen for criminal history; and

~~((H))~~ (d) Identification of the bank account established for the business including, but not limited to, the bank name, address, account number, and account type.

(2) If the applicant is a corporation, limited liability company, partnership, or other entity, the applicant must also provide:

(a) ~~((The date of the applicant's incorporation or formation and the state or country of incorporation or formation;~~

~~(b) If applicable, a certificate of good standing from the state or country in which the applicant is incorporated or formed;~~

~~(c) A brief description of the structure or organization of the applicant, including any parent or subsidiary of the applicant, and whether any parent or subsidiary is publicly traded;~~

~~(d))~~ The legal name, any fictitious or trade name, all business and residential addresses, date of birth, Social Security number, and employment history in the ten-year period preceding the submission of the application for each ~~((executive officer, board director,))~~ AML compliance officer ~~((or other person that has control of the applicant));~~

~~((e))~~ (b) If the applicant or its corporate parent is not a publicly traded entity, the fingerprints of each executive officer, board director, AML compliance officer or other person that has control of the applicant; and

~~((f))~~ (c) A list of any criminal convictions, material litigation, and any litigation related to the provision of money services, in the ten-year period preceding the submission of the application in which any ~~((executive officer, board direc-~~

tor,)) AML compliance officer ((or other person in control of the applicant)) has been involved(;

~~(g) A copy of the applicant's audited financial statements for the most recent fiscal year or, if the applicant is a wholly owned subsidiary of another corporation, the most recent audited consolidated annual financial statement of the parent corporation or the applicant's most recent audited consolidated annual financial statement, and in each case, if available, for the two-year period preceding the submission of the application;~~

~~(h) A copy of the applicant's unconsolidated financial statements for the current fiscal year, whether audited or not, and, if available, for the two-year period preceding the submission of the application;~~

~~(i) If the applicant is publicly traded, a copy of the most recent report filed with the United States Securities and Exchange Commission under section 13 of the federal Securities Exchange Act of 1934 (15 U.S.C. Sec. 78m);~~

~~(j) If the applicant is a wholly owned subsidiary of:~~

~~(i) A corporation publicly traded in the United States, a copy of audited financial statements for the parent corporation for the most recent fiscal year or a copy of the parent corporation's most recent report filed under section 13 of the federal Securities Exchange Act of 1934 (15 U.S.C. Sec. 78m); or~~

~~(ii) A corporation publicly traded outside the United States, a copy of similar documentation filed with the regulator of the parent corporation's domicile outside the United States;~~

~~(k) If the applicant has a registered agent in this state, the name and address of the applicant's registered agent in this state)).~~

~~(3) ((If the application is for money transmission, a) Surety bonds as required by WAC 208-690-040 or ((an assignment of a certificate of deposit, as required by WAC 208-690-045)) 208-690-041.~~

~~(4) An application fee as prescribed by WAC 208-690-130(1). The application fee is not refundable. The director may require all fees to be paid through the NMLS.~~

~~(5) An additional license fee as prescribed by WAC 208-690-130(2).~~

~~(6) If the application is for money transmission, a certification that the applicant's investment portfolio, if maintained as permissible investments for outstanding transmission liabilities, includes only the permissible investments under RCW 19.230.200 and 19.230.210.~~

~~(7) If you are engaged in virtual currency storage, an information security audit report which at a minimum: Occurred within one year of the date of an application submission; and was completed by a company or individual with information security credentials acceptable to the director.~~

~~(8) Application for a proposed license or trade name. The application may be denied if the proposed name is similar to a currently existing licensee name, including trade names, is prohibited because it is deceptive or in violation of any other statute that limits the use of names, or is otherwise likely to cause confusion as to the identity of the true service provider.~~

The director may waive one or more requirements of this section or permit an applicant to submit other information in lieu of the required information.

AMENDATORY SECTION (Amending WSR 16-14-022, filed 6/27/16, effective 8/1/16)

**WAC 208-690-035 Authorized delegates. What are the rules I must comply with when I have authorized delegates?**

(1) Only a licensee may designate an authorized delegate.

(2) A person accepting consumers' funds for transmission through an exempt or excluded entity under RCW 19.230.020 is not an authorized delegate but is a money transmitter and must be licensed under the act.

~~(3) ((An authorized delegate, or any other person exempt or excluded from the licensing requirements of chapter 19.230 RCW, cannot have an authorized delegate.~~

~~(4)) Any person you designate to provide money services on your behalf is an authorized delegate, regardless of whether that person would be exempt or excluded from the application of chapter 19.230 RCW if they provided money services on their own behalf.~~

~~((5)) (4) Your authorized delegates must be physically located in the state of Washington unless you have received prior approval from the director to designate an authorized delegate physically located outside of the state of Washington.~~

~~((6)) (5) The licensee has supervisory authority over the actions of the authorized delegate when providing services on behalf of the licensee. The department may take action against a licensee and/or the authorized delegate for any actions by the authorized delegate on behalf of the licensee in violation of the act or rules.~~

~~((7)) (6) A written contract between you and an authorized delegate must contain, among all the other contract provisions, provisions with language substantially similar to the following:~~

~~(a) The authorized delegate must operate in full compliance with chapter 19.230 RCW and the rules adopted under this chapter.~~

~~(b) The authorized delegate is prohibited from using sub-delegates or conducting business from locations not authorized by the department.~~

~~(c) A description of the specific money services you authorize the delegate to perform on your behalf.~~

~~((8)) (7) The authorized delegate may only conduct activities authorized by you in the written agreement, unless the authorized delegate is also a licensee.~~

~~((9)) (8) You may contract with another licensee to use that other licensee's existing authorized delegates to load funds onto your existing open-loop ((stored value cards)) prepaid access product. If the shared authorized delegate sells new open-loop ((stored value cards)) prepaid access product for you, you must add the authorized delegate to your authorized delegate roster.~~

~~((10)) (9) The authorized delegate must include the licensee's name along with the other applicable requirements of RCW 19.230.330(2) on any disclosures or receipts.~~

~~((11)) (10) The licensee's bond covers the actions of the authorized delegate while the authorized delegate is providing money services on behalf of the licensee pursuant to the written contract.~~

~~((12))~~ (11) You must maintain your authorized delegate agreements and contracts with other licensees to share existing authorized delegates as part of your books and records pursuant to RCW 19.230.170 and make them available to the department upon request.

AMENDATORY SECTION (Amending WSR 16-14-022, filed 6/27/16, effective 8/1/16)

**WAC 208-690-040 Surety bond—~~Money transmitters~~. What are the bonding requirements?**

(1) You must continuously maintain a surety bond as required by RCW 19.230.050, issued by a company authorized to do surety business in this state, as a surety. The surety may not be a wholly owned subsidiary or affiliate of the applicant or licensee.

(2) The penal sum of the bond must be calculated quarterly during the first year of licensing and thereafter annually. The calculation must be based on the previous twelve months' money transmission and payment instrument dollar volume. The bond amount must be calculated at ten thousand dollars for every one million dollars of money transmission and payment instrument dollar volume. The minimum surety bond amount is ten thousand dollars. The maximum surety bond amount is five hundred fifty thousand dollars.

(3) The initial bond amount will be ten thousand dollars and must be reevaluated based on the schedule set forth in subsection (2) of this section.

(4) ~~((The bond must be held for at least))~~ Depending on the financial services you provide, you may be required to hold the bond for up to five years after the date ((the licensee violates the chapter or the licensee)) you cease((s)) to provide money services in this state((, whichever is longer)).

(5) The director may provide an alternative to a bond under certain circumstances that would not compromise consumer protection or allow the company to operate in an unsafe or unsound manner.

NEW SECTION

**WAC 208-690-041 Surety bond—Online currency exchangers. What are the bonding requirements?**

(1) You must continuously maintain a surety bond as required by RCW 19.230.055, issued by a company authorized to do surety business in this state, as a surety. The surety may not be a wholly owned subsidiary or affiliate of the applicant or licensee.

(2) The penal sum of the bond must be calculated quarterly during the first year of licensing and thereafter annually. The calculation must be based on the previous twelve months' online currency exchange dollar volume. The bond amount must be calculated at ten thousand dollars for every one million dollars of currency exchange dollar volume. The minimum surety bond amount is ten thousand dollars. The maximum surety bond amount is fifty thousand dollars.

(3) The initial bond amount will be ten thousand dollars and must be reevaluated based on the schedule set forth in subsection (2) of this section.

(4) The bond must cover claims for at least one year after the date of an online currency exchanger licensee's violation

of the chapter or the licensee ceases to provide online currency exchange services in this state, whichever is longer.

(5) The director may provide an alternative to a bond under certain circumstances.

AMENDATORY SECTION (Amending WSR 16-14-022, filed 6/27/16, effective 8/1/16)

**WAC 208-690-050 Increase of surety bond (~~(or alternative)~~). Will the department ever require an increase in the amount of the surety bond (~~(or alternative)~~)?** The director may increase the amount of the surety bond (~~(or alternative)~~), to a maximum of one million dollars, if the financial condition of a money transmitter or online currency exchanger applicant or licensee so requires. The director may consider, without limitation, the following criteria:

- (1) Significant reduction of net worth.
- (2) Financial losses.
- (3) Potential losses resulting from violations of chapter 19.230 RCW, or these rules.
- (4) Licensee filing for bankruptcy.
- (5) The initiation of any proceedings against the licensee in any state, by any federal agency, or in any foreign country. This includes the filing of material litigation.

(6) The filing of a state or federal criminal charge against the licensee, person in control, responsible individual, executive officer, board director, AML compliance officer, employee, authorized delegate or principal, based on conduct related to providing money services or money laundering.

(7) A licensee, executive officer, board director, AML compliance officer, other person in control, responsible individual, principal or authorized delegate being convicted of a crime.

- (8) Any unsafe or unsound practice.
- (9) A judicial or administrative finding against a money transmitter licensee under chapter 19.86 RCW, or an examination report finding that the money transmitter licensee engaged in an unfair or deceptive act or practice in the conduct of its business.

(10) The nature and volume of the projected or established business activities.

(11) Other events and circumstances that, in the judgment of the director, impair the ability of the licensee to meet its obligations to its money services customers.

AMENDATORY SECTION (Amending WSR 16-14-022, filed 6/27/16, effective 8/1/16)

**WAC 208-690-060 Tangible net worth. What are the rules for my tangible net worth requirements?**

(1) A money transmitter applicant or licensee must demonstrate and maintain tangible net worth calculated at ten thousand dollars for every one million dollars of total company-wide money transmission and payment instrument dollar volume over the previous twelve months. The minimum tangible net worth is ten thousand dollars; the maximum required amount is three million dollars.

(2) The minimum tangible net worth if the company ~~((stores))~~ provides virtual currency ~~((on behalf of others))~~ storage is one hundred thousand dollars. See the definition of virtual currency storage.

(3) The director may increase the amounts specified in subsections (1) and (2) of this section up to a maximum of three million dollars if the director determines that a higher net worth is necessary to achieve the purposes of this chapter based on the:

- (a) Nature and volume of the projected or established business activities;
  - (b) Amount, nature, quality, and liquidity of the company's assets;
  - (c) Amount and nature of the company's liabilities;
  - (d) History of the company's operations and prospects for earning and retaining income;
  - (e) Quality of the company's operations;
  - (f) Quality of the company's management;
  - (g) Nature and quality of the company's principals, responsible individuals, and persons in control;
  - (h) History of the company's compliance with applicable state and federal law; and
  - (i) Any other factor the director considers relevant.
- (4) Determinations of tangible net worth must be made according to generally accepted accounting principles.

AMENDATORY SECTION (Amending WSR 16-14-022, filed 6/27/16, effective 8/1/16)

**WAC 208-690-080 Audited annual financial statement. When must I provide audited financial statements?**

(1) You are required to have an audited financial statement prepared annually by a licensed or certified individual or firm in accordance with generally accepted accounting principles. The financials must be submitted prior to or with the annual assessment. The financials may be submitted through the NMLS. The director may waive the requirements of this subsection for licensees with minimal or no business activity conducted under their license.

(2) Applicants with no business operations prior to application must submit a copy of unconsolidated financial statements for the current fiscal year, whether audited or not. Audited annual financial statements are required in all future years of operation.

AMENDATORY SECTION (Amending WSR 16-14-022, filed 6/27/16, effective 8/1/16)

**WAC 208-690-085 Permissible investments.** (1) You must maintain permissible investment levels pursuant to RCW 19.230.200.

(2) In addition to the permissible investments allowed in RCW 19.230.210(2), a permissible investment may also include receivables from banks and credit cards.

(3) Monthly reports about permissible investments must include the monthly calculation of the average ~~((outstanding))~~ daily transmission liability. Average daily transmission liability means the sum of the daily amounts of a licensee's outstanding money transmission, as computed each day of the month divided by the number of days in the month.

(4) A licensee transmitting virtual currencies must hold virtual currencies of the same kind and volume (like-kind) as that held by the licensee but which is obligated to consumers. For example: A licensee transmitting 100 Bitcoins and 50

Ether on behalf of consumers must be able to demonstrate it possesses at least 100 Bitcoins and 50 Ether.

(5) A licensee transmitting both money and virtual currency must maintain volumes and types of permissible investments as described in subsections (3) and (4) of this section.

AMENDATORY SECTION (Amending WSR 16-14-022, filed 6/27/16, effective 8/1/16)

**WAC 208-690-090 Annual report and annual assessment. What are the annual report and assessment requirements?** Every licensee must submit a completed annual report and annual license assessment fee prescribed by WAC 208-690-140. The completed report and the fee must be received in the department office no later than 5:00 p.m. July 1, or 5:00 p.m. the next business day if July 1 is not a business day. A form for the preparation of the annual report and license assessment will be made available by the department by electronic transmission or mailed upon request. The report must include the following:

(1) If the licensee is a money transmitter, a copy of the licensee's most recent audited annual financial statement or, if the licensee is a wholly owned subsidiary of another corporation, the most recent audited consolidated annual financial statement of the parent company.

(2) ~~((A list of current))~~ Verification that authorized delegate(s in a form and in a medium prescribed by the director.) information in the NMLS is current.

(3) If the licensee is a money transmitter, ~~((a certification))~~ verification that the ((licensee's investment portfolio includes only)) licensee meets permissible investment((s)) requirements under RCW 19.230.200 and 19.230.210 ((and covers average outstanding daily transmission liability)).

(4) If the licensee is a money transmitter ~~((, proof))~~ or online currency exchanger, verification that the licensee has an adequate surety bond ((or assignment of a certificate of deposit and net worth)) as required by WAC 208-690-040 through ((208-690-060)) 208-690-050.

(5) ~~((A description of each))~~ Verification that material changes, as defined by WAC 208-690-110, ((which has not)) have been ((previously)) reported ((to the director.)) through the NMLS and are current.

(6) The annual report and assessment fee may be submitted through the NMLS.

AMENDATORY SECTION (Amending WSR 16-14-022, filed 6/27/16, effective 8/1/16)

**WAC 208-690-100 Is there a penalty for not filing my annual report and annual assessment on time?** (1) If you fail to submit the required annual report and annual assessment fee by July 1, each year, the director may suspend your license and assess a late fee. The late fee is ten percent of the annual assessment if ~~((paid))~~ submitted thirty or fewer days late and twenty-five percent of the annual assessment if ~~((paid))~~ submitted more than thirty days late. The annual report and annual assessment fee are not considered to be submitted until the date both have been submitted. If your license has been suspended under this section and you submit a completed annual report, the annual assessment and the late

fee to the department office no later than 5:00 p.m., thirty calendar days after the original due date, the license suspension may be removed. If the delay extends past thirty days, your license has expired effective thirty-one days after the original due date.

(2) The director may reinstate an expired license under this section if, within twenty days after the license expiration, you:

(a) File the complete annual report and pay both the annual license assessment and the late fee; and

(b) You or your delegates did not engage in providing money services during the period the license was expired.

(3) If any of the deadlines in this section occur on a day that is not a business day, the deadline shall be the next business day.

#### NEW SECTION

**WAC 208-690-103 How is the annual assessment calculated and when is the annual assessment due?** (1) The annual assessment is calculated by multiplying 0.0004 by the previous year's adjusted Washington volume of money transmission, currency exchange, prepaid access sales, and payment instrument sales, with a minimum assessment of one thousand dollars and a maximum assessment of one hundred thousand dollars.

For purposes of this section, "adjusted Washington volume" means:

(a) For money transmission, ninety-five percent of all funds transmitted;

(b) For currency exchange, five percent of all currency exchanged;

(c) For prepaid access sales, ninety-five percent of all funds loaded onto open-loop prepaid access; and

(d) For payment instrument sales, seventy percent of the first ten million dollars of payment instrument sales, twenty percent of the volume over ten million through five hundred million dollars, and one percent of any amount over five hundred million dollars.

(2) The annual assessment is due no later than 5:00 p.m. July 1st each year or the next business day if July 1st is not a business day.

(3) If thirty days after the due date the annual assessment or any late fee for failure to report or pay the annual assessment is not paid, the department may make a claim against the surety bond.

#### NEW SECTION

**WAC 208-690-105 What are my quarterly call report filing requirements?** You are required to file accurate and complete call reports on the dates and in a form prescribed by the NMLS.

AMENDATORY SECTION (Amending WSR 16-14-022, filed 6/27/16, effective 8/1/16)

**WAC 208-690-110 Report of material change. What must I report to the department if something about my business changes?** Material changes described in this section must be reported to the director through the NMLS within

thirty (~~(business)~~) days of the occurrence of the change. "Material change" means any change that is not trivial, and that, if not reported, would cause an investigation or examination to be misled or delayed. Such changes include, but are not limited to:

(1) A change of the licensee's physical, mailing, or email address. Additionally, a change to the physical, mailing, or emailing address of authorized delegates;

(2) A change of the responsible individual, AML compliance officer, executive officers or board members, or other person in control;

(3) A change of the licensee's name or DBA (doing business as);

(4) A change in the location where the records of the licensee that are required to be retained under RCW 19.230.-170 are kept;

(5) The obtaining, revocation or surrender of a money services license in any other jurisdiction;

(6) The conviction of the licensee, an executive officer, responsible individual, board director, AML compliance officer, principal, or other person in control of a misdemeanor or gross misdemeanor involving a financial transaction;

(7) A change in your business bank account including its closure or a change in the location or identity of the bank holding the account;

(8) A change in the business plan from that submitted at application; (~~and~~)

(9) Other similar activities or events affecting the business or executive officers or other persons in control(~~(-)~~);

(10) (~~Other. Within forty five days of a~~) Changes of control. See WAC 208-690-115; and

(11) Data breach (~~(you must notify the director in writing)~~). This notification requirement may change based on directives or recommendations from law enforcement. See also WAC 208-690-270.

AMENDATORY SECTION (Amending WSR 13-24-021, filed 11/22/13, effective 1/1/14)

**WAC 208-690-150 Transaction fee.** What fees must I pay to make changes to my license?

(1) You must pay fifty dollars to add an authorized delegate to your (~~(quarterly)~~) roster of authorized delegates. The fee for adding authorized delegates is capped at five thousand dollars per quarter.

(2) You must pay thirty dollars for the following changes to your license:

(a) Change of physical address, name or trade name (DBA or doing business as);

(b) Request for approval of a change in control;

(c) Change of the responsible individual or AML compliance officer;

(d) Addition of principal, executive officer, board member, or other person in control; or

(e) Change in registered agent.

(3) Transaction fees are separate, distinct from, and in addition to investigation and examination fees under WAC 208-690-170.

AMENDATORY SECTION (Amending WSR 16-14-022, filed 6/27/16, effective 8/1/16)

**WAC 208-690-180 Authority to conduct examinations and investigations.** (1) ~~When may the department examine or investigate my business? ((For the purposes of discovering violations of chapter 19.230 RCW or these rules, discovering unsafe and unsound practices, or securing information lawfully required under chapter 19.230 RCW, the director may at any time, either personally or by designee, investigate or examine your business and, wherever located, the books, accounts, records, papers, documents, files, and other information used in your business or authorized delegates, and of every person who is engaged in the business of providing money services, whether the person acts or claims to act under or without the authority of chapter 19.230 RCW. For these purposes, the director or designated representative must have free access to the offices and places of business, books, accounts, papers, documents, other information, records, files, safes, and vaults of all such persons. The director may require the attendance of and examine under oath all persons whose testimony may be required about the business or the subject matter of any investigation, examination, or hearing and may require such person to produce books, accounts, papers, documents, records, files and any other information the director or designated person declares is relevant to the inquiry. The director may require the production of original books, accounts, papers, documents, records, files, and other information; may require that such original books, accounts, papers, documents, records, files, and other information be copied; or make copies himself or herself or by designee of such original books, accounts, papers, documents, records, files, or other information.)) See RCW 19.230.130(1).~~

(2) If the director determines that there is a danger that original records may be destroyed, altered, or removed to deny access, or hinder an examination or investigation, or that original documents are necessary for the preparation of a criminal referral, the director may take possession of originals of any items described in this section, regardless of the source of such items. Originals and copies taken by the director may be held, returned, or forwarded to other regulatory or law enforcement officials as determined necessary by the director ~~((The director or designated person may issue a subpoena or subpoena duces tecum requiring attendance or compelling production of the books, accounts, papers, documents, records, files, or other information)).~~

~~((2))~~ (3) The licensee, applicant, or person subject to licensing under this chapter must pay the cost of examinations and investigations as specified in RCW 19.230.320 and WAC 208-690-170.

~~((3) Information obtained during an examination or investigation under these rules may be disclosed only as provided in RCW 19.230.190.))~~

(4) The director may retain attorneys, accountants, or other professionals and specialists as examiners, auditors or investigators, to conduct or assist in the conduct or examinations or investigations. The cost of these services must be borne by the person who is the subject of the examination or investigation.

## PART G

### RECEIPTS AND DISCLOSURES

AMENDATORY SECTION (Amending WSR 16-14-022, filed 6/27/16, effective 8/1/16)

**WAC 208-690-200 What ~~((documentation must I provide to consumers))~~ information must receipts contain to be in compliance with RCW 19.230.330(2)?** (1) For general money transmission transactions, the receipt must include your name, physical or mailing address, and phone number in addition to the fee and exchange rate disclosure information as required by RCW 19.230.330 (2)(a). A web site address may be used in lieu of a physical or mailing address for transactions conducted solely over the internet.

(2) For ~~((stored value))~~ prepaid access transactions the receipt may include the name, address, and telephone number of the authorized delegate, provided that your contact information is provided in or on the ~~((stored value device))~~ prepaid access packaging or on the ~~((stored value device itself))~~ prepaid access product.

(3) For bill payment transactions, the receipt may include the name, address, and telephone number of the authorized delegate; provided your name accompanies the authorized delegate's information on the receipt.

### NEW SECTION

**WAC 208-690-205 What disclosures must I provide to consumers?** (1) Disclosures may be provided electronically.

(2) For all transactions. You must disclose to the consumer prior to the transaction that fraudulent transactions may result in the loss of their money with no recourse.

(3) For virtual currency transactions. When applicable, you must make the following disclosures in a clear and conspicuous manner:

(a) A schedule of all fees and charges you may assess on a transaction, how the fees and charges will be calculated if not set in advance and disclosed, and the timing of the fees and charges.

(b) Whether the product or service provided is insured or guaranteed by an agency of the United States, such as the federal deposit insurance corporation or the securities investor protection corporation or by private insurance against theft or loss, including cyber theft or theft by other means.

(c) A notice that the transfer of virtual currency or digital units is irrevocable and any exception to the irrevocability of transfer.

(d) A notice describing your liability for unauthorized, mistaken, or accidental transfers and, describing the consumer's responsibility for providing notice of such mistake to you, and the general error-resolution rights applicable to any transaction.

(e) A disclosure prior to the transaction that informs the consumer that the nature of virtual currency may lead to an increased risk of fraud or cyber attack and the consumer's virtual currency value may be irretrievably stolen. See also WAC 208-690-270.

(f) The disclosures required in (a) through (e) of this subsection may be disclosed together but must be disclosed separately from any other information required.

(4) For currency exchange transactions. If the currency being sought has limited convertibility, you must provide a disclosure to the consumer indicating the limited convertibility.

WAC 208-690-140 How is the annual assessment calculated and when is the annual assessment due?

AMENDATORY SECTION (Amending WSR 16-14-022, filed 6/27/16, effective 8/1/16)

**WAC 208-690-240 ((Cyber)) Information security program.** Each licensee shall establish and maintain ((@ cyber)) an information security program to ensure the availability and functionality of the licensee's electronic systems and to protect those systems and any sensitive data stored on those systems from unauthorized access, use, or tampering. The program may be established and maintained by a parent or affiliate as long as the licensee has adopted the program and it is available to the department for review.

AMENDATORY SECTION (Amending WSR 16-14-022, filed 6/27/16, effective 8/1/16)

**WAC 208-690-250 Information security program required by the federal Safeguards Rule implementing the Gramm-Leach-Bliley Act (GLBA).** (1) Generally, applicants and licensees must have a written program appropriate to the company's size and complexity, the activity conducted, and the sensitivity of information at issue. The program must ensure the information's security and confidentiality, protect against anticipated threats or hazards to the security or integrity of the information, and protect against unauthorized access to or use of the information.

(2) The information security plan must be maintained as part of your books and records.

(3) ~~((Compliance with GLBA and Regulation P, 12 C.F.R. Part 1016, will be deemed compliance with this subsection.~~

(4)) For more information access the FTC web site on the Safeguards Rule at: <https://www.ftc.gov/tips-advice/business-center/guidance/financial-institutions-customer-information-complying> and see 16 C.F.R. 314.

AMENDATORY SECTION (Amending WSR 16-14-022, filed 6/27/16, effective 8/1/16)

**WAC 208-690-280 Business resumption plan.** You must have a written plan that details the company's response and recovery to any event that results in damage to or destruction of books and records or a data breach. The plan must be maintained as part of your books and records.

#### REPEALER

The following sections of the Washington Administrative Code are repealed:

WAC 208-690-045 Alternatives to the surety bond.