

WSR 06-19-098
PROPOSED RULES
DEPARTMENT OF
SOCIAL AND HEALTH SERVICES
 (Health and Recovery Services Administration)
 [Filed September 19, 2006, 4:02 p.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 05-17-140.

Title of Rule and Other Identifying Information: Sections in Title 388 WAC regarding covered and noncovered services - Part 1 of 3.

WAC Sections Proposed in Part 1: Amending WAC 388-501-0050 Health care—General coverage, 388-501-0160 Exception to rule—Request for a noncovered health-care service and 388-531-0100 Scope of coverage for physician-related services—General and administrative; and new WAC 388-501-0060 Healthcare coverage—Scope of covered categories of service, 388-501-0065 Healthcare coverage—Description of covered categories of service, 388-501-0070 Healthcare coverage—Noncovered services, and 388-501-0169 Healthcare coverage—Limitation extension.

Hearing Location(s): Blake Office Park East, Rose Room, 4500 10th Avenue S.E., Lacey, WA 98503 (one block north of the intersection of Pacific Avenue S.E. and Alhadeff Lane. A map or directions are available at <http://www1.dshs.wa.gov/msa/rpau/docket.html> or by calling (360) 664-6097), on November 7, 2006, at 10:00 a.m.

Date of Intended Adoption: Not earlier than November 8, 2006.

Submit Written Comments to: DSHS Rules Coordinator, P.O. Box 45850, Olympia, WA 98504, delivery 4500 10th Avenue S.E., Lacey, WA 98503, e-mail fernaax@dshs.wa.gov, fax (360) 664-6185, by 5:00 p.m. on November 7, 2006.

Assistance for Persons with Disabilities: Contact Stephanie Schiller, DSHS Rules Consultant, by November 3, 2006, TTY (360) 664-6178 or (360) 664-6097 or by e-mail at schilse@dshs.wa.gov.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The purpose of the proposal is to:

- Improve the quality of care received by DSHS clients by using a consistent, evidence-based approach to making benefit coverage decisions.
- Make HRSA benefit coverage rules clearer, more transparent, and consistent.
- Establish a clear, transparent process by which HRSA determines what services are included under its benefit coverage.
- Maximize program resources through prudent use of cost-effective practices.

Changes to Rule in Parts 1, 2, and 3: In this proposal, the department has:

- Replaced "medical assistance administration" and "MAA" with "the department" or "HRSA."
- Substituted WAC 388-501-0160 cross reference in place of WAC 388-501-0165 where noncovered services are addressed.

- Replaced all references to chapter 388-529 WAC with new WAC 388-501-0060 and 388-501-0065.
- Added reference to new WAC 388-501-0169 in rules where limitations on covered services are addressed.
- Repealed chapter 388-529 WAC which is being replaced with WAC 388-501-0060 and 388-501-0065.
- Repealed WAC 388-501-0300 because it was incorporated into WAC 388-501-0050 and 388-501-0070.
- Removed gender reassignment surgery from covered service status.
- More clearly defined what is covered and not covered in the way of cosmetic and reconstructive surgery, treatment, and procedures in WAC 388-531-0100 and new WAC 388-501-0070.
- Added more detail to WAC 388-501-0160 regarding the criteria and steps in the exception to rule (ETR) process.
- In new WAC 388-501-0065, added brief descriptions of services available under each category of service listed in the table in new WAC 388-501-0060.
- Included cross references (in new WAC 388-501-0065 and 388-501-0070) to other program WACs where the reader can find more specific detail of the covered or noncovered service.
- Codified the evaluation criteria HRSA will use when evaluating requests for covered services beyond the maximum allowed.

Reasons Supporting Proposal: It will make HRSA's rules regarding covered and noncovered medical services clearer and easier to understand for our clients and medical providers.

Statutory Authority for Adoption: RCW 74.04.050, 74.08.090, 74.09.530, and 74.09.700.

Statute Being Implemented: RCW 74.04.050, 74.08.-090, 74.09.530, and 74.09.700.

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: Department of social and health services, governmental.

Name of Agency Personnel Responsible for Drafting: Kevin Sullivan, 626 8th Avenue, Olympia, WA 98504-5504, (360) 725-1344; Implementation and Enforcement: Gail Kreiger, 626 8th Avenue, Olympia, WA 98504-5504, (360) 725-1681.

No small business economic impact statement has been prepared under chapter 19.85 RCW. This amendment does not create more than minor costs to small businesses.

A cost-benefit analysis is required under RCW 34.05.328. A preliminary cost-benefit analysis may be obtained by contacting Kevin Sullivan, HRSA Rules Coordinator, P.O. Box 45504, Olympia, WA 98504-4405, phone (360) 725-1344, fax (360) 586-9727, e-mail sullikm@dshs.wa.gov, TTY/TDD 1-800-848-5429.

September 15, 2006

Andy Fernando, Manager
 Rules and Policies Assistance Unit

AMENDATORY SECTION (Amending WSR 01-12-070, filed 6/4/01, effective 7/5/01)

WAC 388-501-0050 (~~Medical and dental~~) Health-care general coverage. ((All medical and dental services, equipment, and supplies provided to medical assistance administration (MAA) clients are subject to review, before or after payment has been made. MAA may deny or recover reimbursement for such services, equipment, and supplies based on these reviews:

(1) Covered services

(a) Covered services are:

(i) Medical and dental services, equipment, and supplies that are within the scope of the eligible client's medical assistance program (see chapter 388-529 WAC) and listed as covered in MAA rules; and

(ii) Determined to be medically necessary as defined in WAC 388-500-0005 or dentally necessary as defined in WAC 388-535-0150.

(b) Providers must obtain prior authorization (PA) or expedited prior authorization (EPA) when required by MAA.

(i) See WAC 388-501-0165 for the PA process.

(ii) The EPA process is designed to eliminate the need for written and telephonic requests for prior authorization for selected services and procedure codes. MAA requires a provider to create an authorization number for EPA for selected procedure codes, using the process explained in the billing instructions for the specific service or program.

(iii) See chapter 388-538 WAC for managed care requirements.

(c) Covered services are subject to the limitations specified by MAA. Providers must obtain PA or EPA before providing services that exceed the specified limit (quantity, frequency or duration). This is known as a limitation extension.

(i) See WAC 388-501-0165 for the PA process.

(ii) The EPA process is designed to eliminate the need for written and telephonic requests for prior authorization for selected services and procedure codes. MAA requires a provider to create an authorization number for EPA for selected procedure codes, using the process explained in the billing instructions for the specific service or program.

(iii) See chapter 388-538 WAC for managed care requirements.

(d) MAA does not reimburse for covered services, equipment or supplies:

(i) That are included in a DSHS-waivered program; or

(ii) For a MAA client who is Medicare-eligible if:

(A) The services, equipment or supplies are covered under Medicare; and

(B) Medicare has not made a determination on the claim or has not been billed by the provider.

(2) Noncovered services

(a) MAA does not cover services, equipment or supplies to which any of the following apply:

(i) The service or equipment is not included as a covered service in the state plan;

(ii) Federal or state laws or regulations prohibit coverage;

(iii) The service or equipment is considered experimental or investigational by the Food and Drug Administration or the Health Care Financing Administration; or

(iv) MAA rules do not list the service or equipment as covered.

(b) MAA reviews all initial requests for noncovered services based on WAC 388-501-0165.

(c) If a noncovered service, equipment or supply is prescribed under the EPSDT program, it will be evaluated as a covered service and reviewed for medical necessity. The following rules, WAC 388-501-0050 through WAC 388-501-0065, describe the healthcare services available to a client on a fee-for-service basis or as an enrollee in a managed care organization (MCO)(defined in WAC 388-538-050). Noncovered services are described in WAC 388-501-0070.

(1) Service categories listed in WAC 388-501-0060 do not represent a contract for services.

(2) The client must be eligible for the covered service on the date the service is performed or provided.

(3) The department pays only for medical or dental services, equipment, or supplies that are:

(a) Within the scope of the client's medical program;

(b) Covered - see subsection (5);

(c) Medically necessary;

(d) Ordered or prescribed by a healthcare provider meeting the requirements of chapter 388-502 WAC; and

(e) Furnished by a provider according to the requirements of chapter 388-502 WAC.

(4) The department's fee-for-service program pays only for services furnished by enrolled providers who meet the requirements of chapter 388-502 WAC.

(5) **Covered services**

(a) Covered services are either:

(i) "Federally-mandated" - means the State of Washington is required by federal regulation (42 CFR 440.210 and 220) to cover the service for Medicaid clients; or

(ii) "State-option" - means the State of Washington is not federally-mandated to cover the service but has chosen to do so at its own discretion.

(b) The department may limit the scope, amount, duration, and/or frequency of covered services. Limitation extensions are authorized according to WAC 388-501-0169.

(6) **Noncovered services**

(a) The department does not pay for any service, equipment, or supply:

(i) That federal or state law or regulations prohibit the department from covering;

(ii) Listed as noncovered in WAC 388-501-0070 or in any other program rule. The department evaluates a request for a noncovered service only if an exception to rule is requested according to the provisions in WAC 388-501-0160.

(b) When Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) applies, a noncovered service, equipment, or supply will be evaluated according to the process in WAC 388-501-0165 to determine if it is medically necessary, safe, effective, and not experimental (see WAC 388-534-0100 for EPSDT rules).

NEW SECTION

WAC 388-501-0060 Healthcare coverage - scope of covered categories of service. (1) This rule provides a list

(see subsection (5)) of medical, dental, mental health, and substance abuse categories of service covered by the department under categorically needy (CN) Medicaid, medically needy (MN) Medicaid, Alien Emergency Medical (AEM), and medical care services (MCS) programs. MCS means the limited scope of care financed by state funds and provided to general assistance and Alcohol and Drug Addiction Treatment and Support Act (ADATSA) program clients.

(2) Not all categories of service listed in this section are covered under every medical program, nor do they represent a contract for services. Services are subject to the exclusions, limitations, and eligibility requirements contained in department rules.

(3) Services covered under each listed category:

(a) Are determined by the department after considering available evidence relevant to the service or equipment to:

- (i) Determine efficacy, effectiveness, and safety;
- (ii) Determine impact on health outcomes;
- (iii) Identify indications for use;
- (iv) Compare alternative technologies; and
- (v) Identify sources of credible evidence that use and report evidence-based information.

(b) May require prior authorization (see WAC 388-501-0165), or expedited authorization when allowed by the department.

(c) Are paid for by the department and subject to review both before and after payment is made. The department or the client's managed care organization may deny or recover payment for such services, equipment, and supplies based on these reviews.

(4) The department does not pay for covered services, equipment, or supplies that:

(a) Require prior authorization from the department, if prior authorization was not obtained before the service was provided;

(b) Are provided by providers who are not contracted with the department as required under chapter 388-502 WAC;

(c) Are included in a department waiver program identified in chapter 388-515 WAC; or

(d) Are covered by a third-party payer (see WAC 388-501-0200), including Medicare, if the third-party payer has not made a determination on the claim or has not been billed by the provider.

(5) **Scope of covered service categories.** The following table lists the department's covered categories of healthcare services.

- Under the four program columns (CN, MN, MCS, and AEM), the letter "C" means a service category is covered for that program, subject to any limitations listed in the specific medical assistance program WAC and department issuances.

- The letter "N" means a service category is not covered under that program.

- The letter "E" means the service category is available only if it is necessary to treat the client's emergency medical condition and may require prior authorization from the department.

- Refer to WAC 388-501-0065 for a description of each service category and for the specific program WAC containing the limitations and exclusions to services.

Service Categories	CN	MN	MCS	AEM
(a) Adult day health	C	C	N	E
(b) Ambulance (ground and air)	C	C	C	E
(c) Blood processing/administration	C	C	C	E
(d) Dental services	C	C	C	E
(e) Detoxification	C	C	C	E
(f) Diagnostic services (lab & x-ray)	C	C	C	E
(g) Family planning services	C	C	C	E
(h) Healthcare professional services	C	C	C	E
(i) Hearing care (audiology/hearing exams/aids)	C	C	C	E
(j) Home health services	C	C	C	E
(k) Hospice services	C	C	N	E
(l) Hospital services - inpatient/outpatient	C	C	C	E
(m) Intermediate care facility/services for mentally retarded	C	C	C	N
(n) Maternity care and delivery services	C	C	N	E
(o) Medical equipment, durable (DME)	C	C	C	E
(p) Medical equipment, nondurable (MSE)	C	C	C	E
(q) Medical nutrition services	C	C	C	E
(r) Mental health services	C	C	C	E
(s) Nursing facility services	C	C	C	E
(t) Organ transplants	C	C	C	N
(u) Out-of-state services	C	C	N	E
(v) Oxygen/respiratory services	C	C	C	E
(w) Personal care services	C	C	N	N

(x) Prescription drugs	C	C	C	E
(y) Private duty nursing	C	C	N	E
(z) Prosthetic/orthotic devices	C	C	C	E
(aa) School medical services	C	C	N	N
(bb) Substance abuse services	C	C	C	N
(cc) Therapy - occupational/physical/speech	C	C	C	E
(dd) Vision care (exams/lenses)	C	C	C	E

NEW SECTION

WAC 388-501-0065 Healthcare coverage - description of covered categories of service. This rule provides a brief description of the medical, dental, mental health, and substance abuse service categories listed in the table in WAC 388-501-0060. The description of services under each category is not intended to be all inclusive.

(1) For categorically needy (CN), medically needy (MN), and medical care services (MCS), refer to the WAC citations listed in the following descriptions for specific details regarding each service category. For Alien Emergency Medical (AEM) services, refer to WAC 388-438-0110.

(2) The following service categories are subject to the exclusions, limitations, and eligibility requirements contained in department rules:

(a) **Adult day health** - Skilled nursing services, counseling, therapy (physical, occupational, speech, or audiology), personal care services, social services, general therapeutic activities, health education, nutritional meals and snacks, supervision, and protection. [WAC 388-71-0702 through WAC 388-71-0776]

(b) **Ambulance** - Emergency medical transportation and ambulance transportation for nonemergency medical needs. [WAC 388-546-0001 through WAC 388-546-4000]

(c) **Blood processing/administration** - Blood and/or blood derivatives, including synthetic factors, plasma expanders, and their administration. [WAC 388-550-1400 and WAC 388-550-1500]

(d) **Dental services** - Diagnosis and treatment of dental problems including emergency treatment. [Chapter 388-535 WAC and Chapter 388-535A WAC]

(e) **Detoxification** - Inpatient treatment performed by a certified detoxification center or in an inpatient hospital setting. [WAC 388-800-0020 through WAC 388-800-0035; and WAC 388-550-1100]

(f) **Diagnostic services** - Clinical testing and imaging services. [WAC 388-531-0100; WAC 388-550-1400 and WAC 388-550-1500]

(g) **Family planning services** - Gynecological exams; contraceptives, drugs, and supplies, including prescriptions; sterilization; screening and treatment of sexually transmitted diseases; and educational services. [WAC 388-532-530]

(h) **Healthcare professional services** - Office visits, emergency room, nursing facility, home-based, and hospital-based care; surgery, anesthesia, pathology, radiology, and laboratory services; obstetric services; kidney dialysis and renal disease services; osteopathic care, podiatry services, physiatry, and pulmonary/respiratory services; and allergen immunotherapy. [Chapter 388-531 WAC]

(i) **Hearing care** - Audiology; diagnostic evaluations; hearing exams and testing; and hearing aids. [WAC 388-544-1200 and WAC 388-544-1300; WAC 388-545-700; and WAC 388-531-0100]

(j) **Home health services** - Intermittent, short-term skilled nursing care, physical therapy, speech therapy, home infusion therapy, and health aide services, provided in the home. [WAC 388-551-2000 through WAC 388-551-3000]

(k) **Hospice services** - Physician services, skilled nursing care, medical social services, counseling services for client and family, drugs, medications (including biologicals), medical equipment and supplies needed for palliative care, home health aide, homemaker, personal care services, medical transportation, respite care, and brief inpatient care. [WAC 388-551-1210]

(l) **Hospital services - inpatient/outpatient** - Emergency room; hospital room and board (includes nursing care); inpatient services, supplies, equipment, and prescription drugs; surgery, anesthesia; diagnostic testing, laboratory work, blood/blood derivatives; radiation and imaging treatment and diagnostic services; and outpatient or day surgery, and obstetrical services. [Chapter 388-550 WAC]

(m) **Intermediate care facility/services for mentally retarded** - Habilitative training, health-related care, supervision, and residential care. [Chapter 388-835 WAC]

(n) **Maternity care and delivery services** - Community health nurse visits, nutrition visits, behavioral health visits, midwife services, maternity and infant case management services, and community health worker visits. [WAC 388-533-0330]

(o) **Medical equipment, durable (DME)** - Wheelchairs, hospital beds, respiratory equipment; prosthetic and orthotic devices; casts, splints, crutches, trusses, and braces. [WAC 388-543-1100]

(p) **Medical equipment, nondurable (MSE)** - Antiseptics, germicides, bandages, dressings, tape, blood monitoring/testing supplies, braces, belts, supporting devices, decubitus care products, ostomy supplies, pregnancy test kits, syringes, needles, transcutaneous electrical nerve stimulators (TENS) supplies, and urological supplies. [WAC 388-543-2800]

(q) **Medical nutrition services** - Enteral and parenteral nutrition, including supplies. [Chapter 388-553 WAC and Chapter 388-554 WAC]

(r) **Mental health services** - Inpatient and outpatient psychiatric services and community mental health services. [Chapter 388-865 WAC]

(s) **Nursing facility services** - Nursing, therapies, dietary, and daily care services. [Chapter 388-97 WAC]

(t) **Organ transplants** - Solid organs, e.g., heart, kidney, liver, lung, pancreas, and small bowel; bone marrow and peripheral stem cell; skin grafts; and corneal transplants. [WAC 388-550-1900 and WAC 388-550-2000, and WAC 388-556-0400]

(u) **Out-of-state services** - Emergency services; prior authorized care. Services provided in bordering cities are treated as if they were provided in state. [WAC 388-501-0175 and WAC 388-501-0180; WAC 388-531-1100; and WAC 388-556-0500]

(v) **Oxygen/respiratory services** - Oxygen, oxygen equipment and supplies; oxygen and respiratory therapy, equipment, and supplies. [Chapter 388-552 WAC]

(w) **Personal care services** - Assistance with activities of daily living (e.g., bathing, dressing, eating, managing medications) and routine household chores (e.g., meal preparation, housework, essential shopping, transportation to medical services). [WAC 388-106-0010, 0300, 0400, 0500, 0600, 0700, 0720 and 0900]

(x) **Prescription drugs** - Outpatient drugs (including in nursing facilities), both generic and brand name; drug devices and supplies; some over-the-counter drugs; oral, topical, injectable drugs; vaccines, immunizations, and biologicals; and family planning drugs, devices, and supplies. [WAC 388-530-1100]

(y) **Private duty nursing** - Continuous skilled nursing services provided in the home, including client assessment, administration of treatment, and monitoring of medical equipment and client care. [WAC 388-551-3000]

(z) **Prosthetic/orthotic devices** - Artificial limbs and other external body parts; devices that prevent, support, or correct a physical deformity or malfunction. [WAC 388-543-1100]

(aa) **School medical services** - Medical services provided in schools to children with disabilities under the Individuals with Disabilities Education Act (IDEA). [Chapter 388-537 WAC]

(bb) **Substance abuse services** - Chemical dependency assessment, case management services, and treatment services. [WAC 388-533-0701 through WAC 388-533-0730; WAC 388-556-0100 and WAC 388-556-0400; and WAC 388-800-0020]

(cc) **Therapy - occupational/physical/speech** - Evaluations, assessments, and treatment. [WAC 388-545-300, WAC 388-545-500, and WAC 388-545-700]

(dd) **Vision care** - Eye exams, refractions, frames, lenses, ocular prosthetics, and nonelective surgery. [WAC 388-544-0250 through WAC 388-544-0550]

Reviser's note: The brackets and enclosed material in the text of the above section occurred in the copy filed by the agency and appear in the Register pursuant to the requirements of RCW 34.08.040.

NEW SECTION

WAC 388-501-0070 Healthcare coverage - noncovered services. (1) The department does not pay for any service, treatment, equipment, drug or supply not listed or referred to as a covered service in WAC 388-501-0060, regardless of medical necessity. Clients are responsible for payment of noncovered services as described in WAC 388-502-0160.

(2) This section does not apply to services provided under the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) program as described in chapter 388-534 WAC.

(3) The department does not pay for any ancillary service(s) provided in association with a noncovered service.

(4) The following list of noncovered services is not intended to be exhaustive. Noncovered services include, but are not limited to:

(a) Any service specifically excluded by federal or state law;

(b) Any service, treatment, equipment, drug, or supply requiring prior authorization from the department, if prior authorization was not obtained before the service was provided;

(c) Acupuncture, Christian Science practice, faith healing, herbal therapy, homeopathy, massage, massage therapy, naturopathy, and sanipractice;

(d) Chiropractic care for adults;

(e) Cosmetic, reconstructive, or plastic surgery, and any related services and supplies, not specifically allowed under WAC 388-531-0100(4).

(f) Ear or other body piercing;

(g) Face lifts or other facial cosmetic enhancements;

(h) Gender reassignment surgery and any surgery related to transsexualism, gender identity disorders, and body dysmorphism, and related services, supplies, or procedures, including construction of internal or external genitalia, breast augmentation, or mammoplasty;

(i) Hair transplants, epilation (hair removal), and electrolysis;

(j) Fertility, infertility or sexual dysfunction testing, care, drugs, and treatment including but not limited to:

(i) Artificial insemination;

(ii) Donor ovum, sperm, or surrogate womb;

(iii) In vitro fertilization;

(iv) Penile implants;

(v) Reversal of sterilization; and

(vi) Sex therapy.

(k) Marital counseling;

(l) Motion analysis, athletic training evaluation, work hardening condition, high altitude simulation test, and health and behavior assessment;

(m) Nonmedical equipment;

(n) Penile implants;

(o) Prosthetic testicles;

(p) Psychiatric sleep therapy;

(q) Subcutaneous injection filling;

(r) Tattoo removal;

(s) Transport of Involuntary Treatment ACT (ITA) clients to or from out-of-state treatment facilities, including those in bordering cities; and

(t) Vehicle purchase - new or used vehicle.

(5) For a specific listing of noncovered services in the following service categories, refer to the accompanying WAC citation:

(a) Ambulance transportation as described in WAC 388-546-0250;

(b) Dental services (for clients twenty-one years of age and younger) as described in Chapter 388-535 WAC;

- (c) Dental services (for clients twenty-one years of age and older) as described in Chapter 388-535 WAC;
- (d) Durable medical equipment as described in WAC 388-543-1300;
- (e) Hearing care services as described in WAC 388-544-1400;
- (f) Home health services as described in WAC 388-551-2130;
- (g) Hospital services as described in WAC 388-550-1600;
- (h) Physician-related services as described in WAC 388-531-0150;
- (i) Prescription drugs as described in WAC 388-530-1150; and
- (j) Vision care services as described in WAC 388-544-0475.

AMENDATORY SECTION (Amending WSR 00-03-035, filed 1/12/00, effective 2/12/00)

WAC 388-501-0160 Exception to rule—Request for a noncovered (~~medical or dental~~) healthcare service(~~s or related equipment~~)). A client and/or (~~their~~) the client's provider may request (~~prior authorization for MAA~~) the department to pay for a noncovered (~~medical or dental~~) healthcare service(~~s or related equipment~~)). This is called an exception to rule.

(1) (~~MAA~~) The department cannot approve an exception to rule if the (~~exception violates~~) requested service is excluded under state (~~or federal law or federal regulation~~) statute.

(2) The item or service(s) for which an exception is requested must be of a type and nature which falls within accepted standards and precepts of good medical practice:

(3) All exception requests must represent cost-effective utilization of medical assistance program funds as determined by the department:

(4) A request for an exception to rule must be submitted to the department in writing within ninety days of the date of the written notification denying authorization for the noncovered service. For (~~MAA~~) the department to consider the exception to rule request(~~s~~):

(a) The client and/or the client's healthcare provider must submit sufficient client-specific information and documentation (~~must be submitted for the MAA~~) to Health and Recovery Services Administration's medical director or designee (~~to determine if:~~

(~~a~~) which demonstrate the client's clinical condition is so different from the majority that there is no equally effective, less costly covered service or equipment that meets the client's need(s)(~~s~~ and)

(b) (~~The requested service or equipment will result in lower overall costs of care for the client~~) The client's healthcare professional must certify that medical treatment or items of service which are covered under the client's medical assistance program and which, under accepted standards of medical practice, are indicated as appropriate for the treatment of the illness or condition, have been found to be:

(i) Medically ineffective in the treatment of the client's condition; or

(ii) Inappropriate for that specific client.

~~((3) The MAA medical director or designee evaluates and considers requests on a case-by-case basis according to the information and documentation submitted from the provider.~~

~~(4) Within fifteen working days of MAA's receipt of the request, MAA notifies the provider and the client, in writing, of MAA's decision to grant or deny the exception to rule)) (5) Within fifteen business days of receiving the request, the department sends written notification to the provider and the client:~~

~~(a) Approving the exception to rule request;~~

~~(b) Denying the exception to rule request; or~~

~~(c) Requesting additional information.~~

~~(i) The additional information must be received by the department within thirty days of the date the information was requested.~~

~~(ii) The department approves or denies the exception to rule request within five business days of receiving the additional information.~~

~~(iii) If the requested information is insufficient or not provided within thirty days, the department denies the exception to rule request.~~

~~(6) The HRSA medical director or designee evaluates and considers requests on a case-by-case basis. The HRSA medical director has final authority to approve or deny a request for exception to rule.~~

~~((5)) (7) Clients do not have a right to a fair hearing on exception to rule decisions.~~

NEW SECTION

WAC 388-501-0169 Healthcare coverage - limitation extension. This section addresses requests for limitation extensions (additional covered services when a client has received the maximum services allowed under specific healthcare program rules). The department does not pay for services exceeding the maximum allowed until authorization is obtained.

(1) No extension of covered services will be authorized when prohibited by specific program rules.

(2) When an extension is not prohibited by specific program rules, a client or the client's provider may request a limitation extension.

(3) Under fee-for-service (FFS), the department evaluates requests for limitation extensions using the process described in WAC 388-501-0165. For a managed care enrollee, the client's managed care organization (MCO) evaluates requests for limitation extensions according to the MCO's prior authorization process.

(4) In addition to subsection (3), both the department and MCO consider the following in evaluating a request for a limitation extension:

(a) The level of improvement the client has shown to date related to the requested service and the probability of continued improvement if the requested service is extended; and

(b) The probability the client's condition will worsen if the requested service is not extended.

AMENDATORY SECTION (Amending WSR 01-01-012, filed 12/6/00, effective 1/6/01)

WAC 388-531-0100 Scope of coverage for physician-related services—General and administrative. (1) The ~~((medical assistance administration (MAA)))~~ department covers medical services, equipment, and supplies when they are ~~((both))~~:

(a) Within the scope of an eligible client's medical ~~((care))~~ assistance program. Refer to ~~((chapter 388-529))~~ WAC 388-501-0060 and WAC 388-501-0065; and

(b) Medically necessary as defined in 388-500-0005.

(2) ~~((MAA evaluates a request for any service that is listed as noncovered in WAC 388-531-0150 under the provisions of WAC 388-501-0165.~~

~~((3) MAA))~~ The department evaluates a request for a service that is in a covered category ~~((, but has been determined to be experimental or investigational under WAC 388-531-0550.))~~ under the provisions of WAC 388-501-0165 ~~((which related to medical necessity)).~~

~~((4) MAA))~~ (3) The department evaluates requests for covered services that are subject to limitations or other restrictions and approves such services beyond those limitations or restrictions ~~((when medically necessary, under the standards for covered services in WAC 388-501-0165))~~ as described in WAC 388-501-0169.

~~((5) MAA))~~ (4) The department covers the following physician-related services, subject to the conditions in subsections (1), (2), and (3) ~~((, and (4))~~ of this section:

(a) Allergen immunotherapy services;

(b) Anesthesia services;

(c) Dialysis and end stage renal disease services (refer to chapter 388-540 WAC);

(d) Emergency physician services;

(e) ENT (ear, nose, and throat) related services;

(f) Early and periodic screening, diagnosis, and treatment (EPSDT) services (refer to WAC 388-534-0100);

(g) ~~((Gender dysphoria surgery and related procedures, treatment, prosthetics, or supplies when recommended after a multidisciplinary evaluation including at least urology, endocrinology, and psychiatry;~~

~~((h))~~ (h) Family planning services (refer to chapter 388-532 WAC);

~~((i))~~ (i) Hospital inpatient services (refer to chapter 388-550 WAC);

~~((j))~~ (j) Maternity care, delivery, and newborn care services (refer to chapter 388-533 WAC);

~~((k))~~ (k) Office visits;

~~((l))~~ (l) Vision-related services, ~~((per))~~ refer to chapter 388-544 WAC;

~~((m))~~ (m) Osteopathic treatment services;

~~((n))~~ (n) Pathology and laboratory services;

~~((o))~~ (o) Psychiatry and other rehabilitation services (refer to chapter 388-550 WAC);

~~((p))~~ (p) Podiatry services;

~~((q))~~ (q) Primary care services;

~~((r))~~ (r) Psychiatric services, provided by a psychiatrist;

~~((s))~~ (s) Pulmonary and respiratory services;

~~((t))~~ (t) Radiology services;

~~((u))~~ (u) Surgical services;

~~((v) Surgery))~~ (u) Cosmetic, reconstructive, or plastic surgery, and related services and supplies to correct physiological defects from birth, illness, or physical trauma, or for mastectomy reconstruction for post cancer treatment; and

~~((w))~~ (v) Other outpatient physician services.

~~((6) MAA))~~ (5) The department covers physical examinations for ~~((MAA))~~ medical assistance clients only when the physical examination is one or more of the following:

(a) A screening exam covered by the EPSDT program (see WAC 388-534-0100);

(b) An annual exam for clients of the division of developmental disabilities; or

(c) A screening pap smear, mammogram, or prostate exam.

~~((7))~~ (6) By providing covered services to a client eligible for a medical ((care)) assistance program, a provider who has signed an agreement with ((MAA)) the department accepts ((MAA's)) the department's rules and fees as outlined in the agreement, which includes federal and state law and regulations, billing instructions, and ((MAA)) department issuances.

WSR 06-19-099

PROPOSED RULES

DEPARTMENT OF

SOCIAL AND HEALTH SERVICES

(Health and Recovery Services Administration)

[Filed September 19, 2006, 4:04 p.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 05-17-140.

Title of Rule and Other Identifying Information: Sections in Title 388 WAC regarding covered and noncovered services - Part 2 of 3.

WAC Sections Proposed in Part 2: Amending WAC 388-416-0015 Certification periods for CN and SCHIP medical programs, 388-475-1000 Healthcare for workers with disabilities (HWD)—Program description, 388-501-0180 Out-of-state medical care, 388-519-0110 Spenddown of excess income for the medically needy program, 388-530-1000 Drug program, 388-530-1150 Noncovered drugs and pharmaceutical supplies and reimbursement limitations, 388-531-1600 Bariatric surgery, 388-533-0340 Maternity support services—Noncovered services, 388-533-0385 Infant case management—Noncovered services, 388-535-1265 Dental-related services not covered—Adults, 388-535A-0040 Covered and noncovered orthodontic services and limitations to coverage, 388-538-063 Mandatory enrollment in managed care for GAU clients, 388-538-095 Scope of care for managed care enrollees, 388-540-130 Covered services, 388-540-140 Noncovered services and 388-540-150 Reimbursement—General; and repealing WAC 388-501-0300 Limits on scope of medical program services, 388-529-0100 Scope of covered medical services by program, and 388-529-0200 Medical services available to eligible clients.

Hearing Location(s): Blake Office Park East, Rose Room, 4500 10th Avenue S.E., Lacey, WA 98503 (one block

north of the intersection of Pacific Avenue S.E. and Alhadeff Lane. A map or directions are available at <http://www1.dshs.wa.gov/msa/rpau/docket.html> or by calling (360) 664-6097, on November 7, 2006, at 10:00 a.m.

Date of Intended Adoption: Not earlier than November 8, 2006.

Submit Written Comments to: DSHS Rules Coordinator, P.O. Box 45850, Olympia, WA 98504, delivery 4500 10th Avenue S.E., Lacey, WA 98503, e-mail fernaax@dshs.wa.gov, fax (360) 664-6185, by 5:00 p.m. on November 7, 2006.

Assistance for Persons with Disabilities: Contact Stephanie Schiller, DSHS Rules Consultant, by November 3, 2006, TTY (360) 664-6178 or (360) 664-6097 or by e-mail at schilse@dshs.wa.gov.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The purpose of the proposal is to:

- Improve the quality of care received by DSHS clients by using a consistent, evidence-based approach to making benefit coverage decisions.
- Make HRSA benefit coverage rules clearer, more transparent, and consistent.
- Establish a clear, transparent process by which HRSA determines what services are included under its benefit coverage.
- Maximize program resources through prudent use of cost-effective practices.

Changes to Rule in Parts 1, 2, and 3: In this proposal, the department has:

- Replaced "medical assistance administration" and "MAA" with "the department" or "HRSA."
- Substituted WAC 388-501-0160 cross reference in place of WAC 388-501-0165 where noncovered services are addressed.
- Replaced all references to chapter 388-529 WAC with new WAC 388-501-0060 and 388-501-0065.
- Added reference to new WAC 388-501-0169 in rules where limitations on covered services are addressed.
- Repealed chapter 388-529 WAC which is being replaced with WAC 388-501-0060 and 388-501-0065.
- Repealed WAC 388-501-0300 because it was incorporated into WAC 388-501-0050 and 388-501-0070.
- Removed gender reassignment surgery from covered service status.
- More clearly defined what is covered and not covered in the way of cosmetic and reconstructive surgery, treatment, and procedures in WAC 388-531-0100 and new WAC 388-501-0070.
- Added more detail to WAC 388-501-0160 regarding the criteria and steps in the exception to rule (ETR) process.
- In new WAC 388-501-0065, added brief descriptions of services available under each category of service listed in the table in new WAC 388-501-0060.

- Included cross references (in new WAC 388-501-0065 and 388-501-0070) to other program WACs where the reader can find more specific detail of the covered or noncovered service.
- Codified the evaluation criteria HRSA will use when evaluating requests for covered services beyond the maximum allowed.

Reasons Supporting Proposal: It will make HRSA's rules regarding covered and noncovered medical services clearer and easier to understand for our clients and medical providers.

Statutory Authority for Adoption: RCW 74.04.050, 74.08.090, 74.09.530, and 74.09.700.

Statute Being Implemented: RCW 74.04.050, 74.08.-090, 74.09.530, and 74.09.700.

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: Department of social and health services, governmental.

Name of Agency Personnel Responsible for Drafting: Kevin Sullivan, 626 8th Avenue, Olympia, WA 98504-5504, (360) 725-1344; Implementation and Enforcement: Gail Kreiger, 626 8th Avenue, Olympia, WA 98504-5504, (360) 725-1681.

No small business economic impact statement has been prepared under chapter 19.85 RCW. This amendment does not create more than minor costs to small businesses.

A cost-benefit analysis is required under RCW 34.05.328. A preliminary cost-benefit analysis may be obtained by contacting Kevin Sullivan, HRSA Rules Coordinator, P.O. Box 45504, Olympia, WA 98504-4405, phone (360) 725-1344, fax (360) 586-9727, e-mail sullikm@dshs.wa.gov, TTY/TDD 1-800-848-5429.

September 15, 2006

Andy Fernando, Manager

Rules and Policies Assistance Unit

AMENDATORY SECTION (Amending WSR 05-19-031, filed 9/12/05, effective 10/13/05)

WAC 388-416-0015 Certification periods for categorically needy (CN) medical and state children's health insurance program (SCHIP). (1) A certification period is the period of time a person is determined eligible for a categorically needy (CN) medical program. Unless otherwise stated in this section, the certification period begins on the first day of the month of application and continues to the last day of the last month of the certification period.

(2) For a child eligible for the newborn medical program, the certification period begins on the child's date of birth and continues through the end of the month of the child's first birthday.

(3) For a woman eligible for a medical program based on pregnancy, the certification period ends the last day of the month that includes the sixtieth day from the day the pregnancy ends.

(4) For families the certification period is twelve months with a six-month report required as a condition of eligibility as described in WAC 388-418-0011.

(5) For children, the certification period is twelve months. Eligibility is continuous without regard to changes in circumstances other than aging out of the program, moving out of state or death. When the medical assistance unit is also receiving benefits under a cash or food assistance program, the medical certification period is updated to begin anew at each:

- (a) Approved application for cash or food assistance; or
- (b) Completed eligibility review.

(6) For an SSI-related person the certification period is twelve months.

(7) When the child turns nineteen the certification period ends even if the twelve-month period is not over. The certification period may be extended past the end of the month the child turns nineteen when:

(a) The child is receiving inpatient services on the last day of the month the child turns nineteen;

(b) The inpatient stay continues into the following month or months; and

(c) The child remains eligible except for exceeding age nineteen.

(8) A retroactive certification period can begin up to three months immediately before the month of application when:

(a) The client would have been eligible for medical assistance if the client had applied; and

(b) The client received covered medical services as described in WAC ~~((388-529-0100))~~ 388-501-0060 and WAC 388-501-0065.

(9) If the client is eligible only during the three-month retroactive period, that period is the only period of certification.

(10) Any months of a retroactive certification period are added to the designated certification periods described in this section.

(11) For a child determined eligible for SCHIP medical benefits as described in chapter 388-542 WAC:

(a) The certification periods are described in subsections (1), (5), and (7) of this section;

(b) There is not a retroactive eligibility period as described in subsections (8), (9), and (10); and

(c) For a child who has creditable coverage at the time of application, the certification period begins on the first of the month after the child's creditable coverage is no longer in effect, if:

(i) All other SCHIP eligibility factors are met; and

(ii) An eligibility decision is made per WAC 388-406-0035.

AMENDATORY SECTION (Amending WSR 02-01-073, filed 12/14/01, effective 1/14/02)

WAC 388-475-1000 Healthcare for workers with disabilities (HWD)—Program description. This section describes the healthcare for workers with disabilities (HWD) program.

(1) The HWD program provides categorically needy (CN) ~~((Medicaid services))~~ scope of care as described in WAC 3~~((88-529-0200))~~ 388-501-0060.

(2) The department approves HWD coverage for twelve months effective the first of the month in which a person applies and meets program requirements. See WAC 388-475-1100 for "retroactive" coverage for months before the month of application.

(3) A person who is eligible for another Medicaid program may choose not to participate in the HWD program.

(4) A person is not eligible for HWD coverage for a month in which the person received Medicaid benefits under the medically needy (MN) program.

(5) The HWD program does not provide long-term care (LTC) services described in chapters 388-513 and 388-515 WAC. LTC services include institutional, waived, and hospice services. To receive LTC services, a person must qualify and participate in the cost of care according to the rules of those programs.

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 01-01-011, filed 12/6/00, effective 1/6/01)

WAC 388-501-0180 Out-of-state medical care. (1) The department ~~((of social and health services (DSHS)))~~ considers cities bordering Washington state and listed in WAC 388-501-0175 the same as in-state cities for:

(a) Medical care coverage under all medical programs administered by the ~~((medical assistance administration (MAA)))~~ department; and

(b) Reimbursement purposes.

(2) The department does not cover out-of-state medical care for clients under the following state-administered (Washington state medical care only) medical programs:

(a) General assistance-unemployable (GA-U); or

(b) Alcohol and Drug Addiction Treatment and Support Act (ADATSA) ~~((; or~~

~~((c) Medically indigent program (MIP)))~~.

(3) Subject to the exceptions and limitations in this section, the department covers out-of-state medical care provided to eligible clients when the services are:

(a) Within the scope of the client's medical care program as specified ~~((under chapter 388-529))~~ in WAC 388-501-0060; and

(b) Medically necessary as defined in WAC 388-500-0005.

(4) If the client travels out-of-state expressly to obtain medical care, the medical services must have prior authorization through the department's determination process described in WAC 388-501-0165.

(5) See WAC 388-501-0165 for the department's determination process for requests for:

(a) ~~((Any service that is listed in any Washington Administrative Code section as nonecovered;~~

~~((b)))~~ A service that is in a covered category, but has been determined to be experimental or investigational under WAC 388-531-0550; ~~((and))~~ or

~~((c)))~~ (b) A covered service that is subject to the department's limitations or other restrictions and the request for the service exceeds those limitations or restrictions (see also WAC 388-501-0169).

(6) The department evaluates a request for a noncovered service if an exception to rule is requested according to the provisions in WAC 388-501-0160.

(7) The department determines out-of-state coverage for transportation services, including ambulance services, according to chapter 388-546 WAC.

~~((7))~~ (8) The department reimburses an out-of-state provider for medical care provided to an eligible client if the provider:

- (a) Meets the licensing requirements of the state in which care is provided;
- (b) Contracts with the department to be an enrolled provider; and
- (c) Meets the same criteria for payment as in-state providers.

AMENDATORY SECTION (Amending WSR 06-13-042, filed 6/15/06, effective 7/16/06)

WAC 388-519-0110 Spenddown of excess income for the medically needy program. (1) The person applying for MN medical coverage chooses a three month or a six month base period for spenddown calculation. The months must be consecutive calendar months unless one of the conditions in subsection (4) of this section apply.

(2) A person's base period begins on the first day of the month of application, subject to the exceptions in subsection (4) of this section.

(3) A separate base period may be made for a retroactive period. The retroactive base period is made up of the three calendar months immediately prior to the month of application.

(4) A base period may vary from the terms in subsections (1), (2), or (3) of this section if:

- (a) A three month base period would overlap a previous eligibility period; or
- (b) A client is not or will not be resource eligible for the required base period; or
- (c) The client is not or will not be able to meet the TANF-related or SSI-related requirement for the required base period; or
- (d) The client is or will be eligible for categorically needy (CN) coverage for part of the required base period; or
- (e) The client was not otherwise eligible for MN coverage for each of the months of the retroactive base period.

(5) The amount of a person's "spenddown" is calculated by the department. The MN countable income from each month of the base period is compared to the MNIL. The excess income from each of the months in the base period is added together to determine the "spenddown" for the base period.

(6) If income varies and a person's MN countable income falls below the MNIL for one or more months, the difference is used to offset the excess income in other months of the base period. If this results in a spenddown amount of zero dollars and cents, see WAC 388-519-0100(5).

(7) Once a person's spenddown amount is known, their qualifying medical expenses are subtracted from that spenddown amount to determine the date of eligibility. The following medical expenses are used to meet spenddown:

(a) First, Medicare and other health insurance deductibles, coinsurance charges, enrollment fees, or copayments;

(b) Second, medical expenses which would not be covered by the MN program;

(c) Third, hospital expenses paid by the person during the base period;

(d) Fourth, hospital expenses, regardless of age, owed by the applying person;

(e) Fifth, other medical expenses, potentially payable by the MN program, which have been paid by the applying person during the base period; and

(f) Sixth, other medical expenses, potentially payable by the MN program which are owed by the applying person.

(8) If a person meets the spenddown obligation at the time of application, they are eligible for MN medical coverage for the remainder of the base period. The beginning date of eligibility would be determined as described in WAC 388-416-0020.

(9) If a person's spenddown amount is not met at the time of application, they are not eligible until they present evidence of additional expenses which meets the spenddown amount.

(10) To be counted toward spenddown, medical expenses must:

(a) Not have been used to meet a previous spenddown; and

(b) Not be the confirmed responsibility of a third party. The entire expense will be counted unless the third party confirms its coverage within:

- (i) Forty-five days of the date of the service; or
- (ii) Thirty days after the base period ends; and
- (c) Meet one of the following conditions:

(i) Be an unpaid liability at the beginning of the base period and be for services for:

- (A) The applying person; or
- (B) A family member legally or blood-related and living in the same household as the applying person.

(ii) Be for medical services either paid or unpaid and incurred during the base period; or

(iii) Be for medical services paid and incurred during a previous base period if that client payment was made necessary due to delays in the certification for that base period.

(11) An exception to the provisions in subsection (10) of this section exists. Medical expenses the person owes are applied to spenddown even if they were paid by or are subject to payment by a publicly administered program during the base period. To qualify, the program cannot be federally funded or make the payments of a person's medical expenses from federally matched funds. The expenses do not qualify if they were paid by the program before the first day of the base period.

(12) The following medical expenses which the person owes are applied to spenddown. Each dollar of an expense or obligation may count once against a spenddown cycle that leads to eligibility for MN coverage:

(a) Charges for services which would have been covered by the department's medical programs as described in (~~chapter 388-529~~) WAC 388-501-0060 and WAC 388-501-0065, less any confirmed third party payments which apply to the charges; and

(b) Charges for some items or services not typically covered by the department's medical programs, less any third party payments which apply to the charges. The allowable items or services must have been provided or prescribed by a licensed health care provider; and

(c) Medical insurance and Medicare copayments or coinsurance (premiums are income deductions under WAC 388-519-0100(4)); and

(d) Medical insurance deductibles including those Medicare deductibles for a first hospitalization in sixty days.

(13) Medical expenses may be used more than once if:

(a) The person did not meet their total spenddown amount and did not become eligible in that previous base period; and

(b) The medical expense was applied to that unsuccessful spenddown and remains an unpaid bill.

(14) To be considered toward spenddown, written proof of medical expenses for services rendered to the client must be presented to the department. The deadline for presenting medical expense information is thirty days after the base period ends unless good cause for delay can be documented.

(15) The medical expenses applied to the spenddown amount are the client's financial obligation and are not reimbursed by the department (see WAC 388-502-0100).

(16) Once a person meets their spenddown and they are issued a medical identification card for MN coverage, newly identified expenses cannot be considered toward that spenddown. Once the application is approved and coverage begins the beginning date of the certification period cannot be changed due to a client's failure to identify or list medical expenses.

AMENDATORY SECTION (Amending WSR 02-17-023, filed 8/9/02, effective 9/9/02)

WAC 388-530-1000 (~~The medical assistance administration (MAA))~~ **Drug program.** (1) The (~~medical assistance administration (MAA))~~ department reimburses providers for prescription drugs and pharmaceutical supplies according to department rules and subject to the exceptions and restrictions listed in this chapter.

(2) (~~MAA~~) The department reimburses only pharmacies that:

(a) Are (~~MAA-enrolled~~) department-enrolled providers; and

(b) Meet the general requirements for providers described under WAC 388-502-0020.

(3) To be both covered and reimbursed under this chapter, prescription drugs must be:

(a) Medically necessary as defined in WAC 388-500-0005;

(b) Within the scope of coverage of an eligible client's medical assistance program. Refer to (~~chapter 388-529~~) WAC 388-501-0060 and WAC 388-501-0065 for scope of coverage information;

(c) For a medically accepted indication appropriate to the client's condition;

(d) Billed according to the conditions under WAC 388-502-0150 and 388-502-0160; and

(e) Billed according to the conditions and requirements of this chapter.

(4) Acceptance and filling of a prescription for a client eligible for a medical care program constitutes acceptance of (~~MAA's~~) the department's rules and fees. See WAC 388-502-0100 for general conditions of payment.

AMENDATORY SECTION (Amending WSR 05-02-044, filed 12/30/04, effective 1/30/05)

WAC 388-530-1150 Noncovered drugs and pharmaceutical supplies and reimbursement limitations. (1) The (~~medical assistance administration (MAA))~~ department does not cover:

(a) Brand or generic drugs, when the manufacturer has not signed a rebate agreement with the federal Department of Health and Human Services. Refer to WAC 388-530-1125 for information on the drug rebate program.

(b) A drug prescribed:

(i) For weight loss or gain;

(ii) For infertility, frigidity, impotency, or sexual dysfunction;

(iii) For cosmetic purposes or hair growth; or

(iv) To promote tobacco cessation, except as described in WAC 388-533-0345 (3)(d) tobacco cessation for pregnant women.

(c) Over-the-counter (OTC) drugs and supplies, except as described under WAC 388-530-1100.

(d) Prescription vitamins and mineral products, except:

(i) When prescribed for clinically documented deficiencies;

(ii) Prenatal vitamins, only when prescribed and dispensed to pregnant women; or

(iii) Fluoride preparations for children under the early and periodic screening, diagnosis, and treatment (EPSDT) program.

(e) A drug prescribed for an indication or dosing that is not evidence based as determined by:

(i) (~~MAA~~) The department in consultation with federal guidelines; or

(ii) The drug use review (DUR) board; and

(iii) (~~MAA~~) The department's medical consultants and (~~MAA~~) the department's pharmacist(s).

(f) Drugs listed in the federal register as "less-than-effective" ("DESI" drugs) or which are identical, similar, or related to such drugs.

(g) Drugs that are:

(i) Not approved by the Food and Drug Administration (FDA); or

(ii) Prescribed for non-FDA approved indications or dosing, unless prior authorized; or

(iii) Unproven for efficacy or safety.

(h) Outpatient drugs for which the manufacturer requires as a condition of sale that associated tests or monitoring services be purchased exclusively from the manufacturer or manufacturer's designee.

(i) Drugs requiring prior authorization for which (~~MAA~~) department authorization has been denied.

(j) Preservatives, flavoring and/or coloring agents.

(k) Less than a one-month supply of drugs for long-term therapy.

(l) A drug with an obsolete national drug code (NDC) more than two years from the date the NDC is designated obsolete by the manufacturer.

(m) Products or items that do not have an eleven-digit NDC.

(n) Nonpreferred drugs when a therapeutic equivalent is on the preferred drug list(s) (PDL), according to WAC 388-530-1100, and subject to the dispense as written (DAW) provisions of WAC 388-530-1280, and 388-530-1290.

(o) Less than a three-month supply of contraceptive patches, contraceptive rings, or oral contraceptives (excluding emergency contraceptive pills), unless otherwise directed by the prescriber.

(2) ~~((MAA))~~ The department does not reimburse enrolled providers for:

(a) Outpatient drugs, biological products, insulin, supplies, appliances, and equipment included in other reimbursement methods including, but not limited to:

(i) Diagnosis-related group (DRG);

(ii) Ratio of costs-to-charges (RCC);

(iii) Nursing facility ~~((per diem))~~ daily rate;

(iv) Managed care capitation rates;

(v) Block grants; or

(vi) Drugs prescribed for clients who are on the ~~((MAA))~~ department's hospice program when the drugs are related to the client's terminal illness and related condition(s).

(b) Any drug regularly supplied as an integral part of program activity by other public agencies (e.g., immunization vaccines for children).

(c) Prescriptions written on pre-signed prescription blanks filled out by nursing facility operators or pharmacists. ~~((MAA))~~ The department may terminate the core provider agreement of pharmacies involved in this practice.

(d) Drugs used to replace those taken from nursing facility emergency kits.

(e) Drugs used to replace a physician's stock supply.

(f) Free pharmaceutical samples.

(g) A drug product after the product's national drug code (NDC) termination date.

(h) A drug product whose shelf life has expired.

(3) ~~((MAA))~~ The department evaluates each request for authorization of a noncovered drug ~~((under WAC 388-530-1100(5) and under the provisions of WAC 388-501-0165)),~~ device, or pharmaceutical supply as an exception to rule according to WAC 388-501-0160.

AMENDATORY SECTION (Amending WSR 05-12-022, filed 5/20/05, effective 6/20/05)

WAC 388-531-1600 Bariatric surgery. (1) The ~~((medical assistance administration (MAA)))~~ department covers medically necessary bariatric surgery for eligible clients.

(2) Bariatric surgery must be performed in a hospital with a bariatric surgery program, and the hospital must be:

(a) Located in the state of Washington or approved border cities (see WAC 388-501-0175); and

(b) Meet the requirements of WAC 388-550-2301.

(3) If bariatric surgery is requested or prescribed under the EPSDT program, ~~((MAA))~~ the department evaluates it as a covered service under EPSDT's standard of coverage that requires the service to be:

(a) Medically necessary;

(b) Safe and effective; and

(c) Not experimental.

(4) ~~((MAA))~~ The department authorizes payment for bariatric surgery and bariatric surgery-related services in three stages:

(a) Stage one—Initial assessment of client;

(b) Stage two—Evaluations for bariatric surgery and successful completion of a weight loss regimen; and

(c) Stage three—Bariatric surgery.

Stage one—Initial assessment

(5) Any ~~((MAA))~~ department-enrolled provider who is licensed to practice medicine in the state of Washington may examine a client requesting bariatric surgery to ascertain if the client meets the criteria listed in subsection (6) of this section.

(6) The client meets the preliminary conditions of stage one when:

(a) The client is between twenty-one and fifty-nine years of age;

(b) The client has a body mass index (BMI) of thirty-five or greater;

(c) The client is not pregnant. (Pregnancy within the first two years following bariatric surgery is not recommended. When applicable, a family planning consultation is highly recommended prior to bariatric surgery.);

(d) The client is diagnosed with one of the following:

(i) Diabetes mellitus;

(ii) Degenerative joint disease of a major weight bearing joint(s) (the client must be a candidate for joint replacement surgery if weight loss is achieved); or

(iii) Other rare comorbid conditions (such as pseudo tumor cerebri) in which there is medical evidence that bariatric surgery is medically necessary and that the benefits of bariatric surgery outweigh the risk of surgical mortality; and

(e) The client has an absence of other medical conditions such as multiple sclerosis (MS) that would increase the client's risk of surgical mortality or morbidity from bariatric surgery.

(7) If a client meets the criteria in subsection (6) of this section, the provider must request prior authorization from ~~((MAA))~~ the department before referring the client to stage two of the bariatric surgery authorization process. The provider must attach a medical report to the request for prior authorization with supporting documentation that the client meets the stage one criteria in subsections (5) and (6) of this section.

(8) ~~((MAA))~~ The department evaluates requests for covered services that are subject to limitations or other restrictions and approves such services beyond those limitations or restrictions when medically necessary, under the ~~((standards for covered services in))~~ provisions of WAC 388-501-0165 and WAC 388-501-0169.

Stage two—Evaluations for bariatric surgery and successful completion of a weight loss regimen

(9) After receiving prior authorization from ((MAA)) the department to begin stage two of the bariatric surgery authorization process, the client must:

(a) Undergo a comprehensive psychosocial evaluation performed by a psychiatrist, licensed psychiatric ARNP, or licensed independent social worker with a minimum of two years postmasters' experience in a mental health setting. Upon completion, the results of the evaluation must be forwarded to ((MAA)) the department. The comprehensive psychosocial evaluation must include:

(i) An assessment of the client's mental status or illness to:

(A) Evaluate the client for the presence of substance abuse problems or psychiatric illness which would preclude the client from participating in presurgical dietary requirements or postsurgical lifestyle changes; and

(B) If applicable, document that the client has been successfully treated for psychiatric illness and has been stabilized for at least six months and/or has been rehabilitated and is free from any drug and/or alcohol abuse and has been drug and/or alcohol free for a period of at least one year.

(ii) An assessment and certification of the client's ability to comply with the postoperative requirements such as life-long required dietary changes and regular follow-up.

(b) Undergo an internal medicine evaluation performed by an internist to assess the client's preoperative condition and mortality risk. Upon completion, the internist must forward the results of the evaluation to ((MAA)) the department.

(c) Undergo a surgical evaluation by the surgeon who will perform the bariatric surgery (see subsection (13) of this section for surgeon requirements). Upon completion, the surgeon must forward the results of the surgical evaluation to ((MAA)) the department and to the licensed medical provider who is supervising the client's weight loss regimen (refer to WAC 388-531-1600 (9)(d)(ii)).

(d) Under the supervision of a licensed medical provider, the client must participate in a weight loss regimen prior to surgery. The client must, within one hundred and eighty days from the date of ((MAA's)) the department's stage one authorization, lose at least five percent of his or her initial body weight. If the client does not meet this weight loss requirement within one hundred and eighty days from the date of ((MAA's)) the department's initial authorization, ((MAA)) the department will cancel the authorization. The client or the client's provider must reapply for prior authorization from ((MAA)) the department to restart stage two. For the purpose of this section, "initial body weight" means the client's weight at the first evaluation appointment.

(i) The purpose of the weight loss regimen is to help the client achieve the required five percent loss of initial body weight prior to surgery and to demonstrate the client's ability to adhere to the radical and lifelong behavior changes and strict diet that are required after bariatric surgery.

(ii) The weight loss regimen must:

(A) Be supervised by a licensed medical provider who has a core provider agreement with ((MAA)) the department;

(B) Include monthly visits to the medical provider;

(C) Include counseling twice a month by a registered dietician referred to by the treating provider or surgeon; and

(D) Be at least six months in duration.

(iii) Documentation of the following requirements must be retained in the client's medical file. Copies of the documentation must be forwarded to ((MAA)) the department upon completion of stage two. ((MAA)) The department will evaluate the documentation and authorize the client for bariatric surgery if the stage two requirements were successfully completed.

(A) The provider must document the client's compliance in keeping scheduled appointments and the client's progress toward weight loss by serial weight recordings. Clients must lose at least five percent loss of initial body weight and must maintain the five percent weight loss until surgery;

(B) For diabetic clients, the provider must document the efforts in diabetic control or stabilization;

(C) The registered dietician must document the client's compliance (or noncompliance) in keeping scheduled appointments, and the client's weight loss progress;

(D) The client must keep a journal of active participation in the medically structured weight loss regimen including the activities under (d)(iii)(A), (d)(iii)(B) if appropriate, and (d)(iii)(C) of this subsection.

(10) If the client fails to complete all of the requirements of subsection (9) of this section, ((MAA)) the department will not authorize stage three—Bariatric surgery.

(11) If the client is unable to meet all of the stage two criteria, the client or the client's provider must reapply for prior authorization from ((MAA)) the department to re-enter stage two.

Stage three—Bariatric surgery

(12) ((MAA)) The department may withdraw authorization of payment for bariatric surgery at any time up to the actual surgery if ((MAA)) the department determines that the client is not complying with the requirements of this section.

(13) A surgeon who performs bariatric surgery for medical assistance clients must:

(a) Have a signed core provider agreement with ((MAA)) the department;

(b) Have a valid medical license in the state of Washington; and

(c) Be affiliated with a bariatric surgery program that meets the requirements of WAC 388-550-2301.

(14) For hospital requirements for stage three—Bariatric surgery, see WAC 388-530-2301.

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 04-13-049, filed 6/10/04, effective 7/11/04)

WAC 388-533-0340 Maternity support services—Noncovered services. (1) The following are considered non-covered services under the MSS program. Any service:

(a) Not within the scope of the program;

(b) Not listed in WAC 388-533-0330; or

(c) Any service provided by staff not qualified to deliver the service.

(2) ~~((MAA))~~ The department evaluates requests for services listed as noncovered under the provisions of WAC ~~((388-501-0165))~~ 388-501-0160.

AMENDATORY SECTION (Amending WSR 04-13-049, filed 6/10/04, effective 7/11/04)

WAC 388-533-0385 Infant case management—Non-covered services. (1) The following services are ~~((considered))~~ noncovered ~~((services))~~ under the infant case management (ICM) program:

(a) Any direct delivery of services other than case management activities listed in WAC 388-533-0380(2); and

(b) Any service provided by staff not qualified to deliver the service.

(2) ~~((MAA))~~ The department evaluates requests for services listed as noncovered under the provisions of WAC ~~((388-501-0165))~~ 388-501-0160.

AMENDATORY SECTION (Amending WSR 03-19-079, filed 9/12/03, effective 10/13/03)

WAC 388-535-1265 Dental-related services not covered—Adults. (1) The ~~((medical assistance administration (MAA)))~~ department does not cover dental-related services ~~((for adults))~~, described in subsection (2) of this section, for adults unless the services are included in ~~((an MAA waiver))~~ a department waiver program.

(2) ~~((MAA))~~ The department does not cover the following dental-related services for adults:

(a) Any service specifically excluded by statute.

(b) More costly services when less costly, equally effective services as determined by the department are available.

(c) Services, procedures, treatment, devices, drugs, or application of associated services which the department or the Centers for Medicare and Medicaid Services (CMS) consider investigative or experimental on the date the services were provided.

(d) Coronal polishing.

(e) Fluoride treatments (gel or varnish) for adults, unless the clients are:

(i) Clients of the division of developmental disabilities;

(ii) Diagnosed with xerostomia, in which case the provider must request prior authorization; or

(iii) High-risk adults sixty-five and older. High-risk means the client has at least one of the following:

(A) Rampant root surface decay; or

(B) Xerostomia.

(f) Restorations for wear on any surface of any tooth without evidence of decay through the enamel or on the root surface.

(g) Flowable composites for interproximal or incisal restorations.

(h) Any permanent crowns, temporary crowns, or crown post and cores.

(i) Bridges, including abutment teeth and pontics.

(j) Root canal services for primary teeth.

(k) Root canal services for permanent teeth other than teeth six, seven, eight, nine, ten, eleven, twenty-two, twenty-three, twenty-four, twenty-five, twenty-six, and twenty-seven.

(l) Pulpotomy services for permanent teeth.

(m) Transitional or treatment dentures.

(n) Overdentures.

(o) Replacements for:

(i) Immediate maxillary or mandibular dentures;

(ii) Maxillary or mandibular partial dentures (resin); or

(iii) Complete maxillary or mandibular dentures in excess of one replacement in a ten-year period; or

(iv) Cast metal framework maxillary or mandibular partial dentures in excess of one replacement in a ten-year period.

(p) Rebasement of complete and immediate dentures and partial dentures.

(q) Adjustments of complete and immediate dentures and partial dentures.

(r) Tooth implants, including insertion, postinsertion, maintenance, and implant removal.

(s) Periodontal bone grafts or oral soft tissue grafts.

(t) Gingivectomy, gingivoplasty, or frenectomy, frenoplasty and other periodontal surgical procedures.

(u) Crown lengthening procedures.

(v) Orthotic appliances, including but not limited to, night guards, temporomandibular joint dysfunction (TMJ/TMD) appliances, and all other mouth guards.

(w) Any treatment of TMJ/TMD.

(x) Extraction of:

(i) Asymptomatic teeth;

(ii) Asymptomatic wisdom teeth; and

(iii) Surgical extraction of anterior teeth seven, eight, nine, ten, twenty-three, twenty-four, twenty-five, or twenty-six, which are considered simple extractions and paid as such.

(y) Alveoloplasty, alveolotomy or tori, exostosis removal.

(z) Debridement of granuloma or cyst associated with tooth extraction.

(aa) Cosmetic treatment or surgery, except as prior authorized by the department for medically necessary reconstructive surgery to correct defects attributable to an accident, birth defect, or illness.

(bb) Nonemergent oral surgery for adults performed in an inpatient hospital setting, except:

(i) Nonemergent oral surgery is covered in an inpatient hospital setting for clients of the division of developmental disabilities when written prior authorization is obtained for the inpatient hospitalization; or

(ii) As provided in WAC 388-535-1080(4).

(cc) Dental supplies such as toothbrushes (manual, automatic, or electric), toothpaste, floss, or whiteners.

(dd) Dentist's time writing and calling in prescriptions or prescription refills.

(ee) Educational supplies.

(ff) Missed or canceled appointments.

(gg) Nonmedical equipment, supplies, personal or comfort items or services.

(hh) Provider mileage or travel costs.

(ii) Service charges or delinquent payment fees.

(jj) Supplies used in conjunction with an office visit.

(kk) Take-home drugs.

(ll) Teeth whitening.

(3) ~~((MAA))~~ The department evaluates a request for any dental-related service(s) that ~~((are not))~~ is listed as noncovered ~~((or are in excess of the dental services program's limitations or restrictions, according to WAC 388-501-0165))~~ under the provisions of WAC 388-501-0160.

(4) The department evaluates a request for a covered service in excess of the dental program's service limitations or restrictions according to the provisions of WAC 388-501-0169.

AMENDATORY SECTION (Amending WSR 05-01-064, filed 12/8/04, effective 1/8/05)

WAC 388-535A-0040 Covered and noncovered orthodontic services and limitations to coverage. (1) Subject to the limitations in this section and other applicable WAC, the ~~((medical assistance administration (MAA)))~~ department covers orthodontic treatment for a client who has one of the following medical conditions:

(a) Cleft lip, cleft palate, or other craniofacial anomalies when the client is treated by and receives follow-up care from a department-recognized craniofacial team for:

(i) Cleft lip and palate, cleft palate, or cleft lip with alveolar process involvement;

(ii) Craniofacial anomalies, including but not limited to:

(A) Hemifacial microsomia;

(B) Craniosynostosis syndromes;

(C) Cleidocranial dental dysplasia;

(D) Arthrogryposis; or

(E) Marfan syndrome.

(iii) Other medical conditions with significant facial growth impact (e.g., juvenile rheumatoid arthritis (JRA)); or

(iv) Post-traumatic, post-radiation, or post-burn jaw deformity.

(b) Other severe handicapping malocclusions, including one or more of the following:

(i) Deep impinging overbite when lower incisors are destroying the soft tissues of the palate;

(ii) Crossbite of individual anterior teeth when destruction of the soft tissue is present;

(iii) Severe traumatic malocclusion (e.g., loss of a pre-maxilla segment by burns or by accident, the result of osteomyelitis, or other gross pathology);

(iv) Overjet greater than 9mm with incompetent lips or reverse overjet greater than 3.5mm with reported masticatory and speech difficulties; or

(v) Medical conditions as indicated on the Washington Modified Handicapping Labiolingual Deviation (HLD) Index Score that result in a score of twenty-five or higher. On a case-by-case basis, ~~((MAA))~~ the department reviews all requests for treatment for conditions that result in a score of less than twenty-five, based on medical necessity.

(2) ~~((MAA))~~ The department may cover requests for orthodontic treatment for dental malocclusions other than those listed in subsection (1) of this section when ~~((MAA))~~ the department determines that the treatment is medically necessary.

(3) ~~((MAA))~~ The department does not cover:

(a) Lost or broken orthodontic appliances;

(b) Orthodontic treatment for cosmetic purposes;

(c) Orthodontic treatment that is not medically necessary (see WAC 388-500-0005);

(d) Out-of-state orthodontic treatment; or

(e) Orthodontic treatment and orthodontic-related services that do not meet the requirements of this section or other applicable WAC.

(4) ~~((MAA))~~ The department covers the following orthodontic treatment and orthodontic-related services, subject to the limitations listed (providers must bill for these services according to WAC 388-535A-0060):

(a) Panoramic radiographs (X rays), once per client in a three-year period.

(b) Interceptive orthodontic treatment, once per the client's lifetime.

(c) Limited transitional orthodontic treatment, up to one year from date of original appliance placement (see subsection (5) of this section for information on limitation extensions).

(d) Comprehensive full orthodontic treatment, up to two years from the date of original appliance placement (see subsection (5) of this section for information on limitation extensions).

(e) Orthodontic appliance removal only when:

(i) The client's appliance was placed by a different provider; and

(ii) The provider has not furnished any other orthodontic treatment to the client.

(f) Other medically necessary orthodontic treatment and orthodontic-related services as determined by ~~((MAA))~~ the department.

(5) A request to exceed stated limitations or other restrictions on covered services is called a limitation extension (LE), which is a form of prior authorization. ~~((MAA))~~ The department evaluates and approves requests for LE for orthodontic services when medically necessary, under the provisions of WAC 388-501-0165.

(6) ~~((MAA))~~ The department evaluates a request for any orthodontic service not listed as covered in this section under the provisions of WAC ~~((388-501-0165))~~ 388-501-0160.

(7) ~~((MAA))~~ The department reviews requests for orthodontic treatment for clients who are eligible for services under the EPSDT program according to the provisions of WAC 388-534-0100.

AMENDATORY SECTION (Amending WSR 06-03-081, filed 1/12/06, effective 2/12/06)

WAC 388-538-063 Mandatory enrollment in managed care for GAU clients. (1) The purpose of this section is to describe the department's managed care requirement for general assistance unemployable (GAU) clients mandated by the Laws of 2003, chapter 25, section 209(15).

(2) The only sections of chapter 388-538 WAC that apply to GAU clients described in this section are incorporated by reference into this section.

(3) To receive department-paid medical care, GAU clients must enroll in a managed care plan as required by WAC 388-505-0110(7) when they reside in a county designated as a mandatory managed care plan county.

(4) GAU clients are exempt from mandatory enrollment in managed care if they:

- (a) Are American Indian or Alaska Native (AI/AN); and
- (b) Meet the provisions of 25 U.S.C. 1603 (c)-(d) for federally recognized tribal members and their descendants.

(5) In addition to subsection (4), the department will exempt a GAU client from mandatory enrollment in managed care or end an enrollee's enrollment in managed care in accordance with WAC 388-538-130(3) and 388-538-130(4).

(6) On a case-by-case basis, the department may grant a GAU client's request for exemption from managed care or a GAU enrollee's request to end enrollment when, in the department's judgment:

(a) The client or enrollee has a documented and verifiable medical condition; and

(b) Enrollment in managed care could cause an interruption of treatment that could jeopardize the client's or enrollee's life or health or ability to attain, maintain, or regain maximum function.

(7) The department enrolls GAU clients in managed care effective on the earliest possible date, given the requirements of the enrollment system. The department does not enroll clients in managed care on a retroactive basis.

(8) Managed care organizations (MCOs) that contract with the department to provide services for GAU clients must meet the qualifications and requirements in WAC 388-538-067 and 388-538-095 (3)(a), (b), (c), and (d).

(9) The department pays MCOs capitated premiums for GAU enrollees based on legislative allocations for the GAU program.

(10) GAU enrollees are eligible for the scope of care as described in WAC (~~388-529-0200~~) 388-501-0060 for medical care services (MCS) programs. Other scope of care provisions that apply:

(a) A client is entitled to timely access to medically necessary services as defined in WAC 388-500-0005;

(b) MCOs cover the services included in the managed care contract for GAU enrollees. MCOs may, at their discretion, cover services not required under the MCO's contract for GAU enrollees;

(c) The department pays providers on a fee-for-service basis for the medically necessary, covered medical care services not covered under the MCO's contract for GAU enrollees; and

(d) A GAU enrollee may obtain emergency services in accordance with WAC 388-538-100.

(11) The department does not pay providers on a fee-for-service basis for services covered under the MCO's contract for GAU enrollees, even if the MCO has not paid for the service, regardless of the reason. The MCO is solely responsible for payment of MCO-contracted health care services that are:

- (a) Provided by an MCO-contracted provider; or
- (b) Authorized by the MCO and provided by nonparticipating providers.

(12) The following services are not covered for GAU enrollees unless the MCO chooses to cover these services at no additional cost to the department:

- (a) Services that are not medically necessary;
- (b) Services not included in the medical care services scope of care;

(c) Services, other than a screening exam as described in WAC 388-538-100(3), received in a hospital emergency department for nonemergency medical conditions; and

(d) Services received from a nonparticipating provider requiring prior authorization from the MCO that were not authorized by the MCO.

(13) A provider may bill a GAU enrollee for noncovered services described in subsection (12), if the requirements of WAC 388-502-0160 and 388-538-095(5) are met.

(14) The grievance and appeal process found in WAC 388-538-110 applies to GAU enrollees described in this section.

(15) The hearing process found in chapter 388-02 WAC and WAC 388-538-112 applies to GAU enrollees described in this section.

AMENDATORY SECTION (Amending WSR 06-03-081, filed 1/12/06, effective 2/12/06)

WAC 388-538-095 Scope of care for managed care enrollees. (1) Managed care enrollees are eligible for the scope of medical care as described in WAC (~~388-529-0100~~) 388-501-0060 for categorically needy clients.

(a) A client is entitled to timely access to medically necessary services as defined in WAC 388-500-0005.

(b) The managed care organization (MCO) covers the services included in the MCO contract for MCO enrollees. MCOs may, at their discretion, cover additional services not required under the MCO contract. However, the department may not require the MCO to cover any additional services outside the scope of services negotiated in the MCO's contract with the department.

(c) The department covers medically necessary (~~category-needy~~) services described in (~~chapter 388-529~~) WAC 388-501-0060 and WAC 388-501-0065 that are excluded from coverage in the MCO contract.

(d) The department covers services through the fee-for-service system for enrollees with a primary care case management (PCCM) provider. Except for emergencies, the PCCM provider must either provide the covered services needed by the enrollee or refer the enrollee to other providers who are contracted with the department for covered services. The PCCM provider is responsible for instructing the enrollee regarding how to obtain the services that are referred by the PCCM provider. The services that require PCCM provider referral are described in the PCCM contract. The department informs enrollees about the enrollee's program coverage, limitations to covered services, and how to obtain covered services.

(e) MCO enrollees may obtain certain services from either an MCO provider or from a (~~medical assistance provider with a~~) department-enrolled provider with a current core provider agreement without needing to obtain a referral from the PCP or MCO. These services are described in the managed care contract, and are communicated to enrollees by the department and MCOs as described in (f) of this subsection.

(f) The department sends each client written information about covered services when the client is required to enroll in managed care, and any time there is a change in covered ser-

vices. This information describes covered services, which services are covered by the department, and which services are covered by MCOs. In addition, the department requires MCOs to provide new enrollees with written information about covered services.

(2) For services covered by the department through PCCM contracts for managed care:

(a) The department covers medically necessary services included in the categorically needy scope of care and rendered by providers who have a current core provider agreement with the department to provide the requested service;

(b) The department may require the PCCM provider to obtain authorization from the department for coverage of nonemergency services;

(c) The PCCM provider determines which services are medically necessary;

(d) An enrollee may request a hearing for review of PCCM provider or the department coverage decisions (see WAC 388-538-110); and

(e) Services referred by the PCCM provider require an authorization number in order to receive payment from the department.

(3) For services covered by the department through contracts with MCOs:

(a) The department requires the MCO to subcontract with a sufficient number of providers to deliver the scope of contracted services in a timely manner. Except for emergency services, MCOs provide covered services to enrollees through their participating providers;

(b) The department requires MCOs to provide new enrollees with written information about how enrollees may obtain covered services;

(c) For nonemergency services, MCOs may require the enrollee to obtain a referral from the primary care provider (PCP), or the provider to obtain authorization from the MCO, according to the requirements of the MCO contract;

(d) MCOs and their providers determine which services are medically necessary given the enrollee's condition, according to the requirements included in the MCO contract;

(e) The department requires the MCO to coordinate benefits with other insurers in a manner that does not reduce benefits to the enrollee or result in costs to the enrollee;

(f) A managed care enrollee does not need a PCP referral to receive women's health care services, as described in RCW 48.42.100 from any women's health care provider participating with the MCO. Any covered services ordered and/or prescribed by the women's health care provider must meet the MCO's service authorization requirements for the specific service.

(g) For enrollees temporarily outside their MCOs service area, the MCO is required to cover enrollees for up to ninety days for emergency care and medically necessary covered benefits that cannot wait until the enrollees return to their service area.

(4) Unless the MCO chooses to cover these services, or an appeal, independent review, or a hearing decision reverses an MCO or department denial, the following services are not covered:

(a) For all managed care enrollees:

(i) Services that are not medically necessary;

(ii) Services not included in the categorically needy scope of services; and

(iii) Services, other than a screening exam as described in WAC 388-538-100(3), received in a hospital emergency department for nonemergency medical conditions.

(b) For MCO enrollees:

(i) Services received from a participating specialist that require prior authorization from the MCO, but were not authorized by the MCO; and

(ii) Services received from a nonparticipating provider that require prior authorization from the MCO that were not authorized by the MCO. All nonemergency services covered under the MCO contract and received from nonparticipating providers require prior authorization from the MCO.

(c) For PCCM enrollees, services that require a referral from the PCCM provider as described in the PCCM contract, but were not referred by the PCCM provider.

(5) A provider may bill an enrollee for noncovered services as described in subsection (4) of this section, if the requirements of WAC 388-502-0160 are met. The provider must give the original agreement to the enrollee and file a copy in the enrollee's record.

(a) The agreement must state all of the following:

(i) The specific service to be provided;

(ii) That the service is not covered by either the department or the MCO;

(iii) An explanation of why the service is not covered by the MCO or the department, such as:

(A) The service is not medically necessary; or

(B) The service is covered only when provided by a participating provider.

(iv) The enrollee chooses to receive and pay for the service; and

(v) Why the enrollee is choosing to pay for the service, such as:

(A) The enrollee understands that the service is available at no cost from a provider participating with the MCO, but the enrollee chooses to pay for the service from a provider not participating with the MCO;

(B) The MCO has not authorized emergency department services for nonemergency medical conditions and the enrollee chooses to pay for the emergency department's services rather than wait to receive services at no cost in a participating provider's office; or

(C) The MCO or PCCM has determined that the service is not medically necessary and the enrollee chooses to pay for the service.

(b) For (~~limited English proficient~~) enrollees with limited English proficiency, the agreement must be translated or interpreted into the enrollee's primary language to be valid and enforceable.

(c) The agreement is void and unenforceable, and the enrollee is under no obligation to pay the provider, if the service is covered by the department or the MCO as described in subsection (1) of this section, even if the provider is not paid for the covered service because the provider did not satisfy the payor's billing requirements.

AMENDATORY SECTION (Amending WSR 03-21-039, filed 10/8/03, effective 11/8/03)

WAC 388-540-130 Covered services. (1) The ~~((medical assistance administration (MAA)))~~ department covers the following services and supplies subject to the restrictions and limitations in this section and other applicable published WAC:

- (a) In-facility dialysis;
- (b) Home dialysis;
- (c) Training for self-dialysis;
- (d) Home dialysis helpers;
- (e) Dialysis supplies;
- (f) Diagnostic lab work;
- (g) Treatment for anemia; and
- (h) Intravenous drugs.

(2) Covered services are subject to the limitations specified by ~~((MAA))~~ the department. Providers must obtain prior authorization (PA) or expedited prior authorization (EPA) before providing services that exceed specified limits in quantity, frequency or duration (refer to WAC 388-501-0165 ~~((for the PA process))~~ and WAC 388-501-0169).

AMENDATORY SECTION (Amending WSR 03-21-039, filed 10/8/03, effective 11/8/03)

WAC 388-540-140 Noncovered services. (1) The ~~((medical assistance administration (MAA)))~~ department does not reimburse kidney centers for the following:

- (a) Blood and blood products (refer to WAC 388-540-190);
- (b) Personal care items such as slippers, toothbrushes, etc.; or
- (c) Additional staff time or personnel costs. Staff time is paid through the composite rate. Home dialysis helpers are the only personnel cost paid outside the composite rate (refer to WAC 388-540-160).

(2) ~~((MAA reviews all initial requests))~~ The department evaluates a request for any service listed as noncovered ~~((services based on WAC 388-501-0165))~~ in this chapter under the provisions of WAC 388-501-0160.

AMENDATORY SECTION (Amending WSR 03-21-039, filed 10/8/03, effective 11/8/03)

WAC 388-540-150 Reimbursement—General. (1) Kidney center services described in this section are paid by one of two methods:

(a) **Composite rate payments**—This is a payment method in which all standard equipment, supplies and services are calculated into a blended rate.

(i) A single dialysis session and related services are reimbursed through a single composite rate payment (refer to WAC 388-540-160).

(ii) Composite rate payments for continuous ambulatory peritoneal dialysis (CAPD) or continuous cycling peritoneal dialysis (CCPD) are limited to thirty-one per month for an individual client.

(iii) Composite rate payments for all other types of dialysis sessions are limited to fourteen per month for an individual client.

(b) **Noncomposite rate payments**—End-stage renal disease (ESRD) services and items covered by the ~~((medical assistance administration (MAA)))~~ department but not included in the composite rate are billed and paid separately (refer to WAC 388-540-170).

(2) **Limitation extension request**—~~((MAA))~~ The department evaluates billings for covered services that are subject to limitations or other restrictions, and approves such services beyond those limitations or restrictions when medically necessary ~~((s))~~ under the ~~((standards))~~ provisions of WAC 388-501-0165 and WAC 388-501-0169.

(3) **Take-home drugs**—~~((MAA))~~ The department reimburses kidney centers for take-home drugs only when they meet the conditions described in WAC 388-540-170(1). Other drugs for at-home use must be billed by a pharmacy and be subject to ~~((MAA))~~ the department's pharmacy rules.

(4) **Medical nutrition**—Medical nutrition products must be billed by a pharmacy or a durable medical equipment (DME) provider.

(5) **Medicare eligible clients**—~~((MAA))~~ The department does not reimburse kidney centers as a primary payer for Medicare eligible clients.

REPEALER

The following sections of the Washington Administrative Code are repealed:

WAC 388-501-0300	Limits on scope of medical program services.
WAC 388-529-0100	Scope of covered medical services by program.
WAC 388-529-0200	Medical services available to eligible clients.

WSR 06-19-100

PROPOSED RULES

DEPARTMENT OF

SOCIAL AND HEALTH SERVICES

(Health and Recovery Services Administration)

[Filed September 19, 2006, 4:05 p.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 05-17-140.

Title of Rule and Other Identifying Information: Sections in Title 388 WAC regarding covered and noncovered services - Part 3 of 3.

WAC Sections Proposed in Part 3: WAC 388-543-1100 Scope of coverage and limitations for DME, 388-543-1150 Limits and limitation extensions, 388-543-1300 Equipment, related supplies, or other nonmedical supplies, and devices not covered, 388-544-0010 Vision care—General, 388-544-0450 Vision care—Prior authorization, 388-544-1100 Hearing aid services—General, 388-544-1400 Hearing aid services—noncovered services, 388-545-900 Neurodevelopmental centers, 388-546-0200 Scope of coverage for ambulance transportation, 388-546-0250 Ambulance ser-

vices the department does not cover, 388-550-2596 Services and equipment covered by the department but not included in LTAC fixed per diem rate, 388-551-2130 Noncovered home health services, 388-551-3000 Private duty nursing services for clients seventeen and younger, 388-553-500 Home infusion therapy/parenteral nutrition program—Coverage, 388-554-500 Orally administered enteral nutrition products—Coverage, 388-554-600 Tube-delivered enteral nutrition products and related equipment and supplies—Coverage, 388-556-0500 Medical care services under state-administered cash programs, and 388-800-0045 What services are offered by ADATSA?

Hearing Location(s): Blake Office Park East, Rose Room, 4500 10th Avenue S.E., Lacey, WA 98503 (one block north of the intersection of Pacific Avenue S.E. and Alhadeff Lane. A map or directions are available at <http://www1.dshs.wa.gov/msa/rpau/docket.html> or by calling (360) 664-6097), on November 7, 2006, at 10:00 a.m.

Date of Intended Adoption: Not earlier than November 8, 2006.

Submit Written Comments to: DSHS Rules Coordinator, P.O. Box 45850, Olympia, WA 98504, delivery 4500 10th Avenue S.E., Lacey, WA 98503, e-mail fernaax@dshs.wa.gov, fax (360) 664-6185, by 5:00 p.m. on November 7, 2006.

Assistance for Persons with Disabilities: Contact Stephanie Schiller, DSHS Rules Consultant, by November 3, 2006, TTY (360) 664-6178 or (360) 664-6097 or by e-mail at schilse@dshs.wa.gov.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The purpose of the proposal is to:

- Improve the quality of care received by DSHS clients by using a consistent, evidence-based approach to making benefit coverage decisions.
- Make HRSA benefit coverage rules clearer, more transparent, and consistent.
- Establish a clear, transparent process by which HRSA determines what services are included under its benefit coverage.
- Maximize program resources through prudent use of cost-effective practices.

Changes to Rule in Parts 1, 2, and 3: In this proposal, the department has:

- Replaced "medical assistance administration" and "MAA" with "the department" or "HRSA."
- Substituted WAC 388-501-0160 cross reference in place of WAC 388-501-0165 where noncovered services are addressed.
- Replaced all references to chapter 388-529 WAC with new WAC 388-501-0060 and 388-501-0065.
- Added reference to new WAC 388-501-0169 in rules where limitations on covered services are addressed.
- Repealed chapter 388-529 WAC which is being replaced with WAC 388-501-0060 and 388-501-0065.
- Repealed WAC 388-501-0300 because it was incorporated into WAC 388-501-0050 and 388-501-0070.

- Removed gender reassignment surgery from covered service status.
- More clearly defined what is covered and not covered in the way of cosmetic and reconstructive surgery, treatment, and procedures in WAC 388-531-0100 and new WAC 388-501-0070.
- Added more detail to WAC 388-501-0160 regarding the criteria and steps in the exception to rule (ETR) process.
- In new WAC 388-501-0065, added brief descriptions of services available under each category of service listed in the table in new WAC 388-501-0060.
- Included cross references (in new WAC 388-501-0065 and 388-501-0070) to other program WACs where the reader can find more specific detail of the covered or noncovered service.
- Codified the evaluation criteria HRSA will use when evaluating requests for covered services beyond the maximum allowed.

Reasons Supporting Proposal: It will make HRSA's rules regarding covered and noncovered medical services clearer and easier to understand for our clients and medical providers.

Statutory Authority for Adoption: RCW 74.04.050, 74.08.090, 74.09.530, and 74.09.700.

Statute Being Implemented: RCW 74.04.050, 74.08.090, 74.09.530, and 74.09.700.

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: Department of social and health services, governmental.

Name of Agency Personnel Responsible for Drafting: Kevin Sullivan, 626 8th Avenue, Olympia, WA 98504-5504, (360) 725-1344; Implementation and Enforcement: Gail Kreiger, 626 8th Avenue, Olympia, WA 98504-5504, (360) 725-1681.

No small business economic impact statement has been prepared under chapter 19.85 RCW. This amendment does not create more than minor costs to small businesses.

A cost-benefit analysis is required under RCW 34.05.328. A preliminary cost-benefit analysis may be obtained by contacting Kevin Sullivan, HRSA Rules Coordinator, P.O. Box 45504, Olympia, WA 98504-4405, phone (360) 725-1344, fax (360) 586-9727, e-mail sullikm@dshs.wa.gov, TYY/TDD 1-800-848-5429.

September 15, 2006

Andy Fernando, Manager
Rules and Policies Assistance Unit

AMENDATORY SECTION (Amending WSR 05-21-102, filed 10/18/05, effective 11/18/05)

WAC 388-543-1100 Scope of coverage and coverage limitations for DME and related supplies, prosthetics, orthotics, medical supplies and related services. The federal government deems **durable medical equipment (DME)** and related supplies, **prosthetics, orthotics, and medical supplies** as optional services under the **Medicaid** program, except when prescribed as an integral part of an approved

plan of treatment under the home health program or required under the early and periodic screening, diagnosis and treatment (**EPSDT**) program. The **department** may reduce or eliminate coverage for optional services, consistent with legislative appropriations.

(1) The ~~((medical assistance administration (MAA)))~~ department covers DME and related supplies, prosthetics, orthotics, medical supplies, related services, repairs and labor charges when they are:

(a) Within the scope of an eligible client's medical care program (see ~~((chapter 388-529))~~ WAC 388-501-0060 and WAC 388-501-0065);

(b) Within accepted medical or physical medicine community standards of practice;

(c) Prior authorized as described in WAC 388-543-1600, 388-543-1800, and 388-543-1900;

(d) Prescribed by a physician, advanced registered nurse practitioner (ARNP), or physician assistant certified (PAC). Except for dual eligible Medicare/Medicaid clients, the prescription must:

(i) Be dated and signed by the prescriber;

(ii) Be less than six months in duration from the date the prescriber signs the prescription; and

(iii) State the specific item or service requested, diagnosis, estimated length of need (weeks, months, or years), and quantity;

(e) Billed to the department as the payor of last resort only. ~~((MAA))~~ The department does not pay first and then collect from Medicare and;

(f) **Medically necessary** as defined in WAC 388-500-0005. The provider or client must submit sufficient objective evidence to establish medical necessity. Information used to establish medical necessity includes, but is not limited to, the following:

(i) A physiological description of the client's disease, injury, impairment, or other ailment, and any changes in the client's condition written by the prescribing physician, ARNP, PAC, licensed prosthetist and/or orthotist, physical therapist, occupational therapist, or speech therapist; and/or

(ii) Video and/or photograph(s) of the client demonstrating the impairments as well and client's ability to use the requested equipment, when applicable.

(2) ~~((MAA))~~ The department evaluates a request for any equipment or device~~((s that are))~~ listed as noncovered in WAC 388-543-1300 under the provisions of WAC ~~((388-501-0165))~~ 388-501-0160.

(3) ~~((MAA))~~ The department evaluates a request for a service that is in a covered category, but has been determined to be experimental or investigational under WAC 388-531-0550, under the provisions of WAC 388-501-0165 ~~((which relate to medical necessity))~~.

(4) ~~((MAA))~~ The department evaluates requests for covered services in this chapter that are subject to limitations or other restrictions and approves such services beyond those limitations or restrictions ~~((when medically necessary, under the standards for covered services in))~~ under the provisions of WAC 388-501-0165 and WAC 388-501-0169.

(5) ~~((MAA))~~ The department does not reimburse for DME and related supplies, prosthetics, orthotics, medical supplies, related services, and related repairs and labor

charges under **fee-for-service (FFS)** when the client is any of the following:

(a) An inpatient hospital client;

(b) Eligible for both **Medicare** and Medicaid, and is staying in a **nursing facility** in lieu of hospitalization;

(c) Terminally ill and receiving hospice care; or

(d) Enrolled in a risk-based managed care plan that includes coverage for such items and/or services.

(6) ~~((MAA))~~ The department covers medical equipment and related supplies, prosthetics, orthotics, medical supplies and related services, repairs, and labor charges listed in ~~((MAA's))~~ the department's published issuances, including Washington Administrative Code (WAC), billing instructions, and numbered memoranda.

(7) An interested party may request ~~((MAA))~~ the department to include new equipment/supplies in the billing instructions by sending a written request plus all of the following:

(a) Manufacturer's literature;

(b) Manufacturer's pricing;

(c) Clinical research/case studies (including FDA approval, if required); and

(d) Any additional information the requester feels is important.

(8) ~~((MAA))~~ The department bases the decision to purchase or rent DME for a client, or to pay for repairs to client-owned equipment on medical necessity.

(9) ~~((MAA))~~ The department covers replacement batteries for purchased medically necessary DME equipment covered within this chapter.

(10) ~~((MAA))~~ The department covers the following categories of medical equipment and supplies only when they are medically necessary, prescribed by a physician, ARNP, or PAC, are within the scope of his or her practice as defined by state law, and are subject to the provisions of this chapter and related WACs:

(a) Equipment and supplies prescribed in accordance with an approved plan of treatment under the home health program;

(b) Wheelchairs and other DME;

(c) Prosthetic/orthotic devices;

(d) Surgical/ostomy appliances and urological supplies;

(e) Bandages, dressings, and tapes;

(f) Equipment and supplies for the management of diabetes; and

(g) Other medical equipment and supplies~~((as))~~ listed in ~~((MAA))~~ department published issuances.

(11) ~~((MAA))~~ The department evaluates a **BR** item, procedure, or service for its medical appropriateness and reimbursement value on a case-by-case basis.

(12) For a client in a **nursing facility**, ~~((MAA))~~ the department covers only the following when medically necessary. All other DME and supplies identified in ~~((MAA))~~ the department's billing instructions are the responsibility of the nursing facility, in accordance with chapters 388-96 and 388-97 WAC. See also WAC 388-543-2900 (3) and (4). ~~((MAA))~~ The department covers:

(a) The purchase and repair of a speech generating device (SGD), a wheelchair for the exclusive full-time use of a permanently disabled nursing facility resident when the

wheelchair is not included in the nursing facility's per diem rate, or a **specialty bed**; and

(b) The rental of a speciality bed.

(13) Vendors must provide instructions for use of equipment; therefore, instructional materials such as pamphlets and video tapes are not covered.

(14) Bilirubin lights are limited to rentals, for at-home newborns with jaundice.

AMENDATORY SECTION (Amending WSR 05-21-102, filed 10/18/05, effective 11/18/05)

WAC 388-543-1150 Limits and limitation extensions.

The ~~((medical assistance administration (MAA)))~~ department covers non-DME (MSE), DME, and related supplies, prosthetics, orthotics, medical supplies, and related services as described in WAC 388-543-1100(1). ~~((MAA))~~ The department limits the amount, frequency, or duration of certain covered MSE, DME, and related supplies, prosthetics, orthotics, medical supplies, and related services, and reimburses up to the stated limit without requiring prior authorization. These limits are designed to avoid the need for prior authorization for items normally considered medically necessary and for quantities sufficient for a thirty-day supply for one client. In order to exceed the stated limits, the provider must request a limitation extension (LE), which is a form of prior authorization (PA). ~~((MAA approves))~~ The department evaluates such requests for LE ~~((when medical necessary,))~~ under the ~~((standards for covered services in WAC 388-501-0165))~~ provisions of WAC 388-501-0169. Procedures for LE are found in ~~((MAA's))~~ department billing instructions. The following items and quantities do not require prior authorization; requests to exceed the stated quantities require LE:

(1) Antiseptics and germicides:

(a) Alcohol (isopropyl) or peroxide (hydrogen) - one pint per month;

(b) Alcohol wipes (box of two hundred) - one box per month;

(c) Betadine or pHisoHex solution - one pint per month;

(d) Betadine or iodine swabs/wipes (box of one hundred) - one box per month;

(e) Disinfectant spray - one twelve-ounce bottle or can per six-month period; or

(f) Periwash (when soap and water are medically contraindicated) - one five-ounce bottle of concentrate solution per six-month period.

(2) Blood monitoring/testing supplies:

(a) Replacement battery of any type, used with a client-owned, medically necessary home or specialized blood glucose monitor - one in a three-month period; and

(b) Spring-powered device for lancet - one in a six-month period.

(3) Braces, belts and supportive devices:

(a) Custom vascular supports (CVS) - two pair per six-month period. CVS fitting fee - two per six-month period;

(b) Surgical stockings (below-the-knee, above-the-knee, thigh-high, or full-length) - two pair per six-month period;

(c) Graduated compression stockings for pregnancy support (pantyhose style) - two per twelve-month period;

(d) Knee brace (neoprene, nylon, elastic, or with a hinged bar) - two per twelve-month period;

(e) Ankle, elbow, or wrist brace - two per twelve-month period;

(f) Lumbosacral brace, rib belt, or hernia belt - one per twelve-month period;

(g) Cervical head harness/halter, cervical pillow, pelvic belt/harness/boot, or extremity belt/harness - one per twelve-month period.

(4) Decubitus care products:

(a) Cushion (gel, sacroiliac, or accuback) and cushion cover (any size) - one per twelve-month period;

(b) Synthetic or lambs wool sheepskin pad - one per twelve-month period;

(c) Heel or elbow protectors - four per twelve-month period.

(5) Ostomy supplies:

(a) Adhesive for ostomy or catheter: Cement; powder; liquid (e.g., spray or brush); or paste (any composition, e.g., silicone or latex) - four total ounces per month.

(b) Adhesive or nonadhesive disc or foam pad for ostomy pouches - ten per month.

(c) Adhesive remover or solvent - three ounces per month.

(d) Adhesive remover wipes, fifty per box - one box per month.

(e) Closed pouch, with or without attached barrier, with a one- or two-piece flange, or for use on a faceplate - sixty per month.

(f) Closed ostomy pouch with attached standard wear barrier, with built-in one-piece convexity - ten per month.

(g) Continent plug for continent stoma - thirty per month.

(h) Continent device for continent stoma - one per month.

(i) Drainable ostomy pouch, with or without attached barrier, or with one- or two-piece flange - twenty per month.

(j) Drainable ostomy pouch with attached standard or extended wear barrier, with or without built-in one-piece convexity - twenty per month.

(k) Drainable ostomy pouch for use on a plastic or rubber faceplate (only one type of faceplate allowed) - ten per month.

(l) Drainable urinary pouch for use on a plastic, heavy plastic, or rubber faceplate (only one type of faceplate allowed) - ten per month.

(m) Irrigation bag - two every six months.

(n) Irrigation cone and catheter, including brush - two every six months.

(o) Irrigation supply, sleeve - one per month.

(p) Ostomy belt (adjustable) for appliance - two every six months.

(q) Ostomy convex insert - ten per month.

(r) Ostomy ring - ten per month.

(s) Stoma cap - thirty per month.

(t) Ostomy faceplate - ten per month. ~~((MAA))~~ The department does not allow the following to be used on a faceplate in combination with drainable pouches (refer to the billing instructions for further details):

(i) Drainable pouches with plastic face plate attached; or

(ii) Drainable pouches with rubber face plate.

(6) Supplies associated with client-owned transcutaneous electrical nerve stimulators (TENS):

(a) For a four-lead TENS unit - two kits per month. (A kit contains two leads, conductive paste or gel, adhesive, adhesive remover, skin preparation material, batteries, and a battery charger for rechargeable batteries.)

(b) For a two-lead TENS unit - one kit per month.

(c) TENS tape patches (for use with carbon rubber electrodes only) are allowed when they are not used in combination with a kit(s).

(d) A TENS stand alone replacement battery charger is allowed when it is not used in combination with a kit(s).

(7) Urological supplies - diapers and related supplies:

(a) The standards and specifications in this subsection apply to all disposable incontinent products (e.g., briefs, diapers, pull-up pants, underpads for beds, liners, shields, guards, pads, and undergarments). See subsections (b), (c), (d), and (e) of this section for additional standards for specific products. All of the following apply to all disposable incontinent products:

(i) All materials used in the construction of the product must be safe for the client's skin and harmless if ingested;

(ii) Adhesives and glues used in the construction of the product must not be water-soluble and must form continuous seals at the edges of the absorbent core to minimize leakage;

(iii) The padding must provide uniform protection;

(iv) The product must be hypoallergenic;

(v) The product must meet the flammability requirements of both federal law and industry standards; and

(vi) All products are covered for client personal use only.

(b) In addition to the standards in subsection (a) of this section, diapers must meet all the following specifications. They must:

(i) Be hourglass shaped with formed leg contours;

(ii) Have an absorbent filler core that is at least one-half inch from the elastic leg gathers;

(iii) Have leg gathers that consist of at least three strands of elasticized materials;

(iv) Have an absorbent core that consists of cellulose fibers mixed with absorbent gelling materials;

(v) Have a backsheet that is moisture impervious and is at least 1.00 mm thick, designed to protect clothing and linens;

(vi) Have a topsheet that resists moisture returning to the skin;

(vii) Have an inner lining that is made of soft, absorbent material; and

(viii) Have either a continuous waistband, or side panels with a tear-away feature, or refastenable tapes, as follows:

(A) For child diapers, at least two tapes, one on each side.

(B) The tape adhesive must release from the backsheet without tearing it, and permit a minimum of three fastening/unfastening cycles.

(c) In addition to the standards in subsection (a) of this section, pull-up pants and briefs must meet the following specifications. They must:

(i) Be made like regular underwear with an elastic waist or have at least four tapes, two on each side or two large tapes, one on each side;

(ii) Have an absorbent core filler that is at least one-half inch from the elastic leg gathers;

(iii) Have an absorbent core that consists of cellulose fibers mixed with absorbent gelling;

(iv) Have leg gathers that consist of at least three strands of elasticized materials;

(v) Have a backsheet that is moisture impervious, is at least 1.00 mm thick, and is designed to protect clothing and linens;

(vi) Have an inner lining made of soft, absorbent material; and

(vii) Have a top sheet that resists moisture returning to the skin.

(d) In addition to the standards in subsection (a) of this section, underpads are covered only for incontinent purposes in a client's bed and must meet the following specifications:

(i) Have an absorbent layer that is at least one and one-half inches from the edge of the underpad;

(ii) Be manufactured with a waterproof backing material;

(iii) Be able to withstand temperatures not to exceed one hundred-forty degrees Fahrenheit;

(iv) Have a covering or facing sheet that is made of non-woven, porous materials that have a high degree of permeability, allowing fluids to pass through and into the absorbent filler. The patient contact surface must be soft and durable;

(v) Have filler material that is highly absorbent. It must be heavy weight fluff filler or the equivalent; and

(vi) Have four-ply, nonwoven facing, sealed on all four sides.

(e) In addition to the standards in subsection (a) of this section, liners, shields, guards, pads, and undergarments are covered for incontinence only and must meet the following specifications:

(i) Have channels to direct fluid throughout the absorbent area, and leg gathers to assist in controlling leakage, and/or be contoured to permit a more comfortable fit;

(ii) Have a waterproof backing designed to protect clothing and linens;

(iii) Have an inner liner that resists moisture returning to the skin;

(iv) Have an absorbent core that consists of cellulose fibers mixed with absorbent gelling materials;

(v) Have pressure-sensitive tapes on the reverse side to fasten to underwear; and

(vi) For undergarments only, be contoured for good fit, have at least three elastic leg gathers, and may be belted or unbelted.

(f) ((MAA)) The department covers the products in this subsection only when they are used alone; they cannot be used in combination with each other. ((MAA)) The department approves a client's use of a combination of products only when the client uses different products for daytime and nighttime use (see ((MAA's)) department billing instructions for how to specify this when billing). The total quantity of all products in this section used in combination cannot exceed the monthly limitation for the product with the highest limit

(see subsections (g), (h), (i), (j), (k), (l), and (m) of this section for product limitations). The following products cannot be used together:

- (i) Disposable diapers;
 - (ii) Disposable pull-up pants and briefs;
 - (iii) Disposable liners, shields, guards, pads, and undergarments;
 - (iv) Rented reusable diapers (e.g., from a diaper service); and
 - (v) Rented reusable briefs (e.g., from a diaper service), or pull-up pants.
- (g) Purchased disposable diapers (any size) are limited to:
- (i) Three hundred per month for a child three to eighteen years of age; and
 - (ii) Two hundred forty per month for an adult nineteen years of age and older.
- (h) Reusable cloth diapers (any size) are limited to:
- (i) Purchased - thirty-six per year; and
 - (ii) Rented - two hundred forty per month.
- (i) Disposable briefs and pull-up pants (any size) are limited to:
- (i) Three hundred per month for a child age three to eighteen years of age; and
 - (ii) One hundred fifty per month for an adult nineteen years of age and older.
- (j) Reusable briefs, washable protective underwear, or pull-up pants (any size) are limited to:
- (i) Purchased - four per year.
 - (ii) Rented - one hundred fifty per month.
- (k) Disposable pant liners, shields, guards, pads, and undergarments are limited to two hundred forty per month.
- (l) Underpads for beds are limited to:
- (i) Disposable (any size) - one hundred eighty per month.
 - (ii) Purchased, reusable (large) - forty-two per year.
 - (iii) Rented, reusable (large) - ninety per month.
- (8) Urological supplies - urinary retention:
- (a) Bedside drainage bag, day or night, with or without anti-reflux device, with or without tube - two per month. This cannot be billed in combination with any of the following:
 - (i) With extension drainage tubing for use with urinary leg bag or urostomy pouch (any type, any length), with connector/adapter; and/or
 - (ii) With an insertion tray with drainage bag, and with or without catheter.
 - (b) Bedside drainage bottle, with or without tubing - two per six month period.
 - (c) Extension drainage tubing (any type, any length), with connector/adapter, for use with urinary leg bag or urostomy pouch. This cannot be billed in combination with a vinyl urinary leg bag, with or without tube.
 - (d) External urethral clamp or compression device (not be used for catheter clamp) - two per twelve-month period.
 - (e) Indwelling catheters (any type) - three per month.
 - (f) Insertion trays:
 - (i) Without drainage bag and catheter - one hundred and twenty per month. These cannot be billed in combination with other insertion trays that include drainage bag, catheters, and/or individual lubricant packets.

(ii) With indwelling catheters - three per month. These cannot be billed in combination with: Other insertion trays without drainage bag and/or indwelling catheter; individual indwelling catheters; and/or individual lubricant packets.

(g) Intermittent urinary catheter - one hundred twenty per month. These cannot be billed in combination with: An insertion tray with or without drainage bag and catheter; or other individual intermittent urinary catheters.

(h) Irrigation syringe (bulb or piston) - cannot be billed in combination with irrigation tray or tubing.

(i) Irrigation tray with syringe (bulb or piston) - thirty per month. These cannot be billed in combination with irrigation syringe (bulb or piston), or irrigation tubing set.

(j) Irrigation tubing set - thirty per month. These cannot be billed in combination with an irrigation tray or irrigation syringe (bulb or piston).

(k) Leg straps (latex foam and fabric). Allowed as replacement only.

(l) Male external catheter, specialty type, or with adhesive coating or adhesive strip - sixty per month.

(m) Urinary suspensory with leg bag, with or without tube - two per month. This cannot be billed in combination with: a latex urinary leg bag; urinary suspensory without leg bag; extension drainage tubing; or a leg strap.

(n) Urinary suspensory without leg bag, with or without tube - two per month.

(o) Urinary leg bag, vinyl, with or without tube - two per month. This cannot be billed in combination with: A leg strap; or an insertion tray with drainage bag and without catheter.

(p) Urinary leg bag, latex - one per month. This cannot be billed in combination with an insertion tray with drainage bag and with or without catheter.

(9) Miscellaneous supplies:

(a) Bilirubin light therapy supplies - five days' supply. ((MAA)) The department reimburses only when these are provided with a prior authorized bilirubin light.

(b) Continuous passive motion (CPM) softgoods kit - one, with rental of CPM machine.

(c) Eye patch with elastic, tied band, or adhesive, to be attached to an eyeglass lens - one box of twenty.

(d) Eye patch (adhesive wound cover) - one box of twenty.

(e) Lice comb (e.g., LiceOut TM, or LiesMeister TM, or combs of equivalent quality and effectiveness) - one per year.

(f) Nontoxic gel (e.g., LiceOut TM) for use with lice combs - one bottle per twelve month period.

(g) Syringes and needles ("sharps") disposal container for home use, up to one gallon size - two per month.

(10) Miscellaneous DME:

(a) Bilirubin light or light pad - five days rental per twelve-month period.

(b) Blood glucose monitor (specialized or home) - one in a three-year period.

(c) Continuous passive motion (CPM) machine - up to ten days rental and requires prior authorization.

(d) Diaphragmatic pacing antennae - four per twelve month-period.

(e) Lightweight protective helmet/soft shell (including adjustable chin/mouth strap) - two per twelve-month period.

(f) Lightweight ventilated hard-shell helmet (including unbreakable face bar, woven chin strap w/adjustable buckle and snap fastener, and one set of cushion pads for adjusting fit to head circumference) - two per twelve-month period.

(11) Prosthetics and orthotics:

(a) Thoracic-hip-knee-ankle orthosis (THKAO) standing frame - one every five years.

(b) Preparatory, above knee "PTB" type socket, non-alignable system, pylon, no cover, SACH foot plaster socket, molded to model - one per lifetime, per limb.

(c) Preparatory, below knee "PTB" type socket, non-alignable system, pylon, no cover, SACH foot thermoplastic or equal, direct formed - one per lifetime, per limb.

(d) Socket replacement, below the knee, molded to patient model - one per twelve-month period.

(e) Socket replacement, above the knee/knee disarticulation, including attachment plate, molded to patient model - one per twelve-month period.

(12) Positioning devices:

(a) Deluxe floor sitter/feeder seat (small, medium, or large), including floor sitter wedge, shoulder harness, and hip strap - one in a three-year period.

(b) High-back activity chair, including adjustable footrest, two pairs of support blocks, and hip strap - one in a three-year period.

(c) Positioning system/supine boards (small or large), including padding, straps adjustable armrests, footboard, and support blocks - one in a five-year period.

(d) Prone stander (child, youth, infant or adult size) - one in a five-year period.

(e) Adjustable standing frame (for child/adult thirty - sixty-eight inches tall), including two padded back support blocks, a chest strap, a pelvic strap, a pair of knee blocks, an abductor, and a pair of foot blocks - one in a five-year period.

AMENDATORY SECTION (Amending WSR 02-16-054, filed 8/1/02, effective 9/1/02)

WAC 388-543-1300 Equipment, related supplies, or other nonmedical supplies, and devices that are not covered. (1) ~~((MAA))~~ The department pays only for DME and related supplies, medical supplies and related services that are medically necessary, listed as covered in this chapter, and meet the definition of DME and medical supplies as defined in WAC 388-543-1000 and prescribed per WAC 388-543-1100 and 388-543-1200.

(2) ~~((MAA))~~ The department pays only for prosthetics or orthotics that are listed as such by the Centers for Medicare and Medicaid Services (CMS), formerly known as HCFA, that meet the definition of prosthetic and orthotic as defined in WAC 388-543-1000 and are prescribed per WAC 388-543-1100 and 388-543-1200.

(3) ~~((MAA))~~ The department considers all requests for covered DME, related supplies and services, medical supplies, prosthetics, orthotics, and related services ~~((and non-covered equipment, related supplies and services, supplies and devices,))~~ under the provisions of WAC 388-501-0165. ~~((When MAA considers that a request does not meet the requirement for medical necessity, the definition(s) of cov-~~

~~ered item(s), or is not covered, the client may appeal that decision under the provisions of WAC 388-501-0165.))~~

(4) ~~((MAA))~~ The department evaluates a request for any DME item listed as noncovered in this chapter under the provisions of WAC 388-501-0160.

(5) The department specifically excludes services and equipment in this chapter from fee-for-service (FFS) scope of coverage when the services and equipment do not meet the definition for a covered item, or the services are not typically medically necessary. This exclusion does not apply if the services and equipment are:

(a) Included as part of a managed care plan service package;

(b) Included in a waived program;

(c) Part of one of the Medicare programs for qualified Medicare beneficiaries; or

(d) Requested for a child who is eligible for services under the EPSDT program. ~~((MAA))~~ The department reviews these requests according to the provisions of chapter 388-534 WAC.

~~((S))~~ (6) Excluded services and equipment include, but are not limited to:

(a) Services, procedures, treatment, devices, drugs, or the application of associated services that the ~~((department of the))~~ Food and Drug Administration (FDA) and/or the Centers for Medicare and Medicaid Services (CMS) ~~((, formerly known as the Health Care Financing Administration (HCFA)))~~ consider investigative or experimental on the date the services are provided;

(b) Any service specifically excluded by statute;

(c) A client's utility bills, even if the operation or maintenance of medical equipment purchased or rented by ~~((MAA))~~ the department for the client contributes to an increased utility bill (refer to the aging and ~~((adult))~~ disability services administration's ~~((AASA))~~ (ADSA) COPEs program for potential coverage;

(d) Hairpieces or wigs;

(e) Material or services covered under manufacturers' warranties;

(f) Shoe lifts less than one inch, arch supports for flat feet, and nonorthopedic shoes;

(g) Outpatient office visit supplies, such as tongue depressors and surgical gloves;

(h) Prosthetic devices dispensed solely for cosmetic reasons (refer to WAC 388-531-0150 (1)(d));

(i) Home improvements and structural modifications, including but not limited to the following:

(i) Automatic door openers for the house or garage;

(ii) Saunas;

(iii) Security systems, burglar alarms, call buttons, lights, light dimmers, motion detectors, and similar devices;

(iv) Swimming pools;

(v) Whirlpool systems, such as jacuzzies, hot tubs, or spas; or

(vi) Electrical rewiring for any reason;

(vii) Elevator systems and elevators; and

(viii) Lifts or ramps for the home; or

(ix) Installation of bathtubs or shower stalls.

(j) Nonmedical equipment, supplies, and related services, including but not limited to, the following:

- (i) Back-packs, pouches, bags, baskets, or other carrying containers;
- (ii) Bed boards/conversion kits, and blanket lifters (e.g., for feet);
- (iii) Car seats for children under five, except for positioning car seats that are prior authorized. Refer to WAC 388-543-1700(13) for car seats;
- (iv) Cleaning brushes and supplies, except for ostomy-related cleaners/supplies;
- (v) Diathermy machines used to produce heat by high frequency current, ultrasonic waves, or microwave radiation;
- (vi) Electronic communication equipment, installation services, or service rates, including but not limited to, the following:
 - (A) Devices intended for amplifying voices (e.g., microphones);
 - (B) Interactive communications computer programs used between patients and healthcare providers (e.g., hospitals, physicians), for self care home monitoring, or emergency response systems and services (refer to ((~~ASA~~) ADSA) COPEs or outpatient hospital programs for emergency response systems and services);
 - (C) Two-way radios; and
 - (D) Rental of related equipment or services;
- (vii) Environmental control devices, such as air conditioners, air cleaners/purifiers, dehumidifiers, portable room heaters or fans (including ceiling fans), heating or cooling pads;
- (viii) Ergonomic equipment;
- (ix) Exercise classes or equipment such as exercise mats, bicycles, tricycles, stair steppers, weights, trampolines;
- (x) Generators;
- (xi) Computer software other than speech generating, printers, and computer accessories (such as anti-glare shields, backup memory cards);
- (xii) Computer utility bills, telephone bills, internet service, or technical support for computers or electronic notebooks;
- (xiii) Any communication device that is useful to someone without severe speech impairment (e.g., cellular telephone, walkie-talkie, pager, or electronic notebook);
- (xiv) Racing strollers/wheelchairs and purely recreational equipment;
- (xv) Room fresheners/deodorizers;
- (xvi) Bidet or hygiene systems, paraffin bath units, and shampoo rings;
- (xvii) Timers or electronic devices to turn things on or off, which are not an integral part of the equipment;
- (xviii) Vacuum cleaners, carpet cleaners/deodorizers, and/or pesticides/insecticides; or
- (xix) Wheeled reclining chairs, lounge and/or lift chairs (e.g., geri-chair, posture guard, or lazy boy).
- (k) Personal and **comfort items** that do not meet the DME definition, including but not limited to the following:
 - (i) Bathroom items, such as antiperspirant, astringent, bath gel, conditioner, deodorant, moisturizer, mouthwash, powder, shampoo, shaving cream, shower cap, shower curtains, soap (including antibacterial soap), toothpaste, towels, and weight scales;

- (ii) Bedding items, such as bed pads, blankets, mattress covers/bags, pillows, pillow cases/covers and sheets;
- (iii) Bedside items, such as bed trays, carafes, and over-the-bed tables;
- (iv) Clothing and accessories, such as coats, gloves (including wheelchair gloves), hats, scarves, slippers, and socks;
- (v) Clothing protectors and other protective cloth furniture coverings;
- (vi) Cosmetics, including corrective formulations, hair depilatories, and products for skin bleaching, commercial sun screens, and tanning;
- (vii) Diverter valves for bathtub;
- (viii) Eating/feeding utensils;
- (ix) Emesis basins, enema bags, and diaper wipes;
- (x) Health club memberships;
- (xi) Hot or cold temperature food and drink containers/holders;
- (xii) Hot water bottles and cold/hot packs or pads not otherwise covered by specialized therapy programs;
- (xiii) Impotence devices;
- (xiv) Insect repellants;
- (xv) Massage equipment;
- (xvi) Medication dispensers, such as med-collators and count-a-dose, except as obtained under the compliance packaging program. See chapter 388-530 WAC;
- (xvii) Medicine cabinet and first-aid items, such as adhesive bandages (e.g., Band-Aids, Curads), cotton balls, cotton-tipped swabs, medicine cups, thermometers, and tongue depressors;
- (xviii) Page turners;
- (xix) Radio and television;
- (xx) Telephones, telephone arms, cellular phones, electronic beepers, and other telephone messaging services; and
- (xxi) Toothettes and toothbrushes, waterpics, and periodontal devices whether manual, battery-operated, or electric.
- (l) Certain wheelchair features and options are not considered by ((~~MAA~~) the department) to be medically necessary or essential for wheelchair use. This includes, but is not limited to, the following:
 - (i) Attendant controls (remote control devices);
 - (ii) Canopies, including those for strollers and other equipment;
 - (iii) Clothing guards to protect clothing from dirt, mud, or water thrown up by the wheels (similar to mud flaps for cars);
 - (iv) Identification devices (such as labels, license plates, name plates);
 - (v) Lighting systems;
 - (vi) Speed conversion kits; and
 - (vii) Tie-down restraints, except where medically necessary for client-owned vehicles.

AMENDATORY SECTION (Amending WSR 05-13-038, filed 6/6/05, effective 7/7/05)

WAC 388-544-0010 Vision care—General. (1) The ((~~medical assistance administration (MAA)~~) department) covers ((~~the~~) vision care ((~~listed in this chapter only~~)) services subject to the exceptions, restrictions, and limitations

listed in this chapter. Vision care is covered when ~~((they are))~~ it is:

(a) Within the scope of the eligible client's medical care program (see ~~((chapter 388-529))~~ WAC 388-501-0060 and WAC 388-501-0065); and

(b) Medically necessary as defined in WAC 388-500-0005.

(2) ~~((MAA))~~ The department evaluates a request for any service that is listed as noncovered in this chapter under the provisions of WAC 388-501-0160.

(3) ~~((MAA))~~ The department evaluates requests for covered services that are subject to limitations or other restrictions and approves such services beyond those limitations or restrictions ~~((when medically necessary;))~~ under the ~~((standards for covered services in WAC 388-501-0165))~~ provisions of WAC 388-501-0169.

(4) ~~((MAA))~~ The department evaluates a request for a service that is in a covered category, but has been determined to be experimental or investigational under WAC 388-531-0550, under the provisions of WAC 388-501-0165.

AMENDATORY SECTION (Amending WSR 05-13-038, filed 6/6/05, effective 7/7/05)

WAC 388-544-0450 Vision care—Prior authorization. (1) ~~The ((medical assistance administration (MAA)))~~ department requires a provider to follow the prior authorization and expedited prior authorization (EPA) process for certain vision care services as identified in this chapter.

(2) For prior authorization (PA), a provider must call or send the department a fax ~~((MAA))~~ using the appropriate telephone or fax number listed in ~~((MAA's))~~ the department's published vision care billing instructions.

(3) For expedited prior authorization (EPA), a provider must create an EPA number. The process and criteria used to create this authorization number are explained in ~~((MAA's))~~ the department's published vision care billing instructions. The EPA number must be used when the provider bills ~~((MAA))~~ the department.

(4) ~~((MAA))~~ The department denies payment for vision care submitted without the required PA or EPA number, or the appropriate diagnosis or procedure code as indicated by the EPA number.

(5) Upon request, a provider must provide documentation to ~~((MAA))~~ the department showing how the client's condition met the criteria for PA or EPA.

(6) ~~((MAA))~~ The department may recoup any payment made to a provider under this chapter if ~~((MAA))~~ the department later determines that the service was not properly authorized or did not meet the EPA criteria. Refer to WAC 388-502-0100 (1)(c).

(7) When a client's situation does not meet the EPA criteria for vision care, or a requested service or item exceeds the limit indicated in this chapter, a provider must follow the requirements of WAC 388-501-0165 and WAC 388-501-0169.

(8) ~~((MAA))~~ The department evaluates a request for any service that is listed as noncovered in this chapter under the provisions of WAC 388-501-0160.

AMENDATORY SECTION (Amending WSR 00-23-068, filed 11/15/00, effective 12/16/00)

WAC 388-544-1100 Hearing aid services—General. (1) ~~((MAA))~~ The department covers only the hearing aid services listed in this chapter, subject to the exceptions, restrictions, and limitations listed in this chapter.

(2) ~~((MAA))~~ The department evaluates requests for covered services ~~((listed as noncovered or))~~ that are subject to limitations or other restrictions ~~((according to the provisions))~~ and approves such services beyond those limitations or restrictions as described in WAC ((388-501-0165)) 388-501-0169.

(3) ~~((MAA))~~ The department evaluates requests for any service listed as noncovered in this chapter under the provisions in WAC 388-501-0160.

(4) The department reimburses providers at the maximum allowable rates established by ~~((MAA))~~ the department.

AMENDATORY SECTION (Amending WSR 00-23-068, filed 11/15/00, effective 12/16/00)

WAC 388-544-1400 Hearing aid services—Noncovered services. (1) ~~((MAA))~~ The department does not cover any of the following:

(a) The purchase of batteries, ear trumpets, or tinnitus maskers;

(b) Group screenings for hearing loss, except as provided under the Healthy Kids/EPSTDT program under WAC 388-534-0100;

(c) Computer-aided hearing devices used in school;

(d) Hearing aid charges reimbursed by insurance or other payer source;

(e) Digital hearing aids; or

(f) FM systems or programmable hearing aids for:

(i) Adults;

(ii) Children when the device is used in school; or

(iii) Children whose hearing loss is adequately improved with hearing aids.

(2) ~~((MAA))~~ The department evaluates a request for any service listed in this section ~~((according to))~~ as noncovered under the provisions of WAC ~~((388-501-0165))~~ 388-501-0160.

AMENDATORY SECTION (Amending WSR 01-20-114, filed 10/3/01, effective 11/3/01)

WAC 388-545-900 Neurodevelopmental centers. (1) This section describes:

(a) Neurodevelopmental centers that may be reimbursed ~~((as such))~~ by the ~~((medical assistance administration (MAA)))~~ department;

(b) Clients who may receive covered services at a neurodevelopmental center; and

(c) Covered services that may be provided at and reimbursed to a neurodevelopmental center.

(2) In order to provide and be reimbursed for the services listed in subsection (4) of this section, ~~((MAA))~~ the department requires a neurodevelopmental center provider to do all of the following:

(a) Be contracted with the department of health (DOH) as a neurodevelopmental center;

(b) Provide documentation of the DOH contract to ~~((MAA))~~ the department;

(c) Sign a core provider agreement with ~~((MAA))~~ the department; and

(d) Receive a neurodevelopmental center provider number from ~~((MAA))~~ the department.

(3) Clients who are twenty years of age or younger and who meet the following eligibility criteria may receive covered services from neurodevelopmental centers:

(a) For occupational therapy, refer to WAC 388-545-300(2);

(b) For physical therapy, refer to WAC 388-545-500(2);

(c) For speech therapy and audiology services, refer to WAC 388-545-700(2); and

(d) For early and periodic screening, diagnosis and treatment (EPSDT) screening by physicians, refer to WAC ~~((388-529-0200))~~ 388-534-0100.

(4) ~~((MAA))~~ The department reimburses neurodevelopmental centers for providing the following services to clients who meet the requirements in subsection (3) of this section:

(a) Occupational therapy services as described in WAC 388-545-300;

(b) Physical therapy services as described in WAC 388-545-500;

(c) Speech therapy and audiology services as described in WAC 388-545-700; and

(d) Specific pediatric evaluations and team conferences that are:

(i) Attended by the center's medical director; and

(ii) Identified as payable in ~~((MAA's))~~ the department's billing instructions.

(5) In order to be reimbursed, neurodevelopmental centers must meet ~~((MAA's))~~ the department's billing requirements in WAC 388-502-0020, 388-502-0100 and 388-502-0150.

AMENDATORY SECTION (Amending WSR 04-17-118, filed 8/17/04, effective 9/17/04)

WAC 388-546-0200 Scope of coverage for ambulance transportation. (1) The ambulance program is a medical transportation service. The medical assistance administration (MAA) pays for ambulance transportation to and from covered medical services when the transportation is:

(a) Within the scope of an eligible client's medical care program (see ~~((chapter 388-529 WAC, Scope of medical services))~~ WAC 388-501-0060);

(b) Medically necessary as defined in WAC 388-500-0005 based on the client's condition at the time of the ambulance trip and as documented in the client's record;

(c) Appropriate to the client's actual medical need; and

(d) To one of the following destinations:

(i) The nearest appropriate MAA-contracted medical provider of MAA-covered services; or

(ii) The designated trauma facility as identified in the emergency medical services and trauma regional patient care procedures manual.

(2) MAA limits coverage to medically necessary ambulance transportation that is required because the client cannot be safely or legally transported any other way. If a client can safely travel by car, van, taxi, or other means, the ambulance trip is not medically necessary and the ambulance service is not covered by MAA. See WAC 388-546-0250 (1) and (2) for noncovered ambulance services.

(3) If Medicare or another third party is the client's primary health insurer and that primary insurer denies coverage of an ambulance trip due to a lack of medical necessity, MAA requires the provider when billing MAA for that trip to:

(a) Report the third party determination on the claim; and

(b) Submit documentation showing that the trip meets the medical necessity criteria of MAA. See WAC 388-546-1000 and 388-546-1500 for requirements for nonemergency ambulance coverage.

(4) MAA covers the following ambulance transportation:

(a) Ground ambulance when the eligible client:

(i) Has an emergency medical need for the transportation;

(ii) Needs medical attention to be available during the trip; or

(iii) Must be transported by stretcher or gurney.

(b) Air ambulance when justified under the conditions of this chapter or when MAA determines that air ambulance is less costly than ground ambulance in a particular case. In the latter case, the air ambulance transportation must be prior authorized by MAA. See WAC 388-546-1500 for nonemergency air ambulance coverage.

AMENDATORY SECTION (Amending WSR 04-17-118, filed 8/17/04, effective 9/17/04)

WAC 388-546-0250 Ambulance services ~~((that MAA))~~ the department does not cover. (1) The ~~((medical assistance administration (MAA)))~~ department does not cover ambulance services when the transportation is:

(a) Not medically necessary based on the client's condition at the time of service (see exception at WAC 388-546-1000);

(b) Refused by the client (see exception for ITA clients in WAC 388-546-4000(2));

(c) For a client who is deceased at the time the ambulance arrives at the scene;

(d) For a client who dies after the ambulance arrives at the scene but prior to transport and the ambulance crew provided minimal to no medical interventions/supplies at the scene (see WAC 388-546-0500(2));

(e) Requested for the convenience of the client or the client's family;

(f) More expensive than bringing the necessary medical service(s) to the client's location in nonemergency situations;

(g) To transfer a client from a medical facility to the client's residence (except when the residence is a nursing facility);

(h) Requested solely because a client has no other means of transportation;

(i) Provided by other than licensed ambulance providers (e.g., wheelchair vans, cabulance, stretcher cars); or

(j) Not to the nearest appropriate medical facility.

(2) If transport does not occur, ~~((MAA))~~ the department does not cover the ambulance service, except as provided in WAC 388-546-0500(2).

(3) ~~((MAA))~~ The department evaluates requests for services that are listed as noncovered in this chapter under the provisions of WAC 388-501-0160.

(4) For ambulance services that are otherwise covered under this chapter but are subject to one or more limitations or other restrictions, ~~((MAA))~~ the department evaluates, on a case-by-case basis, requests to exceed the specified limits or restrictions. ~~((MAA))~~ The department approves such requests when medically necessary, ~~((in accordance with))~~ according to the provisions of WAC 388-501-0165 and WAC 388-501-0169.

(5) An ambulance provider may bill a client for noncovered services as described in this section, if the requirements of WAC 388-502-0160 are met.

AMENDATORY SECTION (Amending WSR 03-02-056, filed 12/26/02, effective 1/26/03)

WAC 388-550-2596 Services and equipment covered by ~~((MAA))~~ the department but not included in the LTAC fixed per diem rate. (1) ~~((MAA))~~ The department uses the ratio of costs-to-charges (RCC) payment method to reimburse an LTAC facility for the following that are not included in the LTAC fixed per diem rate:

(a) Pharmacy - After the first two hundred dollars per day in total allowed charges for any combination of pharmacy services that includes prescription drugs, total parenteral nutrition (TPN) therapy, IV infusion therapy, and/or epogen/neupogen therapy;

(b) Radiology services;

(c) Nuclear medicine services;

(d) Computerized tomographic (CT) scan;

(e) Operating room services;

(f) Anesthesia services;

(g) Blood storage and processing;

(h) Blood administration;

(i) Other imaging services - Ultrasound;

(j) Pulmonary function services;

(k) Cardiology services;

(l) Recovery room services;

(m) EKG/ECG services;

(n) Gastro-intestinal services;

(o) Inpatient hemodialysis; and

(p) Peripheral vascular laboratory services.

(2) ~~((MAA))~~ The department uses the appropriate inpatient or outpatient payment method described in other published WAC to reimburse providers other than LTAC facilities for services and equipment that are covered by ~~((MAA))~~ the department but not included in the LTAC fixed per diem rate. The provider must bill ~~((MAA))~~ the department directly and ~~((MAA))~~ the department reimburses the provider directly.

(3) Transportation services that are related to transporting a client to and from another facility for the provision of outpatient medical services while the client is still an inpa-

tient at the LTAC facility, or related to transporting a client to another facility after discharge from the LTAC facility:

(a) Are not covered or reimbursed through the LTAC fixed per diem rate;

(b) Are not reimbursable directly to the LTAC facility;

(c) Are subject to the provisions in chapter 388-546 WAC; and

(d) Must be billed directly to the:

(i) Department by the transportation company to be reimbursed if the client required ambulance transportation; or

(ii) Department's contracted transportation broker, subject to the prior authorization requirements and provisions described in chapter 388-546 WAC, if the client:

(A) Required nonemergent transportation; or

(B) Did not have a medical condition that required transportation in a prone or supine position.

(4) ~~((MAA))~~ The department evaluates requests for covered transportation services that are subject to limitations or other restrictions, and approves such services beyond those limitations or restrictions ~~((when medically necessary;))~~ under the ~~((standards))~~ provisions of WAC 388-501-0165 and WAC 388-501-0169.

AMENDATORY SECTION (Amending WSR 02-15-082, filed 7/15/02, effective 8/15/02)

WAC 388-551-2130 Noncovered home health services. (1) ~~((MAA))~~ The Health and Recovery Services Administration (HRSA) does not cover the following home health services under the home health program, unless otherwise specified:

(a) Chronic long-term care skilled nursing visits or specialized therapy visits for a medically stable client when a long-term care skilled nursing plan or specialized therapy plan is in place through the department of social and health services' aging and ~~((adult))~~ disability services administration ~~((AASA or division of developmental disabilities (DDD)))~~ (ADSA).

(i) ~~((MAA))~~ HRSA considers requests for interim chronic long-term care skilled nursing services or specialized therapy services for a client while the client is waiting for ~~((AASA or DDD))~~ ADSA to implement a long-term care skilled nursing plan or specialized therapy plan; and

(ii) On a case-by-case basis, ~~((MAA))~~ HRSA may authorize long-term care skilled nursing visits or specialized therapy visits for a client for a limited time until a long-term care skilled nursing plan or specialized therapy plan is in place. Any services authorized are subject to the restrictions and limitations in this section and other applicable published WACs.

(b) Social work services.

(c) Psychiatric skilled nursing services.

(d) Pre- and postnatal skilled nursing services, except as listed under WAC 388-551-2100 (2)(e).

(e) Well-baby follow-up care.

(f) Services performed in hospitals, correctional facilities, skilled nursing facilities, or a residential facility with skilled nursing services available.

(g) Home health aide services that are not provided in conjunction with skilled nursing or specialized therapy services.

(h) Health care for a medically stable client (e.g., one who does not have an acute episode, a disease exacerbation, or treatment change).

(i) Home health specialized therapies and home health aide visits for clients in the following programs:

(i) CNP - emergency medical only; and

(ii) LCP-MNP - emergency medical only.

(j) Skilled nursing visits for a client when a home health agency cannot safely meet the medical needs of that client within home health services program limitations (e.g., for a client to receive infusion therapy services, the caregiver must be willing and capable of managing the client's care).

(k) More than one of the same type of specialized therapy and/or home health aide visit per day.

(l) ~~((MAA))~~ HRSA does not reimburse for duplicate services for any specialized therapy for the same client when both providers are performing the same or similar procedure(s).

(m) Home health visits made without a written physician's order, unless the verbal order is:

(i) Documented prior to the visit; and

(ii) The document is signed by the physician within forty-five days of the order being given.

(2) ~~((MAA))~~ HRSA does not cover additional administrative costs billed above the visit rate (these costs are included in the visit rate and will not be paid separately).

(3) ~~((MAA))~~ HRSA evaluates a request for any service that is listed as noncovered under the provisions of WAC ~~((388-501-0165))~~ 388-501-0160.

AMENDATORY SECTION (Amending WSR 01-05-040, filed 2/14/01, effective 3/17/01)

WAC 388-551-3000 Private duty nursing services for clients seventeen years of age and younger. This section applies to private duty nursing services for eligible clients on fee-for-service programs. Managed care clients receive private duty nursing services through their plans (see chapter 388-538 WAC).

(1) **"Private duty nursing"** means four hours or more of continuous skilled nursing services provided in the home to eligible clients with complex medical needs that cannot be managed within the scope of intermittent home health services. Skilled nursing service is the management and administration of the treatment and care of the client, and may include, but is not limited to:

(a) Assessments (e.g., respiratory assessment, patency of airway, vital signs, feeding assessment, seizure activity, hydration, level of consciousness, constant observation for comfort and pain management);

(b) Administration of treatment related to technological dependence (e.g., ventilator, tracheotomy, bilevel positive airway pressure, intravenous (IV) administration of medications and fluids, feeding pumps, nasal stints, central lines);

(c) Monitoring and maintaining parameters/machinery (e.g., oximetry, blood pressure, lab draws, end tidal CO₂,

ventilator settings, humidification systems, fluid balance, etc.); and

(d) Interventions (e.g., medications, suctioning, IV's, hyperalimentation, enteral feeds, ostomy care, and tracheostomy care).

(2) To be eligible for private duty nursing services, a client must meet all the following:

(a) Be seventeen years of age or younger (see chapter 388-71 WAC for information about private duty nursing services for clients eighteen years of age and older);

(b) Be eligible for categorically needy (CN) or medically needy (MN) scope of care (see WAC ~~((388-529-0100 and 388-529-0200 for client eligibility))~~ 388-501-0060 and WAC 388-501-0065);

(c) Need continuous skilled nursing care that can be provided safely outside an institution; and

(d) Have prior authorization from the department.

(3) The department contracts only with home health agencies licensed by Washington state to provide private duty nursing services and pays a rate established by the department according to current funding levels.

(4) A provider must coordinate with a division of developmental disabilities case manager and request prior authorization by submitting a complete referral to the department, which includes all of the following:

(a) The client's age, medical history, diagnosis, and current prescribed treatment plan, as developed by the individual's physician;

(b) Current nursing care plan that may include copies of current daily nursing notes that describe nursing care activities;

(c) An emergency medical plan which includes notification of electric, gas and telephone companies as well as local fire department;

(d) Psycho-social history/summary which provides the following information:

(i) Family constellation and current situation;

(ii) Available personal support systems;

(iii) Presence of other stresses within and upon the family; and

(iv) Projected number of nursing hours needed in the home, after discussion with the family or guardian.

(e) A written request from the client or the client's legally authorized representative for home care.

(5) The department approves requests for private duty nursing services for eligible clients on a case-by-case basis when:

(a) The information submitted by the provider is complete;

(b) The care provided will be based in the client's home;

(c) Private duty nursing will be provided in the most cost-effective setting;

(d) An adult family member, guardian, or other designated adult has been trained and is capable of providing the skilled nursing care;

(e) A registered or licensed practical nurse will provide the care under the direction of a physician; and

(f) Based on the referral submitted by the provider, the department determines:

(i) The services are medically necessary for the client because of a complex medical need that requires continuous skilled nursing care which can be provided safely in the client's home;

(ii) The client requires more nursing care than is available through the home health services program; and

(iii) The home care plan is safe for the client.

(6) Upon approval, the department will authorize private duty nursing services up to a maximum of sixteen hours per day except as provided in subsection (7) of this section, restricted to the least costly equally effective amount of care.

(7) The department may authorize additional hours:

(a) For a maximum of thirty days if any of the following apply:

(i) The family or guardian is being trained in care and procedures;

(ii) There is an acute episode that would otherwise require hospitalization, and the treating physician determines that noninstitutionalized care is still safe for the client;

(iii) The family or guardian caregiver is ill or temporarily unable to provide care;

(iv) There is a family emergency; or

(v) The department determines it is medically necessary.

(b) ~~((H))~~ After the department ~~((determines it is medically necessary))~~ evaluates the request according to the ~~((process explained in))~~ provisions of WAC 388-501-0165 ~~((; Determination process for coverage of medical equipment and medical or dental services))~~ and WAC 388-501-0169.

(8) The department adjusts the number of authorized hours when the client's condition or situation changes.

(9) Any hours of nursing care in excess of those authorized by the department are the responsibility of the client, family or guardian.

AMENDATORY SECTION (Amending WSR 04-11-007, filed 5/5/04, effective 6/5/04)

WAC 388-553-500 Home infusion therapy/parenteral nutrition program—Coverage, services, limitations, prior authorization, and reimbursement. (1) The home infusion therapy/parenteral nutrition program covers the following for eligible clients, subject to the limitations and restrictions listed:

(a) Home infusion supplies, limited to one month's supply per client, per calendar month.

(b) Parenteral nutrition solutions, limited to one month's supply per client, per calendar month.

(c) One type of infusion pump, one type of parenteral pump, and/or one type of insulin pump per client, per calendar month and as follows:

(i) All rent-to-purchase infusion, parenteral, and/or insulin pumps must be new equipment at the beginning of the rental period.

(ii) ~~((MAA))~~ The department covers the rental payment for each type of infusion, parenteral, or insulin pump for up to twelve months. ~~((MAA))~~ The department considers a pump purchased after twelve months of rental payments.)

(iii) ~~((MAA))~~ The department covers only one purchased infusion pump or parenteral pump per client in a five-year period.

(iv) ~~((MAA))~~ The department covers only one purchased insulin pump per client in a four-year period.

(2) Covered supplies and equipment that are within the described limitations listed in subsection (1) of this section do not require prior authorization for reimbursement.

(3) Requests for supplies and/or equipment that exceed the limitations or restrictions listed in this section require prior authorization and are evaluated on an individual basis according to the provisions of WAC 388-501-0165 and WAC 388-501-0169.

(4) ~~((MAA's))~~ Department reimbursement for equipment rentals and purchases includes the following:

(a) Instructions to a client or a caregiver, or both, on the safe and proper use of equipment provided;

(b) Full service warranty;

(c) Delivery and pickup; and

(d) Setup, fitting, and adjustments.

(5) Except as provided in subsection (6) of this section, ~~((MAA))~~ the department does not pay separately for home infusion supplies and equipment or parenteral nutrition solutions:

(a) When a client resides in a state-owned facility (i.e., state school, developmental disabilities (DD) facility, mental health facility, Western State Hospital, and Eastern State Hospital).

(b) When a client has elected and is eligible to receive ~~((MAA's))~~ the department's hospice benefit, unless both of the following apply:

(i) The client has a preexisting diagnosis that requires parenteral support; and

(ii) The preexisting diagnosis is not related to the diagnosis that qualifies the client for hospice.

(6) ~~((MAA))~~ The department pays separately for a client's infusion pump, parenteral nutrition pump, insulin pump, solutions, and/or insulin infusion supplies when the client:

(a) Resides in a nursing facility; and

(b) Meets the criteria in WAC 388-553-300.

AMENDATORY SECTION (Amending WSR 05-04-059, filed 1/28/05, effective 3/1/05)

WAC 388-554-500 Orally administered enteral nutrition products—Coverage, limitations, and reimbursement. (1) The enteral nutrition program covers and reimburses medically necessary orally administered enteral nutrition products, subject to:

(a) Prior authorization requirements under WAC 388-554-700;

(b) Duration periods determined by the ~~((medical assistance administration (MAA)))~~ department;

(c) Delivery requirements under WAC 388-554-400(2); and

(d) The provisions in other applicable WAC.

(2) Except as provided in subsection (3) of this section, ~~((MAA))~~ the department does not pay separately for orally administered enteral nutrition products:

(a) When a client resides in a state-owned facility (i.e., state school, developmental disabilities (DD) facility, mental health facility, Western State Hospital, and Eastern State Hospital).

(b) When a client has elected and is eligible to receive ~~((MAA's))~~ the department's hospice benefit, unless both of the following apply:

(i) The client has a pre-existing medical condition that requires enteral nutritional support; and

(ii) The pre-existing medical condition is not related to the diagnosis that qualifies the client for hospice.

(3) ~~((MAA))~~ The department pays separately for a client's orally administered enteral nutrition products when the client:

(a) Resides in ~~((the))~~ a nursing facility;

(b) Meets the criteria in WAC 388-554-300; and

(c) Needs enteral nutrition products to meet one hundred percent of the client's nutritional needs.

(4) ~~((MAA))~~ The department does not cover or ~~((reimburse))~~ pay for orally administered enteral nutrition products when the client's nutritional need can be met using traditional foods, baby foods, and other regular grocery products that can be pulverized or blenderized and used to meet the client's caloric and nutritional needs.

(5) ~~((MAA))~~ The department:

(a) Determines reimbursement for oral enteral nutrition products according to a set fee schedule;

(b) Considers Medicare's current fee schedule when determining maximum allowable fees;

(c) Considers vendor rate increases or decreases as directed by the Legislature; and

(d) Evaluates and updates the maximum allowable fees for oral enteral nutrition products at least once per year.

(6) ~~((MAA))~~ The department evaluates a request for orally administered enteral nutrition products that are ~~((not covered or are))~~ in excess of the enteral nutrition program's limitations or restrictions, according to the provisions of WAC 388-501-0165 and WAC 388-501-0169.

(7) The department evaluates a request for orally administered enteral nutrition products that are listed as noncovered in this chapter according to the provisions of WAC 388-501-0160.

AMENDATORY SECTION (Amending WSR 05-04-059, filed 1/28/05, effective 3/1/05)

WAC 388-554-600 Tube-delivered enteral nutrition products and related equipment and supplies—Coverage, limitations, and reimbursement. (1) The enteral nutrition program covers and reimburses the following, subject to the limitations listed in this section and the provisions in other applicable WAC:

(a) Tube-delivered enteral nutrition products;

(b) Tube-delivery supplies;

(c) Enteral nutrition pump rental and purchase;

(d) Nondisposable intravenous (IV) poles required for enteral nutrition product delivery; and

(e) Repairs to equipment.

(2) The ~~((medical assistance administration (MAA)))~~ department covers up to twelve months of rental payments for enteral nutrition equipment. After twelve months of rental, ~~((MAA))~~ the department considers the equipment ~~((to be))~~ purchased and it becomes the client's property.

(3) ~~((MAA))~~ The department requires a provider to furnish clients new or used equipment that includes full manufacturer and dealer warranties for one year.

(4) ~~((MAA))~~ The department covers only one:

(a) Purchased pump per client in a five year period; and

(b) Purchased nondisposable IV pole per ~~((a))~~ client for that client's lifetime.

(5) ~~((MAA's))~~ The department's reimbursement for covered enteral nutrition equipment and necessary supplies includes all of the following:

(a) Any adjustments or modifications to the equipment that are required within three months of the date of delivery. This does not apply to adjustments required because of changes in the client's medical condition;

(b) Fitting and set-up; and

(c) Instruction to the client or the client's caregiver in the appropriate use of the equipment and necessary supplies.

(6) A provider is responsible for any costs incurred to have another provider repair equipment if all of the following apply:

(a) Any equipment that ~~((MAA))~~ the department considers purchased requires repair during the applicable warranty period;

(b) The provider is unable to fulfill the warranty; and

(c) The client still needs the equipment.

(7) If ~~((the))~~ a rental equipment the department considers to have been purchased must be replaced during the warranty period, ~~((MAA))~~ the department recoups fifty percent of the total amount previously paid toward rental and eventual purchase of the equipment delivered to the client. All of the following must apply:

(a) The provider is unable to fulfill the warranty; and

(b) The client still needs the equipment.

(8) ~~((MAA))~~ The department rescinds any authorization for prescribed equipment if the equipment was not delivered to the client before the client:

(a) Loses medical eligibility;

(b) Becomes covered by a hospice agency and the equipment is used in the treatment of the terminal diagnosis or related condition(s);

(c) Becomes eligible for ~~((an MAA))~~ a department-contracted managed care plan; or

(d) Dies.

(9) Except as provided in subsection (10) of this section, ~~((MAA))~~ the department does not pay separately for tube-delivered enteral nutrition products or necessary equipment or supplies when a client:

(a) Resides in a state-owned facility (i.e., state school, developmental disabilities (DD) facility, mental health facility, Western State Hospital, and Eastern State Hospital).

(b) Has elected and is eligible to receive ~~((MAA's))~~ the department's hospice benefit, unless both of the following apply:

(i) The client has a pre-existing medical condition that requires enteral nutritional support; and

(ii) The pre-existing medical condition is not related to the diagnosis that qualifies the client for hospice.

(10) ~~((MAA))~~ The department pays separately for a client's tube-delivered enteral nutrition products and necessary equipment and supplies when:

- (a) The client resides in ~~((the))~~ a nursing facility;
- (b) The client meets the eligibility criteria in WAC 388-554-300; and
- (c) Use of enteral nutrition products meets one hundred percent of the client's nutritional needs.

(11) ~~((MAA))~~ The department determines reimbursement for tube-delivered enteral nutrition products and necessary equipment and supplies using the same criteria described in WAC 388-554-500(5).

(12) ~~((MAA))~~ The department evaluates a request for tube-delivered enteral nutrition products and necessary equipment and supplies that are ~~((not covered or are))~~ in excess of the enteral nutrition program's limitations or restrictions, according to the provisions of WAC 388-501-0165 and WAC 388-501-0169.

(13) The department evaluates a request for tube-delivered enteral nutrition products and necessary equipment and supplies, that are listed as noncovered in this chapter, under the provision of WAC 388-501-0160.

AMENDATORY SECTION (Amending WSR 01-01-009, filed 12/6/00, effective 1/6/01)

WAC 388-556-0500 Medical care services under state-administered cash programs. Medical care services (MCS) are state-administered medical care services provided to a client receiving cash benefits under the general assistance-unemployable (GA-U) program or the Alcohol and Drug Addiction Treatment and Support Act (ADATSA) program. For a client eligible for MCS:

(1) The department of social and health services (DSHS) covers only the medically necessary services within the ~~((notated))~~ applicable program limitations listed in the MCS column under WAC ~~((388-529-0200))~~ 388-501-0060.

(2) DSHS does not cover medical services received outside the state of Washington unless the medical services are provided in a border area listed under WAC 388-501-0175.

AMENDATORY SECTION (Amending WSR 03-02-079, filed 12/30/02, effective 1/30/03)

WAC 388-800-0045 What services are offered by ADATSA? If you qualify for the ADATSA program you may be eligible for:

(1) Alcohol/drug treatment services and support described under WAC-388-800-0080.

(2) Shelter services as described under WAC 388-800-0130.

(3) Medical care services as described under WAC 388-556-0500 ~~((and 388-529-0200))~~, WAC 388-501-0060, and WAC 388-501-0065.

WSR 06-20-039

PROPOSED RULES

EXECUTIVE ETHICS BOARD

[Filed September 26, 2006, 1:57 p.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR [06-16-129 on] August 1, 2006.

Title of Rule and Other Identifying Information: WAC 292-100-007 Definitions, 292-100-045 Executive director dismissals, 292-100-050 Determination on reasonable cause, 292-100-150 Discovery—Production of documents and use at hearing, and 292-100-160 Conduct of hearings.

Hearing Location(s): 2425 Bristol Court, Conference Room 148, Olympia, WA 98504, on November 17, 2006, at 9:00.

Date of Intended Adoption: November 17, 2006.

Submit Written Comments to: Susan Harris, P.O. Box 40149, Olympia, WA 98504-0149, e-mail susanh4@atg.wa.gov, fax (360) 586-3955, by November 13, 2006.

Assistance for Persons with Disabilities: Contact Ruthann Bryant by November 13, 2006, (360) 586-3265.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: (1) Amending WAC 292-100-007 to provide guidance on the board's implementation of RCW 42.52.560 and to reflect current staffing; (2) amending WAC 292-100-045 to incorporate legislative changes allowing the board to dismiss complaints; (3) amending WAC 292-100-050 to provide clarity on the reasonable cause process; (4) amending WAC 292-100-150 to require production of documents to be used in the hearing ten days prior to the hearing; and (5) amending WAC 292-100-160 to clarify the process used when an administrative law judge acts as presiding officer during enforcement hearings.

Reasons Supporting Proposal: To provide affected parties with guidance on the board's implementation of new laws and to provide consistency with the Administrative Procedure Act and board practices in enforcement proceedings.

Statutory Authority for Adoption: RCW 42.52.360 (2)(b).

Statute Being Implemented: Chapter 42.52 RCW.

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: Executive ethics board, governmental.

Name of Agency Personnel Responsible for Drafting, Implementation and Enforcement: Susan Harris, 2425 Bristol Court, Olympia, WA 98504, (360) 586-6759.

No small business economic impact statement has been prepared under chapter 19.85 RCW. There is no impact on small business.

A cost-benefit analysis is not required under RCW 34.05.328. There is no fiscal impact on the state.

Susan Harris

Executive Director

AMENDATORY SECTION (Amending WSR 05-19-142, filed 9/21/05, effective 10/22/05)

WAC 292-100-007 Definitions. Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Board staff" shall include the executive director, ~~((the))~~ administrative officer, investigators, office assistant and attorneys who bring cases before the board ~~((, and the training and information specialist))~~.

(2) "Charitable organization" means any entity that solicits or collects contributions from the general public where the contribution is purported to be used to support a charitable activity, but does not include any commercial fund raiser or commercial fund-raising entity. "Charitable organization" includes, but is not limited to, the following entities:

- Educational
- Recreational
- Social services
- Defense of the poor
- Benevolent
- Health cause

(3) "Charitable organization" does not include religious or political entities or activities.

(4) "Complainant" means a person who has filed a complaint with the board.

~~((3))~~ (5) "Distribute," for the purpose of RCW 42.52.560, means to provide or disseminate information to a group of others. Nothing in this section permits the use of state resources for the purpose of composing, editing, copying or for any purpose other than distributing. Methods of distribution include, but are not limited to: Electronic mail, internal mail, facsimile, hand-to-hand exchange, placing information on desks or workstations, and posting on designated or approved bulletin boards.

(6) "Employee organization" is any organization, union, or association that has two or more members established for the purpose of collective bargaining with employers or for the purpose of opposing collective bargaining or certification of a union.

(7) "Employing agency" means the former or current state agency of the respondent during the time the alleged violation occurred.

~~((4))~~ (8) "Lobbying," for the purposes of RCW 42.52.380, does not include written communication by the board to members of the state legislature or to any other government official on matters pertaining directly to the Ethics in Public Service Act.

~~((5))~~ (9) "Party" includes the board staff and the respondent. The respondent may be represented in any matter filed under chapter 42.52 RCW by an attorney or an exclusive bargaining representative. If the respondent is represented by a person who is not an attorney, the representation shall conform to the standards of ethical conduct required of attorneys before the courts of the state of Washington.

~~((6))~~ (10) "Preliminary investigation" refers to the confidential fact-finding investigation that occurs before the board's determination of reasonable cause.

~~((7))~~ (11) "Presiding officer" refers to the board chair, vice chair, a board member designated as presiding officer by the chair or vice chair, or an administrative law judge.

~~((8))~~ (12) "Respondent" means a current or former state officer or state employee alleged to have violated chapter 42.52 RCW by a complainant.

(13) "Support or oppose" means:

(a) Any communication that is made within sixty days of an election in which a candidate for public office or ballot proposition is placed before the voters and identifies, either directly or indirectly, that candidate or ballot proposition; or

(b) Any communication that is made sixty-one or more days before an election in which a candidate for public office or ballot proposition is placed before the voters and identifies, either directly or indirectly, that candidate or ballot proposition; and

(i) Attacks that candidate's character; or

(ii) Expressly advocates for that candidate or ballot proposition by including such words as "vote for," "elect," "support," "cast your ballot for," "cast your ballot against," "defeat," "vote against"; or

(iii) Is used for the purpose of appealing, directly or indirectly, for votes or for financial or other support or opposition of that candidate or ballot proposition.

AMENDATORY SECTION (Amending WSR 01-13-033, filed 6/13/01, effective 7/14/01)

WAC 292-100-045 (~~Executive director's~~) Dismissal of complaints. (1) If after a preliminary review or investigation the board or the board staff determines that:

(a) Any alleged violation that may have occurred is not within the jurisdiction of the board;

(b) The complaint is obviously unfounded or frivolous; or

(c) The complaint presents a violation of chapter 42.52 RCW, but any violation that may have occurred does not constitute a material violation because it was inadvertent and minor, or has been cured, and, after consideration of all of the circumstances, further proceedings would not serve the purposes of this chapter, the executive director may dismiss the complaint by issuing an order of dismissal.

(2) If the executive director dismisses the complaint, the preliminary review or investigation report and a written notice of the executive director's order of dismissal shall be provided to the complainant, respondent, and the board and shall include a statement of the complainant's right to appeal to the board. (See RCW 42.52.425.)

(3) If the board dismisses the complaint, written notice shall be provided to the complainant, respondent, and the board. (See RCW 42.52.425.)

AMENDATORY SECTION (Amending WSR 01-13-033, filed 6/13/01, effective 7/14/01)

WAC 292-100-050 Determination on reasonable cause. (1) Following the preliminary investigation, the board staff shall prepare a written investigation report and make a recommendation to the board on whether to find reasonable cause, including a recommendation as to whether the potential penalty ~~((may))~~ should be greater than \$500.

(2) Upon receipt of the board staff's investigation report and recommendation, the board shall determine whether or not there is reasonable cause to believe that a violation of chapter 42.52 RCW has occurred and whether any potential penalty should be greater than \$500.

(3) The board's reasonable cause determination shall be done in closed session.

(4) If ~~((the board finds))~~ after determining reasonable cause, the board ~~((shall consider whether the penalty and costs for the alleged violation may be greater than \$500. If the board may wish to impose))~~ further determines that the pen-

alty and costs should be greater than \$500, the respondent shall be given the option to have an administrative law judge conduct the hearing and rule on procedural and evidentiary matters. If the respondent is not given that option, the board may not impose penalty and costs greater than \$500. The board may, on its own initiative, choose to retain an administrative law judge to conduct any hearing.

(5) Upon receipt of an investigation report and recommendation on a complaint referred to the employing agency for investigation, the board shall either:

(a) Reject the report and recommendation and initiate its own investigation; or

(b) Concur with the report and recommendation and either initiate a hearing if the recommended penalty is a monetary fine or refer the matter to the employing agency for implementation of the recommendation if the recommendation is within the agency's authority to implement. The agency shall report implementation to the board and the board shall dismiss the complaint; or

(c) Concur with the report and recommendation, enter a finding of no reasonable cause and dismiss the complaint; or

(d) Concur with the report and recommendation, consider the report an investigative report, enter a finding of reasonable cause, and proceed under this section.

AMENDATORY SECTION (Amending WSR 01-13-033, filed 6/13/01, effective 7/14/01)

WAC 292-100-150 Discovery—Production of documents and use at hearing. (1) ~~((Upon request by either party, copies of all materials to be presented at the hearing shall be provided to the requester within seven days of the request but, for good cause shown, not less than three business days prior to the date of the hearing.))~~ Any materials to be presented at the hearing shall be provided to the executive director and to the opposing party no less than ten days prior to the hearing.

(2) ~~((When documents are to be offered into evidence at the hearing, the one offering the exhibit shall provide a minimum of ten copies.~~

~~(3) If)~~ Upon agreement by both parties, additional documentary evidence ((has not been exchanged prior to)) may be presented at the hearing(¿). The parties shall arrive at the hearing location or make documents available in sufficient time before the time scheduled for the hearing for the purpose of exchanging ((and making copies of)) exhibits to be introduced. When documents are to be offered into evidence at the hearing, the one offering the exhibit shall provide a minimum of ten copies.

(3) If the parties do not reach an agreement on the submission of additional documentary evidence, at the commencement of the hearing the presiding officer shall, after hearing argument, rule on the admissibility of the documents. The proponent of the documents proposed for submission must show good cause why the documents could not be submitted ten days prior to the hearing.

(4) "Good cause" is a substantial reason or legal justification for failing to appear, to act, or respond to an action. To show good cause, the presiding officer must find that a party

had a good reason for what they did or did not do, using the provisions of Superior Court Civil Rule 60 as a guideline.

AMENDATORY SECTION (Amending WSR 01-13-033, filed 6/13/01, effective 7/14/01)

WAC 292-100-160 Conduct of hearings. (1) A hearing shall be conducted pursuant to the Administrative Procedure Act (chapter 34.05 RCW) and its supporting regulations (chapter 10-08 WAC), shall be followed unless modified by chapter 292-100 WAC.

(2) A hearing shall be conducted either by the board or by an administrative law judge. If an administrative law judge participates(~~(-either)~~) by request of a respondent (~~(or by request of the board)~~), the board may choose to sit with the administrative law judge to hear the matter (~~((and to enter a final order at the conclusions of the proceedings; or to have the administrative law judge hear the matter alone and prepare an initial order for review by the board))~~). If an administrative law judge sits with the board, he or she shall rule on procedural and evidentiary matters. If an administrative law judge hears the matter at the request of the board, the board may choose to sit with the administrative law judge or the board may request that the administrative law judge hear the matter alone and prepare an initial order.

(3) ~~((After the))~~ Following a hearing in which the board participates, the board may conclude that:

(a) The respondent(s) did not violate the act, as alleged, and dismiss the case; or

(b) The respondent(s) has (have) violated chapter 42.52 RCW; or

(c) The respondent(s) is (are) in violation of chapter 42.52 RCW, the board's remedy would be inadequate and the matter should be referred to the appropriate law enforcement agency as provided in RCW 42.52.470.

(4) Following a hearing in which the board participates, the board:

(a) Shall set forth in writing its findings of fact, conclusions of law and decision on the merits of the case; and

(b) Shall serve each party, the complainant and the employing agency, a copy of the findings of fact, conclusions of law and decision.

(5) Following a hearing in which the board does not participate, the administrative law judge shall:

(a) Set forth written findings of fact, conclusions of law and decision on the merits of the case in an initial order;

(b) Shall serve each party and board staff a copy of the findings of fact, conclusions of law and decision, including a statement of the right to request review of the initial order by the board.

WSR 06-20-051

PROPOSED RULES

**DEPARTMENT OF COMMUNITY,
TRADE AND ECONOMIC DEVELOPMENT**

[Filed September 27, 2006, 1:03 p.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 06-12-107.

Title of Rule and Other Identifying Information: Washington motion picture competitiveness program proposed rules to implement 2SSB 6558, chapter 247, Laws of 2006.

Hearing Location(s): Seattle Center, Fidalgo Room, 305 Harrison Street, Seattle, WA 98109, on November 13, 2006, at 10:00 a.m.

Date of Intended Adoption: November 30, 2006.

Submit Written Comments to: Marie Sullivan, 128 10th Avenue S.W., Olympia, WA 98504, e-mail maries@cted.wa.gov, fax (360) 586-8440, by November 15, 2006.

Assistance for Persons with Disabilities: Contact TTY (360) 586-0772.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The department of community, trade and economic development is charged with developing criteria to be used by a motion picture competitiveness program in determining funding assistance to productions that use Washington state as a location for Washington state film and video production.

Statutory Authority for Adoption: Chapter 247, Laws of 2006.

Statute Being Implemented: Chapter 247, Laws of 2006.

Name of Proponent: Washington department of community, trade and economic development, governmental.

Name of Agency Personnel Responsible for Drafting, Implementation and Enforcement: Marie Sullivan, 128 10th Avenue S.W., (360) 725-4010.

No small business economic impact statement has been prepared under chapter 19.85 RCW. The economic impacts on regulated entities are negligible.

A cost-benefit analysis is not required under RCW 34.05.328. Not applicable.

September 26, 2006

Marie Sullivan

Washington Motion Picture
Competitiveness Program Proposed Rules

Chapter 130-20 WAC

WASHINGTON MOTION PICTURE COMPETITIVENESS PROGRAM

NEW SECTION

WAC 130-20-001 Purpose and authority. The department of community, trade, and economic development is charged with developing criteria to be used by a motion picture competitiveness program in determining funding assistance to productions that use Washington state as a location for film and video production.

NEW SECTION

WAC 130-20-010 Definitions. The following definitions apply to this chapter, unless the context clearly requires otherwise:

(1) "Applicant" means a movie or film production company intending to produce a qualified production in Washington state.

(2) "Motion picture competitiveness program" means an approved program that is a 501 (c)(6) nonprofit organization with the sole purpose of revitalizing the state's standing in the film production marketplace through recommending and awarding financial assistance to qualified productions.

(3) "Costs" mean actual expenses of production and postproduction expended in Washington state for the production of motion pictures, including but not limited to payments made for salaries, wages, and health insurance and retirement benefits, the rental costs of machinery and equipment, and the purchase of food, property, lodging, and permits for work conducted in Washington state.

(4) "Department" means the department of community, trade, and economic development.

(5) "State film office" means a program within the department with the responsibility of promoting Washington state as a premier location for film and video production.

(6) "Motion picture" means a recorded audio-visual production intended for distribution to theaters, DVD, video, or the internet, or television, or one or more episodes of a single television series, television pilot or television commercials. Motion picture does not mean production of a television commercial that spends less than two hundred fifty thousand dollars in the state of Washington or one or more segments of a newscast or sporting event.

(7) "Funding assistance" means financial assistance from a motion picture competitiveness program.

(8) "Person" means the same as defined in RCW 82.04.030.

(9) "Qualified production" is a production that has been certified by the motion picture competitiveness program as fully meeting the requirements for funding assistance.

(10) "Qualified expenditures" are production costs for in-state wages and benefits, goods and services purchased, leased or employed from a legal resident of this state, or a vendor or supplier who is located and doing business in this state for one year. Qualified expenditures do not include wages, salaries or other compensation for out-of-state production personnel.

(11) "Motion picture competitiveness board" means a board appointed by the governor that administers the motion picture competitiveness program. The board evaluates and awards funding assistance to motion picture projects pursuant to the guidelines of this chapter.

NEW SECTION

WAC 130-20-020 Eligibility criteria and guidelines.

(1) To qualify for funding assistance, the applicant must:

(a) Certify that it is not engaged, to any extent, in the production of erotic material, as defined in RCW 9.68.050.

(b) Include an acknowledgement that the production was filmed in Washington state.

(c) Agree to pay all obligations the film production company incurs in Washington state.

(d) Complete a survey as required in WAC 130-20-060 and file it with the state film office following the completion

of the part of the project covered by the contract with the competitiveness board and before distribution of the funding assistance.

(e) Make every effort to maximize the hiring of local cast, crew and support services.

(f) Make industry standard payments for health insurance and a retirement program for those positions typically covered by a collective bargaining agreement; and

(g) Enter into a contract with the motion picture competitiveness program accepting the terms above.

(2) The following activities are qualified expenditures, provided the expenditure occurs in Washington state:

(a) Production costs.

(b) Salaries of Washington state residents who are cast and crew, not to exceed two hundred fifty thousand dollars for any one employee, including wages and payments into health insurance and retirement plans, or fees of Washington state residents to include talent, management and labor.

(c) Cost of set construction and operations, wardrobe, accessories, location fees and related services.

(d) Costs of photography, sound synchronization, lighting and related services.

(e) Renting or leasing vehicles.

(f) Actual food and lodging, or a per diem not to exceed the IRS rate.

(g) Agency fees for airfare, if purchased through a Washington state-based travel agency or company.

(h) Agency fees for insurance coverage and bonding if purchased from Washington state-based insurance agent.

(i) Postproduction expenditures directly attributable to the production of a motion picture or commercial for services.

(j) Other direct costs of producing a film in accordance with the generally accepted entertainment industry practices if expenditures.

(k) Other costs the competitiveness program believes add economic benefit to the state of Washington.

(3) The board is encouraged to consider the following when considering certifying a production for funding assistance:

(a) The additional income and tax revenue to be retained in the state for general purposes.

(b) Creation and retention of family wage jobs that provide health insurance and payments into a retirement plan.

(c) The impact of projects to maximize in-state labor and use of in-state film production and film postproduction companies.

(d) The impact on the local economy and the state economy as a whole.

NEW SECTION

WAC 130-20-030 Funding assistance limits. (1) Maximum funding assistance from a motion picture competitiveness program is capped at one million dollars per production and subject to the following limitations:

(a) No more than twenty percent of a total actual expenditure in the state of at least five hundred thousand dollars for a single featured film produced in Washington state.

(b) No more than twenty percent of a total actual expenditure in the state of at least three hundred thousand dollars per television episode produced in Washington state (e.g., television series, pilot, movie of the week).

(c) No more than twenty percent of a total actual expenditure in the state of at least two hundred fifty thousand dollars for an infomercial or television commercial produced in Washington state.

(2) Funding assistance is subject to the amount available in the account managed by the motion picture competitiveness program.

NEW SECTION

WAC 130-20-040 Disqualification from the program. A production will be disqualified for funding assistance if the motion picture competitiveness program determines the qualified production does not meet requirements in WAC 130-20-020.

NEW SECTION

WAC 130-20-050 Sales and use tax exemptions. Unless otherwise prohibited, production companies may use both existing sales and use tax exemptions and the funding assistance provided by the motion picture competitiveness program while filming qualified productions in Washington state.

NEW SECTION

WAC 130-20-060 Survey requirement. In order to recognize the accountability and effectiveness of tax policy, the legislature requires that each production receiving funding assistance from the motion picture competitiveness program shall report information to the state film office through a survey. The motion picture competitiveness program shall ensure that no funds are disbursed until an applicant submits answers to a survey developed by the state film office.

(1) The state film office will make available on its web site a survey template.

(2) The motion picture competitiveness program may extend the due date for timely filing of the survey if failure to file was the result of circumstances beyond the control of the motion picture production receiving the funding assistance.

(3) Surveys shall include the following information:

(a) The amount of funding assistance received.

(b) The amount of production spending left in the state.

(c) The number of total employment positions.

(d) The number of full-time, part-time and temporary employment positions as a percent of total employment.

(e) The number of jobs at the wage bands of less than thirty thousand dollars, thirty thousand to sixty thousand dollars, and sixty thousand dollars and greater.

(f) The number of jobs that have employer-provided medical, dental and retirement benefits by each wage band.

(g) Additional information as requested by the department or state film office.

(4) The state film office will continue to track total production spending of projects, monitor the state's competitiveness in the national marketplace, and continue to build part-

nerships that streamline the delivery of production services statewide.

(5) The department shall submit a summary of descriptive statistics based on information from the survey each year by September 1.

(6) The department shall provide the complete surveys to the joint legislative audit and review committee each year by September 1.

WSR 06-20-052

PROPOSED RULES

CENTRAL WASHINGTON UNIVERSITY

[Filed September 28, 2006, 9:43 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 06-14-089.

Title of Rule and Other Identifying Information: Library rules, WAC 106-168-009 Food, beverages, smoking and 106-168-097 Payment of charges—Editorial changes and addition of link to more extensive library conduct policies.

Hearing Location(s): Barge 304, on November 7, 2006, at 2:00 p.m.

Date of Intended Adoption: November 7, 2006.

Submit Written Comments to: Judy B. Miller, President's Office, 400 East University Way, Ellensburg, WA 98926-7501, e-mail miller@cwu.edu, fax (509) 963-3206, by November 6, 2006.

Assistance for Persons with Disabilities: Contact Disability Support Services by October 30, 2006, TTY (509) 963-2143.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: Modify existing rules to provide more information to library users and remove outdated language.

Reasons Supporting Proposal: Provide accurate information to library users.

Statutory Authority for Adoption: RCW 28B.10.528 and 28B.35.120(12).

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: Judy B. Miller, public.

Name of Agency Personnel Responsible for Drafting, Implementation and Enforcement: Thomas M. Peischl, Library, 400 East University Way, Ellensburg, 98926-7548, (509) 963-1901.

No small business economic impact statement has been prepared under chapter 19.85 RCW. Changes do not impact small businesses.

A cost-benefit analysis is not required under RCW 34.05.328. Consistent with RCW 34.05.328 (5)(b)(iv), these changes "... only correct typographical errors, or clarify language of a rule without changing its effect."

September 26, 2006

Jerilyn S. McIntyre
President

AMENDATORY SECTION (Amending Order CWU AO 77, filed 10/6/94, effective 11/6/94)

WAC 106-168-009 Food, beverages, smoking. Users are expected to maintain appropriate public behavior while using the library facilities. ~~((Eating food or drinking beverages is not allowed in any of the areas open to public use. Smoking and other uses of tobacco are prohibited in the library.))~~ Library policies regarding eating food or drinking beverages and tobacco use are included in the library conduct policy available on-line at <http://www.lib.cwu.edu/info/policies/conduct.html>.

AMENDATORY SECTION (Amending Order CWU AO 77, filed 10/6/94, effective 11/6/94)

WAC 106-168-097 Payment of charges. (1) Charges may be paid at the cashier's office. Payment may be made by cash, check, or money order. Departmental purchase orders or interdepartmental funds transfers are not acceptable in payment of charges.

(2) Failure to pay charges will result in the total amount assessed being referred to ~~((the controller's office))~~ student financial services for collection. ~~((The controller))~~ Student financial services may deduct outstanding charges from salary warrants of employees, or withhold outstanding charges from damage deposits or other funds held by the university for any student. ~~((The controller))~~ Student financial services may notify the registrar to withhold permission to enroll until outstanding charges are paid, to refrain from issuing requested transcript copies or to forward the amount outstanding to a collection agency for recovery.

(3) Failure to pay charges may result in the revocation of borrowing privileges.

WSR 06-20-053

PROPOSED RULES

CENTRAL WASHINGTON UNIVERSITY

[Filed September 28, 2006, 9:45 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 06-14-090.

Title of Rule and Other Identifying Information: Chapter 106-172 WAC, Student records policy rules, editorial and substantive changes to modify rules governing access to and disposition of student records consistent with federal and state regulations.

Hearing Location(s): Barge 304, on November 14, 2006, at 2:00 p.m.

Date of Intended Adoption: November 14, 2006.

Submit Written Comments to: Judy B. Miller, President's Office, 400 East University Way, Ellensburg, WA 98926-7501, e-mail miller@cwu.edu, fax (509) 963-3206, by November 13, 2006.

Assistance for Persons with Disabilities: Contact Disability Support Services by November 7, 2006, TTY (509) 963-2143.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: Modify existing rules to comply with FERPA regulations and current administrative practice.

Reasons Supporting Proposal: Consistent with federal law and current administrative practice.

Statutory Authority for Adoption: RCW 28B.10.528 and 28B.35.120(12).

Rule is necessary because of federal law, 20 U.S.C. § 1232g; 34 C.F.R. Part 99.

Name of Proponent: Judy B. Miller, public.

Name of Agency Personnel Responsible for Drafting, Implementation and Enforcement: Keith Champagne, 400 East University Way, Ellensburg, 98926-7432, (509) 963-1515.

No small business economic impact statement has been prepared under chapter 19.85 RCW. Changes are in response to federal law and do not impact small businesses.

A cost-benefit analysis is not required under RCW 34.05.328. Complies with federal law (FERPA, 20 U.S.C. § 1232g; 34 C.F.R. Part 99) - RCW 34.05.328 (5)(b)(iii).

September 20, 2006

Jerilyn S. McIntyre
President

AMENDATORY SECTION (Amending Order CWU AO 75, filed 10/12/94, effective 11/12/94)

WAC 106-172-711 Definitions. The following definitions shall apply for the interpretation of these regulations:

(1) The "university" means Central Washington University as a whole, including any and all of its component departments, offices, or units.

(2) "Directory information" means the student's name, ~~((hometown address,))~~ university and permanent home address and telephone number, e-mail address, a photograph, date of birth, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, class, ((previous institutions attended,)) major field(s) of study, previous institutions attended, awards((-)) and honors (including honor roll), degrees conferred (including dates), and ((other similar information)) participation in officially recognized sports and activities, and height and weights of members of athletic teams. ~~((The))~~ Central Washington University may release directory information ((concerning a student to the public unless the student submits a signed request in writing,)) in accordance with the provisions of FERPA. Students may withhold directory information by giving written notice within two weeks after the ((first day of classes for the)) beginning of fall quarter. Requests for nondisclosure must be forwarded to the office of the vice-president for student affairs and enrollment management where an appropriate notation will be ((entered in)) indicated on the student's ((computer)) file on the student information system. Students may place a nondisclosure indicator on their student record directly on the student information system. ~~((These requests will then be forwarded to the university relations and information office which maintains a complete file of nondisclosure requests. Authorization to withhold the information must be filed annually since the))~~

Requests for nondisclosure will be honored ((by the university for only one year)) unless students submit a written request to have the block on their directory information removed. Students who wish to withhold directory information after they graduate, which would include their dates of attendance and degrees conferred, must submit another written request to the vice-president for student affairs and enrollment management. Forms for making requests to withhold directory information are available in the Office of the Vice-President for Student Affairs and Enrollment Management, Bouillon Hall, Room 204, at the Ellensburg campus.

(3) "Eligible student" means any person who is officially registered at this university.

(4)(a) "Education records" mean those records which:

(i) Are directly related to a student, and include admission, academic, financial aid, student account, placement records, and

(ii) Are maintained by the university or by a party acting for the university.

(b) The term education record does not include the following:

(i) Records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker of the record and which are not accessible or revealed to any other person except a temporary substitute;

(ii) Records of public safety and police services which are maintained separately and solely for law enforcement officials of the same jurisdiction—provided that education records maintained by the university are not disclosed to the law enforcement unit;

(iii) Records of someone employed by the university, which are made in the normal course of business, related exclusively to the person as an employee, and are not used for any other purpose;

(iv) Records made by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional directly related to the treatment of a student, and not disclosed to anyone other than individuals providing treatment provided records can be reviewed by a physician or other appropriate professional of the student's choice.

(5) "Personally identifiable" means that the data or information includes:

(a) The name of a student, the student's parent, or other family member,

(b) The student's university and permanent home address ~~((of the student)),~~

(c) A personal identifier, such as the student's social security number or student number,

(d) A list of personal characteristics which would make the student's identity easily traceable, or

(e) Other information which would make the student's identity easily traceable.

(6) "Record" means information or data recorded in any medium including but not limited to: Handwriting, print, tapes, film, microfilm, and microfiche.

(7) "Financial aid" means a payment of funds provided to an individual which is conditioned on the individual's attendance at an educational agency or institution.

(8) "Vice-president for student affairs" means the vice-president for student affairs and enrollment management or the vice-president's designee.

AMENDATORY SECTION (Amending Order CWU AO 75, filed 10/12/94, effective 11/12/94)

WAC 106-172-721 Notification by educational institution. (1) The university shall inform eligible students, annually, of the following:

(a) The types of education records and information contained therein which are maintained by the institution;

(b) The titles and addresses of official responsible for the maintenance of each type of record, the persons who have access to those records, and the purposes for which they have access;

(c) The policies and procedures of the university for reviewing and expunging those records, and for challenging the accuracy of them;

(d) the procedures for gaining access to the educational records;

(e) The cost, as approved by the board of trustees, which will be charged to the eligible student for reproducing single copies of records, provided that the cost shall not exceed the actual cost of reproducing the record;

(f) The categories of information which the university has designated as directory information.

(2) Notice of the existence of this policy and the availability of the information described in subsection (1)(a) through (f) of this section may be published in any official university print medium publication having general circulation among students. This may be a special publication for this purpose only, or included in another publication. Students may consult the office of the vice-president for student affairs and enrollment management for the information described.

AMENDATORY SECTION (Amending Order CWU AO 75, filed 10/12/94, effective 11/12/94)

WAC 106-172-731 Access to education records. The university shall provide each student access to his/her education records except as otherwise limited according to WAC 106-172-733.

The right of access shall include:

(1) The right to inspect and review the content of education records in the presence of appropriate university personnel.

(2) The right to obtain single copies of each record, at the expense of the eligible student but not to exceed the actual cost to the university of reproducing such copies.

(3) The right to a response from the university to reasonable requests for explanations and interpretations of those records.

(4) The right of an opportunity for a proceeding to challenge the content and accuracy of those records according to WAC 106-172-761.

(5)(a) Students wishing access under provisions of this policy to education records maintained by the university should address a request in writing to the person in charge of maintenance of that record. If copies are requested, copies

may be supplied at no more than the cost of making the copy, including supplies and staff time.

(b) The individual responsible for maintenance of any record shall respond to written requests only, and provide copies as requested, within ~~((twenty))~~ forty-five working days. The university registrar is not prohibited from providing a student with a copy of the student's academic transcript from CWU, but is prohibited from providing a student with a copy of the student's official academic transcripts from other institutions.

(6) The office of the vice-president for student affairs and enrollment management will maintain a file showing what education records are maintained by any department or entity of the university and the title and address of the official responsible for maintenance of each record.

AMENDATORY SECTION (Amending Order CWU AO 75, filed 10/12/94, effective 11/12/94)

WAC 106-172-735 Exception to consent requirements and record of access. (1) The university may disclose personally identifiable information from the education records of a student without the written consent of the student if the disclosure is to:

(a) University officials, including faculty members, when the information is required for a legitimate educational purpose,

(b) Officials of another school in which the student seeks or intends to enroll, providing a reasonable attempt has been made to notify the student of the transfer of the records at the last known address of the student — except when the transfer of the records is initiated by the student;

(c) Federal or state officials requiring access to education records in connection with the audit or evaluation of federally or state-supported educational programs. Such surveys must be administered in a manner which will not permit personal identification of students by individuals other than those conducting the study, and such information will be destroyed when no longer needed for the purposes for which it was provided;

~~(d) ((Agencies requesting information in connection with a student's application for, or receipt of, financial aid))~~ Persons or organizations providing financial aid, individuals and organizations charged with oversight of the university, or of federal or state programs in which the university participates;

(e) Accrediting organizations in order to carry out their accrediting functions;

(f) Parents of any student under the age of twenty-one, regardless of the student's dependency status, in cases where the student has violated laws or university rules governing alcohol or controlled substances;

(g) Any personal subpoena and/or subpoena duces tecum, when lawfully prepared and served upon the university or an appropriate administrator of the university. The university will notify the student by certified or registered mail to the address or addresses on file with the university of any such subpoena. Such a notice will be sent to the student in advance of compliance with the subpoena((-));

(h) Persons in an emergency to protect the health and safety of students or other persons according to WAC 106-172-772:

(i) The U.S. Citizenship and Immigration Service under the terms and provisions of immigration law.

(2) Any student may grant permission for use of information about himself/herself by giving specific permission in writing, signed and dated by the student giving such consent to include:

- (a) A specification by title of the records released;
- (b) The reasons for such release;
- (c) The names of the parties to whom such records will be released; and
- (d) A written statement indicating that the information cannot subsequently be released in a personally identifiable form to any other party without the written consent of the student involved.

(3) The university shall maintain a record which will indicate all parties, other than those parties specified in WAC 106-172-735 (1)(a), who have been granted access to a student's education records. The record will:

- (a) Indicate specifically the legitimate interest that each such party has in obtaining the information.
- (b) Be available only to the student, to the employees of the university responsible for maintaining the records, and to the parties identified under WAC 106-172-735 (1)(a) and (d).

AMENDATORY SECTION (Amending Order CWU AO 75, filed 10/12/94, effective 11/12/94)

WAC 106-172-763 Informal proceedings. (1) Whenever possible the university shall attempt to settle disputes regarding requests to amend education records through informal proceedings.

(2) A student who wishes to exercise the rights set forth in WAC 106-172-761(2) shall:

- (a) First, attempt a resolution with the university official who has custody of the education records; and
- (b) Second, discuss with the vice-president for student affairs and enrollment management or designate the nature of the corrective action recommended by the student.

AMENDATORY SECTION (Amending Order CWU AO 75, filed 10/12/94, effective 11/12/94)

WAC 106-172-765 Conduct of the proceeding. (1) If informal proceedings fail to resolve the complaint of a student, the student may file with the vice-president for student affairs and enrollment management a written request for the proceeding before a proceeding officer of the university to be designated by the vice-president for student affairs and enrollment management, and who does not have a direct interest in the outcome of the proceeding.

(2) The proceeding shall be held within a reasonable time (not to exceed twenty working days) after the university has received the request and the student shall be given notice of the date, place, and time reasonably in advance of the proceeding.

(3) The student shall be given an opportunity to present evidence relevant to the issues raised in WAC 106-172-

761(2) and may be represented by any person (including an attorney) of the student's choosing at his or her expense.

(4) A decision in writing shall be prepared within a reasonable period of time (not to exceed ten working days), which decision shall be based solely upon the evidence presented, and which includes a summary of the evidence and the reasons for the decision.

(5) If, as a result of the proceeding, the decision is:

(a) To amend the record, the university must do so accordingly and give notice to the student.

(b) Not to amend, the student must be allowed to place a written comment or explanation in the student's file, and it must be kept in the file as long as the file itself is kept. If the contested portion of the file is disclosed to anybody, the student's statement must also be disclosed.

(6) The designated proceeding officer shall be advised by the assistant attorney general representing the university.

AMENDATORY SECTION (Amending Order CWU AO 75, filed 10/12/94, effective 11/12/94)

WAC 106-172-772 Release of information for health or safety emergencies. (1) The university (president or designee, vice-president for student affairs and enrollment management) may release information from education records to appropriate persons in connection with an emergency if the knowledge of such information is necessary to protect the health or safety of a student or other persons.

(2) The factors which should be taken into account in determining whether records may be released shall include:

- (a) The seriousness of the threat to the health or safety of the student or other persons;
- (b) The need for such records to meet the emergency;
- (c) Whether the persons to whom such records are released are in a position to deal with the emergency; and
- (d) The extent to which time is of the essence in dealing with the emergency.

**WSR 06-20-060
PROPOSED RULES
NOXIOUS WEED
CONTROL BOARD**

[Filed September 29, 2006, 10:03 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 06-14-016.

Title of Rule and Other Identifying Information: Chapter 16-750 WAC, State noxious weed list and schedule of monetary penalties.

Hearing Location(s): Washington Cattlemen's Association, 1301 Dolar Way Road, Ellensburg, WA, on November 15, 2006, at 1:30 p.m.

Date of Intended Adoption: December 4, 2006.

Submit Written Comments to: Steve McGonigal, P.O. Box 42560, Olympia, WA 98504, e-mail smcgonigal@agr.wa.gov, fax (360) 902-2053, by November 8, 2006.

Assistance for Persons with Disabilities: Contact Steve McGonigal, (360) 902-2053, by November 8, 2006.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The state noxious weed list provides the basis for noxious weed control efforts by county noxious weed control boards, weed districts, the state weed board and the Washington state department of agriculture, under the auspices of chapter 17.10 RCW. The effect of the state noxious weed list is to prioritize and coordinate control of noxious weed species statewide, concentrating on prevention and early detection, while still allowing for local program flexibility.

This proposal amends chapter 16-750 WAC by: (1) Adding two weed species to the Class B weed list; (2) adding one weed species to the Class C weed list; (3) changing the designated control areas for two Class B weeds; (4) updating the scientific name of one Class B weed; and (5) correcting the spelling of the scientific name of one Class C weed.

Reasons Supporting Proposal: Common fennel, spurge laurel and yellow archangel are present in the state and have been found to be highly destructive, competitive or difficult to control, so their addition to the noxious weed list is proposed. Distribution data indicated that the control designation areas for two existing Class B noxious weeds should be amended, and those changes are proposed. The scientific community has accepted a new scientific name for spotted knapweed, and a change to that new name is proposed. The scientific name of yellow flag iris is misspelled in the WAC, and a correction is proposed.

Statutory Authority for Adoption: Chapter 17.10 RCW.

Statute Being Implemented: Chapter 17.10 RCW.

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: Washington state noxious weed control board, governmental.

Name of Agency Personnel Responsible for Drafting, Implementation and Enforcement: Steve McGonigal, 1111 Washington Street, Olympia, WA 98504-2560, (360) 902-2053.

No small business economic impact statement has been prepared under chapter 19.85 RCW. Net economic impact of the proposed changes on small business would be negligible. Adding plants to the Class C list does not mandate control, forbid sale, nor make other regulatory changes. Inquiries to the nursery industry have indicated that spurge laurel is not present in the nursery industry. Inquiries to the seed industry have indicated that there is no commercial fennel seed production in the state. For the Class B weeds for which changes to designated control areas are proposed, the new control areas proposed are areas where the plants are of limited distribution.

A cost-benefit analysis is not required under RCW 34.05.328. The Washington state noxious weed control board is not one of the agencies listed in this section.

September 29, 2006

Steve McGonigal

Executive Secretary

AMENDATORY SECTION (Amending WSR 05-24-026, filed 11/30/05, effective 12/31/05)

WAC 16-750-011 State noxious weed list—Class B noxious weeds.

Name	Will be a "Class B designate" in all lands lying within:
(1) alyssum, hoary <i>Berteroa incana</i>	(a) regions 1, 2, 5, 6, 8, 9, 10 (b) region 3, except Okanogan County (c) Okanogan County, of region 3, except Ranges 29 through 31 East of Townships 37 through 40 North (d) Adams and Whitman counties of region 7.
(2) arrowhead, grass-leaved <i>Sagittaria graminea</i>	(a) regions 1, 3, 4, 6, 7, 8, 9, 10 (b) region 2 except Lake Roesiger, Lake Serene, Lake Loma and Echo Lake in Snohomish County (c) region 5 except Mason Lake in Mason County.
(3) blackgrass <i>Alopecurus myosuroides</i>	(a) regions 1, 2, 3, 5, 6, 8, 9, 10 (b) Ferry, Stevens, Pend Oreille counties of region 4 (c) Adams County of region 7.
(4) blueweed <i>Echium vulgare</i>	(a) regions 1, 2, 3, 4, 5, 6, 8, 9, 10 (b) region 7 except for an area starting at the Stevens County line on SR 291 south to the SR 291 bridge over the Little Spokane River, thence upstream along the Little Spokane River to the first Rutter Parkway Bridge; thence south along the Rutter Parkway to the intersection of Rutter Parkway and Indian Trail Road; thence southerly along Indian Trail Road to a point three miles south (on section line between sections 22 and 27, T-26N, R-42E); thence due west to a point intersecting the line between Ranges 41 and 42; thence north along

Name	Will be a "Class B designate" in all lands lying within:
(5) broom, Scotch <i>Cytisus scoparius</i>	(a) regions 3, 4, 6, 7, 9, 10.
(6) bryony, white <i>Bryonia alba</i>	(a) regions 1, 2, 3, 4, 5, 6, 8, 9 (b) region 7 except Whitman County (c) Franklin County of region 10.
(7) bugloss, common <i>Anchusa officinalis</i>	(a) regions 1, 2, 3, 5, 6, 8, 9, 10 (b) region 4 except Stevens and Spokane counties (c) Lincoln, Adams, and Whitman counties of region 7.
(8) bugloss, annual <i>Anchusa arvensis</i>	(a) regions 1, 2, 3, 4, 5, 6, 8, 9 (b) Lincoln and Adams counties (c) Whitman County except ranges 43 through 46 East of Townships 16 through 20 North.
(9) camelthorn <i>Alhagi maurorum</i>	(a) regions 1, 2, 3, 4, 5, 7, 8, 9 (b) region 6 except those portions of Sections 23, 24, 25, and 29 through 36, T16N, R27E, W.M. lying outside Intercounty Weed District No. 52 and except Sections 1 through 12, T15N, R27E, W.M. in Grant County and except the area west of Highway 17 and north of Highway 26 in Adams County (c) Franklin, Columbia, Garfield, and Asotin counties of region 10 (d) an area beginning at the Washington—Oregon border at the southwest portion of section 5, R32E, T6N, then north to the northwest corner of section 3, R32E, T7N, then east to the northeast corner of section 3, R36E, T7N, then south to southeast portion of section 15, R36E, T6N, at the Washington—Oregon border, then west along the Washington—Oregon border to the point of beginning.
(10) carrot, wild <i>Daucus carota</i>	(a) regions 3, 7 (except where intentionally cultivated) (b) Spokane and Ferry counties of region 4 (except where intentionally cultivated) (c) region 6, except Yakima County (except where intentionally cultivated) (d) region 9, except Yakima County (except where intentionally cultivated) (e) region 10, except Walla Walla County (except where intentionally cultivated).
(11) catsear, common <i>Hypochaeris radicata</i>	(a) regions 3, 4, 6, 7, 10 (b) region 9 except Klickitat County.
(12) chervil, wild <i>Anthriscus sylvestris</i>	(a) regions 1, 3, 4, 6, 7, 9, 10 (b) region 5 except those portions of Thurston County within T15, 16, 17N, R2, 3, 4W (c) region 2 except Guemes Island in Skagit County (d) region 8 except Clark County.

Name		Will be a "Class B designate" in all lands lying within:	
(13)	cinquefoil, sulfur <i>Potentilla recta</i>	(a)	regions 1, 3, 8, 10
		(b)	region 2 except Skagit County
		(c)	region 4 except Stevens, Ferry, and Pend Oreille counties
		(d)	region 5 except Thurston and Pierce counties
		(e)	region 6 except Yakima County
		(f)	region 7 except Spokane County
		(g)	region 8 except Lewis County
		(h)	region 9 except Klickitat County.
(14)	cordgrass, smooth <i>Spartina alterniflora</i>	(a)	regions 1, 3, 4, 5, 6, 7, 9, 10
		(b)	region 2 except Padilla Bay of Skagit County
		(c)	region 8 except bays and estuaries of Pacific County.
(15)	cordgrass, common <i>Spartina anglica</i>	(a)	regions 1, 3, 4, 5, 6, 7, 8, 9, 10
		(b)	region 2 except bays and estuaries of Skagit and Island counties and except bays and estuaries north of Everett in Snohomish County.
(16)	daisy, oxeye <i>Leucanthemum vulgare</i>	(a)	regions 7, 10
		(b)	region 9 except those areas lying within Klickitat and Yakima counties west of Range 13 East
		(c)	region 6 except those areas lying within Yakima and Kittitas counties west of Range 13 E.
(17)	elodea, Brazilian <i>Egeria densa</i>	(a)	regions 3, 4, 6, 7, 9, 10
		(b)	Lewis County of region 8
		(c)	Clallam County of region 1
		(d)	King County of region 5, except lakes Washington, Sammamish, Union and Fenwick.
(18)	fanwort <i>Cabomba caroliniana</i>	(a)	regions 1, 2, 3, 4, 5, 6, 7, 9, 10
		(b)	region 8 except T8N, R3W of Cowlitz County.
(19)	<u>fennel, common <i>Foeniculum vulgare</i></u> <u>(except var. <i>azoricum</i>)</u>	<u>(a)</u>	<u>regions 3, 4, 6, 7, 8, 9, 10</u>
		<u>(b)</u>	<u>region 1 except the incorporated areas of Port Townsend</u>
		<u>(c)</u>	<u>region 2 except the incorporated areas of Anacortes and Mount Vernon</u>
		<u>(d)</u>	<u>region 5 except King and Kitsap counties.</u>
<u>(20)</u>	fieldcress, Austrian <i>Rorippa austriaca</i>	(a)	regions 1, 2, 3, 4, 5, 6, 8, 9
		(b)	regions 7 and 10 except within the Palouse River Canyon from Big Palouse Falls to the Snake River.
((20))	floating heart, yellow <i>Nymphoides</i>	(a)	regions 1, 2, 3, 5, 6, 7, 8, 9, 10
<u>(21)</u>	<i>peltata</i>	(b)	region 4 except the Spokane River between Long Lake Dam and Nine Mile Dam.
((21))	gorse <i>Ulex europaeus</i>	(a)	regions 1, 3, 4, 6, 7, 9, 10
<u>(22)</u>		(b)	Skagit, Island, and Whatcom counties of region 2
		(c)	Thurston, Kitsap, Pierce, and King counties of region 5
		(d)	Wahkiakum, Clark, Skamania, Cowlitz, and Lewis counties of region 8.
((22))	hawkweed, mouseear <i>Hieracium</i>	(a)	regions 1, 2, 3, 4, 6, 7, 8, 9, 10
<u>(23)</u>	<i>pilosella</i>	(b)	region 5 except Thurston County

Name	Will be a "Class B designate" in all lands lying within:
	(c) Thurston County lying within T17N, R1W, S31; T16N, R2W, S30 W1/2; T16N, R3W, S25, SE1/4; T16N, R3W, S36, N1/2; T16N, R2W, S31, NW1/4.
((23)) <u>(24)</u> hawkweed, orange <i>Hieracium aurantiacum</i>	(a) regions <u>1</u> , 3, 6, 9, 10 (b) ((Clallam County of region 1 (e)) Skagit County of region 2 ((c)) <u>(c)</u> Ferry County of region 4 ((e)) <u>(d)</u> Thurston and King counties of region 5 ((f)) <u>(e)</u> Lincoln and Adams counties of region 7 ((g)) <u>(f)</u> Lewis County of region 8.
((24)) <u>(25)</u> hawkweed, polar <i>Hieracium atratum</i>	(a) regions 1, 2, 3, 4, 6, 7, 8, 9, 10 (b) region 5 outside the boundaries of Mt. Rainier National Park.
((25)) <u>(26)</u> hawkweed, queen-devil <i>Hieracium glomeratum</i>	(a) regions 1, 2, 3, 5, 6, 7, 8, 9, 10 (b) Ferry County of region 4.
((26)) <u>(27)</u> hawkweed, smooth <i>Hieracium laevigatum</i>	(a) regions 1, 3, 4, 5, 6, 7, 8, 9, 10 (b) San Juan, Island, and Skagit counties of region 2.
((27)) <u>(28)</u> hawkweed, yellow <i>Hieracium caespitosum</i>	(a) regions 1, 2, 3, 5, 6, 7, 8, 10 (b) region 4 except Stevens and Pend Oreille counties (c) region 9 except sections 32, 33 and 34 of T6N, R12E, and sections 4, 5, 6, and 7 of T5N, R12E, and section 12 of T5N, R11E, of Klickitat County.
((28)) <u>(29)</u> hedgeparsley <i>Torilis arvensis</i>	(a) regions 1, 2, 3, 4, 5, 6, 7, 8, 10 (b) Yakima, Benton, Franklin counties (c) Klickitat County except those lands lying within T4N, R10E, R11E, R12E, R13E, R14E; T3N, R10E, R11E, R12E, R13E; T2N, R12E, R13E.
((29)) <u>(30)</u> helmet, policeman's <i>Impatiens glandulifera</i>	(a) regions 1, 3, 4, 6, 7, 8, 9, 10 (b) region 2 except Whatcom County (c) region 5 except Pierce and Thurston counties.
((30)) <u>(31)</u> herb-Robert <i>Geranium robertianum</i>	(a) regions 3, 4, 6, 7, 9, 10
((31)) <u>(32)</u> houndstongue <i>Cynoglossum officinale</i>	(a) Kittitas County of region 6 (b) Douglas ((County)) and <u>Chelan counties</u> of regions 3 and 6.
((32)) <u>(33)</u> indigobush <i>Amorpha fruticosa</i>	(a) regions 1, 2, 3, 4, 5, 6 (b) regions 7 and 10 except within 200 feet of the Snake River from Central Ferry downstream (c) regions 8, 9, and 10 except within 200 feet of the Columbia River.
((33)) <u>(34)</u> knapweed, black <i>Centaurea nigra</i>	(a) regions 1, 2, 3, 4, 7, 9, 10 (b) region 5 except that area below the ordinary highwater mark of the Nisqually River, beginning at Alder Dam and downstream to the mouth of the Nisqually River in Pierce and Thurston counties (c) region 6 except Kittitas County (d) region 8 except Clark County.

Name	Will be a "Class B designate" in all lands lying within:	
((34)) <u>(35)</u> knapweed, brown <i>Centaurea jacea</i>	(a)	regions 1, 2, 3, 4, 7, 9, 10
	(b)	region 5 except that area below the ordinary highwater mark of the Nisqually River, beginning at Alder Dam and downstream to the mouth of the Nisqually River in Pierce and Thurston counties
	(c)	region 6 except Kittitas County
	(d)	region 8 except Clark County.
((35)) <u>(36)</u> knapweed, diffuse <i>Centaurea diffusa</i>	(a)	regions 1, 2, 5, 8
	(b)	Grant County lying in Townships 13 through 16 North, Ranges 25 through 27 East; Townships 17 and 18 N., Ranges 25 through 30 East; Townships 19 and 20 North, Ranges 29 and 30 East; T21N, R23E, Sections 1 through 30; T21N, R26E., Sections 5, 6, 7, 8, 17, and 18; East 1/2 Township 21N, Range 27E.; T21N, Ranges 28 through 30 E; those portions of Townships 22 through 28N, Ranges 28 through 30 E.; those portions of Township 22 through 28N., Ranges 23 through 30E. lying in Grant County; all W.M.
	(c)	Adams County except those areas within T15N, R36E, Section 36; T15N, R37E, Sections 22, 26, 27, 28, 31, 32, 33 and 34; T15N, R37E, western half of Sections 23, 24 and 25; T15N, R38E, Sections 2, 10, 11, 14, 15, 19 and 20; T16N, R38E, Sections 34 and 35; T17N, R37E, Sections 5 and 6
	(d)	Franklin County of regions 9 and 10.
((36)) <u>(37)</u> knapweed, meadow <i>Centaurea jacea</i> <i>x nigra</i>	(a)	regions 1, 2, 3, 4, 7, 9, 10
	(b)	region 5 except that area below the ordinary highwater mark of the Nisqually River, beginning at Alder Dam and downstream to the mouth of the Nisqually River in Pierce and Thurston counties
	(c)	region 6 except Kittitas County
	(d)	region 8 except Clark County.
((37)) <u>(38)</u> knapweed, Russian <i>Acroptilon repens</i>	(a)	regions 1, 2, 5, 7, 8
	(b)	region 4 except that area lying within the boundaries of the Colville Indian Reservation within Ferry County
	(c)	Adams County of region 6 except for the area west of Highway 17 and North of Highway 26
	(d)	Intercounty Weed District No. 52
	(e)	region 10 except Franklin County.
((38)) <u>(39)</u> knapweed, spotted <i>Centaurea</i> (<i>bie-</i> <i>bersteini</i>) <i>stoebe</i>	(a)	regions 1, 2, 3, 5, 6, 9
	(b)	Ferry County of region 4
	(c)	Adams and Whitman counties of region 7
	(d)	region 8, except that portion of Lewis County below the ordinary high watermark of the Tilton River from Hwy. 508 to Lake Mayfield
	(e)	region 10 except Garfield County.
((39)) <u>(40)</u> knotweed, Bohemian <i>Polygonum</i> <i>bohemicum</i>	(a)	Kittitas County of region 6
	(b)	Chelan and Douglas counties of regions 3 and 6
	(c)	Pend Oreille County of region 4.
((40)) <u>(41)</u> knotweed, giant <i>Polygonum sachalin-</i> <i>ense</i>	(a)	Kittitas County of region 6
	(b)	Pend Oreille County of region 4.

Name	Will be a "Class B designate" in all lands lying within:
((41)) <u>(42)</u> knotweed, Himalayan <i>Polygonum polystachyum</i>	(a) Kittitas County of region 6 (b) Pend Oreille County of region 4 (c) Lewis County of region 8.
((42)) <u>(43)</u> knotweed, Japanese <i>Polygonum cuspidatum</i>	(a) Kittitas County of region 6 (b) Chelan and Douglas counties of regions 3 and 6 (c) Pend Oreille County of region 4.
((43)) <u>(44)</u> kochia <i>Kochia scoparia</i>	(a) Regions 1, 2, 5, 8 (b) Pend Oreille County of region 4 (c) Kittitas County of region 6.
<u>(45)</u> laurel, spurge <i>Daphne laureola</i>	<u>(a) regions 3, 4, 6, 7, 8, 9, 10</u> <u>(b) San Juan, Snohomish and Skagit counties of region 2</u> <u>(c) Grays Harbor and Mason counties of region 5.</u>
((44)) <u>(46)</u> lepyrodielis <i>Lepyrodielis holosteoides</i>	(a) regions 1, 2, 3, 4, 5, 6, 8, 9, 10 (b) region 7 except an area within Whitman County east of the Pullman—Wawawai Road from Wawawai to Pullman and south of State Highway 270 from Pullman to Moscow, Idaho.
((45)) <u>(47)</u> loosestrife, garden <i>Lysimachia vulgaris</i>	(a) regions 1, 2, 3, 4, 6, 7, 8, 9, 10 (b) region 5 except King County (c) Those portions of King County lying north of I-90 and east of the line extending from SR522 to SR202 to E. Lake Sammamish Parkway; west of I-5 including Vashon Island; south of I-90 and east and south of I-405 to the county line.
((46)) <u>(48)</u> loosestrife, purple <i>Lythrum salicaria</i>	(a) regions 1, 4, 7, 8 (b) region 2 except Snohomish County (c) region 3 except within 100 feet of the ordinary highwater mark of the Okanogan River from the Canadian border south to Riverside (d) Grays Harbor, Mason, Kitsap, and Thurston counties of region 5 (e) Those portions of King County lying north of I-90 and east of the line extending from SR522 to SR202 to E. Lake Sammamish Parkway; west of I-5 including Vashon Island; south of I-90 and east and south of I-405 to the county line (f) Pierce County, except those areas lying within T2D, 21, 22N, R1W and R1E, all sections (g) region 6 except that portion of Grant County lying northerly of the Frenchmen Hills-O'Sullivan Dam Road, southerly of Highway Interstate 90, easterly of the section line of the location of County Road J SW/NW if constructed and westerly of the section line of the location of County Road H SE/NE if constructed (h) region 9 except Benton County (i) region 10 except Walla Walla County (j) Intercounty Weed Districts No. 51 and No. 52.
((47)) <u>(49)</u> loosestrife, wand <i>Lythrum virgatum</i>	(a) regions 1, 4, 7, 8 (b) region 2 except Snohomish County

Name	Will be a "Class B designate" in all lands lying within:
	(c) region 3 except within 100 feet of the ordinary highwater mark of the Okanogan River from the Canadian border south to Riverside
	(d) region 5 except King County
	(e) Those portions of King County lying north of I-90 and east of the line extending from SR522 to SR202 to E. Lake Sammamish Parkway; west of I-5 including Vashon Island; south of I-90 and east and south of I-405 to the county line
	(f) region 6 except that portion of Grant County lying northerly of the Frenchmen Hills-O'Sullivan Dam Road, southerly of Highway Interstate 90, easterly of the section line of the location of County Road J SW/NW if constructed and westerly of the section line of the location of County Road H SE/NE if constructed
	(g) region 9 except Benton County
	(h) region 10 except Walla Walla County
	(i) Intercounty Weed Districts No. 51 and No. 52.
((48)) nutsedge, yellow <i>Cyperus esculentus</i>	(a) regions 1, 2, 3, 4, 5, 7, 8
<u>(50)</u>	(b) region 6 except those areas lying between State Highway 26 and State Highway 28, and westerly of Dodson Road in Grant County, and except S 1/2, Sec. 2, T20N, R25E., W.M.
	(c) region 9 except:
	(i) except those areas lying within the following boundary description within Yakima County: Beginning at the intersection of Highway 12 and Parker Heights Road and continuing easterly to Konnowac Pass Road follow said road north to the intersection of Konnowac Pass Road and Nightingale Road. The northern boundary shall be the Roza Canal, continuing from the established point at Nightingale Road. The boundaries will follow the Roza Canal easterly to the County Line Road. The east boundaries will be the Yakima/Benton County Line from a point beginning at the County Line and Highway 22 (near Byron) continuing westerly along Highway 22 (to near the city of Mabton) to the intersection of Highway 22 and the Reservation Boundary (Division Road) and continuing north to the Yakima River. Then it will follow the river northwest to the Wapato-Donald Road continuing north along said road to Highway 12 then Highway 12 to Parker Heights Road.
	(ii) an area lying southerly of State Route 14 and within T2N, Ranges 13 and 14 E of Klickitat County
	(d) region 10 except Walla Walla County.
((49)) oxtongue, hawkweed <i>Picris hieracoides</i>	(a) regions 1, 2, 3, 4, 5, 6, 7, 9, 10
<u>(51)</u>	(b) region 8 except Skamania County.
((50)) parrotfeather <i>Myriophyllum aquaticum</i>	(a) regions 1, 2, 3, 4, 5, 6, 7, 9, 10
<u>(52)</u>	(b) region 8 except Clark, Cowlitz, and Wahkiakum counties.

Name	Will be a "Class B designate" in all lands lying within:
((51)) <u>(53)</u> pepperweed, perennial <i>Lepidium latifolium</i>	(a) regions 1, 2, 3, 4, 5, 7, 8, 10 (b) Intercounty Weed Districts No. 51 and 52 (c) Kittitas County of region 6 (d) Adams County of region 6 except for the area west of Highway 17 and north of Highway 26.
((52)) <u>(54)</u> primrose, water <i>Ludwigia hexapetala</i>	(a) regions 1, 2, 3, 4, 5, 6, 7, 9, 10 (b) region 8 except T8N, R3W, S14 of Cowlitz County.
((53)) <u>(55)</u> puncturevine <i>Tribulus terrestris</i>	(a) Skagit County of region 2 (b) Kittitas County of region 6 (c) Adams County (d) Clallam County of region 1.
((54)) <u>(56)</u> ragwort, tansy <i>Senecio jacobaea</i>	(a) regions 3, 4, 6, 7, 9, 10 (b) region 5, that portion of Pierce County lying south or east of a boundary beginning at the White River and State Highway 410, then west along State Highway 410 to intersection with State Highway 162 (Orting) to intersection with Orville Road, then south along Orville Road to intersection with Kapowsin Highway (304th Street East), then west following Kapowsin Highway to intersection with State Route 7, then south along State Route 7 to intersection with State Route 702, then west along State Route 702 to intersection with State Route 507, then southwest along State Route 507 to intersection with the Nisqually River.
((55)) <u>(57)</u> Saltcedar <i>Tamarix ramosissima</i>	(a) regions 1, 2, 3, 4, 5, 7, 8, unless intentionally established prior to 2004 (b) region 6 except Grant County, unless intentionally established prior to 2004 (c) region 9 except Benton and Franklin counties, unless intentionally established prior to 2004 (d) region 10 except Franklin County, unless intentionally established prior to 2004.
((56)) <u>(58)</u> sandbur, longspine <i>Cenchrus longispinus</i>	(a) regions 1, 2, 3, 4, 5, 7, 8 (b) Adams County of region 6 except for that area lying within Intercounty Weed District No. 52 (c) Intercounty Weed District No. 51 (d) Kittitas County of region 6.
((57)) <u>(59)</u> skeletonweed, rush <i>Chondrilla juncea</i>	(a) regions 1, 2, 3, 5, 8, 9 (b) Franklin County except T13N, R36E; and T14N, R36E (c) Adams County except those areas lying east of a line running north from Franklin County along the western boundary of Range 36 East to State Highway 26 then north on Sage Road until it intersects Lee Road, then due north until intersection with Providence Road, then east to State Highway 261, then north along State Highway 261 to its intersection with Interstate 90, henceforth on a due north line to intersection with Bauman Road, then north along Bauman Road to its terminus, then due north to the Lincoln County line.

Name	Will be a "Class B designate" in all lands lying within:
	<ul style="list-style-type: none"> (d) region 6 except that portion lying within Grant County that is southerly of State Highway 28, northerly of Interstate Highway 90 and easterly of Grant County Road I Northwest (e) Stevens County north of Township 33 North of region 4 (f) Ferry and Pend Oreille counties of region 4 (g) Asotin County of region 10 (h) Garfield County south of Highway 12 (i) Columbia County from the Walla Walla County line on Highway 12, all areas south of Turner Road; at Turner Road to the Garfield county line, all areas south and east of Turner Road (j) Whitman County lying in Ranges 43 through 46 East of Townships 15 through 20 North; T14N, Ranges 44 through 46 East; and T13N, Ranges 45 and 46 East.
<p>((58)) <u>(60)</u> sowthistle, perennial <i>Sonchus arvensis ssp. arvensis</i></p>	<ul style="list-style-type: none"> (a) regions 1, 2, 3, 4, 7, 8, 9, 10 (b) Adams County of region 6 (c) region 5 except for sections 28, 29, 30, 31, 32, and 33 in T19N, R1E of Thurston and Pierce counties.
<p>((59)) <u>(61)</u> spurge, leafy <i>Euphorbia esula</i></p>	<ul style="list-style-type: none"> (a) regions 1, 2, 3, 4, 5, 6, 8, 9, 10 (b) region 7 except as follows: <ul style="list-style-type: none"> (i) T27N, R37E, Sections 34, 35, 36; T27N, R38E, Sections 31, 32, 33; T26N, R37E, Sections 1, 2, 3, 10, 11, 12, 13, 14, 15, 16, 26; T26N, R38E, Sections 5, 6, 7, 8 of Lincoln County (ii) T24N, R43E, Section 12, Qtr. Section 3, Parcel No. 9068 of Spokane County.
<p>((60)) <u>(62)</u> spurge, myrtle <i>Euphorbia myrsinites L</i></p>	<ul style="list-style-type: none"> (a) Pend Oreille County of region 4.
<p>((61)) <u>(63)</u> starthistle, yellow <i>Centaurea solstitialis</i></p>	<ul style="list-style-type: none"> (a) regions 1, 2, 3, 5, 6, 8 (b) region 4 except those areas within Stevens County bounded by a line beginning at the intersection of State Highway 20 and State Highway 25, then north to intersection with Pinkston Creek Road, then east along Pinkston Creek Road to intersection with Highland Loop Road, then south along Highland Loop Road to intersection with State Highway 20, then west along State Highway 20 to intersection with State Highway 25 (c) region 7 except those areas within Whitman County lying south of State Highway 26 from the Adams County line to Colfax and south of State Highway 195 from Colfax to Pullman and south of State Highway 270 from Pullman to the Idaho border (d) Franklin County (e) region 9 except Klickitat County

Name	Will be a "Class B designate" in all lands lying within:
	(f) in all lands lying within Asotin County, Region 10, except as follows: T11N, R44E, Sections 25, 26, 27, 28, 29, 31, 32, 33, 34, and 35; T11N, R45E, Sections 21, 22, 23, and 25; T11N, R36E, Sections 19, 20, 21, 28, 29, 30, 31, 32, and 33; T10N, R44E, Sections 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 15, and 16; T10N, R45E, Sections 23 and 24; T10N, R46E, Sections 7, 8, 17, 18, 19, 20, 21, 22, 27, 34, and 35; T9N, R46E, Sections 1, 2, 12, 13, 14, 23, 24, 25, 26, 35, and 36; T9N, R47E, Sections 18, 19, 30, and 31; T8N, R46E, Sections 1, 2, 3, 9, 10, 11, 12, 13, 14, 15, 16, 23, and 24; T8N, R47E, Sections 8, 17, 18, 19, 20, 29, 30, 31, and 32.
((62)) (64) Swainsonpea <i>Sphaerophysa salsula</i>	(a) regions 1, 2, 3, 4, 5, 7, 8 (b) Columbia, Garfield, Asotin, and Franklin counties (c) an area beginning at the Washington—Oregon border at the southwest portion of Section 15, R32E, T6N, then north to the northwest corner of Section 3, R32E, T7N, then east to the northeast corner of Section 3, R36E, T7N, then south to the southeast portion of Section 15, R36E, T6N, at the Washington—Oregon border, then west along the Washington—Oregon border to the point of beginning (d) Weed District No. 3 of Grant County (e) Adams County of region 6.
((63)) (65) thistle, musk <i>Carduus nutans</i>	(a) regions 1, 2, 3, 5, 6, 7, 8, 9, 10 (b) Spokane and Pend Oreille counties.
((64)) (66) thistle, plumeless <i>Carduus acanthoides</i>	(a) regions 1, 2, 3, 5, 6, 7, 8, 9, 10 (b) region 4 except those areas within Stevens County lying north of State Highway 20.
((65)) (67) thistle, Scotch <i>Onopordum acanthium</i>	(a) regions 1, 2, 3, 4, 5, 6, 8, 9 (b) region 7 except for those areas within Whitman County lying south of State Highway 26 from the Adams County line to Colfax and south of State Highway 195 from Colfax to Pullman and south of State Highway 270 from Pullman to the Idaho border (c) Franklin County.
((66)) (68) toadflax, Dalmatian <i>Linaria dalmatica ssp. dalmatica</i>	(a) regions 1, 2, 5, 8, 10 (b) Douglas County of region 3 lying south of T25N and west of R25E (c) Okanogan County lying within T 33, 34, 35N, R19, 20, 21, 22E, except the southwest, southeast, and northeast quarters of the northeast quarter of section 27, T35N, R21E; and the northeast quarter of the southeast quarter of section 27, T35N, R21E (d) Kittitas, Chelan, Douglas, and Adams counties of region 6 (e) Intercounty Weed District No. 51 (f) Weed District No. 3 of Grant County (g) Lincoln and Adams counties (h) The western two miles of Spokane County of region 7 (i) region 9 except as follows: (i) those areas lying within Yakima County

Name	Will be a "Class B designate" in all lands lying within:
((67)) (69) watermilfoil, Eurasian <i>Myriophyllum spicatum</i>	(ii) those areas lying west of the Klickitat River and within Klickitat County. (a) regions 1, 9, 10 (b) region 7 except Spokane County (c) region 8 except within 200 feet of the Columbia River (d) Adams County of region 6 (e) in all water bodies of public access, except the Pend Oreille River, in Pend Oreille County of region 4.

AMENDATORY SECTION (Amending WSR 05-01-012, filed 12/2/04, effective 1/2/05)

WAC 16-750-015 State noxious weed list—Class C noxious weeds.

Common Name	Scientific Name
archangel, yellow	<i>Lamiastrum galeobdolon</i>
babysbreath	<i>Gypsophila paniculata</i>
beard, old man's	<i>Clematis vitalba</i>
bindweed, field	<i>Convolvulus arvensis</i>
butterfly bush	<i>Buddleja davidii</i>
canarygrass, reed	<i>Phalaris arundinacea</i>
cockle, white	<i>Silene latifolia ssp. alba</i>
cocklebur, spiny	<i>Xanthium spinosum</i>
cress, hoary	<i>Cardaria draba</i>
odder, smoothseed alfalfa	<i>Cuscuta approximata</i>
goatgrass, jointed	<i>Aegilops cylindrica</i>
groundsel, common	<i>Senecio vulgaris</i>
hawkweed, nonnative species	<i>Hieracium sp.</i> , except species designated in the note in the left-hand column

Note:

This listing includes all species of *Hieracium*, except the following:

- Species designated as Class A noxious weeds in WAC 16-750-005;
- Species designated as Class B noxious weeds in WAC 16-750-011;
- Native species designated below:
 - Canada hawkweed (*H. canadense*)
 - houndstongue hawkweed (*H. cynoglossoides*)
 - long-beaked hawkweed (*H. longiberbe*)
 - narrow-leaved hawkweed (*H. umbellatum*)
 - slender hawkweed (*H. gracile*)
 - western hawkweed (*H. albertinum*)
 - white-flowered hawkweed (*H. albiflorum*)
 - woolley-weed (*H. scouleri*)

henbane, black	<i>Hyoscyamus niger</i>
iris, yellow flag	<i>Iris ((pseudocorus)) pseudacorus</i>

Common Name	Scientific Name
ivy, English, 4 cultivars only:	<i>Hedera hibernica</i> 'Hibernica' <i>Hedera helix</i> 'Baltica' <i>Hedera helix</i> 'Pittsburgh' <i>Hedera helix</i> 'Star'
mayweed, scentless	<i>Matricaria perforata</i>
poison-hemlock	<i>Conium maculatum</i>
pondweed, curly-leaf	<i>Potamogeton crispus</i>
reed, common, nonnative genotypes	<i>Phragmites australis</i>
rye, cereal	<i>Secale cereale</i>
spikeweed	<i>Hemizonia pungens</i>
St. Johnswort, common	<i>Hypericum perforatum</i>
tansy, common	<i>Tanacetum vulgare</i>
thistle, bull	<i>Cirsium vulgare</i>
thistle, Canada	<i>Cirsium arvense</i>
toadflax, yellow	<i>Linaria vulgaris</i>
water lily, fragrant	<i>Nymphaea odorata</i>
whiteweed, hairy	<i>Cardaria pubescens</i>
willow-herb, hairy	<i>Epilobium hirsutum</i>
wormwood, absinth	<i>Artemisia absinthium</i>

**WSR 06-20-068
PROPOSED RULES
DEPARTMENT OF TRANSPORTATION**

[Filed September 29, 2006, 1:42 p.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 06-16-136.

Title of Rule and Other Identifying Information: Chapter 468-15 WAC, Small works roster and WAC 468-15-040 Contractors questionnaire form—Information required.

Hearing Location(s): Department of Transportation Building, Commission Board Room 1D2, 310 Maple Park Avenue S.E., Olympia, WA 98504-7360, on November 20, 2006, at 8:30 a.m.

Date of Intended Adoption: November 20, 2006.

Submit Written Comments to: Kenneth A. Walker, P.O. Box 47360, Olympia, WA 98504-7360, e-mail walkeke@wsdot.a.gov, fax (360) 705-7017.

Assistance for Persons with Disabilities: Contact Ken Walker by November 6, 2006, TTY (360) 705-6980 or (360) 705-7017.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: Minor revisions to the rule to clarify and enhance the bidder pool for small works roster projects. Eliminates the requirement for submittal of an audited or reviewed financial statement as a condition for placement on a small works roster for projects estimated to cost \$200,000 or less.

Reasons Supporting Proposal: Discussion with potential contractors and agency staff concerning ways to obtain a larger pool of bidders for small works projects indicate a number of contractors competing for the small projects do not prepare an audited or reviewed financial statement due to the cost. The financial statement is a key element in the determination of a firm's maximum bidding capacity for larger projects, however small works roster projects are limited to \$200,000 or less by statute. This limiting factor and the bonding requirements ensures the state has adequate protection for small works projects. The revision will bring WSDOT's requirements more in line with the requirements of other state agencies.

Statutory Authority for Adoption: RCW 39.04.155.

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: Washington state department of transportation, governmental.

Name of Agency Personnel Responsible for Drafting: Ken Walker, 1A23 Transportation Building, (360) 705-7017; Implementation and Enforcement: Don Nelson, Transportation Building, (360) 705-7101.

No small business economic impact statement has been prepared under chapter 19.85 RCW. No negative impact to small business. This will potentially save small business the cost of preparing audited or reviewed financial statements and enhance their ability to compete for small public works contracts.

A cost-benefit analysis is not required under RCW 34.05.328. No negative impact to small business.

September 19, 2006

John F. Conrad, Assistant Secretary

Engineering and Regional Operations Division

AMENDATORY SECTION (Amending WSR 03-03-012, filed 1/7/03, effective 2/7/03)

WAC 468-15-040 Contractors questionnaire form—Information required. Contractors desiring to be included on a small works roster established by Washington state department of transportation pursuant to RCW 39.04.155, shall submit a completed ((standard)) small works roster questionnaire ((and financial form)) on a form prescribed by the secretary of transportation. Copies of the form may be obtained from the department's contract ad and award office. The completed questionnaire shall be prepared and transmitted to the secretary, attention: Contractor prequalification office. The questionnaire shall include the following information:

(1) The contractor's name, address, telephone number, fax number, e-mail address, and type of organization (corporation, partnership, sole proprietorship, etc.);

(2) A statement of ownership of the firm and, if a corporation, the name of the parent corporation, if any, and the names of any affiliated or subsidiary companies;

(3) State contractor's license number;

(4) State of Washington unified business identifier number (UBI) and UBI expiration date;

(5) Federal tax ID number;

(6) List of classes of work as enumerated on the form that the firm desires to be considered for such work class;

(7) Indication of those counties in which the contractor is interested in being considered for small works projects;

(8) Indication whether the contractor is certified as a minority or women's business enterprise or a disadvantaged business enterprise by the office of minority women business enterprises;

(9) List all contracts or subcontracts performed in whole or in part within the immediate three preceding years. Include the contract amount, date of completion, classes of work performed, owner or prime contractor's name, mailing address, phone number, fax number, and name of a contact person for the owner/prime for which the contractor performed the work. Only that work completed by the contractor's own organization under its own supervision will be considered for qualification. A minimum three completed projects must be listed.

(a) Personnel requirements.

(i) List principal officers and key employees indicating their years of experience in the classes of work for which qualification is sought.

(ii) A firm must have, within its own organization, qualified permanent, full-time personnel having the skills and experience including, if applicable, technical or specialty licenses, for each work class for which qualification is sought. Those firms seeking qualification for electrical work (classes 9, 16, 41, and 42) must provide photocopies of current Washington state electrical licenses. The skills and experience must be substantiated by education and practical experience on completed construction projects.

(iii) "Its own organization" shall be construed to include only the contractor's permanent, full-time employed office and site supervisory personnel. Workers of the organization shall be employed and paid directly by the prime contractor.

(b) The applicant shall list the following occurrences within the previous three years:

(i) Instances of having been denied qualification, or a license, or instances of having been deemed other than responsible by any public agency.

(ii) Convictions for felonies listed in WAC 468-16-050.

(iii) Failure to complete a contract.

~~(c) ((Complete financial statement for the contracting firm's last fiscal year. The contractor firm must have a positive net worth.~~

~~(d) A wholly owned subsidiary firm may file the latest consolidated financial statement of its parent corporation in lieu of a financial statement prepared solely for the subsidiary.~~

~~(e))~~ The ((standard)) small works roster questionnaire shall be processed as follows:

(i) A ((standard)) small works roster questionnaire will be reviewed and a written notice provided to the applicant,

within thirty days of its receipt, stating whether or not the applicant has qualified for or been denied qualification for the small works roster. The applicant will be advised of lack of receipt of data corroborating project completion and error or omissions in the questionnaire and a request for additional information necessary to complete the evaluation of the applicant. If the information is not provided within twenty calendar days of the request, the application will be processed, if possible, with the information available or it will be returned to the applicant without further action.

(ii) The department will enter the contractor's information on the appropriate small works roster. The department will notify the contractor by letter of placement on the appropriate small works roster. An applicant should not consider itself enrolled on the small works roster until receipt of such written notice.

It is the responsibility of the contractor to notify the department of any incorrect information set forth in the notice, and to notify the department of any change in the information set forth in its application.

WSR 06-20-069
PROPOSED RULES

DEPARTMENT OF TRANSPORTATION

[Filed September 29, 2006, 1:45 p.m.]

Original Notice.

Expedited rule making—Proposed notice was filed as WSR 06-08-060.

Title of Rule and Other Identifying Information: The Transportation Innovative Partnerships Act, proposed chapter 468-600 WAC et seq., are being proposed by the transportation commission in response to SHB 1541 enacted by the 2005 legislature. This law will provide a more desirable and effective approach to developing transportation projects in partnership with the private sector; greater flexibility in achieving the transportation project; allows for creative cost and risk sharing between the public and private partners. This law also states that the transportation commission shall be responsible for receiving, reviewing and approving proposals with the technical support of WSDOT.

Hearing Location(s): Department of Transportation Headquarters Building, Large Commission Board Room, 310 Maple Park Avenue S.E., Olympia, WA 98504, on November 15, 2006, at 1:00 p.m.

Date of Intended Adoption: November 15, 2006.

Submit Written Comments to: Jeff Doyle, Director, Public-Private Partnerships, P.O. Box 47395, Olympia, WA 98504-7395, e-mail doylej@wsdot.wa.gov, by November 10, 2006.

Assistance for Persons with Disabilities: Contact Wendy Harris by November 10, 2006, TTY (800) 833-6388 or (360) 705-7023.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The Transportation Innovative Partnership Act became law in June 2005. That law directs the Washington transportation commission to adopt administrative rules for the purpose of implementing and overseeing a public-private partnership program. The

purpose of this program is to encourage and facilitate private sector participation in the design, development, construction, financing, operations and maintenance of transportation-related facilities and programs. The private sector is eligible to participate in any or all of these aspects of transportation project delivery. Final approval of any public-private partnership proposal rests with the transportation commission.

Statutory Authority for Adoption: RCW 47.29.030 empowers the Washington state transportation commission to adopt rules.

Statute Being Implemented: Chapter 47.29 RCW, Transportation Innovative Partnership Act of 2005.

Rule is not necessitated by federal law, federal or state court decision.

Agency Comments or Recommendations, if any, as to Statutory Language, Implementation, Enforcement, and Fiscal Matters: The Washington transportation commission and WSDOT both encourage any comments and suggested improvements to be communicated to Jeff Doyle, either by conversation or written submission. At this present time, no specific funding has been provided to carry out the requirements of chapter 47.29 RCW. The commission and WSDOT both anticipate submitting a request for funding this program to the governor and the legislature in time for the 2007 legislative session, which begins in January 2007. Absent specific funding, the commission and WSDOT must manage the program within their budgetary and resource constraints.

Name of Proponent: Washington state department of transportation, governmental.

Name of Agency Personnel Responsible for Drafting and Implementation: Jeff Doyle, 310 Maple Park Avenue S.E., P.O. Box 47316, Olympia, WA 98504, (360) 705-7023; Enforcement: Reema Griffith, P.O. Box 47308, Olympia, WA 98504-7308, (360) 705-7070.

No small business economic impact statement has been prepared under chapter 19.85 RCW. These proposed rules govern a program that is 100% voluntary in participation by private industry. The rules relate to the process for reviewing, negotiating and approving public-private project agreements. The projects themselves may have impacts, which are subject to usual and customary analysis for impacts (such as environmental impact statements), but these administrative rules are not project-specific.

A cost-benefit analysis is not required under RCW 34.05.328. The promulgation of these rules is required under chapter 47.29 RCW, there are no fees or cost impacts imposed as a result of these rules. Further rule making will be required to establish application fees for the evaluation of unsolicited proposals.

September 28, 2006

Reema Griffith

Executive Director

Transportation Commission

Chapter 468-600 WAC

TRANSPORTATION INNOVATIVE PARTNERSHIP PROGRAM

NEW SECTION

WAC 468-600-010 Intent. The Transportation Innovative Partnership Act was created to encourage the innovative delivery and funding of important transportation-related projects and services by leveraging resources more readily available in the private sector.

The legislature has articulated the policy goals and objectives of the act, found in chapter 47.29 RCW. These rules are intended to prescribe the processes that will be used to implement a successful transportation innovative partnership program in the state of Washington.

NEW SECTION

WAC 468-600-015 Definitions. As used in these rules:

- (1) "Commission" means the Washington state transportation commission;
- (2) "Competing proposal" means a written submission to the department that a proposer submits in response to a notice issued by the department under WAC 468-600-320;
- (3) "Department" means the Washington state department of transportation;
- (4) "Eligible project" as defined in RCW 47.29.050 includes:
 - (a) Transportation projects, whether capital or operating, where the state's primary purpose for the project is to facilitate the safe transport of people or goods via any mode of travel. However, this does not include projects that are primarily for recreational purposes, such as parks, hiking trails, off-road vehicle trails, etc.; and
 - (b) Facilities, structures, operations, properties, vehicles, vessels, or the like that are developed concurrently with an eligible transportation project and that are capable of providing revenues to support financing of an eligible transportation project, or that are public projects that advance public purposes unrelated to transportation;
- (5) "Eligible public works project" means only a project that meets the criteria of either RCW 47.29.060 (3) or (4);
- (6) "Governor" means the governor of the state of Washington;
- (7) "Key persons" means individuals or personnel employed by or affiliated with a proposer or team of proposers, and who, because of that person's responsibilities and participation in a proposed project, the department has formally designated as key to the proposer's ability to successfully develop or deliver the project;
- (8) "Major partner" means, with respect to a limited liability company or joint venture, each firm, business organization or person that has an ownership interest therein in excess of five percent, unless the department has provided an alternate definition that applies only to a specific project or series of projects;

(9) "Major subcontractor" means any subcontractor designated in the proposal to perform ten percent or more of the scope of work for a proposed project, unless the department

has provided an alternate definition that applies only to a specific project or series of projects;

(10) "Private sector partner" and "private partner" means a person, entity or organization that is not the federal government, a state, or a political subdivision of the state and that proposes to enter into an agreement with the state to participate in any or all portions of the design, development, construction, improvement, expansion, extension, delivery, operation, maintenance or financing of a project eligible under the act;

(11) "Proposal" means a written submission to the department satisfying the requirements of WAC 468-600-105, 468-600-240 or 468-600-250;

(12) "Proposer" means a person, business entity, a consortium of business entities or a public sector entity that submit a proposal for review and evaluation under these rules, whether the proposal was solicited or unsolicited by the department;

(13) "Public facility" means a building, structure, vehicle, vessel or the like where ownership is retained by the public sector and where the facility is available for use by the general public. This does not include any facilities that are owned by the private sector;

(14) "Public funds" means all moneys derived from a public imposition of taxes, fees, charges and tolls, including those imposed by a private entity for the privilege to use a publicly owned facility;

(15) "Public-private partnership" and "PPP" mean a non-traditional arrangement between the department and one or more public or private entities for the implementation of an eligible project as defined in subsection (12) of this section;

(16) "Public project" means a project that is owned by the state or any of its political subdivisions;

(17) "Secretary" means the secretary of the Washington state department of transportation;

(18) "State" means the government of the state of Washington, including all agencies, organizations, boards, commissions, elected or appointed officials, who are empowered to act on behalf of the state of Washington;

(19) "Transportation Innovative Partnership Act" and "act" means the law enacted and codified in chapter 47.29 RCW, and any amendments thereto;

(20) "Transportation innovative partnership program" and "TIPP" means that portion of the department of transportation responsible for implementing and carrying out the duties prescribed in chapter 47.29 RCW, these rules, and under the powers conferred upon the department to implement the executive branch functions of state government;

(21) "WSDOT" means the Washington state department of transportation.

CONFLICT OF INTEREST, PROPOSER CONDUCT AND APPEARANCE OF FAIRNESS

NEW SECTION

WAC 468-600-030 Conflict of interest. (1) When submitting a proposal, the proposer's representative must certify that he or she is unaware of any information that might be pertinent in determining whether an organizational conflict of

interest exists. If the proposer is aware of information that might be pertinent to this issue, the proposer must provide, as an exception to the certification, a disclosure statement fully describing this information in a form approved by the commission as part of its proposal. For purposes of this section, "organizational conflict of interest" means that because of other activities or relationships with other persons, a proposer, a principal officer of a proposer, or a prime contractor who is proposed to perform construction or design work on an eligible project, is unable or potentially unable to render impartial assistance or advice to the state; or the person's objectivity in performing the proposed contract work is or might be otherwise impaired; or a person has an unfair competitive advantage.

(2) After review and approval by the commission, the department shall publish and make available conflict of interest guidelines and policies that encompass the standards of conduct required by federal and state law, and as further required in these administrative rules. The conflict of interest guidelines and policies may be modified as necessary to meet the particular objectives of individual projects, whether those projects emanate from solicited or unsolicited proposals.

NEW SECTION

WAC 468-600-035 Proposer conduct. (1) Proposers are prohibited from influencing or attempting to influence the evaluation of, or the decision to select a specific project proposal that has been submitted, or may be submitted under these rules, except as specifically allowed under these rules or as specifically allowed by the state in any RFP document. This includes, but is not limited to, attempts to influence officers or employees of the state or elected or appointed officials of the local, state or federal level of government.

(2) For those activities not prohibited by subsection (1) of this section, but which attempt to influence decision making in any legislative branch, proposers must fully disclose all lobbying activities undertaken by any of its contractors, officers, employees or agents that are subject to public disclosure under chapter 42.17 RCW or federal law. For lobbying activities subject to chapter 42.17 RCW, copies of all required disclosure forms for the previous two years' reporting cycles must be submitted.

NEW SECTION

WAC 468-600-038 Conflict of interest by state officials—Appearance of fairness. (1) Any person elected, appointed or employed by the state, who has a conflict of interest or potential conflict of interest, must disclose such actual or potential conflict of interest and abstain from consideration, discussion, debate, and decision making concerning any project proposal submitted under these rules.

(2) During the pendency of any solicitation, negotiation or selection of a proposal, no member of the commission may engage in ex parte communications with proponents or opponents with respect to the proposal, unless that person:

(a) Places on the record the substance of any written or oral ex parte communications concerning the decision of action; and

(b) Provides that a public announcement of the content of the communication and of the parties' rights to rebut the substance of the communication shall be made at each meeting where action is considered or taken on the subject to which the communication related. This prohibition does not preclude a member of the commission from seeking in a public meeting specific information or data from such parties relative to the decision if both the request and the results are a part of the public record.

NEW SECTION

WAC 468-600-040 Release of rights and indemnification of state. By submitting a proposal, a proposer thereby waives and relinquishes any claim, right, or expectation to occupy, use, profit from, or otherwise exercise any prerogative with respect to any route, corridor, rights of way, public property or public facility identified in the proposal as being necessary for or part of the proposed project. A proposer may not obtain any claim, right or expectation to use any such route, corridor, rights of way, public property or public facility by virtue of having submitted a proposal that proposes to use it or otherwise involves or affects it.

By submitting such a proposal, a proposer thereby waives and relinquishes any right, claim, copyright, proprietary interest or other right in any proposed location, site, route, corridor, rights of way, alignment, or transportation mode or configuration identified in the proposal as being involved in or related to the proposed project, and proposer agrees to indemnify and hold the state harmless against any such claim made by any of its contractors, subcontractors, agents, employees and assigns.

The waiver and release of rights in this section do not apply to a proposer's rights in any documents, designs and other information and records that constitute "sensitive business, commercial or financial information" as that term is defined and used in WAC 468-600-605.

SOLICITED PROPOSALS

NEW SECTION

WAC 468-600-100 Department to establish programmatic approach to solicitation of TIP projects. (1) The department shall establish a programmatic approach, or plan, for the selection and solicitation of TIP projects. The plan will include maintaining a registry of projects eligible for development under a competitive solicitation process. The projects must meet all eligibility requirements of WAC 468-600-015(4). The projects should be reasonably described, including the status of any preliminary development or construction, and any public or private funds committed for any phase of the project, whether expended, appropriated, earmarked or otherwise identified as available for use.

(2) The department shall periodically update the information in the registry, and shall review and consider additions or deletions to the registry at least every two years. When considering additional projects for the registry, or removal of the projects on the registry, the department must

publish a request for information that seeks comments and suggestions from the public and private sectors.

(3) At least once every two years, the department must develop a plan for conducting a solicitation of proposals under the TIP program. The purpose of this plan is to:

(a) Encourage sound programming and budgeting practices, which are the basis for submittals required under chapter 43.88 RCW;

(b) Ensure that the department does not issue a request for proposals that exceeds the resources available to properly evaluate, select and enter into development agreements;

(c) Ensure that development of projects under the TIP program would not run contrary to any legislatively enacted direction or express executive policies or directions; and

(d) Provide potential proposers an anticipated schedule for the solicitation and development of certain projects on the registry.

In selecting projects for competitive solicitation, the department should endeavor to follow the published plan for soliciting proposals for projects on the registry. However, the department is not required to solicit only those projects contained on the registry, nor is it required to conduct a solicitation for a predetermined number of projects each year or biennium, nor is it required to undertake projects in the exact order of consideration as published in the *Register*.

NEW SECTION

WAC 468-600-102 Selection of projects for solicitation. The department may select projects for development that it believes would benefit from the formation of a public-private partnership under the TIP program, and present a draft request for proposals for the selected project or projects to the commission for review and approval to proceed with a solicitation. In making its recommendation of projects for solicitation, the department should seek those that offer the greatest potential to accelerate cost-effective delivery of the project, promote innovative approaches to delivering the project, provide a means of financing for the project that might not otherwise be readily available under a traditional project delivery process, or otherwise meet the policy goals established in RCW 47.29.040. Before approving any projects proposed for solicitation, the commission must ensure that the projects are included in the Washington transportation plan or otherwise identified by the commission as being a priority need for the state.

NEW SECTION

WAC 468-600-103 Alternative process for soliciting projects authorized. When the department in its sole discretion deems it appropriate to do so given the nature of the proposal, the department may specify requirements for proposal content, and for criteria and procedures under which the proposals will be evaluated and selected, that are in addition to or in lieu of those provided for in WAC 468-600-105 through 468-600-110 and 468-600-300 through 468-600-350. Any alternative process or processes so specified must comply with the requirements of RCW 47.29.010 through 47.29.270. Examples of possible alternative processes include:

(1) Issuing a request for qualifications, where proposers are ranked and selected based on the qualifications of the major partners, major subcontractors and key persons, which would result in a predevelopment agreement being entered into that authorizes the proposer to fully develop a detailed proposal that would be evaluated pursuant to WAC 468-600-350;

(2) Issuing a request for proposals that invites the private sector to make proposals to develop eligible projects that are contained in the department's registry of projects under WAC 468-600-100.

These examples are offered for illustrative purposes only, and should not be construed to limit the scope of the state's discretion or authority to develop proposal and evaluation criteria and processes for any project as long as those criteria and processes comply with the requirements of RCW 47.29.010 et seq.

NEW SECTION

WAC 468-600-105 Issuance of requests for proposals. The department shall draft and issue requests for proposals at the direction or on behalf of the commission pursuant to WAC 468-600-103(2). When drafting requests for proposals (RFP) pursuant to RCW 47.29.103(2), the department must specify requirements for proposal content, and may identify criteria and procedures under which proposals will be evaluated and selected. If the commission approves the projects and the RFP proposed for solicitation, the department shall issue the RFP and publish notice as provided in WAC 468-600-106. The department may set the deadline for responses as it sees fit to encourage full knowledge, opportunity and competition among private entities. At a minimum, the request for proposals for each transportation project must include the following:

(1) **General information.**

(a) Notice of any preproposal conference as follows:

(i) The time, date and location of any preproposal conference;

(ii) Whether attendance at the conference will be mandatory or voluntary; and

(iii) A disclaimer that statements made by the department's representatives at the conference are not binding upon the state unless confirmed by written addendum.

(b) The name and title of the person authorized and designated by the department to receive the proposals and contact person (if different).

(c) Instructions and information concerning submission requirements including the address of the office to which proposals must be delivered and any other special information, e.g., whether proposals may be submitted by facsimile or electronic data interchange (secured e-mail).

(d) The time and date of closing after which the department will not accept proposals.

(e) The form and submission of proposals and any information required therein.

(f) If the agreement resulting from a solicitation will be a contract for a public work subject to chapter 39.12 RCW or the Davis-Bacon Act (40 U.S.C. section 3141 to 3148), a statement that no proposals will be considered by the state

unless the proposal contains a statement by the proposer, as part of its proposal, that proposer agrees to be bound by and will comply with the provisions of chapter 39.12 RCW and 40 U.S.C. section 3141 to 3148.

(g) Contractor's certification of nondiscrimination in obtaining required subcontractors in accordance with state law.

(h) How the state will notify proposers of addenda and how the state will make addenda available.

(2) **Project description.** A description of the eligible project for which the department is requesting proposals for a public-private partnership in such detail as the department considers appropriate or feasible under the circumstance.

(3) **Evaluation process.** A description of the process by which the proposals will be evaluated, including:

(a) A statement that the commission and/or department may reject any proposal not in compliance with all prescribed procedures and requirements and other applicable laws, and that the state reserves its rights under WAC 468-600-810 through 468-600-820;

(b) The anticipated solicitation schedule, deadlines, protest process, and evaluation process, if any; and

(c) Evaluation criteria that the state will use to select a proposal(s) from among those submitted in response to the request for proposals.

(4) **Desired contract terms.** The department shall provide an outline or draft term sheet of those contract terms and conditions, including warranties and bonding requirements, that the department considers necessary.

(5) **Federal funds.** If federal funds are involved, the federal laws, rules and regulations applicable to the fund requirements shall govern in the event they conflict with a provision required by state law.

NEW SECTION

WAC 468-600-110 Public notice of solicitation. (1) **Notice and distribution fee.** The commission, or the department acting on behalf of the commission, shall furnish notice to a sufficient number of entities for the purpose of fostering and promoting competition. The notice shall indicate where, when, how, and for how long the solicitation document may be obtained and generally describe the work. The notice may contain any other appropriate information. The department may charge a fee or require a deposit for the solicitation document. The department may furnish notice using any method determined to foster and promote competition, including:

(a) Mail notice of the availability of solicitation documents ("notice") to entities that have expressed an interest in department procurements;

(b) Place notice on the state of Washington's electronic procurement system; or

(c) Place notice on the department's and the commission's internet web site.

(2) **Method of publication.** The department shall furnish notice for every solicitation for proposals by any method that meets the requirements of RCW , including:

(a) Mail notice of the availability of solicitation documents ("notice") to entities that have expressed an interest in department procurements;

(b) Place notice on the state of Washington's electronic procurement system;

(c) Place notice on the department and commission's internet web site;

(d) Advertising - the department shall publish the advertisement for proposals at least once in at least one newspaper of general circulation in the area where the contract is to be performed, in at least one trade newspaper or publication of general statewide circulation and in as many additional issues and publications as the department may determine to be necessary or desirable to foster and promote competition.

(3) **Publication contents.** All advertisements for proposals shall set forth:

(a) The scheduled closing, that shall not be less than five days after the date of the last publication of the advertisement;

(b) The date that entities must file applications for prequalification if prequalification is a requirement and the class or classes of work for which entities must be prequalified;

(c) The nature of the work to be performed or the goods to be purchased;

(d) The office where any documents related to the solicitation may be reviewed;

(e) The name, title and address of the department employee authorized to receive proposals; and

(f) If applicable, that the contract is for a public work subject to chapter 39.12 RCW or the Davis-Bacon Act (40 U.S.C. sections 3141 to 3148).

(4) **Posting advertisement for proposals.** The department shall post a copy of each advertisement for proposals at the principal business office of the department. A proposer may obtain a copy of the advertisement for proposals upon request from the transportation innovative partnership program office, or on the internet at www.wsdot.wa.gov.

(5) **Notice to state office of minority and women's business enterprises (OMWBE).** The department shall provide timely notice of all solicitations to the state office of minority and women's business enterprises.

UNSOLICITED PROPOSALS

NEW SECTION

WAC 468-600-200 Authority for the state to accept unsolicited proposals—Moratorium. The commission may not accept or consider any unsolicited proposals before July 1, 2007.

NEW SECTION

WAC 468-600-210 Projects eligible for unsolicited proposals. Projects that are the subject of an unsolicited proposal must meet the following minimum criteria:

(1) The project must meet the definition of an "eligible project" under WAC 468-600-015(4);

(2) The project must not be listed in the registry of projects intended for a competitive solicitation, under WAC 468-600-100;

(3) The project must be included in the Washington transportation plan or otherwise identified by the commission as being a priority need of the state.

NEW SECTION

WAC 468-600-215 Department's management of unsolicited proposals. (1) The department may, at any time, select any class, category or description of proposal or an eligible project, including any individual proposal or project, for the purpose of giving priority to the processing and consideration of unsolicited proposals by issuing a written order that declares that the department will give priority to the processing and consideration of unsolicited proposals for certain types of projects (or to a particular proposal), and describes the class or character of the proposals or projects (or the particular proposal or project) that are given priority. The priority order may either specify the term of the priority order, identify the submitted proposals (or proposal) that are subject to the priority order, or provide that the priority order will continue in effect until recalled by a subsequent order of the department.

(2) Commencing on the effective date of the order giving priority, the department may undertake expedited processing and consideration of unsolicited proposals (or a particular unsolicited proposal) for transportation projects of the class, category or description contained in the order. The limited resources of the department, in such cases, will require either the postponement of, or delay in, the processing and consideration of unsolicited proposals for projects that are not within a class, category or description that is subject to a priority order.

(3) By submitting an unsolicited proposal, each proposer thereby waives and relinquishes every claim of right, entitlement or expectation that:

(a) Its proposal will enjoy the benefit of a priority order; and

(b) The processing and consideration of its proposal will not be subject to postponement or delay arising out of the department's issuance of an order that gives priority to another proposal or to proposals for different classes, categories or descriptions of projects.

(4) The department may, by written order, suspend the acceptance and consideration of proposals based on the types, classes, cost ranges, geographic areas of projects, or other factors as determined by the department. The order will specify either the term of the suspension or that the suspension will continue until recalled by a subsequent order of the department.

(5) Commencing on the effective date of the suspension order, the department will refuse to accept unsolicited proposals or unsolicited proposals for projects of the class, category or description contained in the order, and may, as stated in the order, cease further processing and consideration of any such unsolicited proposals then currently under consideration by the department.

(6) By submitting an unsolicited proposal, each proposer thereby waives and relinquishes every claim of right, entitlement or expectation that the processing and consideration of its proposal will not be subject to suspension under this rule.

(7) The state of Washington, the department of transportation, the Washington transportation commission, and their officers and employees, shall have no responsibility or liability of any nature for the preservation, confidentiality or safe-keeping of any proposal that is subject to a suspension order under this rule and is submitted to the department while that suspension order is in effect.

NEW SECTION

WAC 468-600-220 Submission of unsolicited conceptual proposals. (1) Subject to WAC 468-600-210 through 468-600-215, any private entity or unit of government may submit an unsolicited conceptual proposal for a project to the department for consideration under the transportation innovative partnership program.

(2) A proposal review fee in the amount prescribed by WAC 468-600-230 must accompany any unsolicited conceptual proposal submitted by a private entity or unit of government.

(3) The proposer shall submit twenty copies, individually identified, of any unsolicited conceptual proposal in addition to the proposal bearing the signature of the authorized representative. The original proposal, required copies and processing fee shall be delivered to the department.

(4) The department will consider an unsolicited conceptual proposal only if:

(a) The proposed project is unique or innovative in comparison with, and is not substantially duplicative of, other transportation system projects included in the state transportation improvement program within the department or, if it is similar to a project in the state transportation improvement program, the proposed project has not been fully funded by the state or any other public entity as of the date the proposal is submitted, or the proposal offers an opportunity to materially advance or accelerate the implementation of the project. Unique or innovative features that may be considered by the department in evaluating such a proposal may include but are not limited to unique or innovative financing, construction, design, schedule or other project components as compared with other projects or as otherwise defined by state rules or regulations; and

(b) The conceptual phase includes all information required by and is presented in the format set out in WAC 468-600-540. Such information shall include a list of any proprietary information included in the proposal that the proposer considers protected trade secrets or other information exempted from disclosure under either WAC 468-600-605 or RCW 47.29.190.

(5) The department will not consider an unsolicited proposal for a project involving another state or local government unit of another state unless the department and the appropriate representative of the other state or of the local government unit of the other state have entered into an agreement that permits the acceptance of unsolicited proposals for such a project.

NEW SECTION

WAC 468-600-230 Fees to accompany unsolicited proposals. (Reserved.)

NEW SECTION**WAC 468-600-232 Alternative process authorized.**

When the department in its sole discretion deems it appropriate to do so given the nature of the proposal, the department may specify requirements for proposal content, and for criteria and procedures under which the proposals will be evaluated and selected, that are in addition to or in lieu of those provided for in WAC 468-600-240 through 468-600-370. Any alternative process or processes so specified must comply with the requirements of RCW 47.29.010 through 47.29-270. Examples of possible alternative processes include:

(1) Selecting a proposal for development into a final agreement based on a unitary proposal instead of a two-step conceptual/detailed proposal process; and

(2) Proposers are ranked and selected based on the qualifications of the major partners, major subcontractors and key persons, which would result in a predevelopment agreement being entered into that authorizes the proposer to fully develop a detailed proposal that would be evaluated pursuant to WAC 468-600-350.

(3) Nothing in this section, nor in these WAC rules, shall be construed to allow proposer conduct or participation in a project that would be prohibited under the Federal Highway Administration's *Conflict of Interest Guidelines*.

These examples are offered for illustrative purposes only, and should not be construed to limit the scope of the state's discretion or authority to develop proposal and evaluation criteria and processes for any project as long as those criteria and processes comply with the requirements of RCW 47.29.010 et seq.

NEW SECTION

WAC 468-600-240 Contents and format of conceptual proposals. Pursuant to RCW 47.29.170, unsolicited proposals are subject to a two-step process. The first step is to submit the conceptual proposal. If the concept is approved, the commission or department may ask for further information in the form of a fully detailed proposal, which constitutes the second step. An unsolicited or competing conceptual proposal shall include at least the following information, unless waived by the department, separated by tabs as herein described:

(1) TAB 1: Qualifications and experience.

(a) Identify the legal structure of the private entity or consortium of private entities or of private and public entities (the "team") submitting the proposal. Identify the organizational structure of the team for the project, the team's management approach and how each major partner and major subcontractor identified as being a part of the team as of the date of submission of the proposal fits into the overall team.

(b) Describe the experience of each private entity involved in the proposed project. Describe the length of time in business, business experience, public sector transportation experience, PPP experience, development experience, design-build experience and other similarly sized engagements of each major partner and major subcontractor. The lead entity must be identified.

(c) Provide the names, addresses and telephone numbers of persons within the team who may be contacted for further information.

(d) Include the address, telephone number, and the name of a specific contact person at a public entity for which the private entity or the team or the primary members of the team have completed a development project, public-private partnership project or design-build project.

(e) Include the resumes for those managerial persons within the team that will likely be associated in a significant way with the project development and implementation.

(f) Provide financial information regarding the private entity or team and each major partner that includes, if available, the most recent independently audited financial statement of the private entity or team and of each major partner, and which demonstrates their ability to perform the work and project as set forth in the proposal, including ability to obtain appropriate payment and performance bonds.

(g) Submit executed disclosure forms, prescribed by the department, for the team, each major partner and any major subcontractor.

(2) TAB 2: Project characteristics.

(a) Provide a topographical map (1:2,000 or other appropriate scale) depicting the location of the proposed project.

(b) Provide a description of the eligible project or projects, including all proposed interconnections with other existing transportation facilities or known publicly identified projects.

(c) Describe the project in sufficient detail so the type and intent of the project, the general location of the project, and the communities that may be affected by the project are clearly identified. Describe the assumptions used in developing the project.

(d) List the critical factors for the project's success.

(e) If the proposed project does not conform with the state and regional transportation plans or regional plans, outline the proposer's approach for securing the project's conformity with, or indicate the steps required for, acceptance into such plans.

(f) When a proposed project is sited, in whole or in part, within the jurisdiction of a metropolitan planning organization or area commission on transportation, identify applicable regional and local approvals required for the project.

(g) Provide an explanation of how the proposed transportation project would impact local transportation plans of each affected locality.

(h) Provide a list of public transportation facilities and major apparent public utility facilities that will be crossed or affected by the transportation project and a statement of the proposer's plans to accommodate such facilities.

(i) Describe the role the proposer anticipates the department will have in the development, construction, operation, maintenance, financing, or any other aspect of the eligible project.

(3) TAB 3: Project financing.

(a) Provide a projected budget for the project or scope of work based on proposer's prior experience on other scopes of work and projects or other cost projection factors and information.

(b) Include a list and discussion of assumptions (e.g., user fees, toll rates and usage of the facility) underlying all major elements of the plan for the project.

(c) Identify the proposed risk factors relating to the proposed project financing and methods for dealing with these factors.

(d) Identify any significant local, state or federal resources that the proposer contemplates requesting for the project. Describe the total commitment (financial, services, property, etc.), if any, expected from governmental sources; the timing of any anticipated commitment; and its impact on project delivery.

(e) Identify any aspect of the financial model for the project that implicates or potentially implicates restrictions on the use of highway-related revenues under Article II, section 40 of the Washington Constitution (commonly known as the Motor Vehicle Trust Fund), and explain how the financial model avoids conflicting with those restrictions.

(f) Provide a conceptual estimate of the total cost of the transportation project.

(4) TAB 4: Public support/project benefit/compatibility.

(a) Identify who will benefit from the project, how they will benefit and how the project will benefit the overall transportation system.

(b) Identify any anticipated government support or opposition, or general public support or opposition, for the project.

(c) Explain the strategy and plans that will be carried out to involve and inform the agencies and the public in areas affected by the project.

(d) Describe the significant social and economic benefits of the project to the community, region or state and identify who will benefit from the project and how they will benefit. Identify any state benefits resulting from the project including the achievement of state transportation policies or other state goals.

(5) All pages of a conceptual proposal shall be numbered. Each copy of the proposal will be bound or otherwise contained in a single volume where practicable. All documentation submitted with the proposal will be contained in that single volume.

(6) A conceptual proposal submitted by a private sector partner must be signed by an authorized representative of the private sector partner submitting the unsolicited conceptual proposal.

(7) The proposer shall include a list of any proprietary information included in the proposal which the proposer considers protected trade secrets or other information exempted from disclosure under WAC 468-600-605.

NEW SECTION

WAC 468-600-250 Contents and format of detailed proposals. If the preliminary conceptual proposal is accepted, the commission or the department may request a detailed proposal. A detailed proposal shall include all information required in the conceptual proposal under WAC 468-600-240, with additional discussion, description and details, and with updates and refinements as necessary to keep the

document most current. In addition, the following information must be included, unless waived by the department:

(1) TAB 2: Project characteristics.

(a) Provide a detailed description of the eligible project or projects, including all proposed interconnections with other existing transportation facilities or known publicly identified projects. Describe the project in sufficient detail so the type and intent of the project, the general location of the project, and the communities that may be affected by the project are clearly identified. Describe the assumptions used in developing the project.

(b) Identify any significant local, state or federal services or practical assistance that the proposer contemplates requesting for the project. In particular, identify and describe any significant services that will need to be performed by the department such as right of way acquisition or operation and maintenance of the completed project.

(c) Include a preliminary list of all significant federal, state, regional and local permits and approvals required for the project. Identify which, if any, permits or approvals are planned to be obtained by the department.

(d) List the critical factors for the project's success.

(e) Identify the proposed preliminary schedule for implementation of the project.

(f) Describe the assumptions related to ownership, law enforcement and operation of the project and any facility that is part of the project.

(g) Describe the payment and performance bonds, guarantees, letters of credit and other performance security, if any, that the proposer will provide for the project.

(h) Identify any public improvements that will be part of the proposed project that will constitute "public works" under RCW 47.29.020(5), the workers on which must be paid in accordance with Washington's prevailing rate of wage law, chapter 39.12 RCW, and any public improvements the workers on which must be paid in accordance with the federal Davis-Bacon Act, 40 U.S.C. sections 3141 to 3148.

(2) TAB 3: Project financing.

(a) Identify the form and amount of any private capital contribution and the entities that will make such capital contributions. If other forms of contribution are proposed, describe the nature of the contributions, the fair market value (if applicable), and whether compensation for such contributions will be sought.

(b) If the proposal would provide for a state-granted franchise to a private concessionaire in exchange for financial consideration, provide the proposer's financial model and all capital costs, operating and maintenance costs (including reconstruction, resurfacing, restoration, and rehabilitation costs), revenues and other data and assumptions that comprise the base case financial model.

(c) Provide an explanation of how funds for the project will be segregated, accounted for and expended in a manner that ensures that any moneys protected under Article II, section 40 of the Washington Constitution be expended exclusively for the purposes authorized under that provision.

(d) Identify, to the extent possible, proposed financing team members, including banks, investment banks, equity investors, credit enhancement providers, bond trustees and legal counsel to the same.

(3) TAB 5: Special deliverables.

(a) Provide a statement setting out the plan for securing all necessary real property, including proposed timeline for any necessary acquisitions.

(b) Provide proposed design, construction and completion guarantees and warranties.

(c) Include traffic studies and/or forecasts and related materials that establish project revenue assumptions, including, if any, user fees or toll rates, and usage of the facility.

(d) Provide such additional material and information as the department may reasonably request.

(4) All pages of a proposal shall be numbered. Each copy of the proposal shall be bound or otherwise contained in a single volume where practicable. All documentation submitted with the proposal will be contained in that single volume.

(5) A proposal submitted by a private sector partner must be signed by an authorized representative of the private sector partner submitting the proposal.

(6) The proposer shall clearly mark any proprietary information included in the proposal which the proposer considers protected trade secrets or other information exempted from disclosure under RCW 47.29.190 and WAC 468-600-605. Any individual page containing material that the proposer considers proprietary must be stamped "proprietary."

REVIEW, EVALUATION AND SELECTION OF PROPOSALS

NEW SECTION

WAC 468-600-300 Additional disclosure requirements for proposers of solicited and unsolicited proposals. (1) In addition to the disclosure requirements of WAC 468-600-600, the department may impose, after the submission of a proposal, any other special disclosure requirements the department determines to be reasonably necessary to evaluate the expertise, experience, financial backing, integrity, ownership and control of any proposer.

(2) All proposers must provide all the information required by this rule and by the department. All proposers and key persons must complete and submit the required disclosure form within the deadlines set by the department. All proposers and key persons must provide any documents required in the disclosure process, or other documents as determined by the department, or their proposals may be rejected by the department.

(3) The department may reject, or require the supplementation of, a proposal if the proposer has not provided all information required in the disclosure form or if any information provided is not accurate, current or truthful. The failure or refusal of any proposer to properly execute, fully complete, or accurately report any information required by the required disclosure shall be sufficient grounds for rejection of the proposal.

(4) Any change in the status of the proposer, in the identity of any of the key persons, or the addition of any key persons must be reported to the department within thirty days of the known change, and those whose status has changed or who have been added as key persons will be required to sub-

mit the required disclosure information. For purposes of this section, a "change in the status of a proposer" means a reorganization of the business structure or corporate structure of the proposer or a major partner, or a change in ownership of the proposer or a major partner amounting to a transfer of over twenty percent of the entity's ownership.

(5) The burden of satisfying the department's disclosure requirements, both in terms of producing the disclosures and assuring their accuracy and completeness, resides with each proposer.

(6) Each proposer, by submitting a proposal, thereby accepts all risk of adverse public notice, damages, financial loss, criticism, harm to reputation or embarrassment that may result from any disclosure or publication of any material or information required or requested by the state in connection with the proposer's submission of a proposal. In submitting a proposal, the proposer expressly waives, on behalf of itself, its partners, joint venturers, officers, employees and agents, any claim against the secretary, the state of Washington, the commission, the department and their officers and employees, for any damages that may arise therefrom.

(7) A public entity that submits a proposal may, prior to submission, request the department to waive the disclosure requirements of this rule with respect to the corporate public entity and its officers. However, if the public entity proposes to enter into or establish a partnership or joint venture with a private sector partner to perform any substantial portion of the proposed project (as opposed to the engagement of only a prime contractor or subcontractors), then disclosure of the private party must be made as if the private party is a proposer, in accordance with this rule.

NEW SECTION

WAC 468-600-305 Appointment of evaluation panel. The commission shall appoint and direct an evaluation panel to commence a review and evaluation process as directed in this section. At a minimum, the evaluation panel must consist of:

- (1) Department staff;
- (2) An independent representative of a consulting or contracting firm with no interests in the project, whose firm would be precluded from participating in any part of the project;
- (3) An observer from the state auditor's office or the joint legislative audit and review committee;
- (4) A person appointed by the commission; and
- (5) A financial expert.

NEW SECTION

WAC 468-600-310 Preliminary review of proposals. (1) For solicited proposals, after the close of the proposal period, the department will conduct a preliminary review and certify receipt of those submitted proposals that have met the following criteria:

- (a) The proposal is complete;
- (b) The proposal is responsive; and
- (c) The proposal meets any additional procedural or process requirements prescribed by the state.

Solicited proposals certified by the department under this subsection will be forwarded to the evaluation panel under WAC 468-600-305.

(2) Unsolicited conceptual proposals submitted under WAC 468-600-220 will be reviewed by the evaluation panel, as created and assembled under WAC 468-600-305. The evaluation panel will initially determine whether the conceptual proposal is eligible for evaluation pursuant to WAC 468-600-200 (state's authority to accept unsolicited proposals—Moratorium); WAC 468-600-210 (Projects eligible for unsolicited proposals) and WAC 468-600-215 (management of unsolicited proposals). If not, the evaluation panel will not proceed further with its evaluation and the department may return the proposal to the proposer. If the conceptual proposal is eligible for evaluation, the evaluation panel will assess:

- (a) Whether the proposal is complete;
- (b) Whether the proposer appears qualified;
- (c) Whether the proposal appears to satisfy the requirements of WAC 468-600-240;
- (d) Whether the project as proposed appears to be technically and financially feasible;
- (e) Whether the project as proposed appears to have the potential of enhancing the state transportation system; and
- (f) Whether the project as proposed appears to be in the public interest.

(3) The evaluation panel will report the results of its evaluation and its recommendation to the commission. The recommendation will not include sensitive business, commercial or financial information or trade secrets as described in WAC 468-600-605.

NEW SECTION

WAC 468-600-315 Commission review of unsolicited conceptual proposals. Following an assessment by the evaluation panel that an unsolicited conceptual proposal merits further review, the commission will review the recommendation and approve or disapprove the proposal for further evaluation and action by the state. If approved for further review, the commission shall direct the proposer to prepare a detailed proposal pursuant to WAC 468-600-250.

NEW SECTION

WAC 468-600-320 Competing proposals. (1) If the commission grants approval of a conceptual proposal for further evaluation and review, within thirty days of the commission's approval the department shall provide public notice of the proposed project. This notice shall:

- (a) Be published in a newspaper of general circulation and upon such electronic web site providing for general public access as the department may develop for such purpose;
- (b) Be provided to any county, city, metropolitan service district, or transportation district in which the project will be located;
- (c) Be provided to any person or entity that expresses in writing to the department an interest in the subject matter of the unsolicited conceptual proposal and to any member of the legislature whose house or senate district would be affected by such proposal;

(d) Outline the general nature and scope of the unsolicited conceptual proposal, including the location of the transportation project and the work to be performed on the project; and

(e) Specify the address to which any competing conceptual proposal must be submitted.

(2) The department may also elect to deliver such notice directly to any person or entity the department believes may have an interest in submitting a competing conceptual proposal.

(3) Any entity that elects to submit a competing conceptual proposal for the proposed project shall submit a written letter of intent to do so not later than thirty calendar days after the department's initial publication of notice. Any letter of intent received by the department after the expiration of the thirty-day period shall not be valid and any competing conceptual proposal submitted thereafter by a private or governmental entity that has not submitted a timely letter of intent shall not be considered by the department.

(4) An entity that has submitted a timely letter of intent must submit its competing conceptual proposal to the department not later than one hundred twenty calendar days after the department's initial publication of notice under subsection (1) of this section, or such other time as the department provides in the notice. The competing conceptual proposal must:

- (a) Be signed by an authorized representative of the proposer;
- (b) Be accompanied by the processing fee for conceptual proposals required under WAC 468-600-230; and
- (c) Include the information and be organized in the manner required of an unsolicited conceptual proposal under WAC 468-600-240.

(5) Any competing conceptual proposal that is received within the time provided in subsection (4) of this section must be forwarded to the evaluation panel as provided in WAC 468-600-310. The panel must:

- (a) Evaluate the competing conceptual proposal under the criteria specified in WAC 468-600-310; and
- (b) Determine whether the competing proposal(s) differ from the original unsolicited conceptual proposal in such a significant and meaningful manner that they should be treated as an original unsolicited conceptual proposal. If the evaluation panel believes that a proposal submitted as a competing proposal should be treated as an original unsolicited conceptual proposal and that it satisfies the requirements of WAC 468-600-240, the evaluation panel shall forward the proposal to the commission for preliminary review and approval under WAC 468-600-315, and the proposal shall thereafter be processed under these rules in the same manner as an unsolicited conceptual proposal. If the competing conceptual proposal is not to be treated as an original unsolicited conceptual proposal, the competing conceptual proposal will be reviewed by the evaluation panel as provided in WAC 468-600-330 through 468-600-350.

NEW SECTION

WAC 468-600-330 Proposal evaluation factors and criteria. For solicited proposals, the evaluation panel shall

assess the certified proposals based on the unique project-specific evaluation criteria identified in the solicitation documents, including any written amendments or clarifications thereto, and upon any other factors the panel believes is necessary to ensure a successful project that benefits the public interest.

For unsolicited and competing proposals, the evaluation panel must consider the following factors:

(1) **Qualifications and experience.** Has the proposer created a team that is qualified, managed, and structured in a manner that will enable the team to complete the proposed project and perform the proposed scope of work?

(a) **Experience with similar infrastructure projects.** Have members of this team previously worked together or in a substantially similar consortium or partnership arrangement constructing, improving operating, maintaining or managing transportation infrastructure? Has the lead firm managed, or any of the member firms worked on, a similar public-private partnership project?

(b) **Demonstration of ability to perform work.** Does the team possess the necessary financial, staffing, equipment, and technical resources to successfully complete the project and perform the proposed scope of work? Do the team and/or member firms have competing financial or workforce commitments that may inhibit success and follow-through on this project?

(c) **Leadership structure.** Is one firm designated as lead on the project? Does the organization of the team indicate a well thought out approach to managing the project? Is there an agreement/document in place between members?

(d) **Project manager's experience.** Is a project manager identified, and does this person work for the principal firm? If not, is there a clear definition of the role and responsibility of the project manager relative to the member firms? Does the project manager have experience leading this type and magnitude of project?

(e) **Management approach.** Have the primary functions and responsibilities of the management team been identified? Have the members of the team developed an approach to facilitate communication among the project participants? Has the firm adequately described its approach to communicating with and meeting the expectations of the state?

(f) **Financial condition.** Is the financial information submitted on the forms sufficient to determine the firms' capability to fulfill its obligations described in the project proposal, and is that capability demonstrated by the submitted information?

(g) **Project ownership.** Does the proposal identify the proposed ownership arrangements for each phase of the project and clearly state assumptions on legal liabilities and responsibilities during each phase of the project?

(h) **Competitive subcontracting.** To what extent have adequate procurement policies been adopted by the proposer to ensure opportunities for competitive procurement of work, services, materials and supplies that the proposer will subcontract?

(2) **Project characteristics.** Is the proposed project technically feasible?

(a) **Project definition.** Is the project described in sufficient detail to determine the type and size of the project, the

location, all proposed interconnections with other transportation facilities, the communities that may be affected, and alternatives (e.g., alignments) that may need to be evaluated?

(b) **Proposed project schedule.** Is the time frame for project completion clearly outlined? Is the proposed schedule reasonable given the scope and complexity of the project?

(c) **Quality management.** Does the proposer present a quality management plan, including quality control and quality assurance processes, that are good industry practice and are likely to result in delivery of a project and services that meet the department's standards and comply with contract requirements?

(d) **Operation.** Does the proposer present a reasonable statement setting forth plans for operation of the project or facilities that are included in the project?

(e) **Technology.** Is the proposal based on proven technology? What is the degree of technical innovation associated with the proposal? Will the knowledge or technology gained from the project benefit other areas of the state or nation? Does the technology proposed maximize interoperability with relevant local and statewide transportation technology? Can the proposed project upgrade relevant local technology?

(f) **Conforms to laws, regulations, and standards.** Is the proposed project consistent with applicable state and federal statutes and regulations, or reasonably anticipated modifications of state or federal statutes, regulations or standards? Does the proposed design meet applicable state and federal standards?

(g) **Federal permits.** Is the project outside the purview of federal oversight, or will it require some level of federal involvement due to its location on the National Highway System or Federal Interstate System or because federal permits are required? Does the proposal identify the primary federal permits and agencies that will be involved in review and oversight of the project?

(h) **Meets/exceeds environmental standards.** Is the proposed project consistent with applicable state and federal environmental statutes and regulations? Does the proposed design meet applicable state environmental standards? Does the proposal adequately address air quality issues?

(i) **State and local permits.** Does the proposal list the required permits and provide a schedule for obtaining them? Are there known or foreseeable negative impacts arising from the project? If so, does the proposal outline a plan to address those negative impacts? Are alternatives to standards or regulations needed to avoid those impacts that cannot be addressed?

(j) **Right of way.** Does the proposal set forth a method or plan to secure all property interests required for the transportation project?

(k) **Maintenance.** Does the proposer have a plan to maintain any facilities that are part of the proposed transportation project in conformance with department standards? Does the proposal clearly define assumptions or responsibilities during the operational phase including law enforcement, toll collection and maintenance? Under the proposal, will maintenance and operation of any new facilities be consistent with standards applied throughout the highway system and use the same work forces and methods?

(3) **Project financing.** Has the proposer provided a financial plan that allows access to the necessary capital to make a substantial contribution of nonstate, private sector, or other innovative financing resources to the financing of the facility or project?

(a) **Financing.** Did the proposer demonstrate evidence of its experience, ability and commitment to provide a sufficient private-sector contribution or other innovative financing contribution of funds or resources to the project as well as the ability to obtain the other necessary financing?

(b) **Conformance with RCW 47.29.060.** Does the proposed financing plan conform to any requirements of state-issued debt under RCW 47.29.060? If the proposed financing plan is not in conformance, has the proposer committed to seeking any necessary legislative or other state approvals in order to proceed with the financing plan as proposed?

(c) **Financial plan.** Does the financial plan demonstrate a reasonable basis for funding project development and operations? Are the assumptions on which the plan is based well defined and reasonable in nature? Are the plan's risk factors identified and dealt with sufficiently? Are the planned sources of funding and financing realistic? Is the proposer willing to place private capital at risk in order to successfully deliver the project? Does the proposer adequately identify sources of nonstate funding that it anticipates including in the project financing, and does the proposer provide adequate assurance of the availability of those funds and the reliability of the funding sources?

(d) **Estimated cost.** Is the estimated cost of the project reasonable in relation to the cost of similar projects?

(e) **Life-cycle cost analysis.** Does the proposal include an appropriately conducted life-cycle cost estimate of the proposed project and/or facility? How does the life-cycle cost impact the projected rate of return?

(f) **Financial model.** If the procurement is for a concession agreement, does the proposal present a sound base case financial model? Are the assumptions in the financial model reasonable and realistic?

(g) **Business objective.** Does the proposer clearly articulate its reasons for pursuing this project? Do its assumptions appear reasonable?

(4) **Public support.** Has the proposer demonstrated sufficient public support for the proposed project or proposed a reasonable plan for garnering that support?

(a) **Community benefits.** Will this project bring a significant transportation and economic benefit to the community, the region, and/or the state? Are there ancillary benefits to the communities because of the project?

(b) **Community support.** What is the extent of known support or opposition for the project? Does the project proposal demonstrate an understanding of the national and regional transportation issues and needs, as well as the impacts this project may have on those needs? Is there a demonstrated ability to work with the community? Have affected local jurisdictions expressed support for the project?

(c) **Public involvement strategy.** What strategies are proposed to involve local and state elected officials in developing this project? What level of community involvement is contemplated for the project? Has the proposer articulated a clear strategy for informing and educating the public and for

obtaining community input throughout the development and life of the project?

(5) **Project compatibility.** Is the proposed project compatible with, or can it be made compatible with state and local comprehensive transportation plans?

(a) **Compatibility with the existing transportation system.** Does this project propose improvements that are compatible with, or that can be made compatible with, the present and planned transportation system? Does the project provide continuity with existing and planned state and local facilities?

(b) **Fulfills policies and goals.** Does the proposed project help achieve performance, safety, mobility or transportation demand management goals? Does the project improve connections among the transportation modes?

(c) **Conformity with local, regional and state transportation plans.** Does the project conform with, or can it achieve conformity with, city and county comprehensive plans and regional transportation plans? Does the project conform with, or can it achieve conformity with, plans developed by the commission and any applicable regional transportation plans or local transportation programs? If not, are the steps proposed in the proposal to achieve conformity with such plans adequate and appropriate to provide a high likelihood that the project and the applicable plans can be brought into conformity?

(d) **Economic development.** Will the proposed project enhance the state's economic development efforts? Is the project critical to attracting or maintaining competitive industries and businesses to the region, consistent with stated objectives?

NEW SECTION

WAC 468-600-331 Factors for proposals that include tolling. If the project financing component of a proposal includes a plan to impose tolls, the evaluation panel shall specifically consider:

(1) The opinions and interests of units of government encompassing or adjacent to the path of the proposed tollway project in having the tollway installed;

(2) The potential impact of the proposed tollway project on local environmental, aesthetic and economic conditions and on the economy of the state in general;

(3) The extent to which funding other than state funding is available for the proposed tollway project and the extent to which resources other than tolls would be required to be established and/or maintained as necessary security to support such a financing;

(4) The likelihood that the estimated use of the tollway project will provide sufficient revenues to independently finance the costs related to the construction and future maintenance, repair and reconstruction of the tollway project, including the repayment of any loans to be made from moneys in the transportation innovative partnerships account created under RCW 47.29.230 or other accounts;

(5) With respect to tollway projects, any portion of which will be financed with state funds or department loans or grants:

(a) The relative importance of the proposed tollway project compared to other proposed tollways; and

(b) Traffic congestion and economic conditions in the communities that will be affected by competing tollway projects; and

(6) The effects of tollway implementation on other major highways in the state system and on community and local street traffic.

NEW SECTION

WAC 468-600-340 Proposer presentations. At any time during the evaluation process, the evaluation panel may request proposers to make presentations to the panel. Proposers shall be afforded not less than ten business days following written notification from the panel to prepare such presentations. The format of these presentations will include a formal presentation by the proposer, followed by any questions the evaluation panel may have pertaining to the project proposal or the presentation. These meetings will allow the evaluation panel to seek clarification of project elements and complete deliverable requirements, and provide proposers with the opportunity to further explain their proposed projects. If there is an issue to which the proposer is unable to respond during the formal presentation, the evaluation panel may, at its discretion, grant the proposer a reasonable period of time in which to submit a written response.

NEW SECTION

WAC 468-600-345 Required supplements or refinements to proposals. (1) The department reserves the right to require or to permit proposers to submit, at any time, revisions, clarifications to, or supplements of their previously submitted proposals. The department may, in the exercise of this authority, require proposers to add features, concepts, elements, information or explanations that were not included in their initial proposals, and may require them to delete features, concepts, elements, information or explanations that were included in their initial proposals. A proposer will not be legally bound to accept a request to add to or delete from a proposal any feature, concept, element or information, but its refusal to do so in response to a request by the department shall constitute sufficient grounds for the department to elect to terminate consideration of its proposal.

(2) After the department's opening and review of proposals, the department may issue or electronically post an addendum to the request for proposals that:

(a) Requires proposers to address or add physical features or elements, and information or explanations that were not included in their initial proposals; or

(b) Requires proposers to delete physical features or elements that were included in their initial proposals; or

(c) Change the method by which the department will send any such addendum that it issues by a method other than electronic posting to all proposers to continue in the proposal process; or

(d) Any addendum issued will contain a deadline by which the proposers must submit to the department any additions to, modifications of or deletions from their proposals.

NEW SECTION

WAC 468-600-350 Evaluation panel recommendation to commission. (1) After reviewing the proposals and hearing presentations from proposers, the evaluation panel will prepare a written determination, based on facts and circumstances presented in the proposals and the presentations, that one or more proposals merit selection and advancement into a contract negotiation phase or to contract execution. In its written determination regarding any proposal, the evaluation panel may specify conditions that it recommends the proposer be required to satisfy before proceeding to contract negotiations. By way of example, such conditions may include, but are not limited to:

(a) Requiring the proposer to provide additional information or clarification concerning elements or parts of its proposal;

(b) Requiring the proposer to develop and submit additional information confirming the technical feasibility of the proposed project;

(c) Requiring the proposer to develop and submit additional information confirming that the proposed project complies with or can be brought into compliance with relevant local and state transportation plans, restrictions on property use, and environmental laws, or that the project and the applicable plans, restrictions and environmental laws can otherwise be brought into conformity;

(d) Requiring the proposer to commit in writing to the department to undertake good faith efforts to modify or adjust the proposal in specific ways, or to incorporate steps, characteristics or features that the department identifies as necessary or desirable to enhance the feasibility, public acceptance, transportation efficiency, or economy in execution or operation, of the project;

(e) Otherwise requiring the proposer to develop and present revisions to, or alternatives within, the proposal that will permit the department to obtain best value based on the requirements and evaluation criteria set forth in the notice or request for proposals and based on knowledge obtained by the department by virtue of its review and evaluation of the proposals; and

(f) Requiring the proposer to enter into an interim agreement, on terms satisfactory to the proposer and the state, under which the proposer will provide services to the department in connection with the development of the proposal or further development of the project, including assistance to the department in obtaining any necessary regulatory approvals.

(2) The evaluation panel will report its assessments and recommendations to the commission.

NEW SECTION

WAC 468-600-355 Commission review and selection of proposals. The commission shall review the proposals, the assessments and the recommendations of the evaluation panel. Based on that review, the commission may:

(1) Select one proposal to advance to execution of a contract or development agreement; or

(2) Select one proposal to advance to negotiations of a contract or development agreement; or

(3) Select one proposal to advance to execution or negotiations of a contract or development agreement, subject to the proposer's willingness and ability to satisfy specified conditions; or

(4) Pursuant to WAC 468-600-360, select more than one proposal from which to conduct competitive negotiations; or to continue competitive negotiations for a specified period of time; or

(5) Reject all proposals. For purposes of this section, competitive negotiations means negotiations authorized under WAC 468-600-360, for the purposes of refining and arriving at a final selection of a proposer. This term does not refer to negotiations for a contract or development agreement as provided in WAC 468-600-710.

NEW SECTION

WAC 468-600-360 Commission's authority to elect competitive negotiations. (1) In addition to the commission's ability to exercise any alternative process permitted under WAC 468-600-232, the commission may authorize, at its option, competitive negotiations with more than a single proposer as a means of selecting from among competing proposals submitted under these rules. Negotiations under this section are part of the proposal evaluation process and do not constitute the negotiation of a project agreement.

(2) The commission may announce its election to conduct competitive negotiations:

(a) In any notice issued for solicited proposals under WAC 468-600-105; or

(b) By written notice, by mail or by electronic means, to the proposers, issued at any time following the state's receipt of proposals under WAC 468-600-220.

(3) In any communication under subsection (2) of this section, or by notice to the proposers issued by mail or by electronic means at any time after the receipt of proposals, the commission may announce that it will initiate competitive negotiations with all proposers who submitted responsive proposals, or only with proposers who qualify to negotiate because the state has determined that their proposals fall within a competitive range.

(4) When the commission elects to negotiate only with proposers within a competitive range, then after the evaluation panel's evaluation of proposals in accordance with the criteria set forth in the notice or request for proposals, the commission will determine the proposers in the competitive range.

(a) For purposes of this subsection (4), the proposers in the competitive range consist of those proposers whose proposals, as determined by the commission in its discretion, have a reasonable chance of being determined the best proposal as the result of the evaluations conducted by the evaluation panel under WAC 468-600-350. In determining which proposals fall within the competitive range, the commission may consider whether its preliminary evaluation of proposals establishes a natural break in the preliminary scores of the proposals that suggests those proposals that are sufficiently competitive to be included in the competitive range.

(b) The department will provide written notice to all proposers, by mail or by electronic means, of the proposals the

commission determines to fall within the competitive range. A proposer whose proposal is not within the competitive range may submit a written protest of the commission's evaluation and determination of the competitive range within fourteen calendar days after the date of the department's notice. A proposer's written protest must state facts and argument that demonstrate how the competitive range determination was flawed or how the commission's determination constituted an abuse of discretion. If the department receives no written protest concerning the proposed selection listing within the fourteen calendar day period, then the department will proceed with negotiations with the proposers whose proposals fell within the competitive range.

(c) In response to a timely filed protest, the commission will issue a written decision that resolves the issues raised in the protest. The commission will make its written determination available, by mail or by electronic means, to the protesting proposer and to the proposers falling within the competitive range.

(5) The object of competitive negotiations, which the department may conduct concurrently with more than one proposer or serially, is to maximize the state's ability to obtain best value and to permit proposers to develop revised proposals. Therefore, the negotiations may include, but shall not be limited to:

(a) Informing proposers of deficiencies in their proposals;

(b) Notifying proposers of parts of their proposals for which the department would like additional information; and

(c) Otherwise allowing proposers to develop revised proposals that will permit the state to obtain the best proposal based on the requirements and evaluation criteria set forth in the notice or request for proposals.

(6) The scope, manner and extent of negotiations with any proposer are subject to the discretion of the department. To prevent the disclosure of proposal information to a proposer's competitors, the department shall conduct negotiations with proposers before the nature of the proposals, information about the proposed project, or proposal information have been made public under WAC 468-600-600. In conducting negotiations, the department:

(a) Shall treat all proposers fairly and shall not engage in conduct that favors any proposer over another;

(b) Shall not reveal to another proposer a proposer's unique technology, unique or innovative approaches to project design, management or financing, or any information that would compromise the proposer's intellectual property, trade secrets or sensitive business information; or

(c) Shall not reveal to another proposer a proposer's price or pricing information, provided, however, that the department may inform a proposer that the department considers a proposer's price or pricing information to be too high or too low.

(7) The evaluation panel must further evaluate the proposals subjected to the competitive negotiation process, and recommendations to the commission for their action under WAC 468-600-350 (1), (2), (3) or (5).

NEW SECTION

WAC 468-600-365 Protests of rejection of proposal/award of contract to competitor in competing proposals context. (1) At least fourteen calendar days prior to the final selection of the successful proposer in any competitive proposal selection process, the department will give, electronically or otherwise, written notice to all participating proposers of the commission's apparent selection of the successful proposer. A proposer who would be adversely affected by the selection announced in the notice may, within fourteen calendar days after the date of the department's notice, submit to the department a written protest of the selection of the apparent successful proposer.

(2) For purposes of this rule, a protesting proposer is adversely affected by a selection only if the proposer has submitted a responsive competing proposal and is next-in-line for selection. In other words, the protesting proposer must demonstrate that all higher-scoring proposers are ineligible for selection because either:

(a) The higher-scoring proposals were not responsive to the requirements stated in the department's solicitation documents; or

(b) The department committed a substantial violation of a provision in the department's notice requesting competitive negotiation, in these rules, or in chapter 47.29 RCW, or otherwise abused its discretion, in evaluating the revised proposals.

(3) A proposer's written protest must state facts and argument that demonstrate how the selection process was flawed or how the commission's selection of the apparent successful proposer constituted an abuse of the commission's discretion. If the commission receives no written protest concerning the proposed selection listing within the fourteen-day period, then the selection of the successful proposer automatically shall become effective on the fifteenth calendar day after the department first transmitted or otherwise delivered its written notice of the apparent successful proposer.

(4) In response to a proposer's timely filed protest that complies with this rule, the commission will issue a written decision that resolves the issues raised in the protest. In considering a timely protest, the commission may request further information from the protesting proposer and from the apparent successful proposer identified in the department's notice issued under subsection (1) of this section. The commission will make its written determination available, by mail or by electronic means, to the protesting proposer and to the apparent successful proposer identified in the department's notice issued under subsection (1) of this section.

NEW SECTION

WAC 468-600-370 Notification of apparent successful proposer—Prenegotiation activities authorized. (1) Upon the commission's selection of a proposal under WAC 468-600-355 and upon expiration of the protest period, the department shall notify the proposer of its intent to execute a contract or development agreement or to enter negotiations on a contract and/or development agreement.

(2) Upon the commission's provisional selection of a proposal subject to satisfaction of conditions, and upon expi-

ration of the protest period, the department shall notify the proposer of the conditions. The proposer shall have a period of time, set forth in the department's notice, but to be at least ten calendar days, from receipt of the department's notification to elect to proceed under specified conditions. If the proposer elects to proceed, the department shall work with the proposer to develop a plan for satisfying the conditions. If the plan entails entry into an interim agreement, the agreement will conform to all relevant requirements of chapter 47.29 RCW and these rules.

(3) After the commission's selection or provisional selection of a proposal, the department and the proposer may confer on any matter pertinent to refinement of the proposal.

NEW SECTION

WAC 468-600-600 Public records and public disclosure. (1) Upon written request and within the time required under chapter 42.56 RCW, the department shall review such requests, process and provide those records that are not otherwise exempt from disclosure. The department may charge fees as allowed by state law.

(2) On the department's receipt of a request pursuant to chapter 42.56 RCW, for the disclosure of records or information that have been submitted to the department by a proposer under the program authorized by chapter 47.29 RCW, the department will notify the proposer of the request and provide the proposer a reasonable opportunity to demonstrate that all or part of the requested records or information are exempt from disclosure under applicable law recognizing the confidentiality of public records and information. In determining whether the information or records are exempt from disclosure, the department will consider the evidence and objections to disclosure presented by the proposer, but as custodian of the records or information, the department must make the initial determination of the records that may be withheld from disclosure.

(3) An affected proposer who seeks to demonstrate that public records pertaining to it are exempt from disclosure must respond to the department with its evidence and objections within four working days of the department's issuance of notice of the request to the proposer. After considering the proposer's evidence and objections, the department will inform the proposer of its disclosure decision, giving the proposer no fewer than three working days in which to institute appropriate proceedings in its own behalf to protect the proposer's interests in preventing the disclosure or maintaining the confidentiality of the records or information. The proposer shall be exclusively responsible for all costs, expenses and attorney fees incurred in taking any action to prevent the disclosure of information or records under this section. The department shall not make a disclosure of records or information while an action by the proposer to enjoin disclosure thereof is pending.

NEW SECTION

WAC 468-600-605 Designation of sensitive business, commercial or financial information and trade secrets.

(1) The following procedure shall be followed by proposers to designate information as "sensitive business, commercial

or financial information" under RCW 47.29.190: Each individual page of a proposal that contains sensitive business, commercial or financial information must be clearly marked "sensitive business, commercial or financial information."

(2) A proposer may desire that certain information be considered "trade secret" information for purposes of applying the public records exemption set out in state law. "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique or process that derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. To qualify for that exemption, trade secret information must meet the following criteria:

- (a) Not be the subject of a patent;
- (b) Be known only to a limited number of individuals within an organization;
- (c) Be used in a business that the organization conducts;
- (d) Be of potential or actual commercial value; and
- (e) Be capable of providing the user with a business advantage over competitors not having the information.

(3) The following procedures shall be followed by the proposer to designate information as trade secret:

(a) Each individual page of a proposal, plan or progress report that contains trade secret information must be clearly marked trade secret;

(b) Written substantiation describing what information is considered trade secret and why, must accompany the document. The written substantiation shall address the following:

- (i) Identify which portions of information are claimed trade secret;
- (ii) Identify how long confidential treatment is desired for this information;
- (iii) Identify any pertinent patent information;
- (iv) Describe to what extent the information has been disclosed to others, who knows about the information, and what measures have been taken to guard against undesired disclosure of the information to others;
- (v) Describe the nature of the use of the information in business;
- (vi) Describe why the information is considered to be commercially valuable;
- (vii) Describe how the information provides a business advantage over competitors;

(viii) If any of the information has been provided to other government agencies, identify which one(s); and

(ix) Include any other information that supports a claim of trade secret.

(4) Notwithstanding a proposer's designation of information as constituting "trade secret," and subject to a proposer's opportunity to object to disclosure under WAC 468-600-605, the department may independently assess whether the trade secret exemption applies when responding to a public records request.

AGREEMENTS FOR PROJECTS

NEW SECTION

WAC 468-600-700 General preconditions for entering into agreements. The following are preconditions of any agreement that will be entered into between the state and a private sector partner:

(1) The department must seek to adopt contracting techniques that represent the best practices in use by owners of facilities;

(2) To the extent permitted by law, protection must be provided for local contractors to participate in any subcontracting opportunities on projects;

(3) Projects that use tolling technology must maintain standards that are consistent with any standards adopted or widely used by the state;

(4) Provision must be made for patrolling and law enforcement on state-owned transportation facilities, as approved by the Washington state patrol for facilities within their jurisdiction;

(5) Any debt to be issued to pay for the construction of a state-owned transportation facility that is secured by public funds must conform to RCW 47.29.060, or if not in conformance, any agreements reached must be conditioned upon obtaining necessary legislative approval of alternative financing provisions;

(6) The public involvement plan must provide that all forums, workshops, open houses or public meetings be administered and attended by the public sector partner; and

(7) Any project with a capital cost in excess of three hundred million dollars must establish an advisory committee, consisting of at least five but not more than nine members, who shall be appointed by the commission.

NEW SECTION

WAC 468-600-710 Negotiation of agreement. A proposal or proposals selected by the commission for negotiation of a final agreement shall be referred to a negotiation team within the department. The team shall be responsible for negotiating the final agreement with the proposer. Each final agreement will define the rights and obligations of the state and the respective proposer with regard to the project. Agreements must contain all provisions in WAC 468-600-700 and 468-600-715, and must allocate responsibilities under WAC 468-600-720.

NEW SECTION

WAC 468-600-715 Mandatory terms of agreements. Any final agreement must include the following provisions:

(1) If public moneys are used to pay any costs of construction of public works that is part of an eligible project, the construction contract shall contain provisions that require payment of workers under the contract in accordance with chapter 39.12 RCW; and

(2) Any maintenance provisions on a public facility must be provided in a manner consistent with collective bargaining agreements, the Personnel Reform Act, and civil service laws

in effect on any portion of the project that constitutes a public facility.

NEW SECTION

WAC 468-600-720 Terms to be negotiated between the parties. Any final agreement must contain terms that address at least the following issues:

- (1) At what point in the transportation project public and private sector partners will enter the project and which partners will assume responsibility for specific project elements;
- (2) How the partners will share management of the risks of the project;
- (3) How the partners will share the costs of development of the project;
- (4) How the partners will allocate financial responsibility for cost overruns;
- (5) The consequences for nonperformance;
- (6) The incentives for performance;
- (7) The invoicing and payment procedures and schedules to be followed to the extent that the department or state is to pay for the work, and the accounting and auditing standards to be used to evaluate work on the project; and
- (8) An agreement for the construction of a public improvement as part of an eligible project shall provide and be approved for bonding, financial guarantees, deposits or the posting of other security to secure the payment of laborers, subcontractors and suppliers who perform work or provide materials as part of the project. Furthermore, the department shall determine that adequate security exists to address any default or nonperformance by the private sector partner or other contractual claims of the department against the proposer; and
- (9) For projects that revert to public ownership, responsibilities for reconstruction or renovation that bring the facility up to government standards before reversion to the state.

NEW SECTION

WAC 468-600-722 State objection to subcontractors.

- (1) Prior to the execution of any contract with a proposer, the proposer must provide the department with a list of all major subcontractors who will perform work in the construction, operation or maintenance of the project. All subcontractors must be legally eligible to perform or work on public contracts under federal and Washington law and regulations. No subcontractor will be accepted who is ineligible to receive public works contracts in the state of Washington.
- (2) If the department has reasonable objection to any proposed subcontractor, the department is authorized to require, before the execution of a contract, an apparently successful proposer to submit an acceptable substitute. In such case, the proposer must submit an acceptable substitute, and the contract may, at the department's discretion, be modified to equitably account for any difference in cost necessitated by the substitution. The department will set a maximum time period from the date of the department's written demand for substitution within which to make an acceptable substitution. A proposer's failure to make an acceptable substitution at the end of the time period will constitute sufficient grounds for the department to refuse to execute a contract, without incur-

ring any liability for the refusal. In setting a maximum time period, the department shall consider the scope of the subcontract, availability of other subcontractors, and whether the disapproved subcontractor is identified in the proposal as an equity contributor or source of other financial support to the project relied on by the proposer. Following such identification, the proposer shall be granted an additional maximum time period as determined by the department to conclude negotiations of acceptable terms and conditions with that substitute major subcontractor.

- (3) The department may not require any proposer to engage any subcontractor, supplier, other person or organization against whom the proposer has reasonable objection.

NEW SECTION

WAC 468-600-725 Cessation of negotiations. The department must establish a maximum time period allowed for conducting negotiations on a potential project or development agreement(s). Such time period may be established in the solicitation document described in WAC 468-600-105, or as a condition of selecting a particular proposer or proposers. If the department elects to conduct competitive negotiations under WAC 468-600-360, any deadline established for conducting negotiations must be equitably applied to all proposers engaged in negotiations. The department may extend a maximum negotiating time period if it determines extension to be in the interests of the state.

NEW SECTION

WAC 468-600-730 Legal sufficiency review of final agreement. On completion of a final agreement, the attorney general will review it for legal sufficiency. The department and the transportation commission are wholly responsible for exercising business judgment, including the appropriate and desirable allocation of risk and incentive in any agreement.

NEW SECTION

WAC 468-600-735 Commission analysis required. Before any agreements are executed, the commission must:

- (1) Conduct a financial analysis that fully discloses all costs and cost estimates, including the costs of any financing, and all estimated project revenues; and
- (2) Compare the department's internal ability to complete the project that documents the advantages of completing the project as a public-private partnership versus solely as a public venture.

The commission may undertake this analysis at any point in the solicited or unsolicited proposal process.

NEW SECTION

WAC 468-600-740 Publication of contents of proposed agreement. If a tentative agreement has been reached, before the commission may take any action on such agreement, an executive summary describing all material elements of the agreement must be prepared and made available to the public. The department must publish notice of existence of the agreement in each county that is, or could potentially be,

affected by the project. The published notice must generally describe the nature of the project, the anticipated communities that the project might impact, and how summary level information on the proposed agreement can be obtained. Such notice must be provided not less than twenty calendar days before the public hearing required under WAC 468-600-741.

NEW SECTION

WAC 468-600-741 Public hearings on proposed project and agreement. Prior to taking action on any tentative agreement, the commission must hold an informational session and public hearing in the county seat of the boundaries of the proposed project with at least twenty calendar days' advance notice. Notice of such meeting may be provided in conjunction with the publication of the notice under WAC 468-600-740.

NEW SECTION

WAC 468-600-742 Twenty-day period for consideration and evaluation of public comments. After holding the public hearing required in WAC 468-600-741, the commission must consider any testimony received, and must wait at least twenty calendar days before taking any action approving, rejecting or directing execution or continued negotiations of the agreement.

NEW SECTION

WAC 468-600-750 Commission review of final agreement. On completion of the attorney general's legal sufficiency review of the final agreement, and after considering any public comment received, the commission shall:

- (1) Approve the final agreement;
- (2) Reject the final agreement; or
- (3) Return the final agreement to the team for further negotiation on issues the commission specifies.

TRANSPORTATION INNOVATIVE PARTNERSHIP PROGRAM ADMINISTRATION

NEW SECTION

WAC 468-600-800 Program expenses attributable to projects. The department shall confer with its internal auditor and accounting staff to adopt a methodology to properly apportion program and project development expenses to the specific projects that are the subject of an agreement executed under WAC 468-600-750. The department shall forward the methodology for properly allocating program expenses to the office of financial management for review and approval.

NEW SECTION

WAC 468-600-810 State's reservation of rights. (1) The state reserves all rights available to it by law in administering these rules, including without limitation, the right in its sole discretion to:

- (a) Reject any and all proposals at any time;

(b) Terminate evaluation of any and all proposals at any time;

(c) Suspend, discontinue and/or terminate comprehensive agreement negotiations with any proposer at any time prior to the actual authorized execution of such agreement by all parties;

(d) Negotiate with a proposer without being bound by any provision in its proposal;

(e) Request or obtain additional information about any proposals;

(f) Issue addenda to and/or cancel any RFQ or RFP;

(g) In accordance with the rule-making procedures of chapter 34.05 RCW, supplement or withdraw all or any part of these rules;

(h) Decline to return any and all fees required to be paid by proposers hereunder; and

(i) Request revisions to proposals.

(2) Absent express written provisions contained in any solicitation document, order or written policy issued by the department, the department is not liable for, or required to, reimburse the costs incurred by proposers, whether or not selected for negotiations, in developing proposals or in negotiating agreements. Any and all information the department makes available to proposers shall be as a convenience to the proposer and without representation or warranty of any kind.

WSR 06-20-077

PROPOSED RULES

DEPARTMENT OF HEALTH

[Filed October 2, 2006, 8:31 a.m.]

Original Notice.

Exempt from preproposal statement of inquiry under RCW 34.05.310(4).

Title of Rule and Other Identifying Information: WAC 246-235-075 Financial assurance and recordkeeping for decommissioning, this proposal amends this section to bring radiation protection regulations into conformance with the current United States Nuclear Regulatory Commission (NRC) rules for financial surety for decommissioning sites where large amounts of radioactive materials were used.

Hearing Location(s): Washington State Department of Health, 111 Israel Road S.E., Town Center 2, Room 145, Tumwater, WA 98501, on November 16, 2006, at 10:00 a.m.

Date of Intended Adoption: November 20, 2006.

Submit Written Comments to: Anine Grumbles, Radioactive Materials Section, P.O. Box 47827, Olympia, WA 98504-7827, web site <http://www3.doh.wa.gov/policyreview/>, fax (360) 236-2255, by November 16, 2006.

Assistance for Persons with Disabilities: Contact Anine Grumbles by October 23, 2006, TTY (800) 833-6388 or 711.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The proposed amendment increases the frequency at which the decommissioning funding plan, its cost estimate, and associated financial surety are updated from every five years to no more than every three years. This rule improves the likelihood that adequate financial surety will be available when needed.

Reasons Supporting Proposal: Escalating costs of decommissioning facilities where radioactive materials have been used, including disposal of low level radioactive waste, can quickly exceed the amount of surety that was provided originally. Ensuring that there will be adequate resources for decommissioning when the licensee terminates will protect the public health and the environment.

Statutory Authority for Adoption: RCW 70.98.050, 70.98.095.

Statute Being Implemented: RCW 70.98.050, 70.98.-095.

Rule is necessary because of federal law, 68 F.R. 57327.

Name of Proponent: Washington state department of health, governmental.

Name of Agency Personnel Responsible for Drafting: Anine Grumbles, 111 Israel Road S.E., Tumwater, (360) 236-3222; Implementation and Enforcement: Arden C. Scroggs, 111 Israel Road S.E., Tumwater, (360) 236-3221.

No small business economic impact statement has been prepared under chapter 19.85 RCW. This rule change is exempt from the small business impact statement requirement under RCW 19.85.025(3) because it adopts federal regulations without material change. This rule also has a regulatory flexibility certification prepared by NRC stating that the rule will not have a significant economic impact upon a substantial number of small entities.

A cost-benefit analysis is not required under RCW 34.05.328. Under RCW 34.05.328 (5)(b)(iii) and (iv), RCW 34.05.328 does not apply to this rule adoption because this rule adopts federal regulations without material change and clarifies the language of a rule or otherwise makes house-keeping changes. This rule is for conformance with the NRC regulations and is mandatory under our agreement state status with the federal government.

September 26, 2006

B. White

for M. C. Selecky
Secretary

AMENDATORY SECTION (Amending WSR 00-07-085, filed 3/15/00, effective 4/15/00)

WAC 246-235-075 Financial assurance and record-keeping for decommissioning. (1) Each applicant for one of the following licenses shall submit a decommissioning funding plan as described in this section:

(a) A specific license authorizing receipt of radioactive waste for the purpose of volume reduction, repackaging or interim storage.

(b) Receipt of contaminated articles, scrap material, equipment, or clothing to be decontaminated at the licensee's facility.

(c) A specific license authorizing the possession and use of radioactive material of half-life greater than one hundred twenty days and in quantities for unsealed material exceeding 10^3 times and for sealed forms exceeding 10^{10} times the applicable quantities set forth in WAC 246-221-300 Appendix B (for a combination of isotopes the unity rule applies. A decommissioning funding plan will be required if R is greater than 1, where R is defined as the sum of the ratios of the

quantity for sealed and unsealed forms of each isotope compared to the applicable value derived from WAC 246-221-300).

(d) A specific license authorizing possession and use of source material in readily dispersible form and in quantities greater than 10 millicuries.

(2) Each decommissioning funding plan shall contain:

(a) A cost estimate for decommissioning facilities impacted by the activities authorized in the specific license.

(b) A description of the method of assuring funds for decommissioning.

(c) A ((~~schedule~~)) means for adjusting cost estimates and associated funding levels periodically over the life of the facility or facilities.

(d) A description of methods and general procedures for performing facility decontamination, maintaining security, and performing a final radiation survey.

(e) A commitment to clean up accidental spills promptly and to begin decommissioning of the facility or facilities within twelve months of ceasing operation involving radioactive material.

(3) Each cost estimate for decommissioning shall include:

(a) A description of the facility and areas within the facility likely to require decommissioning as a result of routine operation.

(b) Anticipated labor, equipment and material costs.

(c) Anticipated waste volume.

(d) Anticipated packaging, transportation and waste disposal costs.

(e) An assessment of costs associated with an accident involving licensed material.

(4) Each applicant shall submit a certification that financial assurance for decommissioning shall be provided by one or more of the following methods:

(a) Prepayment. Prepayment is the deposit of sufficient funds to pay decommissioning costs. Funds shall be deposited prior to the start of operation into an account segregated from licensee assets and outside the licensee's administrative control. Prepayment may be in the form of a trust, escrow account, government fund, certificate of deposit, or deposit of government securities.

(b) A surety method, insurance, or other guarantee method. These methods guarantee that decommissioning costs will be paid should the licensee default. A surety method may be in the form of a surety bond, letter of credit, or line of credit. Any surety method or insurance used to provide financial assurance for decommissioning must contain the following conditions:

(i) The surety method or insurance shall be open-ended or, if written for a specified term, such as five years, shall be renewed automatically unless ninety days or more prior to the renewal date, the issuer notifies the department, the beneficiary, and the licensee of its intention not to renew. The surety method or insurance shall also require that the full face amount be paid to the beneficiary automatically prior to the expiration without proof of forfeiture if the licensee fails to provide a replacement acceptable to the department within thirty days after receipt of notification of cancellation.

(ii) The surety method or insurance shall be payable to a trust established for decommissioning costs. The trustee and trust shall be acceptable to the department. Acceptable trustees include an appropriate state or federal government agency or an entity which has the authority to act as a trustee and whose trust operations are regulated and examined by a federal or state agency.

(iii) The surety method or insurance must remain in effect until the department has terminated the license.

(c) An external sinking fund in which deposits are made at least annually, coupled with a surety method or insurance, the value of which may decrease by the amount being accumulated in the sinking fund. An external sinking fund is a fund established and maintained by setting aside funds periodically in an account segregated from licensee assets and outside the licensee's administrative control. The total amount of funds in the external sinking fund shall be sufficient to pay decommissioning costs at the time termination of operation is expected. An external sinking fund may be in the form of a trust, escrow account, government fund, certificate of deposit, or deposit of government securities. The surety or insurance provisions shall be as stated in subsection (4)(b) of this section.

(d) Statement of intent. In the case of state or local government licensees, a statement of intent containing a cost estimate for decommissioning and indicating that funds for decommissioning will be obtained when necessary.

(e) Other methods of financial assurance as approved by the department. The department may approve other financial mechanisms submitted by the applicant or licensee if the alternate method meets, at a minimum, the requirements of 10 C.F.R. 30.35 and associated U.S. Nuclear Regulatory Commission guidance.

~~(5)(a) ((The department shall review each decommissioning funding plan prior to license issuance and prior to license renewal.))~~ The applicant or licensee shall submit to the department an initial decommissioning funding plan prior to license issuance and shall submit an updated plan at intervals not to exceed three years.

(b) The applicant or licensee shall incorporate department comments into the decommissioning funding plan including its cost estimate and shall revise its financial surety accordingly.

(c) Applicants shall obtain the appropriate financial assurance as approved by the department prior to receipt of licensed material. The department may issue a new license if the applicant agrees to comply with the decommissioning funding plan as approved. If the applicant defers execution of the financial instrument until after the license has been issued, a signed original of the financial instrument obtained to satisfy the requirements of this section shall be submitted to the department before receipt of licensed material.

~~(d) ((Holders of licenses issued on or before the effective date of this rule shall submit a decommissioning funding plan to the department by April 1, 1993.))~~ Licensees shall implement the financial assurance requirements within thirty days of receiving department approval of the initial or updated decommissioning funding plan. Licensees shall submit copies of the financial surety within thirty days of securing the surety and annually thereafter.

(6) Each person licensed under this chapter shall keep records of information important to the safe and effective decommissioning of the facility in an identified location until the site is released for unrestricted use. Before licensed activities are transferred or assigned in accordance with WAC 246-232-050(2), licensees shall transfer all records described in this subsection to the new licensee. In this case, the new licensee will be responsible for maintaining these records until the license is terminated by the department. If records of relevant information are kept for other purposes, reference to these records and their locations may be used. Information the department considers important to decommissioning consists of:

(a) Records of spills or other unusual occurrences involving the spread of contamination in and around the facility, equipment, or site. These records may be limited to instances when contamination remains after any cleanup procedures or when there is reasonable likelihood that contaminants may have spread to inaccessible areas as in the case of possible seepage into porous materials such as concrete. These records shall include any known information on identification of involved nuclides, quantities, forms, and concentrations.

(b) As-built drawings and modifications of structures and equipment in restricted areas where radioactive materials are used and/or stored, and of locations of possible inaccessible contamination such as buried pipes which may be subject to contamination. If required drawings are referenced, each relevant document need not be indexed individually. If drawings are not available, the licensee shall substitute appropriate records of available information concerning these areas and locations.

(c) Except for areas containing only sealed sources (provided the sources have not leaked or no contamination remains after any leak) or depleted uranium used only for shielding or as penetrators in unused munitions, or radioactive materials having only half-lives of less than sixty-five days, a list contained in a single document and updated every two years, of the following:

(i) All areas designated and formerly designated as restricted areas as defined under WAC 246-220-010;

(ii) All areas outside of restricted areas that require documentation under (a) of this subsection;

(iii) All areas outside of restricted areas where current and previous wastes have been buried as documented under WAC 246-221-230 (8)(a); and

(iv) All areas outside of restricted areas which contain material such that, if the license expired, the licensee would be required to either decontaminate the area to meet the criteria for decommissioning in chapter 246-246 WAC or apply for approval for disposal under WAC 246-221-180. Records of the cost estimate performed for the decommissioning funding plan or of the amount certified for decommissioning, and records of the funding method used for assuring funds if either a funding plan or certification is used.

WSR 06-20-083**PROPOSED RULES****WASHINGTON STATE UNIVERSITY**

[Filed October 2, 2006, 9:30 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 06-16-083.

Title of Rule and Other Identifying Information: Repeal of chapter 504-44 WAC, Public records—Initiative 276 and add new chapter 504-45 WAC, Public records.

Hearing Location(s): Washington State University, Lighty Room 403, Pullman, Washington, on November 9, 2006, at 4:00 p.m. to 5:00 p.m.

Date of Intended Adoption: January 25, 2007.

Submit Written Comments to: Ralph T. Jenks, Director, Procedures, Records, and Forms and University Rules Coordinator, P.O. Box 641225, Pullman, WA 99164-1225, e-mail jenks@wsu.edu, fax (509) 335-3969, by November 9, 2006.

Assistance for Persons with Disabilities: Contact Linda Nelson by November 1, 2006.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: Repeal the current procedures for requesting public records from Washington State University. Add new chapter for requesting public records from Washington State University that incorporates suggestions and wording from the model rules provided by the attorney general's office.

Reasons Supporting Proposal: To repeal WSU's current procedures and add a new chapter to incorporate attorney general's model rules on public records.

Statutory Authority for Adoption: RCW 28B.30.150.

Statute Being Implemented: Chapter 42.56 RCW.

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: Washington State University, public.

Name of Agency Personnel Responsible for Drafting and Implementation: Ralph T. Jenks, Director, Procedures, Records, and Forms, (509) 335-2004; and Enforcement: Richard Heath, Senior Associate Vice President, Office of Business Affairs, (509) 335-8548.

No small business economic impact statement has been prepared under chapter 19.85 RCW. The rule has no impact on small business.

A cost-benefit analysis is not required under RCW 34.05.328. The university does not consider this rule to be a significant legislative rule.

September 29, 2006

Ralph T. Jenks, Director
Procedures, Records, and Forms
and University Rules Coordinator

Chapter 504-45 WAC**PUBLIC RECORDS**NEW SECTION

WAC 504-45-010 Authority and purpose. (1) RCW 42.56.070(1) requires each agency to make available for

inspection and copying nonexempt "public records" in accordance with published rules. The act defines "public record" to include 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 agency. RCW 42.56.070(2) requires each agency to set forth "for informational purposes" every law, in addition to the Public Records Act, that exempts or prohibits the disclosure of public records held by that agency.

(2) The purpose of these rules is to establish the procedures Washington State University will follow in order to provide full access to public records. Washington State University shall hereinafter be referred to as the "university." Where appropriate, the term university also refers to the staff and employees of Washington State University. These rules provide information to persons wishing to request access to public records of the university and establish processes for both requestors and university staff that are designed to best assist members of the public in obtaining such access.

(3) The purpose of the act is to provide the public full access to information concerning the conduct of government, mindful of individuals' privacy rights and the desirability of the efficient administration of government. The act and these rules will be interpreted in favor of disclosure. In carrying out its responsibilities under the act, the university will be guided by the provisions of the act describing its purposes and interpretation.

NEW SECTION

WAC 504-45-020 Agency description—Contact information—Public records officer. (1) Washington State University is an institution of higher education, authority for which is located in chapter 28B.30 RCW. The administrative offices of the university are located at the university's main campus at Pullman, Washington. Regional campuses are located in Spokane, Tri-Cities, and Vancouver, Washington. Agricultural research centers are located at Mt. Vernon, Prosser, Puyallup, Vancouver and Wenatchee, Washington. Cooperative extension offices are maintained in the county seats of all counties in the state. The Intercollegiate College of Nursing is located in Spokane, Washington. Learning Centers are located in Longview, Aberdeen, Goldendale, Wenatchee, Port Hadlock, Tacoma, Mt. Vernon, Yakima and Walla Walla, Washington. The university also has operations offices in Seattle and Olympia, Washington.

(2) Any person wishing to request access to public records of the university, or seeking assistance in making such a request should contact the university's public records officer located at the Pullman administrative offices. Current contact information and additional information regarding release of public records can be found on the university web site at <http://www.wsu.edu>.

(3) The public records officer will oversee compliance with the act but another university 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 university will provide the "fullest assistance" to requestors; ensure that public records are protected from damage or disorganization; and prevent fulfilling public

records requests from causing excessive interference with essential functions of the university.

NEW SECTION

WAC 504-45-030 Availability of public records. (1)

Hours for inspection of records. Public records are available for inspection and copying during normal business hours of the university. For the purposes of this chapter, the normal business hours for the public records office shall be from 8:00 a.m. to noon and from 1:00 p.m. to 5:00 p.m., Monday through Friday, excluding the university's holidays. Records must be inspected at the offices of the university.

(2) Index of records. An index of final orders, declaratory orders, interpretive statements, and policy statements entered after June 30, 1990, is available at the office of the university's rules coordinator at the Pullman campus. The university will post links to many of these records on its web site at <http://www.wsu.edu>.

(3) Organization of records. The university will maintain its records in a reasonably organized manner. The university will take reasonable actions to protect records from damage and disorganization. A requestor shall not take university records from university offices without the permission of the public records officer or designee. Certain records are available on the university web site at www.wsu.edu. Requestors are encouraged to view the documents available on the web site prior to submitting a records request.

(4) Making a request for public records.

(a) Any person wishing to inspect or copy public records of the university should make the request in writing on the university's request form, or by letter, fax, or e-mail addressed to the public records officer and including the following information:

- (i) Name of requestor;
- (ii) Address of requestor;
- (iii) Other contact information, including telephone number and any e-mail address;
- (iv) Identification of the public records adequate for the public records officer to locate the records; and
- (v) The date 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. Pursuant to RCW 42.56.120, standard photocopies will be provided at a rate of no more than fifteen cents per page.

(c) A form is available for use by requestors at the office of the public records officer and on the university's web site at <http://www.wsu.edu>.

(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.

NEW SECTION

WAC 504-45-040 Processing of public records requests—general. (1) Providing "fullest assistance." The university is charged by statute with adopting rules which

provide for how it will "provide full access to public records," "protect records from damage or disorganization," "prevent excessive interference with the essential functions of the agency," provide "fullest assistance" to requestors, and provide the "most timely possible action" on public records requests. The public records officer or designee will process requests in the order allowing the most requests to be processed in the most efficient manner.

(2) Acknowledging receipt of request. Within five business days of receipt of the request, the public records officer will do one or more of the following:

- (a) Make the records available for inspection or copying;
- (b) If copies are requested and payment for the copies, if any, is made or terms of payment are agreed upon, send the copies to the requestor;
- (c) Provide a reasonable estimate of when records will be available;

(d) If the request is unclear or does not sufficiently identify the requested records, request clarification from the requestor. Such clarification may be requested and provided by telephone, e-mail or mail. Based upon that clarification, the public records officer or designee may revise the estimate of when records will be available; or

(e) Deny the request.

(3) Consequences of failure to respond. If the university does not respond in writing within five business days of receipt of the request for disclosure, the requestor should consider contacting the public records officer to determine the reason for the failure to respond.

(4) Protecting rights of others. In the event that the requested records contain information that may affect rights of others and may be exempt from disclosure, the public records officer may, prior to providing the records, give notice to such others whose rights may be affected by the disclosure. Such notice should be given so as to make it possible for those other persons to contact the requestor and ask him or her to revise the request, or, if necessary, seek an order from a court to prevent or limit the disclosure. The notice to the affected persons will include a copy of the request.

(5) Records exempt from disclosure. Some records are exempt from disclosure, in whole or in part. If the university believes that a record is exempt from disclosure and should be withheld, the public records officer will state the specific exemption and provide a brief explanation of why the record or a portion of the record is being withheld. If only a portion of a record is exempt from disclosure, but the remainder is not exempt, the public records officer will redact the exempt portions, provide the nonexempt portions, and indicate to the requestor why portions of the record are being redacted.

(6) Inspection of records.

(a) Consistent with other demands, the university shall promptly provide space to inspect public records. No member of the public may remove a document from the viewing area or disassemble or alter any document. The requestor shall indicate which documents he or she wishes the university to copy.

(b) The requestor must claim or review the assembled records within thirty days of the university's notification to him or her that the records are available for inspection or copying. The university will notify the requestor in writing

of this requirement and inform the requestor that he or she should contact the university to make arrangements to claim or review the records. If the requestor or a representative of the requestor fails to claim or review the records within the thirty-day period or make other arrangements, the university may close the request. Other public records requests can be processed ahead of a subsequent request by the same person for the same or almost identical records, which can be processed as a new request.

(7) Providing copies of records. After inspection is complete, the public records officer or designee shall make any copies of records requested by the requestor or arrange for copying.

(8) Providing records in installments. When the request is for a large number of records, the public records officer or designee will provide access for inspection and copying in installments, if he or she reasonably determines that it would be practical to provide the records in that way. If, within thirty days, the requestor fails to inspect the entire set of records or one or more of the installments, the public records officer or designee may stop searching for the remaining records and close the request.

(9) Completion of inspection. When the inspection of the requested records is complete and all requested copies are provided, the public records officer or designee will indicate that the university has completed a diligent search for the requested records and made any located nonexempt records available for inspection.

(10) Closing withdrawn or abandoned request. When the requestor either withdraws the request or fails to fulfill his or her obligations to inspect the records or pay the deposit or final payment for the requested copies, the public records officer will close the request and indicate to the requestor that the university has closed the request.

(11) Later discovered documents. If, after the university has informed the requestor that it has provided all available records, the university becomes aware of additional responsible documents existing at the time of the request, it will promptly inform the requestor of the additional documents and will make them available for inspection or provide copies upon payment on an expedited basis.

NEW SECTION

WAC 504-45-050 Reserved.

NEW SECTION

WAC 504-45-060 Exemptions. (1) The Public Records Act provides that a number of types of documents are exempt from public inspection and copying. In addition, documents are exempt from disclosure if any "other statute" exempts or prohibits disclosure. Requestors should be aware of the following exemptions, outside the Public Records Act, that restrict the availability of some documents held by the university for inspection and copying. This is not an exhaustive list as numerous exemptions exist outside the act. The university's failure to list an exemption here shall not affect the efficacy of any exemption.

(a) RCW 5.60.060—Privileged communications;

(b) 20 U.S.C. 1232g—Family Education Rights and Privacy Act (FERPA);

(c) 42 U.S.C. 405 (c)(2)(vii)(1)—Social Security numbers;

(d) 45 CFR 16-0164—HIPAA Privacy Rule;

(e) Chapter 19.108 RCW and RCW 4.24.601—Uniform Trade Secrets Act; and

(f) RCW 10.97—Regarding criminal history information.

(2) The university is prohibited by statute from providing lists of individuals for commercial purposes.

NEW SECTION

WAC 504-45-070 Costs of providing copies of public records. (1) Costs for paper copies. There is no fee for inspecting public records. A requestor may obtain standard black and white photocopies for fifteen cents per page. Before beginning to make the copies, the public records officer or designee may require a deposit of up to ten percent of the estimated costs of copying all the records selected by the requestor. The public records officer or designee may also require the payment of the remainder of the copying costs before providing all the records, or the payment of the costs of copying an installment before providing that installment. The university will not charge sales tax when it makes copies of public records. The university may charge actual costs for special arrangements necessary for providing copies of records when required by the requestor, e.g., costs of color copying.

(2) Costs of mailing. The university may also charge actual costs of mailing, including the cost of the shipping container.

(3) Payment. Payment may be made by cash, check or money order to the university.

NEW SECTION

WAC 504-45-080 Review of denials of public records. (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 e-mail) 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 shall promptly provide the petition and any other relevant information to the vice-president for business affairs or designee. That person will immediately consider the petition and either affirm or reverse such denial within two business days following the university's receipt of the petition, or within such other time as the university and the requestor mutually agree to.

(3) Review by the attorney general's office. Pursuant to RCW 42.56.530, if the university 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.

(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.

REPEALER

The following chapter of the Washington Administrative Code is repealed:

- WAC 504-44-010 Purpose.
- WAC 504-44-020 Definitions.
- WAC 504-44-030 Description of central and field organization of Washington State University.
- WAC 504-44-040 Operations and procedures.
- WAC 504-44-050 Public records available.
- WAC 504-44-060 Public records officer.
- WAC 504-44-070 Office hours.
- WAC 504-44-080 Requests for public records.
- WAC 504-44-090 Copying.
- WAC 504-44-100 Exemptions.
- WAC 504-44-110 Review of denials of public records requests.
- WAC 504-44-120 Protection of public records.
- WAC 504-44-130 Records index.
- WAC 504-44-140 Communications to the university.
- WAC 504-44-150 Adoption of form.
- WAC 504-44-990 Appendix A—Request for public records.
- WAC 504-44-99001 Appendix B—Public records—Request for copies.
- WAC 504-44-99002 Appendix C—Public records—Request for review.

WSR 06-20-085
PROPOSED RULES
DEPARTMENT OF PERSONNEL
 [Filed October 3, 2006, 8:09 a.m.]

Original Notice.
 Exempt from preproposal statement of inquiry under RCW 34.05.310(4).
 Title of Rule and Other Identifying Information: WAC 357-01-370 Workweek.
 Hearing Location(s): Department of Personnel, 2828 Capitol Boulevard, Tumwater, WA, on November 9, 2006, at 8:30 a.m.
 Date of Intended Adoption: November 9, 2006.

Submit Written Comments to: Connie Goff, Department of Personnel, P.O. Box 47500, fax (360) 586-4694, by November 3, 2006. FOR DOP TRACKING PURPOSES PLEASE NOTE ON SUBMITTED COMMENTS "FORMAL COMMENT."

Assistance for Persons with Disabilities: Contact department of personnel by November 3, 2006, TTY (360) 753-4107 or (360) 586-8260.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The purpose of this new section is to define the term workweek.

Statutory Authority for Adoption: Chapter 41.06 RCW. Statute Being Implemented: RCW 41.06.150.

Rule is not necessitated by federal law, federal or state court decision.

Agency Comments or Recommendations, if any, as to Statutory Language, Implementation, Enforcement, and Fiscal Matters: It has been determined that it will be helpful to have the term "workweek" defined in Title 357 WAC.

Name of Proponent: Department of personnel, governmental.

Name of Agency Personnel Responsible for Drafting: Connie Goff, 521 Capitol Way South, Olympia, WA, (360) 664-6250; Implementation and Enforcement: Department of personnel.

No small business economic impact statement has been prepared under chapter 19.85 RCW. Not required.

A cost-benefit analysis is not required under RCW 34.05.328.

November 9, 2006 [October 3, 2006]
 Eva N. Santos
 Director

NEW SECTION

WAC 357-01-370 Workweek. A regular recurring period of 168 hours beginning at a time determined by the appointing authority and continuing for seven consecutive 24-hour periods.

WSR 06-20-086
PROPOSED RULES
DEPARTMENT OF PERSONNEL
 [Filed October 3, 2006, 8:10 a.m.]

Original Notice.
 Exempt from preproposal statement of inquiry under RCW 34.05.310(4).

Title of Rule and Other Identifying Information: WAC 357-13-090 How is an employee affected when his/her position is reallocated?

Hearing Location(s): Department of Personnel, 2828 Capitol Boulevard, Tumwater, WA, on November 9, 2006, at 8:30 a.m.

Date of Intended Adoption: November 9, 2006.

Submit Written Comments to: Connie Goff, Department of Personnel, P.O. Box 47500, fax (360) 586-4694, by November 3, 2006. FOR DOP TRACKING PURPOSES PLEASE NOTE ON SUBMITTED COMMENTS "FORMAL COMMENT."

Assistance for Persons with Disabilities: Contact department of personnel by November 3, 2006, TTY (360) 753-4107 or (360) 586-8260.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The purpose of this change is to clarify what happens when an employee who has not completed their probationary period is being reallocated upward.

Statutory Authority for Adoption: Chapter 41.06 RCW.

Statute Being Implemented: RCW 41.06.150.

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: Department of personnel, governmental.

Name of Agency Personnel Responsible for Drafting: Connie Goff, 521 Capitol Way South, Olympia, WA, (360) 664-6250; Implementation and Enforcement: Department of personnel.

No small business economic impact statement has been prepared under chapter 19.85 RCW. Not required.

A cost-benefit analysis is not required under RCW 34.05.328.

November 9, 2006 [October 3, 2006]

Eva N. Santos

Director

AMENDATORY SECTION (Amending WSR 05-12-088, filed 5/27/05, effective 7/1/05)

WAC 357-13-090 How is an employee affected when his/her position is reallocated?

This table is used to determine how an employee whose position is reallocated is affected.			
	Employee's position reallocated to:		
	Class with a higher salary range maximum	Class with an equal salary range maximum	Class with a lower salary range maximum
Reallocation results from:			
A position review requested by the employee or initiated by the employer	<p><i>If the employee has performed the higher level duties for at least six months and meets the competencies and other position requirements:</i></p> <p>⇒ The employee remains in the position and is appointed with permanent status provided the probationary or trial service period for the class to which the position is reallocated is six months in duration. If the probationary period or trial service period is longer than six months and the employee has not performed higher level duties for the length of the probationary period or trial service period, the employer may require the employee serve the remainder of the probationary or trial service period before gaining permanent status in the reallocated position.</p> <p><i>If the reallocation is the result of a change in the duties of the position and the employee has not performed the higher level duties for six months or more:</i></p>	<p><i>If the employee meets the competencies and other position requirements:</i></p> <p>⇒ The employee remains in the position and retains existing appointment status.</p>	<p><i>If the employee meets the competencies and other position requirements and chooses to remain in the reallocated position:</i></p> <p>⇒ The employee retains appointment status; has the right to be placed on the employer's internal layoff list; and has his/her salary set in accordance with WAC 357-28-120.</p>

	<p>⇒ The employer must give the employee the opportunity to compete for the position. The employer may choose to promote the employee without competition as long as the employee meets the competencies and any other position requirements.</p> <p>If the employee is not selected for the position, the employer's layoff procedure applies. If the employee is appointed <u>and they have already gained permanent status</u>, the employee must serve a trial service period. <u>If the employee has not completed their probationary period, then the probationary period and the new trail service period will overlap, provided the higher and lower classes are in the same or a closely related field. If the classes are not in the same or closely related field, then the employee will start their probationary period over in the new class.</u></p> <p>Upon appointment to the higher class, the employee's base salary must be increased a minimum of a two step increase, not to exceed the top step of the range as provided in WAC 357-28-115.</p>	<p>⇒ The employee retains the previous base salary in accordance with WAC 357-28-120.</p> <p><i>If the employee does not meet the competencies and other position requirements:</i></p> <p>⇒ The employer's layoff procedure applies.</p>	<p><i>If the employee chooses to vacate the position or does not meet the competencies and other position requirements:</i></p> <p>⇒ The employer's layoff procedure applies.</p>
<p>The director implementing a new classification plan under provisions of RCW 41.06.136 or revising the classification plan.</p>	<p>The employee remains in the position and keeps existing appointment status. See WAC 357-28-125 and 357-28-130 for determining the employee's salary.</p>		

WSR 06-20-087
PROPOSED RULES
DEPARTMENT OF PERSONNEL

[Filed October 3, 2006, 8:11 a.m.]

Original Notice.

Exempt from preproposal statement of inquiry under RCW 34.05.310(4).

Title of Rule and Other Identifying Information: WAC 357-31-565 May employers grant paid leave for purposes of recognition?

Hearing Location(s): Department of Personnel, 2828 Capitol Boulevard, Tumwater, WA, on November 9, 2006, at 8:30 a.m.

Date of Intended Adoption: November 9, 2006.

Submit Written Comments to: Connie Goff, Department of Personnel, P.O. Box 47500, fax (360) 586-4694, by

November 3, 2006. FOR DOP TRACKING PURPOSES PLEASE NOTE ON SUBMITTED COMMENTS "FORMAL COMMENT."

Assistance for Persons with Disabilities: Contact department of personnel by November 3, 2006, TTY (360) 753-4107 or (360) 586-8260.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The purpose of this change is to remove the requirement that recognition leave must be used before the employee's vacation leave.

Statutory Authority for Adoption: Chapter 41.06 RCW. Statute Being Implemented: RCW 41.06.150.

Rule is not necessitated by federal law, federal or state court decision.

Agency Comments or Recommendations, if any, as to Statutory Language, Implementation, Enforcement, and Fiscal Matters: This change is necessary so that an employee

will not lose vacation leave when recognition leave is awarded close to the employee's anniversary date.

Name of Proponent: Department of personnel, governmental.

Name of Agency Personnel Responsible for Drafting: Connie Goff, 521 Capitol Way South, Olympia, WA, (360) 664-6250; Implementation and Enforcement: Department of personnel.

No small business economic impact statement has been prepared under chapter 19.85 RCW. Not required.

A cost-benefit analysis is not required under RCW 34.05.328.

November 9, 2006 [October 3, 2006]

Eva N. Santos

Director

AMENDATORY SECTION (Amending WSR 05-08-140, filed 4/6/05, effective 7/1/05)

WAC 357-31-565 May employers grant paid leave for purposes of recognition? Employers who have received performance management confirmation may grant employees up to five days of paid leave within a twelve-month period to recognize outstanding accomplishments or the achievement of predefined work goals by individual employees or units. Leave granted under this provision:

(1) Is not payable upon layoff, dismissal, separation, or resignation or transferable between employers;

(2) Must be used within twelve months of the leave being granted; and

(3) ~~((Must be used before the employee uses vacation leave.))~~

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.

WSR 06-20-088

WITHDRAWAL OF PROPOSED RULES GAMBLING COMMISSION

(By the Code Reviser's Office)

[Filed October 3, 2006, 8:33 a.m.]

WAC 230-06-040, proposed by the gambling commission in WSR 06-07-156 appearing in issue 06-07 of the State Register, which was distributed on April 5, 2006, is withdrawn by the code reviser's office under RCW 34.05.335(3), since the proposal was not adopted within the one hundred eighty day period allowed by the statute.

Kerry S. Radcliff, Editor
Washington State Register

WSR 06-20-089

WITHDRAWAL OF PROPOSED RULES DEPARTMENT OF REVENUE

(By the Code Reviser's Office)

[Filed October 3, 2006, 8:33 a.m.]

WAC 458-20-271, proposed by the department of revenue in WSR 06-07-158 appearing in issue 06-07 of the State Register, which was distributed on April 5, 2006, is withdrawn by the code reviser's office under RCW 34.05.335(3), since the proposal was not adopted within the one hundred eighty day period allowed by the statute.

Kerry S. Radcliff, Editor
Washington State Register

WSR 06-20-090

WITHDRAWAL OF PROPOSED RULES SECRETARY OF STATE

(By the Code Reviser's Office)

[Filed October 3, 2006, 8:33 a.m.]

WAC 434-324-106, proposed by the secretary of state in WSR 06-07-162 appearing in issue 06-07 of the State Register, which was distributed on April 5, 2006, is withdrawn by the code reviser's office under RCW 34.05.335(3), since the proposal was not adopted within the one hundred eighty day period allowed by the statute.

Kerry S. Radcliff, Editor
Washington State Register

WSR 06-20-091

WITHDRAWAL OF PROPOSED RULES SECRETARY OF STATE

(By the Code Reviser's Office)

[Filed October 3, 2006, 8:34 a.m.]

WAC 434-230-160, 434-253-110, 434-261-075 and 434-262-203, proposed by the secretary of state in WSR 06-07-163 appearing in issue 06-07 of the State Register, which was distributed on April 5, 2006, is withdrawn by the code reviser's office under RCW 34.05.335(3), since the proposal was not adopted within the one hundred eighty day period allowed by the statute.

Kerry S. Radcliff, Editor
Washington State Register

WSR 06-20-093

PROPOSED RULES DEPARTMENT OF LICENSING

[Filed October 3, 2006, 9:48 a.m.]

Original Notice.
Preproposal statement of inquiry was filed as WSR 05-15-121.

Title of Rule and Other Identifying Information: Funeral directors and embalmers, amending WAC 308-47-010, 308-47-020, 308-47-030, 308-47-070, 308-48-010, 308-48-030, 308-48-031, 308-48-040, 308-48-080, 308-48-150, 308-48-160, 308-48-180, 308-48-200, 308-48-210, 308-48-350, 308-48-510, 308-48-520, 308-48-530, 308-48-550, 308-48-590, 308-48-780, 308-48-800, 308-49-168 and 308-49-170; and repeals WAC 308-48-110 and 308-49-120.

Hearing Location(s): Holiday Inn - Select, One South Grady Way, Renton, WA 98055, on November 28, 2006, at 10:00 a.m.

Date of Intended Adoption: December 19, 2006.

Submit Written Comments to: Dennis McPhee, P.O. Box 9012, Olympia, WA 98507, e-mail dmcphoe@dol.wa.gov, fax (360) 664-1495, by November 10, 2006.

Assistance for Persons with Disabilities: Contact Joe Vincent Jr. by November 10, 2006, TTY (360) 586-2788 or (360) 664-1555.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: These amendments bring existing rules into uniformity with SSB 5752 and update existing rules for clarity. The proposal repeals two rules, WAC 308-48-110 and 308-49-120, which are outdated.

Reasons Supporting Proposal: These amendments are needed to bring rules into uniformity with SSB 5752 and to clarify existing rules.

Statutory Authority for Adoption: RCW 18.39.175, chapter 34.05 RCW.

Statute Being Implemented: Chapter 18.39 RCW.

Rule is not necessitated by federal law, federal or state court decision.

Agency Comments or Recommendations, if any, as to Statutory Language, Implementation, Enforcement, and Fiscal Matters: This rule proposal has no fiscal impact. The amendments are needed to bring rules into uniformity with SSB 5752.

Name of Proponent: Department of licensing, board of funeral directors and embalmers, governmental.

Name of Agency Personnel Responsible for Drafting: Dennis McPhee, 405 Black Lake Boulevard, Olympia, WA 98507, (360) 664-1555; Implementation and Enforcement: Joe Vincent Jr., 405 Black Lake Boulevard, Olympia, WA 98507, (360) 664-1555.

No small business economic impact statement has been prepared under chapter 19.85 RCW. No additional costs are imposed on small businesses.

A cost-benefit analysis is not required under RCW 34.05.328. Proposal has no economic impact.

September 29, 2006

Joe Vincent Jr.

Administrator

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 06-21 issue of the Register.

WSR 06-20-105
PROPOSED RULES
DEPARTMENT OF
SOCIAL AND HEALTH SERVICES
(Economic Services Administration)

[Filed October 3, 2006, 4:19 p.m.]

Original Notice.

Exempt from preproposal statement of inquiry under RCW 34.05.310(4).

Title of Rule and Other Identifying Information: WAC 388-310-0200 WorkFirst—Activities and 388-310-0700 WorkFirst—Comprehensive evaluation.

Hearing Location(s): Blake Office Park East, Rose Room, 4500 10th Avenue S.E., Lacey, WA 98503 (one block north of the intersection of Pacific Avenue S.E. and Alhadeff Lane. A map or directions are available at <http://www1.dshs.wa.gov/msa/rpau/docket.html> or by calling (360) 664-6097), on November 7, 2006, at 10:00 a.m.

Date of Intended Adoption: Not earlier than November 8, 2006.

Submit Written Comments to: DSHS Rules Coordinator, P.O. Box 45850, Olympia, WA 98504, delivery 4500 10th Avenue S.E., Lacey, WA 98503, e-mail fernaax@dshs.wa.gov, fax (360) 664-6185, by 5:00 p.m., November 7, 2006.

Assistance for Persons with Disabilities: Contact Stephanie Schiller, DSHS Rules Consultant, by November 3, 2006, TTY (360) 664-6178 or (360) 664-6097 or by e-mail at schilse@dshs.wa.gov.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The rules add language to comply with state legislature SHB 2394 WorkFirst participants—Financial literacy and RCW 74.08A.250 and 74.08A.260 that expand the definition of work activities to include financial literacy activities designed to assist a participant in becoming self-sufficient and financially stable. It adds financial literacy evaluation to comprehensive evaluation, foundation part, used to develop the individual responsibility plan (IRP) for WorkFirst participants.

A preproposal statement of inquiry (CR-101) was not filed and is not required for rules adopting or incorporating by reference language from Washington state statutes without material change. See RCW 34.05.310(4).

Reasons Supporting Proposal: Financial literacy is an essential element in achieving financial stability and self-sufficiency. It promotes WorkFirst parents' ability to make financial decisions that will contribute to their long-term financial well-being.

Statutory Authority for Adoption: RCW 74.04.050, 74.08.090, 74.08A.340.

Statute Being Implemented: RCW 74.08A.250 and 74.08A.260.

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: Department of social and health services, governmental.

Name of Agency Personnel Responsible for Drafting, Implementation and Enforcement: Olga Walker, P.O. Box 45470, Olympia, WA 98504-5470, (360) 725-4641.

No small business economic impact statement has been prepared under chapter 19.85 RCW. This proposed rule does not have an economic impact on small businesses, it only affects DSHS clients by outlining the rules clients must meet in order to be eligible for the department's cash assistance or food benefit programs.

A cost-benefit analysis is not required under RCW 34.05.328. These amendments are exempt as allowed under RCW 34.05.328 (5)(b)(vii) which states in-part, "[t]his section does not apply to...rules of the department of social and health services relating only to client medical or financial eligibility and rules concerning liability for care of dependents."

September 28, 2006

Andy Fernando, Manager

Rules and Policies Assistance Unit

AMENDATORY SECTION (Amending WSR 02-15-067, filed 7/11/02, effective 8/1/02)

WAC 388-310-0200 WorkFirst—Activities. (1) Who is required to participate in WorkFirst activities?

(a) You are required to participate in WorkFirst activities, and become what is called a "mandatory participant," if you:

- (i) Receive TANF or SFA cash assistance; and
- (ii) Are a custodial parent or age sixteen or older; and
- (iii) Are not exempt. For exemptions see WAC 388-310-0300 and 388-310-0350.

(b) Participation is voluntary for all other WorkFirst participants (those who no longer receive or have never received TANF or SFA cash assistance).

(2) What activities do I participate in when I enter the WorkFirst program?

When you enter the WorkFirst program, you will participate in one or more of the following activities (which are described in more detail in other sections of this chapter):

- (a) Paid employment (see WAC 388-310-0400 (2)(a) and 388-310-1500);
- (b) Self employment (see WAC 388-310-1700);
- (c) Job search (see WAC 388-310-0600);
- (d) Community jobs (see WAC 388-310-1300)
- (e) Work experience (see WAC 388-310-1100);
- (f) On-the-job training (see WAC 388-310-1200);
- (g) Vocational educational training (see WAC 388-310-1000);
- (h) Basic education activities (see WAC 388-310-0900);
- (i) Job skills training (see WAC 388-310-1050);
- (j) Community service (see WAC 388-310-1400);
- (k) Activities provided by tribal governments for tribal members and other American Indians (see WAC 388-310-1400(1) and 388-310-1900);
- (l) Other activities identified by your case manager on your individual responsibility plan that will help you with situations such as drug and/or alcohol abuse, homelessness, or mental health issues; and/or

(m) Activities identified by your case manager on your individual responsibility plan to help you cope with family violence as defined in WAC 388-61-001; and/or

(n) Up to ten hours of financial literacy activities to help you become self-sufficient and financially stable.

(3) If I am a mandatory participant, how much time must I spend doing WorkFirst activities?

If you are a mandatory participant, you will be required to participate full time, working, looking for work or preparing for work. You might be required to participate in more than one part-time activity at the same time that add up to full time participation. You will have an individual responsibility plan (described in WAC 388-310-0500) that includes the specific activities and requirements of your participation.

(4) What activities do I participate in after I get a job?

You will participate in other activities, such as job search or training once you are working twenty hours or more a week in a paid unsubsidized job, to bring your participation up to full time.

You may also engage in activities if you are working full time and want to get a better job.

Post employment services (described in WAC 388-310-1800) include:

- (a) Activities that help you keep a job (called an "employment retention" service); and/or
- (b) Activities that help you get a better job or better wages (called a "wage and skill progression" service).

AMENDATORY SECTION (Amending WSR 06-08-044, filed 3/30/06, effective 6/1/06)

WAC 388-310-0700 WorkFirst—Comprehensive evaluation. (1) Why do I receive a comprehensive evaluation?

You participate in a comprehensive evaluation with your case manager and other WorkFirst staff to determine:

- (a) Your employment strengths, your educational background, family situation and other factors; and
- (b) Which WorkFirst activities you need to become employed.

(2) What is the comprehensive evaluation and when will it be used?

(a) The comprehensive evaluation is a series of questions, answers and evaluations focused on your strengths, job skills, education and other relevant elements. The results of the comprehensive evaluation are used to determine your ability to find and keep a job in your local labor market and what WorkFirst activities will help you prepare for and find work. It includes:

(i) An employability evaluation with your case manager, discussing important issues that can affect your ability to find a job, like child care, family violence or substance abuse. Your case manager will also ask you a few questions to find out if you might benefit from engaging in financial literacy activities such as money management training or any other type of credit counseling service. If so, we will tell you how to get this information;

(ii) A work skills assessment to review your education, employment history, employment strengths and job skills; and

(iii) Educational and other evaluations.

(b) You and your case manager and/or social worker use the information and recommendations from these evaluations

to create or modify your individual responsibility plan, adding activities that help you become employable.

(c) After your comprehensive evaluation, you may receive more assessments to find out if you need additional services.

WSR 06-20-109
PROPOSED RULES
DEPARTMENT OF AGRICULTURE

[Filed October 4, 2006, 9:09 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 06-05-112.

Title of Rule and Other Identifying Information: The Washington state department of agriculture (WSDA) organic food program is proposing changes to chapter 16-157 WAC, Organic standards and certification. The program is proposing to establish some new fees and increase some selected fees. The new fees and fee increases are needed to recover the cost of providing these services and to provide adequate funding for the WSDA organic food program.

The proposal would increase late fees and new application fees. New fees include a \$20 site fee that will increase fees for certified organic producers. The site fee is designed to recover the cost of conducting inspections on farms and ranches that have multiple sites that need to be inspected. Organic production operations that have one location in organic production will pay a \$20 site fee. Organic production operations with multiple locations will pay \$20 for each separate site.

The proposal also includes an expedited inspection fee of \$40 per hour. This fee will recover the costs associated with expedited inspections. Expedited inspections are those inspections that [are] conducted outside of our normal work schedule.

Hearing Location(s): Natural Resources Building, 2nd Floor, Room 259, 1111 Washington Street, Olympia, WA 98504-2560, on November 8, 2006, at 2 p.m.

Date of Intended Adoption: November 17, 2006.

Submit Written Comments to: Miles McEvoy, Organic Food Program, P.O. Box 42560, Olympia, WA 98504-2560, e-mail mmcevoy@agr.wa.gov, fax (360) 902-2087, by 5:00 p.m., November 8, 2006.

Assistance for Persons with Disabilities: Contact Julie Carlson by November 1, 2006, TTY (360) 902-1996 or (360) 902-1880.

Statutory Authority for Adoption: Chapters 15.86 and 34.05 RCW.

Statute Being Implemented: Chapter 15.86 RCW.

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: Washington state department of agriculture, governmental.

Name of Agency Personnel Responsible for Drafting, Implementation and Enforcement: Miles McEvoy, Olympia, (360) 902-1924.

No small business economic impact statement has been prepared under chapter 19.85 RCW. RCW 19.85.030 (1)(a)

requires the department to prepare a small business economic impact statement (SBEIS) for proposed rules that impose a more than minor cost on businesses in an industry. The department analyzed the economic impact of the proposed amendments and concluded that the cost imposed by the proposed amendments are "not more than minor," therefore, a formal SBEIS is not required.

A cost-benefit analysis is not required under RCW 34.05.328. The WSDA is not a listed agency under RCW 34.05.328 (5)(a)(i). RCW 34.05.328 regulates "significant legislative rules" and RCW 34.05.328 (5)(a)(i) lists the specific state agencies that are considered "significant legislative rule agencies." WSDA is not listed; therefore, we do not consider ourselves to be a "significant legislative rule agency." In addition, section 309 (for the department of agriculture) of chapter 372, Laws of 2006, provides that: (2) Fees and assessments approved by the department in the 2005-07 biennium are authorized to exceed the fiscal growth factor under RCW 43.135.055.

October 3, 2006

Jerry Buendel

Assistant Director

AMENDATORY SECTION (Amending WSR 02-10-090, filed 4/29/02, effective 5/30/02)

WAC 16-157-010 Purpose. This chapter is ~~((promulgated pursuant to))~~ adopted under RCW 15.86.060 wherein the director is authorized to adopt rules for the proper administration of the Organic Food Products Act, and ~~((pursuant to))~~ under RCW 15.86.070 wherein the director is authorized to adopt rules establishing a certification program for producers, processors, and handlers of organic and transitional food.

AMENDATORY SECTION (Amending WSR 04-24-015, filed 11/22/04, effective 12/23/04)

WAC 16-157-020 Adoption of the National Organic Program. The ~~((2004))~~ Washington state department of agriculture adopts the standards of the National Organic Program ~~((final rule)),~~ 7 CFR Part 205, effective ~~((November 3, 2003, is adopted by reference as Washington state standards))~~ September 11, 2006, for the production and handling of organic crops, livestock, and processed food products. The National Organic Program ~~((final))~~ rules may be obtained from the department.

AMENDATORY SECTION (Amending WSR 03-03-044, filed 1/10/03, effective 2/10/03)

WAC 16-157-030 Definitions. As used in this chapter: ~~((H))~~ "Department" means the Washington state department of agriculture ~~((of the state of Washington)).~~

~~((Z))~~ "Director" means the director of the department of agriculture or his or her duly authorized representative.

~~((T))~~ "Facility" includes, but is not limited to, any premises, plant, establishment, ~~((facilities))~~ facility and ~~((the))~~ associated appurtenances ~~((thereto, in whole or in part.))~~ where organic food is prepared, handled, or processed in any manner for resale or distribution to retail outlets, restaurants,

and any other such (~~other~~) facility selling or distributing to (~~the ultimate~~) consumers.

~~((4))~~ "Gross annual income" means the total monetary value received during a twelve-month period of time. The twelve-month period of time may be a fiscal year or a calendar year.

"Handler" means any person engaged in the business of handling agricultural products, including producers who handle crops or livestock of their own production.

"Handling operation" means any operation or portion of an operation that receives or otherwise acquires agricultural products and processes, packages, or stores such products.

"New applicant" means any person (~~that~~) who applies for organic certification for the first time, or (~~when previous certification status has expired for at least one year~~) any person who has surrendered an organic certification or had an organic certification suspended or revoked.

"Person" means any individual, partnership, limited liability company, association, cooperative, or other entity.

~~((5))~~ "Processor" means any handler engaged in the canning, freezing, drying, dehydrating, cooking, pressing, powdering, packaging, baking, heating, mixing, grinding, churning, separating, extracting, cutting, fermenting, eviscerating, preserving, jarring, slaughtering or otherwise processing organic food.

~~((6))~~ "Producer" means a person who engages in the business of growing or producing food, fiber, feed, and other agricultural-based consumer products.

"Production operation" means a farm, ranch, or other business that grows, gathers, or raises crops, wild crops, or livestock.

"Renewal applicant" means any person that has received organic certification from the department in the previous year.

~~((7))~~ "Retailer" means any handler that sells organic food products directly to consumers.

~~((8))~~ "Sale" means selling, offering for sale, holding for sale, preparing for sale, trading, bartering, offering a gift as an inducement for sale of, and advertising for sale in any media.

~~((9))~~ "Site" means a contiguous defined field, orchard, block, pasture, paddock, garden, circle, plot or other designated area under the same management practices (e.g., organic, transitional).

~~((10))~~ "Transitional product" means any agricultural product that (a) is marketed using the term transitional in its labeling and advertising and (b) satisfies all of the requirements of organic except that it has had no applications of prohibited substances within one year prior to the harvest of the crop.

AMENDATORY SECTION (Amending WSR 02-10-090, filed 4/29/02, effective 5/30/02)

WAC 16-157-210 Confidentiality. Except for applications and laboratory analyses submitted for certification under this chapter, the department keeps confidential any business-related information obtained under this chapter. All business-related information submitted to the department under this chapter is exempt from public inspection and

copying consistent with RCW 15.86.110 and (~~42.17.310~~) 42.56.210.

NEW SECTION

WAC 16-157-215 General requirements for certification. (1) Except for operations exempt or excluded in the National Organic Program (7 CFR 205.101), each production or handling operation or specified portion of a production or handling operation must be certified if it produces or handles crops, livestock, livestock products, or other agricultural products intended to be sold, labeled, or represented as "one hundred percent organic," "organic," or "made with organic (specified ingredients or food group(s))."

(a) If you have an operation that meets the definition of "production operation," you must be certified as a producer.

(b) If you have an operation that meets the definition of "handling operation," you must be certified as a handler or processor unless you are a certified producer who cleans, washes, grades, dries, packages, transports, or does similar preparation of your own production.

(c) If you are a certified producer who changes crops, wild crops, or livestock products of your own production into new distinct products by physically, chemically, or otherwise changing the original product, you must also be certified as a processor.

(2) If you are seeking to receive or maintain organic certification, you must submit an application on forms approved by the department.

(a) Application forms must be signed by an authorized representative of the business operation and must be accompanied by the appropriate fees in order to be considered.

(b) Application forms are available upon request from the department.

(3) If you are a new applicant, you must include a complete organic system plan with your application.

(4) If you are a certified operation, you must submit an update to your organic system plan on an annual basis. Certified operations may be required by the department to submit a new complete organic system plan whenever there are significant changes to the operation.

(5) Applications for certification must include a list of all organic products produced and/or handled, including sample labels and complete product profiles for each distinctly labeled organic product.

(a) Certified operations must not use an organic label or make organic claims for any product not included in the operation's organic system plan.

(b) Certified operations may add new products to their organic certification by submitting sample labels and complete product profiles to the department where applicable.

(c) Product profiles must include a complete list of ingredients in the product and processing aids used in manufacturing the product.

(6) Certified operations that do not submit a renewal application and fees to continue certification or do not comply annually with 7 CFR 205.406 may have their certification suspended.

AMENDATORY SECTION (Amending WSR 05-22-055, filed 10/28/05, effective 11/28/05)

WAC 16-157-220 **Producer fee schedule.** (~~Producers who wish to apply for the organic food certification program must apply to the department each year.~~

~~(1) The cost per application shall be based on the following fee schedule:~~

~~(a) Renewal applicants—~~

~~Application fees must be based on the previous calendar year's sales of organic food. In the event that the current calendar year's sales exceed the previous year's sales, the department may bill the producer for the additional fee. In the event that the current calendar year's sales are less than the previous year's sales, the producer may request a refund for the reduced fee. In addition, renewal applications postmarked after February 1, must pay a late fee of seventy-five dollars. Renewal applicants that are adding additional sites to their organic certification must pay a new site fee of fifty dollars for each additional site.~~

~~(b) New applicants—~~

~~Application fees must be based on an estimate of the current year's sales of organic food. In the event that the current calendar year's sales exceed the estimate, the department may bill the producer for the additional fee. In the event that the current calendar year's sales are less than the estimate, the producer may request a refund for the reduced fee. In addition, new applicants must pay a one hundred dollar new applicant fee. New applicants that are seeking organic certification for more than one site must pay a site fee of fifty dollars for each additional site. The fee shall accompany the application.) (1) If you wish to apply for the organic producer certification program, you must submit an application and fees to the department each year.~~

~~(2) **Annual fees:** The cost per producer application is based on the following fee schedule.~~

((SALES))		
GROSS ANNUAL INCOME		ANNUAL FEE
\$ 0 -	\$ 15,000	..... \$ 200
\$ 15,001 -	\$ 20,000	..... \$ 225
\$ 20,001 -	\$ 25,000	..... \$ 280
\$ 25,001 -	\$ 30,000	..... \$ 335
\$ 30,001 -	\$ 35,000	..... \$ 390
\$ 35,001 -	\$ 42,500	..... \$ 470
\$ 42,501 -	\$ 50,000	..... \$ 560
\$ 50,001 -	\$ 65,000	..... \$ 670
\$ 65,001 -	\$ 80,000	..... \$ 835
\$ 80,001 -	\$100,000	..... \$ 1,000
\$100,001 -	\$125,000	..... \$ 1,150
\$125,001 -	\$150,000	..... \$ 1,300
\$150,001 -	\$175,000	..... \$ 1,450
\$175,001 -	\$200,000	..... \$ 1,600
\$200,001 -	\$240,000	..... \$ 1,750
\$240,001 -	\$280,000	..... \$ 1,900
\$280,001 -	\$325,000	..... \$ 2,050

((SALES))		
GROSS ANNUAL INCOME		ANNUAL FEE
\$325,001 -	\$375,000	..... \$ 2,200
\$375,001 -	\$425,000	..... \$ 2,450
\$425,001 -	\$500,000	..... \$ 2,700
\$500,001 -	\$750,000	..... \$ 3,000
\$750,001 -	and up	.. \$2,200 plus 0.11% of gross organic sales

~~((2) **Transitional acreage fee**— In addition to the producer application fee, each applicant must pay a fee of fifty dollars per site for the land for which they are requesting transitional certification.) (a) **New applicants:** Application fees are based on an estimate of the gross annual income from organic agricultural products.~~

~~(i) In the event that the actual gross annual income from organic agricultural products exceeds the estimated gross annual income from organic agricultural products, the department may bill the producer for the additional fee.~~

~~(ii) In the event that the actual gross annual income from organic agricultural products is less than the estimated gross annual income from organic agricultural products, the producer may request a refund for the reduced fee.~~

~~(b) **Renewal applicants:** Application fees are based on the previous year's gross annual income from organic agricultural products.~~

~~(i) In the event that the current year's gross annual income from organic agricultural products exceeds the previous year's gross annual income from organic agricultural products, the department may bill the producer for the additional fee.~~

~~(ii) In the event that the current year's gross annual income is less than the previous year's gross annual income from organic agricultural products, the producer may request a refund for the reduced fee.~~

~~(c) **Late fees:** Renewal applications postmarked after February 1 must include a late fee in addition to the renewal fee.~~

If your application is postmarked after February 1 but before:	The late fee is:
March 1	\$150.00
April 1	\$300.00
May 1	\$450.00
June 1	\$600.00
July 1	\$750.00
August 1	\$1,000.00

~~(3) **Site fee:**~~
~~(a) Each site that is involved in organic production must be inspected on an annual basis.~~

~~(b) All sites involved in organic production must be included as part of the producer's organic system plan.~~

~~(c) The producer of each site that is included in the organic system plan must pay a site inspection fee of twenty dollars per year.~~

~~(4) **Transitional certification fee:** In addition to the producer application fee, if you are requesting transitional~~

certification, you must pay a fifty dollar transitional certification fee for each site request.

(5) **New application fee:** New applicants must pay a two hundred fifty dollar new application fee in addition to the annual fees.

AMENDATORY SECTION (Amending WSR 03-03-044, filed 1/10/03, effective 2/10/03)

WAC 16-157-230 Processor fee schedule. ((Processors who wish to apply for the organic food certification program must apply to the department each year. Producers that process their own organic products pay application and certification fees under WAC 16-157-220.

(1) **Application fee:**

(a) **Renewal applicants**—Application fees are two hundred dollars per facility. In addition, renewal applications postmarked after March 1, must pay a late fee of seventy-five dollars.

(b) **New applicants**—Application fees are two hundred dollars per facility. In addition, new applicants must pay a one hundred dollar new applicant fee.

(2) **Certification fee**—A certification fee based on the following fee schedule must accompany the application. Certification fees are assessments on the organic products in each category. New applicants must base certification fees on an estimate of sales in each category. Renewal applicants must base certification fees on the previous calendar year's sales in each category. Applicants may have food products in more than one category.) (1)(a) If you wish to apply for organic processor certification, you must submit an application and fees to the department each year.

(b) If you are a producer who processes your own organic products, you may pay application and certification fees under WAC 16-157-220 or apply separately as a processor.

(2) **Application fees:**

(a) **New applicants:** New applicants must pay an application fee of two hundred dollars per application and a new applicant fee of two hundred fifty dollars.

(b) **Renewal applicants:** Application fees are two hundred dollars per renewal application.

(c) **Late fees:** Renewal applications postmarked after March 1 must include a late fee in addition to the renewal fee.

<u>If your application is postmarked after March 1 but before:</u>	<u>The late fee is:</u>
<u>April 1</u>	<u>\$150.00</u>
<u>May 1</u>	<u>\$300.00</u>
<u>June 1</u>	<u>\$450.00</u>
<u>July 1</u>	<u>\$600.00</u>
<u>August 1</u>	<u>\$750.00</u>
<u>September 1</u>	<u>\$1,000.00</u>

(3) **Certification fees:**

(a) **Category I - Organic food products:** Products labeled as "organic" or "one hundred percent organic" are assessed 0.30% of the previous ((calendar)) year's ((sales))

gross annual income for the first million dollars and 0.11% for ((sales)) gross annual income above one million dollars.

(b) **Category II - Made with organic food products:** Products labeled as "made with organic ingredients" are assessed 0.20% of the previous ((calendar)) year's ((sales)) gross annual income for the first million dollars and 0.07% for ((sales)) gross annual income above one million dollars.

(c) **Category III - Food products with organic ingredients:** Products packaged for retail sales that limit ((their)) organic claims to the information panel are assessed 0.11% of the previous ((calendar)) year's ((sales)) gross annual income for the first million dollars and 0.04% for ((sales)) gross annual income above one million dollars.

(d) **Category IV - Custom organic food products:** Products produced by processors who charge a service fee to organic manufacturers for processing organic food are assessed at 0.40% of the previous ((calendar)) year's service fees received for processing organic food for the first million dollars and 0.11% for service fees above one million dollars.

(e) In the event that the current ((calendar)) year's ((sales (or service fees))) gross annual income exceeds the previous year's ((sales (or service fees))) gross annual income or estimate of ((sales)) income, the department may bill the applicant for the additional certification fee.

(f) In the event that the current ((calendar)) year's ((sales (or service fees) are)) gross annual income is less than the previous year's gross ((sales (or service fees))) annual income or estimate of sales, the applicant may request a refund for the reduced certification fee.

AMENDATORY SECTION (Amending WSR 03-03-044, filed 1/10/03, effective 2/10/03)

WAC 16-157-240 Handler fee schedule. ((Handlers who)) (1) If you wish to apply for the organic food certification program, you must ((apply)) submit an application and fees to the department each year.

(a) **Handlers** ((that)) who process organic food products must apply for organic certification under WAC 16-157-230.

(b) **Retailers** who wish to apply for the organic food certification program must apply for organic certification under WAC 16-157-245.

(c) **Producers** ((that)) who package, store, or handle organic products from other certified organic operations must apply for certification as a handler under this section.

(d) **Producers** who handle only their own organic products do not need to obtain separate certification as handlers.

(e) **Producers** who are certified as handlers under this section pay certification fees for their own production under WAC 16-157-220 and do not include sales of their own production in the calculation of their handler certification fees.

(f) All other handlers of organic food products may apply for organic certification under this section.

((1) **Renewal applicants.** Application fees must be based on the previous calendar year's sales of organic food. In the event that the current calendar year's sales exceed the previous year's sales, the department may bill the handler for the additional fee. In the event that the current calendar year's sales are less than the previous year's sales, the handler may request a refund for the reduced fee. In addition, renewal

applications postmarked after March 1 must pay a late fee of seventy-five dollars.

(2) New applicants. Application fees must be based on an estimate of the current year's sales of organic food. In the event that the current calendar year's sales exceed the estimate, the department may bill the handler for the additional fee. In the event that the current calendar year's sales are less than the estimate, the handler may request a refund for the reduced fee. In addition, new applicants must pay a one hundred dollar new applicant fee.

(3) The cost per facility must be based on the following fee schedule. The appropriate fee must accompany the application. (2) Annual fees: The cost per organic handler application is based on the following schedule.

((ORGANIC SALES))	
GROSS ANNUAL INCOME	FEE
\$ 0 - \$ 50,000	\$ 200
\$ 50,001 - \$ 75,000	\$ 250
\$ 75,001 - \$ 100,000	\$ 330
\$ 100,001 - \$ 200,000	\$ 440
\$ 200,001 - \$ 300,000	\$ 550
\$ 300,001 - \$ 400,000	\$ 660
\$ 400,001 - \$ 500,000	\$ 770
\$ 500,001 - \$ 750,000	\$ 990
\$ 750,001 - \$ 1,000,000	\$ 1,100
\$1,000,001 - \$ 1,250,000	\$ 1,375
\$1,250,001 - \$ 1,500,000	\$ 1,650
\$1,500,001 - \$ 2,000,000	\$ 2,200
\$2,000,001 - \$ 2,500,000	\$ 2,750
\$2,500,001 - \$ 3,000,000	\$ 3,300
\$3,000,001 - \$ 4,000,000	\$ 3,850
\$4,000,001 - \$ 5,000,000	\$ 4,400
\$5,000,001 - \$ 6,000,000	\$ 5,500
\$6,000,001 - \$ 7,000,000	\$ 6,600
\$7,000,001 - \$ 8,000,000	\$ 7,700
\$8,000,001 - \$ 9,000,000	\$ 8,800
\$9,000,001 - \$ 10,000,000	\$ 9,900
over \$ 10,000,000	\$ 11,000

(a) New applicants: Application fees are based on an estimate of the gross annual income from organic agricultural products.

(i) In the event that the actual gross annual income exceeds the estimate, the department may bill the handler for the additional fee.

(ii) In the event that the actual gross annual income from organic agricultural products is less than the estimate, the handler may request a refund for the reduced fee.

(b) Renewal applicants: Application fees are based on the previous year's gross annual income from organic agricultural products.

(i) In the event that the current year's gross annual income from organic agricultural products exceeds the previous year's gross annual income from organic agricultural

products, the department may bill the handler for the additional fee.

(ii) In the event that the current year's gross annual income from organic agricultural products is less than the previous year's gross annual income from organic agricultural products, the handler may request a refund for the reduced fee.

(c) Late fees: Renewal applications postmarked after March 1 must include a late fee in addition to the renewal fee.

If your application is postmarked

after March 1 but before:

The late fee is:

April 1	\$150.00
May 1	\$300.00
June 1	\$450.00
July 1	\$600.00
August 1	\$750.00
September 1	\$1,000.00

(d) New application fee: New applicants must pay a two hundred fifty dollar new application fee in addition to the annual fees.

AMENDATORY SECTION (Amending WSR 03-03-044, filed 1/10/03, effective 2/10/03)

WAC 16-157-245 Retailer fee schedule. ((Retailers who wish to apply for the organic food certification program must apply to the department each year.

(1) Renewal applicants. Application fees must be based on the previous calendar year's sales of organic products. In the event that the current calendar year's sales exceed the previous year's sales, the department may bill the retailer for the additional fee. In the event that the current calendar year's sales are less than the previous year's sales, the retailer may request a refund for the reduced fee. In addition, renewal applications postmarked after March 1 must pay a late fee of seventy-five dollars.

(2) New applicants. Application fees must be based on an estimate of the current year's sales of organic food. In the event that the current calendar year's sales exceed the estimate, the department may bill the retailer for the additional fee. In the event that the current calendar year's sales are less than the estimate, the retailer may request a refund for the reduced fee. In addition, new applicants must pay a one hundred dollar new applicant fee.

(3) The cost per facility must be based on the following fee schedule. The appropriate fee must accompany the application. (1) If you are seeking organic retailer certification, you must submit an application and fees to the department each year.

(2) Application fees: The cost per retailer application is based on the following schedule.

((ORGANIC SALES))	
GROSS ANNUAL INCOME	FEE
\$ 0 - \$ 100,000	\$330
\$100,001 - \$ 500,000	\$500
\$500,001 - \$ 1,000,000	\$750

((ORGANIC SALES))

<u>GROSS ANNUAL INCOME</u>	<u>FEE</u>
\$1,000,001 - \$2,000,000	\$1,000
\$2,000,001 - \$3,000,000	\$1,500
\$3,000,001 - \$4,000,000	\$2,000
\$4,000,001 - \$5,000,000	\$2,250
over - \$5,000,000	\$2,500

(a) New applicants: Application fees are based on an estimate of the gross annual income from organic agricultural products.

(i) In the event that the actual gross annual income from organic agricultural products exceeds the estimate, the department may bill the retailer for the additional fee.

(ii) In the event that the actual gross annual income from organic agricultural products is less than the estimated gross annual income from organic agricultural products, the retailer may request a refund for the reduced fee.

(b) Renewal applicants: Application fees are based on the previous year's gross annual income from organic agricultural products.

(i) In the event that the current year's gross annual income from organic agricultural products exceeds the previous year's gross annual income from organic agricultural products, the department may bill the producer for the additional fee.

(ii) In the event that the current year's gross annual income from organic agricultural products is less than the previous year's gross annual income from organic agricultural products, the producer may request a refund for the reduced fee.

(c) Late fees: Renewal applications postmarked after March 1 must include a late fee in addition to the renewal fee.

<u>If your application is postmarked after March 1 but before:</u>	<u>The late fee is:</u>
<u>April 1</u>	<u>\$150.00</u>
<u>May 1</u>	<u>\$300.00</u>
<u>June 1</u>	<u>\$450.00</u>
<u>July 1</u>	<u>\$600.00</u>
<u>August 1</u>	<u>\$750.00</u>
<u>September 1</u>	<u>\$1,000.00</u>

(d) New application fee: New applicants must pay a two hundred fifty dollar new application fee in addition to the annual fees.

AMENDATORY SECTION (Amending WSR 03-03-044, filed 1/10/03, effective 2/10/03)

WAC 16-157-250 Inspections. (1)(a) The director shall make ((at least one inspection and any additional inspections deemed necessary to each applicant each year)) one or more inspections per year of each certified producer, processor, or handler to determine compliance with this chapter and chapter 15.86 RCW ((and rules adopted pursuant to chapter 15.86 RCW)).

((This inspection may entail)) (b) Inspections may include a survey of required records, examination of fields, facilities and storage areas, and inspection of any other information deemed necessary by the requirements of this chapter.

(2) The annual on-site inspection and any additional inspections conducted for collecting samples or for surveillance within the state of Washington are provided for under the application and certification fees.

(a) Additional inspections, if necessary to determine compliance or requested, will be charged to the ((applicant)) certified producer, processor, or handler at the rate of forty dollars per hour plus ((mileage)) associated travel costs as set ((at the rate established)) by the state office of financial management.

(b) Out-of-state inspections, if necessary or requested, shall be at the rate of ((\$40/hr.)) forty dollars per hour plus ((transportation)) associated travel costs.

(3) Expedited inspections and evaluations are defined as inspections and evaluations that are conducted outside of the normal inspection and evaluation schedule. Expedited inspections and evaluations are conducted in less than two weeks from the receipt of a written notice.

(a) Applicants for certification and certified operations may request expedited inspections or evaluations.

(b) The department may provide expedited inspections and evaluations if sufficient staff is available to expedite the work.

(c) Expedited inspections and evaluations shall be at the rate of forty dollars per hour, plus associated travel costs.

AMENDATORY SECTION (Amending WSR 03-03-044, filed 1/10/03, effective 2/10/03)

WAC 16-157-255 Sampling. A representative sample of ((the)) any organic product may be tested for pesticide or other contaminants whenever the director deems it necessary for organic certification or maintenance of organic certification. Sample analysis is provided under the application and certification fees.

AMENDATORY SECTION (Amending WSR 03-03-044, filed 1/10/03, effective 2/10/03)

WAC 16-157-260 Organic and transitional producer certification and the use of logos. (1) ((Organic producers certified under this chapter may use the organic producer logo, found in WAC 16-157-275, to identify organic products.

Transitional producers certified under this chapter may use the transitional producer logo, found in WAC 16-157-275, to identify transitional products.

((2)) The director must review the application, inspection report, and results of any samples collected to determine ((that the)) if a producer has complied with the conditions for organic or transitional certification. A certificate will be issued when the director determines that the producer has complied with the conditions for organic or transitional producer certification.

(2) Organic producers certified under this chapter may use the organic producer logo, found in WAC 16-157-275, to identify organic products.

(3) Transitional products certified under this chapter may use the transitional producer logo, found in WAC 16-157-275, to identify transitional products.

AMENDATORY SECTION (Amending WSR 03-03-044, filed 1/10/03, effective 2/10/03)

WAC 16-157-270 Organic food processor and handler certification and use of logos. (1) The director must review the application, inspection report, and results of any organic samples collected to determine ~~((that the))~~ if a processor or handler has complied with the conditions for organic food certification. An organic food certificate will be issued when the director determines that the processor or handler has complied with the conditions for organic food certification.

(2) Processors certified under this chapter may use the organic processor logo, found in WAC 16-157-275, to identify organic products processed by the facility.

(3) Handlers certified under this chapter may use the organic handler logo, found in WAC 16-157-275, to identify organic products handled by the facility.

AMENDATORY SECTION (Amending WSR 03-03-044, filed 1/10/03, effective 2/10/03)

WAC 16-157-290 Export and transaction certificates. (1) Organic export and transaction certificates are issued to verify that a specific shipment of organic food products has been produced, processed, and handled in accordance with the ~~((2004))~~ National Organic Program, 7 CFR Part 205, or a foreign organic standard.

(2) Applications for export and transaction certificates must be submitted on forms furnished by the department. The applicant must furnish all information requested on the application. A separate application must be made for each export and transaction certificate.

(3) The fee for export and transaction certificates ~~((shall be))~~ is forty dollars per application.

WSR 06-20-111

PROPOSED RULES

SPOKANE COUNTY AIR POLLUTION CONTROL AUTHORITY

[Filed October 4, 2006, 9:46 a.m.]

Original Notice.

Exempt from preproposal statement of inquiry under RCW 34.05.310(4).

Title of Rule and Other Identifying Information: (1) SCAPCA Regulation I, Article IV, Section 4.02 General Requirements for Registration; (2) SCAPCA Regulation I, Article V, Section 5.02 Notice of Construction (NOC) - When Required; and (3) SCAPCA Regulation I, Article VI, Section 10.06 Registration and Operating Permit Fees for Air Contaminant Sources.

Hearing Location(s): Spokane County Public Works Building, 1206 West Broadway, Hearing Room, Lower

Level, Spokane, WA 99201, on December 7, 2006, at 9:30 a.m.

Date of Intended Adoption: December 7, 2006.

Submit Written Comments to: Joe Southwell or Matt Holmquist, 1101 West College, Suite 403, Spokane, WA 99201, e-mail mgholmquist@scapca.org or jrsouthwell@scapca.org, fax (509) 477-6828 by November 9, 2006.

Assistance for Persons with Disabilities: Contact Barbara Nelson by 4:30 p.m., November 9, 2006, (509) 477-4727.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: (1) and (2) Amend permitting regulations to exempt coffee roasters with ≤ 10 lb maximum batch capacity from permitting requirements; and (3) amend annual registration fees to achieve full program cost recovery.

Reasons Supporting Proposal: (1) and (2) Spokane County Air Pollution Control Authority (SCAPCA) board of directors direction to revise SCAPCA coffee roaster permitting requirements to be consistent with other local air agencies in state; and (3) SCAPCA's registration program fee schedule has not been adjusted in a decade.

Statutory Authority for Adoption: RCW 70.94.141(1), 70.94.380(2).

Statute Being Implemented: RCW 70.94.151(2).

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: SCAPCA, governmental.

Name of Agency Personnel Responsible for Drafting, Implementation and Enforcement: Joe Southwell/Matt Holmquist, SCAPCA, 1101 West College, Suite 403, Spokane, WA 99201, (509) 477-4727.

No small business economic impact statement has been prepared under chapter 19.85 RCW. This is a local air pollution control authority rule and as such, chapter 19.85 RCW does not apply.

A cost-benefit analysis is not required under RCW 34.05.328. This is a local agency rule and pursuant to RCW 70.94.141(1), RCW 34.05.328 does not apply to this rule.

October 3, 2006

Matt Holmquist

Compliance Administrator

AMENDATORY SECTION

SCAPCA Regulation I, Article X, Section 10.06

SECTION 10.06 REGISTRATION AND OPERATING PERMIT FEES FOR AIR CONTAMINANT SOURCES

A. Each source required by Article IV, Section 4.01 to be registered, each air operating permit source, and each source required by Article V, Section 5.02 to obtain an approved Notice of Construction and Application for Approval is subject to an annual fee for each calendar year, or portion of each calendar year, during which it operates. The owner or operator shall pay the fee, pursuant to the requirements in Section 10.02. Fees received pursuant to the registration program or the operating permit program shall not exceed the actual costs of program administration.

B. The annual fee for each source required by Article IV, Section 4.01 to be registered and that is not subject to Section

10.06.C of this Regulation shall be determined by adding all of the applicable fees in the current fee schedule.

1. The Board shall annually review the fee schedule for registered sources and determine if the total projected fee revenue to be collected pursuant to this Section is sufficient to fully recover program costs. Any proposed fee revisions shall include opportunity for public review and comment. Accordingly, the Authority shall account for program costs, including employee costs and overhead. If the Board determines that the total projected fee revenue is either significantly excessive or deficient for this purpose, then the Board shall amend the fee schedule to more accurately recover program costs.

((The annual fee for each source shall be determined as follows:

~~1. For sources that are not subject to Section 10.06.B.3, 4, or 5 of this Regulation and which emit less than 5 tons per year of criteria and toxic air pollutants:~~

- ~~a. a flat fee of \$160; and~~
- ~~b. a \$30 fee for each stack and other emission point, not to exceed \$600; and~~
- ~~c. an emission fee of \$20 per ton of each criteria and toxic air pollutant; and~~
- ~~d. an additional fee of \$150 for each source which operated at least one incinerator or burn out oven during the registration period; and~~
- ~~e. an additional fee of \$100 if the source is required by the Authority to submit an annual emissions inventory to the Washington Emission Data System (WEDS).~~

~~2. For sources that are not subject to Section 10.06.B.3, 4, or 5 of this Regulation and which emit 5 tons or more per year of criteria and toxic air pollutants, but less than 100 tons per year of any one criteria pollutant:~~

- ~~a. a flat fee of \$215; and~~
- ~~b. a \$30 fee for each stack and other emission point, not to exceed \$600; and~~
- ~~c. an emission fee of \$20 per ton of each criteria and toxic air pollutant; and~~
- ~~d. an additional fee of \$150 for each source which operated at least one incinerator or burn out oven during the registration period; and~~

$$PDRF_{I, y=2006 \Rightarrow 2015} = \frac{\text{Remaining Program Deficit}_y}{(2016 - y)} \times \frac{E_{I(y-1)}}{E_{T(y-1)}}$$

Where,

PDRF_I is the program deficit recovery fee assessed during year "y" (from 2006-2015) to each AOP source, I, that operated during any portion of the calendar year "y";

Remaining Program Deficit_y is the total cumulative funding deficit for SCAPCA's AOP program at the end of year "y";

"y" is the year, beginning in year 2006 and ending in year 2015;

E_I is the total (in tons) of actual emissions from AOP source, I, during the calendar year prior to year "y" (y-1); and

E_T is the sum (in tons) of the actual emissions from all AOP sources during the calendar year prior to year "y" (y-1).

Note: The program deficit recovery fee will expire in 2016 when the AOP program deficit will be zero.

~~e. an additional fee of \$100 if the source is required by the Authority to submit an annual emissions inventory to the Washington Emission Data System (WEDS).~~

~~3. For facilities, where the dispensing of gasoline is the only registered emission point, and which are not subject to Section 10.06.B.4 of this Regulation, a flat fee of \$165.)~~

C. The annual fee for each air operating permit source shall be determined as follows:

((4) 1. For sources that are subject to the air operating permit (AOP) program during any portion of the calendar year:

- a. Annual base fee of \$3,000;
- b. Emission fee of \$31.11 per ton of actual emissions from the previous calendar year;
- c. SCAPCA time fee, as determined by the following formula:

$$TF_I = \frac{(H_I + H_G) \times RPC}{H_T}$$

Where,

TF_I is the SCAPCA time fee for AOP source, I;

H_I is the total SCAPCA staff hours spent on AOP source, I;

H_G is the total general hours SCAPCA staff spent on the AOP program divided by the total number of sources subject to the AOP program during any portion of the calendar year;

RPC is the remaining SCAPCA AOP program cost, calculated by subtracting the sum of the Section 10.06.B.4.a and b. fees from the total SCAPCA AOP program costs; and

H_T is the total number of hours SCAPCA staff spent on the AOP program, including total time spent on the AOP sources and general hours spent on the AOP program.

Note: H_I, H_G, H_T, and RPC are for the most recent SCAPCA fiscal year.

Note: H_I, H_G, and H_T are obtained from SCAPCA time accounting records.

d. Program deficit recovery fee, as determined by the following formula:

e. A share of the assessment by Ecology pursuant to RCW 70.94.162(3), as determined by the following formula:

$$I = \frac{F_I \times A_E}{F_T}$$

Where,

I is the individual share of the assessment;

F_I is the total individual fee assessed pursuant to Section 10.06.~~((B-4))~~C.1.a., b., c., and d. of this Regulation;

A_E is the total Ecology assessment pursuant to RCW 70.94.162(3); and

F_T is the sum of all the individual fees assessed pursuant to Sections 10.06.~~((B-4))~~C.1.a., b., c., and d. of this Regulation.

((S)2. For affected units under Section 404 of the Federal Clean Air Act (42 USC 7401 et seq):

- a. A fee of \$50 per hour of time expended in carrying out the fee eligible activities specified in RCW 70.94.; and
- b. A share of the assessment by Ecology pursuant to RCW 70.94.162(3), as determined by the following formula:

$$I = \frac{F_I \times A_E}{F_T}$$

Where,

I is the individual share of the assessment;

F_I is the total individual fee assessed pursuant to Section 10.06.~~((B-5))~~C.2.a. of this Regulation;

A_E is the total Ecology assessment pursuant to RCW 70.94.162(3); and

F_T is the sum of all the individual fees assessed pursuant to Sections 10.06.~~((B-5))~~C.2.a. of this Regulation.

Reviser's note: The typographical errors in the above material occurred in the copy filed by the Spokane County Air Pollution Control Authority and appear in the Register pursuant to the requirements of RCW 34.08.040.

AMENDATORY SECTION

REGULATION I, ARTICLE IV, SECTION 4.02

ARTICLE IV

SECTION 4.02 GENERAL REQUIREMENTS FOR REGISTRATION

A. Registration Responsibility. The owner, operator, or a designated agent of a stationary source, shall register said stationary source, except those stationary sources exempted under Section 4.03 of this Article, using forms furnished by the Authority. The owner and operator of the stationary source are responsible for registration and for submitting accurate information.

B. Registration Information. The owner, operator, or designated agent shall register each emissions unit, including quantifiable fugitive air emissions, located at the stationary source. The owner, operator, or designated agent shall provide information to the Authority, as may be required by the Authority, concerning location, size, and height of air contaminant outlets, processes employed, nature of the air contaminant emission, and such other information, as is relevant to air pollution. The owner, operator, or designated agent shall update registration information annually, using forms provided by the Authority.

C. Signature. The owner, operator, or the designated agent for such owner or operator shall sign each registration form verifying that the information on the form is to his or her knowledge, complete and accurate.

D. Reporting requirements for transfer or change of ownership of registered stationary sources.

1. The new owner or operator, that assumes ownership and/or operational control of a registered stationary source, shall report any change of ownership or change of operator to the Authority, within ninety (90) days of completing transfer of ownership and/or assuming operational control. The new owner or operator shall report the change on "Change of

Ownership Forms" provided by the Authority. The report shall contain the following information:

- a. Legal name of the company prior to transfer;
- b. Site address;
- c. Previous owner's name;
- d. New legal name of company (if different)
- e. New owner's name;
- f. New owner's mailing address;
- g. New owner's phone number;
- h. Effective date of the transfer;
- i. Description of the affected emission units; and
- j. New owner's or responsible agent's signature.

2. Any liability for fee payment, including payment of delinquent fees and other penalties shall survive any transfer of ownership of a stationary source.

E. Reporting requirements for permanent shutdown of registered stationary sources.

1. The owner or operator shall file a "Source Closure Notification Form" with the Authority within ninety (90) days after the owner or operator determines that operations, producing air contaminant emissions, have permanently ceased. The report shall contain the following information:

- a. Legal name of the company prior to closure or shut-down;
- b. Stationary source address;
- c. Effective date of the stationary source closure or emissions unit shutdown;
- d. Description of the affected emission units; and
- e. Owner's or responsible agent's signature.

2. In the event of a permanent closure, process and pollution control equipment may remain in place and on site, but shall be configured such that the equipment or processes are incapable of generating emissions to the atmosphere (e.g. disconnection of power to equipment, mechanical positioning that inhibits processing; placing of padlocks on equipment to prevent operation).

F. New Sources.

1. The owner or operator of an stationary source shall file a *Notice of Construction and Application for Approval*, in accordance with Article V of this Regulation, prior to establishing any new or modified stationary source. An approved *Notice of Construction and Application for Approval* suffices to meet the initial requirement to register the stationary source. Registration information shall be updated annually thereafter.

2. Prior to re-opening a closed stationary source, or establishing a new source at a site for which the Authority has received a "Source Closure Notification Form", the proponent shall contact the Authority for a determination as to whether a *Notice of Construction and Application for Approval* must be filed with, and approved by, the Control Officer, per the requirements of Article V of this Regulation, prior to operation.

3. An exemption from new source review under Article V of this Regulation shall not be construed as an exemption from registration under this Article. In addition, an exemption from registration under this Article shall not be construed as an exemption from any other provision of this Regulation.

AMENDATORY SECTION

REGULATION I, ARTICLE V, SECTION 5.02

ARTICLE V**SECTION 5.02 NOTICE OF CONSTRUCTION (NOC) - WHEN REQUIRED**

A. A Notice of Construction application must be filed by the owner or operator and an order of approval issued by the permitting agency prior to the establishment of any new source or source categories. For purposes of this section "establishment" shall mean to "begin actual construction", as that term is defined in Article I, Section 1.04, and "new source" shall include any modification to an existing stationary source or source category, as defined in Article I, Section 1.04. Stationary sources or source categories subject to this Section include, but are not limited to, the following:

1. Stationary sources or source categories listed in Exhibit "R" of Article IV of this Regulation, except for those that are below emission thresholds listed therein or are exempted as provided in Section 5.02.P of this Regulation; or

2. Any modification to an existing stationary source or source category which results in an increase in actual emissions, except for stationary sources or source categories with actual emission increases below emission thresholds listed in Exhibit "R" of Article IV of this Regulation; or

3. Regardless of any other subsection of this section, a notice of construction application must be filed and an order of approval issued by the Authority prior to establishment of any of the stationary sources listed in Items 7 and 8 of Article IV, Exhibit "R"; or

4. a. Establishment of a new major stationary source or source category;

b. Major modifications to an existing stationary source or source category;

c. Establishment of a new major temporary stationary source or source category;

d. Major modification of a temporary stationary source or source category that is located at an existing stationary source or source category; or

5. Any modifications that require an increase either in a facility-wide emission limitation or a unit specific emission limit; or

6. Replacement of existing emissions unit(s) with new or used emissions unit(s); or

7. Restart of a stationary source or source category after "closure or shutdown", as defined in Article I, Section 1.04;

8. Relocation of an existing stationary source or source category, except as provided for in Section 5.02.H and as specified in Section 5.02.I; or

9. Location for the first time of a portable, (or temporary, if applicable) stationary source or source category operates in Spokane County.

10. Determination by the Authority that a Notice of Construction application is necessary in order to reduce the potential impact from any stationary source or source category's air emissions on: the health, safety, and/or welfare of the public, or unreasonable interference with any other property owner's use and enjoyment of his property, or damage to other property owner's property or business.

B. Stationary sources or source categories not subject to Section 5.02.A include those stationary sources or source categories listed in Sections 5.02.H, 5.02.I, 5.02.M and 5.02.N.1 of this Article.

C. The owner, operator, or their agent shall use Authority prepared and furnished application and information request forms when applying for a *Notice of Construction and Application for Approval*.

D. New source review of a modification shall be limited to the emissions unit or units proposed to be added to an existing or modified stationary source or source category and the air contaminants whose actual emissions would increase as a result of the modification. NOTE: Modification, as defined in Article I, Section 1.04 of this Regulation, does not have the same meaning as a Major Modification, defined in WAC 173-400-112 and WAC 173-400-113.

E. New stationary sources' or source categories' emission calculations shall be based on a stationary source or source categories' "potential-to-emit", as defined in Article I, Section 1.04 of this Regulation. Modified stationary source or source category emission calculations shall be based on the increase in "actual emissions", as defined in Article I Section 1.04 of this Regulation.

F. The Authority implements and enforces the requirements of WAC 173-400-114 for replacement or substantial alteration of emission control technology at an existing stationary source.

G. A separate *Notice of Construction and Application for Approval* shall be filed for each new or modified stationary source, source category, or emissions control system, unless identical units are to be constructed, installed, or established and operated in an identical manner at the same facility, except that the owner or operator has the option to file one application for an entire facility, with a detailed inventory of stationary sources or source categories and their emissions related to that facility.

H. A *Notice of Construction and Application for Approval* is not required for construction, installation, establishment, modification, or alteration of stationary sources or source categories, comprised of equipment utilized exclusively in connection with any structure, which is designed for, and used exclusively as, a residence with not more than four dwelling units.

I. A *Notice of Construction and Application for Approval* is required for portable, (or temporary, if applicable) stationary sources or source categories, operating in accordance with Section 5.08 - the first time that it operates in Spokane County. Thereafter, each time that the portable or temporary stationary source or source category relocates and operates at a new site in Spokane County, it must apply for and obtain an approved *Notice of Intent to Install and Operate a Temporary Stationary Source* pursuant to Section 5.08.

J. A person seeking approval to construct or modify an air operating permit source, may elect to integrate review of the air operating permit application or amendment, required under RCW 70.94.161, and the *Notice of Construction and Application for Approval* required by this Article. A *Notice of Construction and Application for Approval* designated for integrated review shall be processed in accordance with the provisions in Chapter 173-401 WAC.

K. A *Notice of Construction and Application for Approval* for a major modification in a nonattainment area, or for a major stationary source in a nonattainment area, is subject to the public notice requirements of Section 5.05.

L. An applicant filing a *Notice of Construction and Application for Approval* for a project described in WAC 173-400-117(2) (Special protection requirements for Class I areas) must send a copy of the application to the responsible federal land manager.

M. De minimis emission levels (based on Potential-To-Emit), below which a new source or stationary source category, is not subject to a *Notice of Construction and Application for Approval*, are listed in Exhibit "R" of Article IV of this Regulation. De minimis emission levels (based on actual emissions increase), below which a modification of an existing stationary source or source category, is not subject to a *Notice of Construction and Application for Approval*, are listed in Exhibit "R" of Article IV of this Regulation. The owner or operator shall maintain sufficient documentation, as required by the Authority, to verify that the new or existing stationary source or source category is entitled to continued exemption under this section.

N. Transfer of Ownership

1. If an existing stationary source or stationary source category, with a valid Order of Approval, is transferred to new ownership per Article IV, Section 4.02.D and the stationary source category or stationary source category is unchanged by the transfer, then the existing Order of Approval is transferable to the new ownership, as written.

2. An existing Order of Approval is not transferable to a stationary source or stationary source category that is installed or established at a site where a stationary source category or stationary source category was previously located and the business nature of the new source is different from the previous stationary source.

3. In either of the above cases, if the stationary source or stationary source category did not have a valid Order of Approval under the prior ownership, then the owner or operator of the new source or stationary source category shall apply for, and receive approval of, a Notice of Construction prior to commencing operation.

O. Except where Ecology is the permitting agency pursuant to WAC 173-400-141 (PSD) or Ecology's Industrial Sector has retained specific air pollution stationary sources or source categories exclusively under their jurisdiction, pursuant to RCW 70.94.422, the Authority permits, implements and enforces WAC 173-400-112 (Requirements for new sources in nonattainment areas) and WAC 173-400-113 (Requirements for new sources in attainment areas), in Spokane County.

P. The following new sources are exempt from the requirement to file A Notice of Construction and Application for Approval, provided that the source has registered with the Authority (as required per Regulation I, Article IV) prior to placing the source in operation:

1. Batch coffee roasters with a maximum rated capacity of 10 lbs per batch or less, unless air pollution controls are required because of documented nuisance odors or emissions.

WSR 06-20-112

PROPOSED RULES

DEPARTMENT OF REVENUE

[Filed October 4, 2006, 10:41 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 06-11-170.

Title of Rule and Other Identifying Information: WAC 458-20-186 Tax on cigarettes.

Hearing Location(s): Capital Plaza Building, 4th Floor Executive Conference Room, 1025 Union Avenue S.E., Olympia, WA 98504, on Thursday, November 16, 2006, at 10:00 a.m.

Date of Intended Adoption: November 24, 2006.

Submit Written Comments to: Margaret J. Partlow, P.O. Box 47453, Olympia, WA 98504-7453, e-mail margaretpa@dor.wa.gov, fax (360) 586-5543, by November 16, 2006.

Assistance for Persons with Disabilities: Contact Sandy Davis at (360) 725-7499 no later than ten days before the hearing date. Deaf and hard of hearing individuals may call 1-800-451-7985 (TTY users).

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: WAC 458-20-186 (Rule 186) provides tax-reporting information to persons who sell, use, consume, handle, possess, or distribute cigarettes. The rule explains who is liable for the tax, how and when the cigarette tax imposed by chapter 82.24 RCW is to be paid, and the record-keeping requirements. It also explains the application process for wholesale and retail cigarette vendor licenses, and the responsibilities of persons making "delivery sales" into this state. It includes references to statutory fees, bonding requirements, and explains the conditions for and process of application for reinstatement of a license following a revocation under the Administrative Procedure Act.

The proposed changes to the rule update existing information, incorporate recent legislative changes, and clarify that the "stamping allowance" for wholesalers is income, not merely a discount on the price of the stamps; accordingly, the stamping allowance is subject to business and occupation tax.

Statutory Authority for Adoption: RCW 82.32.300, 82.01.060(2), and 82.24.235.

Statute Being Implemented: Chapter 82.24 RCW.

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: Department of revenue, governmental.

Name of Agency Personnel Responsible for Drafting: Margaret J. Partlow, 1025 Union Avenue S.E., Suite #544, Olympia, WA, (360) 570-6123; Implementation: Alan R. Lynn, 1025 Union Avenue S.E., Suite #544, Olympia, WA, (360) 570-6125; and Enforcement: Janis P. Bianchi, 1025 Union Avenue S.E., Suite #544, Olympia, WA, (360) 570-6147.

No small business economic impact statement has been prepared under chapter 19.85 RCW. A small business economic impact statement is not required because the rule and the amendments do not impose any requirements or burdens upon small business that are not already required by statute.

A cost-benefit analysis is not required under RCW 34.05.328. The proposed rule is not a significant legislative rule as defined by RCW 34.05.328.

October 4, 2006
 Alan R. Lynn
 Rules Coordinator

AMENDATORY SECTION (Amending WSR 05-02-035, filed 12/30/04, effective 1/30/05)

WAC 458-20-186 Tax on cigarettes. (1) Introduction.

This rule addresses those taxes and licensing activities that apply exclusively to cigarettes as defined by RCW 82.24.010. See WAC 458-20-185 for tax liabilities and registration requirements associated with tobacco products other than cigarettes. The tax on cigarettes is in addition to all other taxes owed. For example, retailers and wholesalers are liable for business and occupation tax on their retailing or wholesaling activities, and must collect and remit sales tax on retail sales of cigarettes. Consumers pay the cigarette tax in addition to sales or use tax on purchases of cigarettes for consumption within this state. (Wholesalers not licensed in the state of Washington who are making sales of cigarettes to Indians in accordance with a cigarette tax contract authorized by RCW 43.06.455 must comply with the specific terms of their individual contracts. See also WAC 458-20-192 regarding sales in Indian country.)

(2) **Organization of rule.** The information provided in this rule is divided into seven parts:

(a) Part I explains the tax liabilities of persons who sell, use, consume, handle, possess, or distribute cigarettes in this state.

(b) Part II explains the licensing requirements and responsibilities for persons making wholesale or retail sales of cigarettes in this state.

(c) Part III explains the stamping requirements and how the cigarette tax rates are calculated.

(d) Part IV describes the exemptions from the tax and the procedures that must be followed to qualify for exemption.

(e) Part V explains the requirements and responsibilities for persons transporting cigarettes in Washington.

(f) Part VI explains the requirements and responsibilities for persons engaged in making delivery sales of cigarettes into this state.

(g) Part VII explains the enforcement and administration of the cigarette tax.

Part I - Tax on Cigarettes

(101) **In general.** The Washington state cigarette tax is due and payable by the first person who sells, uses, consumes, handles, possesses, or distributes the cigarettes in this state.

(a) **Possession.** For the purpose of this rule, a "possessor" of cigarettes is anyone who personally or through an agent, employee, or designee, has possession of cigarettes in this state.

(b) **Payment.** Payment of the cigarette tax is made through the purchase of stamps from banks authorized by the department of revenue (department) to sell the stamps. Only licensed wholesalers may purchase or obtain cigarette

stamps. Except as specifically provided in Part IV of this rule, it is unlawful for any person other than a licensed wholesaler to possess unstamped cigarettes in this state. However, as explained in subsection (102)(b) of this rule, certain consumers may possess unstamped cigarettes for personal consumption if they pay the tax as provided in this rule.

(c) **Imposition of tax.** Ordinarily, the tax obligation is imposed on and collected from the first possessor of unstamped cigarettes. However, failure of an exempt entity with an obligation to collect and remit the tax does not relieve a subsequent nonexempt possessor of unstamped cigarettes from liability for the tax.

(d) **Promotions.** Cigarettes given away for advertising or any other purpose are taxed in the same manner as if they were sold, used, consumed, handled, possessed, or distributed in this state, but are not required to have the stamp affixed. Instead, the manufacturer of the cigarettes must pay the tax on a monthly return filed with the department. See subsection (702) of this rule.

(102) **Possession of cigarettes in Washington state.**

(a) Every person who is (i) in possession of unstamped cigarettes in this state, and (ii) is not specifically exempt by law, is liable for payment of the cigarette tax as provided in chapter 82.24 RCW and this rule.

(b) Consumers who buy unstamped cigarettes or who purchase cigarettes from sources other than licensed retailers in this state must pay the cigarette tax as provided in subsection (702) of this rule when they first bring the cigarettes into this state or first possess them in this state. This requirement includes, but is not limited to, delivery sales as described in Part VI of this rule.

(c) **Cigarettes purchased from Indian retailers.** Special rules apply to cigarettes purchased from Indian retailers.

(i) Indians purchasing cigarettes in Indian country are exempt from the state cigarette tax; however, these sales must comply with WAC 458-20-192. Other consumers may purchase cigarettes for their personal consumption from "qualified Indian retailers" without incurring liability for state cigarette tax. A "qualified Indian retailer" is one who is subject to the terms of a valid cigarette tax contract with the state pursuant to RCW 43.06.455.

(ii) Consumers who purchase cigarettes from Indian retailers who are not subject to a cigarette tax contract with the state must comply with the reporting requirements and remit the cigarette tax as explained in subsection (702) of this rule. These consumers are also liable for the use tax on their purchases. See WAC 458-20-178.

(iii) It is the duty of the consumer in each instance to ascertain his or her responsibilities with respect to such purchases.

(d) **Cigarettes purchased on military reservations.** Active duty or retired military personnel, and their dependants, may purchase cigarettes for their own consumption on military reservations without paying the state tax (see Part IV). However, such persons are not permitted to give or resell those cigarettes to others.

(e) **Counterfeit cigarettes.** It is unlawful for any person to manufacture, sell, or possess counterfeit cigarettes. A cigarette is counterfeit if (i) it or its packaging bears any logo or marking used by a manufacturer to identify its own ciga-

rettes, and (ii) the cigarette was not manufactured by the owner of that logo or trademark or by any authorized licensee of the manufacturer. RCW 82.24.570.

(f) Possession of unstamped and untaxed cigarettes, and possession of counterfeit cigarettes, are criminal offenses in this state. See Part VII.

Part II - Wholesale and Retail Cigarette Vendor Licensing Requirements and Responsibilities

(201) **License required.** No person, other than a government instrumentality or an Indian retailer as set forth in Part IV of this rule, may engage in the retail or wholesale distribution of cigarettes in this state without a license. No person may engage in the business of sampling within this state unless that person has first obtained a sampler's license. Failure to obtain the required license prior to sampling or selling cigarettes at wholesale or retail is a criminal act. RCW 70.155.050.

(202) **Definitions.** For the purposes of this rule, the following definitions apply:

(a) **"Place of business"** means any location where business is transacted with, or sales are made to, customers. The term includes, but is not limited to, any vehicle, truck, vessel, or the like at which sales are made.

(b) **"Retailer"** means every person, other than a wholesaler, who purchases, sells, offers for sale, or distributes cigarettes, regardless of quantity or amount, or the number of sales, and all persons operating under a retailer's registration certificate.

(c) **"Retail selling price"** means the ordinary, customary, or usual price paid by the consumer for each package of cigarettes, less the tax levied by the state.

(d) **"Sample" and "sampling"** have the same meaning as in RCW 70.155.010.

(e) **"Wholesaler"** means every person who purchases, sells, or distributes cigarettes, as defined in chapter 82.24 RCW, to retailers for the purpose of resale only.

(203) **Wholesale license.** Prior to the sale or distribution of cigarettes at wholesale, each wholesaler must first obtain a wholesale cigarette license from the department of licensing.

(a) **Background check.** Each wholesaler must undergo a criminal background check before a license will be issued. RCW 82.24.510. The background check must be completed to the satisfaction of the liquor control board and the department. Failure to provide information sufficient to complete the background check may, in the department's discretion, result in denial of the license.

(b) **Application.** Application for license or renewal of license is made on forms supplied by the department of licensing and must be accompanied by the annual license fee as provided in chapter 82.24 RCW. A wholesale cigarette license is valid for one year from the date it is issued.

(c) **Multiple locations.** If the wholesaler sells, or intends to sell, cigarettes at more than one place of business, whether temporary or permanent, a separate license with a license fee as provided in chapter 82.24 RCW is required for each additional place of business. Each license must be exhibited in the place of business for which it is issued.

(d) **Bond required.** Each licensed wholesaler must file a bond with the department in an amount determined by the

department, but not less than \$5,000.00. The bond must be executed by the wholesaler as principal, and by a corporation approved by the department of licensing and authorized to engage in business as a surety company in this state, as surety. The bond must run concurrently with the wholesaler's license.

(204) **Duties and responsibilities of licensed wholesalers.**

(a) **Stamps.** Only licensed wholesalers may purchase or obtain cigarette stamps. Wholesalers are prohibited by law from selling or providing stamps to any other wholesaler or person.

(b) **Numbering.** Each roll of stamps, or group of sheets, has a separate serial number. The department keeps records of which wholesaler purchases each roll or group of sheets. Wholesalers are prohibited from possessing stamps other than those specifically issued to them.

(c) **Sales restricted.** Wholesalers selling cigarettes in this state may sell cigarettes only to Washington retailers who have a current retail cigarette license, to other licensed wholesalers, or to Indian tribal entities authorized to possess cigarettes that are not taxed by the state.

(d) **Unstamped cigarettes.** Except as explained in Part IV of this rule, no person other than a licensed wholesaler may possess unstamped cigarettes in this state. (For the purpose of this rule, the term "unstamped cigarette" means any cigarette that does not bear a Washington state cigarette stamp as described in Part III of this rule.) Licensed wholesalers may possess unstamped cigarettes in this state only in the following circumstances:

(i) Licensed wholesalers may possess unstamped cigarettes for up to 72 hours after receipt; however, the cigarettes must be stamped on or before sale or transfer to any other party other than another licensed wholesaler. Licensed wholesalers may possess unstamped cigarettes for more than 72 hours after receipt if they receive prior written permission from the department to do so.

(ii) Licensed wholesalers who have furnished a surety bond in an amount determined by the department may set aside, without stamping, that portion of their stock reasonably necessary for conducting sales to persons outside this state or to instrumentalities of the federal government. All unstamped stock must be kept separate and apart from stamped stock.

(e) **Transfers.** Wholesalers in possession of unstamped cigarettes under subsection (204)(d) of this rule that are transferred by the wholesaler to another facility within this state must be transferred in compliance with RCW 82.24.250.

(205) **Retail license.** Prior to the retail sale or distribution of cigarettes, each retailer must first be issued a retail cigarette license from the department of licensing. A license is required for each location at which cigarettes are sold at retail. Each license must be exhibited at the place of business for which it is issued.

(a) **Application.** Applications for license or renewal of license are made on forms supplied by the department of licensing and must be accompanied by the annual license fee as provided in chapter 82.24 RCW. A retail cigarette license is valid for one year from the date it is issued.

(b) **Vending machines.** Retailers operating cigarette vending machines are required to pay an additional annual fee as set forth in chapter 82.24 RCW for each vending machine.

(206) **Duties and responsibilities of retailers.**

(a) No retailer in this state may possess unstamped cigarettes unless he or she is also a licensed wholesaler.

(b) Retailers may obtain cigarettes only from cigarette wholesalers licensed by this state.

(207) **Additional requirements for manufacturers, wholesalers, retailers, and samplers.** Persons making wholesale or retail sales or engaged in the business of sampling of cigarettes in this state must comply with all the provisions of chapters 70.155 and 70.158 RCW. All cigarettes sold, delivered, or attempted to be delivered, in violation of RCW 70.155.105 are subject to seizure and forfeiture. RCW 82.24.130.

(208) **Suspension or revocation of wholesale or retail cigarette licenses.**

(a) The department has full power and authority to revoke or suspend the license of any wholesale or retail cigarette dealer in the state upon sufficient showing that the license holder has violated the provisions of chapter 82.24 RCW or this rule. See RCW 82.24.550 and WAC 458-20-10001 for information on the procedures pertaining to suspension or revocation of cigarette licenses.

(b) Any person possessing both a cigarette license and a tobacco products license is subject to suspension and revocation of both licenses for violation of either chapter 82.24 or 82.26 RCW. For example, if a person has both a cigarette license and a tobacco license, revocation of the cigarette license will also result in revocation of the tobacco license.

(c) A person whose license has been suspended or revoked must not sell or permit the sale of cigarettes or tobacco products on premises occupied or controlled by that person during the period of the suspension or revocation.

(d) For the purposes of this rule, "tobacco products" has the same meaning as in RCW 82.26.010.

(e) Any person whose license has been revoked must wait one year following the date of revocation before requesting a hearing for reinstatement. Reinstatement hearings are held pursuant to WAC 458-20-10001.

Part III - Stamping and Rates

(301) **Cigarette stamps.**

(a) Stamps indicating payment of the cigarette tax must be affixed prior to any sale, use, consumption, handling, possession, or distribution of all cigarettes other than those specifically exempted as explained in Part IV of this rule. The stamp must be applied to the smallest container or package, unless the department, in its sole discretion, determines that it is impractical to do so. Stamps must be of the type authorized by the department and affixed in such a manner that they cannot be removed from the package or container without being mutilated or destroyed.

(b) Licensed wholesalers may purchase state-approved cigarette stamps from authorized banks. Payment for stamps must be made at the time of purchase unless the wholesaler has prior approval of the department to defer payment and furnishes a surety bond equal to the proposed monthly credit

limit. Payments under a deferred plan are due within 30 days following purchase. Licensed wholesalers are (~~allowed a discount~~) compensated for affixing the stamps at the rate of \$6.00 per thousand stamps affixed ("stamping allowance") (which amount is offset against the purchase price). (The stamping allowance is subject to business and occupation tax under the service and other business activities classification.)

(302) **Rates.**

(a) The Washington state cigarette tax is imposed on a per cigarette basis. The rate of the tax is a combination of statutory rates found in RCW 82.24.020, 82.24.027, and 82.24.028.

(b) When the rate of tax increases, the first person who sells, uses, consumes, handles, possesses, or distributes previously taxed cigarettes after the rate increase is liable for the additional tax.

(303) **Refunds.** Any person may request a refund of the face value of the stamps when the tax is not applicable and the stamps are returned to the department. Documentation supporting the claim must be provided at the time the claim for refund is made.

(a) Refunds for stamped untaxed cigarettes sold to Indian tribal members or tribal entities (~~will include the stamping allowance and~~) in the full value of the stamps affixed will be approved by an agent of the department.

(b) Refunds for stamped cigarettes will not include the stamping allowance if the stamps are:

(i) Damaged, or unfit for sale, and as a result are destroyed or returned to the manufacturer or distributor; or

(ii) Improperly or partially affixed through burns, jams, double stamps, stamped on carton flaps, or improperly removed from the stamp roll.

(c) The claim for refund must be filed on a form provided by the department. An affidavit or a certificate from the manufacturer for stamped cigarettes returned to the manufacturer for destruction or by an agent of the department verifying the voiding of stamps and authorizing the refund must accompany the claim for refund.

Part IV - Exemptions

(401) **In general.** There are limited exemptions from the cigarette tax provided by law. This part discusses exemptions and the procedures that must be followed to qualify for an exemption.

(402) **Government sales.** The cigarette tax does not apply to the sale of cigarettes to:

(a) The United States Army, Navy, Air Force, Marine Corps, or Coast Guard exchanges and commissaries and Navy or Coast Guard ships' stores;

(b) The United States Veteran's Administration; or

(c) Any person authorized to purchase from the federal instrumentalities named in (a) or (b) above, if the cigarettes are purchased from the instrumentality for personal consumption.

(403) **Sales in Indian country.**

(a) The definitions of "Indian," "Indian country," and "Indian tribe," in WAC 458-20-192 apply to this rule. "Cigarette contract" means an agreement under RCW 43.06.450 through 43.06.460.

(b) The cigarette tax does not apply to cigarettes taxed by an Indian tribe in accordance with a cigarette contract under RCW 43.06.450 through 43.06.460.

(c) The cigarette tax does not apply to cigarettes sold to an Indian in Indian country for personal consumption; however, those sales must comply with the allocation provisions of WAC 458-20-192. Sales made by an Indian cigarette outlet to nontribal members are subject to the tax, except as provided in (b) above.

(d) See WAC 458-20-192 for information on making wholesale sales of cigarettes to Indians and Indian tribes.

(404) **Interstate commerce.** The cigarette tax does not apply to cigarettes sold to persons licensed as cigarette distributors in other states when, as a condition of the sale, the seller either delivers the cigarettes to the buyer at a point outside this state, or delivers the same to a common carrier with the shipment consigned by the seller to the buyer at a location outside this state. Any person engaged in making sales to licensed distributors in other states or making export sales or in making sales to the federal government must furnish a surety bond in a sum equal to twice the amount of tax that would be affixed to the cigarettes that are set aside for the conduct of such business without affixing cigarette stamps. The unstamped stock must be kept separate and apart from any stamped stock.

Part V - Transporting Cigarettes in Washington

(501) **Transportation of cigarettes restricted.** No person other than a licensed wholesaler may transport unstamped cigarettes in this state except as specifically set forth in RCW 82.24.250 and this rule, or as may be allowed under a cigarette tax contract subject to the provisions of RCW 43.06.455. Licensed wholesalers transporting unstamped cigarettes in this state must do so only in their own vehicles unless they have given prior notice to the liquor control board of their intent to transport unstamped cigarettes in a vehicle belonging to another person.

(502) **Notice required.** Persons other than licensed wholesalers intending to transport unstamped cigarettes in this state must first give notice to the liquor control board of their intent to do so.

(503) **Transportation of unstamped cigarettes.** All persons transporting unstamped cigarettes must have in their actual possession invoices or delivery tickets for such cigarettes. The invoices or delivery tickets must show the true name and address of the consignor or seller, the true name and address of the consignee or purchaser, and the quantity and brands of the cigarettes transported. It is the duty of the person responsible for the delivery or transport of the cigarettes to ensure that all drivers, agents, or employees have the delivery tickets or invoices in their actual possession for all such shipments.

(504) **Consignment.** If the cigarettes transported pursuant to subsection (501), (502), or (503) of this rule are consigned to or purchased by any person in this state, that purchaser or consignee must be a person who is authorized by chapter 82.24 RCW to possess unstamped cigarettes in this state.

(505) **Out-of-state shipments.** Licensed wholesalers shipping cigarettes to a point outside Washington or to a fed-

eral instrumentality must, at the time of shipping or delivery, report the transaction to the department. The report must show both (a) complete details of the sale or delivery, and (b) whether stamps have been affixed to the cigarettes.

The report may be made either by submitting a duplicate invoice or by completing a form provided by the department, and must be filed with the department as set forth in subsection (702) of this rule.

(506) **Compliance required.** No person may possess or transport cigarettes in this state unless the cigarettes have been properly stamped or that person has fully complied with the requirements of RCW 82.24.250 and this rule. Failure to comply with the requirements of RCW 82.24.250 is a criminal act. Cigarettes in the possession of persons who have failed to comply are deemed contraband and are subject to seizure and forfeiture under RCW 82.24.130.

Part VI - Delivery Sales of Cigarettes

(601) **Definitions.** The definitions in this subsection apply throughout this rule.

(a) **"Delivery sale"** means any sale of cigarettes to a consumer in the state where either: (i) The purchaser submits an order for a sale by means of a telephonic or other method of voice transmission, mail delivery, any other delivery service, or the internet or other online service; or (ii) the cigarettes are delivered by use of mail delivery or any other delivery service. A sale of cigarettes made in this manner is a delivery sale regardless of whether the seller is located within or outside the state. (For example, "Royal Tax-free Smokes," located in the state of Vermont, offers sales via the internet and a toll-free telephone number, and ships its products to consumers in this state. These transactions are delivery sales.) A sale of cigarettes not for personal consumption to a person who is a wholesaler licensed under chapter 82.24 RCW or a retailer licensed under chapter 82.24 RCW is not a delivery sale.

(b) **"Delivery service"** means any private carrier engaged in the commercial delivery of letters, packages, or other containers, that requires the recipient of that letter, package, or container to sign to accept delivery.

(602) **Tax liability.** Cigarettes delivered in this state pursuant to a delivery sale are subject to tax as provided in Part I of this rule. Persons making delivery sales in this state are required to provide prospective consumers with notice that the sales are subject to tax pursuant to chapters 82.24 and 82.12 RCW, with an explanation of how the tax has been or is to be paid with respect to such sales.

(603) **Additional requirements.** Persons making delivery sales of cigarettes in this state must comply with all the provisions of chapter 70.155 RCW. All cigarettes sold, delivered, or attempted to be delivered, in violation of RCW 70.155.105 are subject to seizure and forfeiture. RCW 82.24.130.

Part VII - Enforcement and Administration

(701) **Books and records.** An accurate set of records showing all transactions related to the purchase, sale, or distribution of cigarettes must be retained. RCW 82.24.090. These records may be combined with those required in connection with the tobacco products tax (see WAC 458-20-

185), if there is a segregation therein of the amounts involved. All records must be preserved for five years from the date of the transaction.

(702) **Reports and returns.** The department may require any person dealing with cigarettes in this state to complete and return forms, as furnished by the department, setting forth sales, inventory, and other data required by the department to maintain control over trade in cigarettes.

(a) Manufacturers and wholesalers selling stamped, unstamped, or untaxed cigarettes must submit a complete record of sales of cigarettes in this state monthly. This report is due no later than the 15th day of the calendar month and must include all transactions occurring in the previous month.

(b) Persons making sales of tax-exempt cigarettes to Indian tribes or Indian retailers pursuant to WAC 458-20-192 (9)(a) must transmit a copy of the invoice for each such sale to the special programs division of the department prior to shipment.

(c) Wholesalers selling stamped cigarettes manufactured by nonparticipating manufacturers as defined in WAC 458-20-264 must report all such sales to the special programs division no later than the 25th day of the calendar month and must include all transactions occurring in the previous month.

(d) Persons making sales of cigarettes into this state to other than a licensed wholesaler or retailer must file a report as required under Title 15, Chapter 10A, section 376 of the U.S. Code (commonly referred to as the "Jenkins Act" report). This report is due no later than the 10th day of each calendar month and must include all transactions occurring in the previous month.

(e) Persons shipping or delivering any cigarettes to a point outside of this state must submit a report showing full and complete details of the interstate sale or delivery as set forth in Part V of this rule. This report is due no later than the 15th day of the calendar month immediately following the shipment or delivery.

(f) Persons giving away unstamped cigarettes for advertising, promotional, or any other purpose, must report and pay the tax on the number of cigarettes distributed in this state.

(g) Consumers who buy unstamped cigarettes or who purchase cigarettes from sources other than licensed retailers in this state must pay the tax when they first bring the cigarettes into this state or first possess them in this state. The tax is paid with a "Tax Declaration for Cigarettes," which may be obtained from the department.

(703) **Criminal provisions.** Chapter 82.24 RCW prohibits certain activities with respect to cigarettes. Persons handling cigarettes within this state must refer to these statutes. The prohibited activities include, but are not limited to, the following:

(a) **Transportation or possession of 60,000 or fewer cigarettes.** Transportation or possession of 60,000 or fewer unstamped cigarettes is prohibited unless the notice requirements set forth in RCW 82.24.250 have been met; failure to meet those notice requirements is a gross misdemeanor. RCW 82.24.110 (1)(m).

(b) **Transportation or possession of more than 60,000 cigarettes.** Transportation or possession of more than 60,000 unstamped cigarettes is prohibited unless the notice require-

ments set forth in RCW 82.24.250 have been met; failure to meet those notice requirements is a felony. RCW 82.24.110 (2).

(c) **Forgery or counterfeiting of stamps.** Alteration, fabrication, forgery, and counterfeiting of stamps are felonies. RCW 82.24.100.

(d) **Counterfeit cigarettes.** The manufacture, sale, or possession of counterfeit cigarettes in this state is a felony. RCW 82.24.570.

(704) **Search, seizure, and forfeiture.** The department or the liquor control board may search for, seize, and subsequently dispose of unstamped cigarette packages and containers, counterfeit cigarettes, conveyances of all kinds (including aircraft, vehicles, and vessels) used for the transportation of unstamped and/or counterfeit cigarettes, and vending machines used for the sale of unstamped and/or counterfeit cigarettes. See RCW 82.24.130, et seq., for provisions relating to search, seizure, and forfeiture of property, possible redemption of property, and for treatment of such property in the absence of redemption.

(705) **Penalties.** RCW 82.24.120 provides a penalty for failure to affix the cigarette stamps or to cause the stamps to be affixed as required, or to pay any tax due under chapter 82.24 RCW. In addition to the tax deemed due, a penalty equal to the greater of \$10.00 per package of unstamped cigarettes or \$250.00 will be assessed. Interest is also assessed on the amount of the tax at the rate as computed under RCW 82.32.050(2) from the date the tax became due until the date of payment. The department may, in its sole discretion, cancel all or part of the penalty for good cause.

WSR 06-20-113

PROPOSED RULES

DEPARTMENT OF REVENUE

[Filed October 4, 2006, 10:42 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 06-11-169.

Title of Rule and Other Identifying Information: WAC 458-20-185 Tax on tobacco products.

Hearing Location(s): Capital Plaza Building, 4th Floor Executive Conference Room, 1025 Union Avenue S.E., Olympia, WA 98504, on Thursday, November 16, 2006, at 10:00 a.m.

Date of Intended Adoption: November 24, 2006.

Submit Written Comments to: Margaret J. Partlow, P.O. Box 47453, Olympia, WA 98504-7453, e-mail margaretpa@dor.wa.gov, fax (360) 586-5543, by November 16, 2006.

Assistance for Persons with Disabilities: Contact Sandy Davis at (360) 725-7499 no later than ten days before the hearing date. Deaf and hard of hearing individuals may call 1-800-451-7985 (TTY users).

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: WAC 458-20-185 (Rule 185) provides tax-reporting information to persons who sell, use, handle, possess, transport, store, or distribute tobacco products. The proposed changes to the rule update

existing information and incorporate significant legislative amendments to chapter 82.26 RCW.

The current Rule 185 provides that the other tobacco products (OTP) tax "does not apply to tobacco products sold to federal government agencies... and a credit may be taken for the amount of tobacco products tax previously paid on such products." The department has reconsidered these reporting instructions as they relate to tobacco products sold to federal entities and determined that the instructions are not authorized by current statute. These instructions are therefore not included in the proposed rule, and as a result a credit for taxes previously paid on tobacco products sold to federal entities will not be allowed.

Statutory Authority for Adoption: RCW 82.32.300 and 82.01.060(2).

Statute Being Implemented: Chapter 82.26 RCW.

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: Department of revenue, governmental.

Name of Agency Personnel Responsible for Drafting: Margaret J. Partlow, 1025 Union Avenue S.E., Suite #544, Olympia, WA, (360) 570-6123; Implementation: Alan R. Lynn, 1025 Union Avenue S.E., Suite #544, Olympia, WA, (360) 570-6125; Enforcement: Janis P. Bianchi, 1025 Union Avenue S.E., Suite #544, Olympia, WA, (360) 570-6147.

No small business economic impact statement has been prepared under chapter 19.85 RCW. A small business economic impact statement is not required because the rule and the amendments do not impose any requirements or burdens upon small business that are not already required by statute.

A cost-benefit analysis is not required under RCW 34.05.328. The proposed rule is not a significant legislative rule as defined by RCW 34.05.328.

October 4, 2006

Alan R. Lynn
Rules Coordinator

AMENDATORY SECTION (Amending WSR 03-12-058, filed 6/2/03, effective 7/3/03)

WAC 458-20-185 Tax on tobacco products. ((+) **Introduction.** This rule explains the tax liabilities of persons engaged in business as a retailer, distributor or subjobber of tobacco products. The tax on tobacco products is in addition to all other taxes owed. For example, retailers, distributors, and subjobbers are liable for business and occupation tax on their retailing or wholesaling activities, use tax on tobacco products distributed as samples, and litter tax on the value of the tobacco products. See WAC 458-20-186 for tax liabilities associated with taxes which apply exclusively to cigarettes.

(2) **Definitions.** The following definitions apply to this rule.

(a) "Tobacco products" means all tobacco products except cigarettes as defined in RCW 82.24.010. The term includes:

- (i) Cigars, cheroots, stogies, and periques;
- (ii) Granulated, plug-cut, crimp-cut, ready rubbed, and other smoking tobacco;

(iii) Snuff, snuff flour, cavendish, plug and twist tobacco, fine-cut, and other chewing tobaccos; and

(iv) Shorts, refuse seraps, clippings, cuttings and sweepings of tobacco, and other kinds and forms of tobacco, prepared in such manner as to be suitable for chewing or smoking in a pipe or otherwise, or both for chewing and smoking.

(b) "Manufacturer" means a person who manufactures and sells tobacco products.

(c) "Distributor" means:

(i) Any person engaged in the business of selling tobacco products in this state who brings, or causes to be brought, into this state from without the state any tobacco products for sale;

(ii) Any person who makes, manufactures, or fabricates tobacco products in this state for sale in this state;

(iii) Any person engaged in the business of selling tobacco products without this state who ships or transports tobacco products to retailers in this state, to be sold by those retailers; or

(iv) Any person engaged in the business of selling tobacco products in this state who handles for sale any tobacco products that are within this state but upon which tax has not been imposed.

(d) "Subjobber" means any person, other than a tobacco manufacturer or distributor, who buys tobacco products from a distributor and sells them to persons other than the ultimate consumers.

(e) "Retailer" means any person engaged in the business of selling tobacco products to ultimate consumers.

(f) "Sale" means any transfer, exchange, or barter, in any manner or by any means whatsoever, for a consideration, and includes and means all sales made by any person. It includes all gifts by persons engaged in the business of selling tobacco products, for advertising, as a means of evading the provisions of chapter 82.26 RCW, or for any other purposes whatsoever.

(g) "Wholesale sales price" means the established price for which a manufacturer sells tobacco product to the distributor, exclusive of any discount or other reduction.

(i) A wholesale sales price that is an established price must reflect the fair market value of the tobacco products. In the case where a seller and buyer establish a sales price that does not reflect fair market value, such as may occur in certain sales between affiliated companies, the wholesale sales price is the fair market value of the tobacco product and not the sales price established by the seller and buyer.

(ii) The phrase "discount or other reduction" includes any reduction from the established wholesale sales price made to a specific customer or class of customers.

Example. Pursuant to a half-price promotion, a manufacturer sells tobacco products to a distributor. The invoice lists \$100 as the price of the product less a \$50 discount resulting in a net invoice of \$50. The tax is due on \$100 which is the wholesale sales price exclusive of any discount or other reduction.

(h) "Business" means any trade, occupation, activity, or enterprise engaged in for the purpose of selling or distributing tobacco products in this state.

(i) "Place of business" means any place where tobacco products are sold or where tobacco products are manufactured, stored, or kept for the purpose of sale or consumption;

including any vessel, vehicle, airplane, train, or vending machine.

(j) "Retail outlet" means each place of business from which tobacco products are sold to consumers.

(k) "Department" means the department of revenue.

(l) "Person" means any individual, receiver, administrator, executor, assignee, trustee in bankruptcy, trust, estate, firm, copartnership, joint venture, club, company, joint stock company, business trust, municipal corporation, the state and its departments and institutions, political subdivision of the state of Washington, corporation, limited liability company, association, society, or any group of individuals acting as a unit, whether mutual, cooperative, fraternal, nonprofit, or otherwise. The term excludes any person immune from state taxation, including the United States or its instrumentalities, and federally recognized Indian tribes and enrolled tribal members, conducting business within Indian country.

(m) "Indian country" means the same as defined in WAC 458-20-192.

~~(3) **Rate and measure of tax.** The Washington state tobacco products tax is an excise tax levied on the wholesale sales price on all tobacco products sold, used, consumed, handled, or distributed within the state.~~

The rate of tax is a combination of statutory percentage rates found in RCW 82.26.020, 82.26.025, and 82.26.028. The total current rate of tax is shown on the current combined excise tax return.

~~(4) **Imposition of tax.** The tax is imposed once on all tobacco products sold, used, consumed, handled, or distributed within this state.~~

~~(a) **When tax is imposed.** The tax is imposed at the time the distributor:~~

~~(i) Brings, or causes to be brought, into this state from without the state tobacco products for sale; or~~

~~(ii) Makes, manufactures, or fabricates tobacco products in this state for sale in this state; or~~

~~(iii) Ships or transports tobacco products to retailers in this state, to be sold by those retailers; or~~

~~(iv) Handles for sale any tobacco products that are within this state but upon which tax has not been imposed. For example, a retailer with a place of business in this state purchases for sale tobacco products from an enrolled tribal member of a federally recognized tribe located within Indian country. Because the tax was not imposed on the enrolled tribal member, the retailer must pay the tax.~~

~~(b) **Additional occasion when tax may be imposed.** Any retailer who fails to keep invoices as required under chapter 82.32 RCW and which invoices do not conform to the requirements set forth in subsection (5)(b) of this rule is liable for the tax on any uninvoiced tobacco product which that retailer handles for sale.~~

~~(c) **When an out-of-state person is a distributor who must pay the tax.** A person located out of state who is selling tobacco products to Washington wholesalers from a stock of goods located outside this state is not a distributor and therefore is not liable for the tax.~~

~~(i) On the other hand, a person located out of state who is selling and shipping tobacco products to Washington retailers from an out-of-state stock of goods is a distributor and is subject to the tax. If the out-of-state person is not~~

required to register and pay taxes in Washington, the retailers to whom it sells must pay the tax. However, such out-of-state persons may elect to register with the state and pay the tax.

(ii) A Washington retailer who purchases tobacco from an out-of-state stock of goods from a person located out-of-state who is not required to register and pay taxes in Washington may provide to that person a certificate affirming that the Washington retailer will remit to the state the tax due. Both the out-of-state person and the Washington retailer should retain a copy of such certificate. The certificate should substantially conform to the example shown below:

Retailer's Certificate of Remittance of Tax

The undersigned retailer hereby certifies that the undersigned will remit to the state the tax due on the tobacco products specified below purchased from seller. This certificate shall be considered a part of each order which the undersigned may give to the seller, unless otherwise specified, and shall be valid until revoked by the undersigned in writing or until it expires, whichever occurs first. This certificate expires four years from the effective date.

Name of Seller:
Name of Retailer: Effective Date:
UBI/Registration #
Address of Retailer:
Tobacco products purchased
Agent for Retailer (print)
Signature:

(iii) A person who is located out-of-state and who is required to register and pay taxes in Washington may sell and ship tobacco products to a Washington customer who is both a wholesaler and retailer. Under this circumstance, the person, the customer, and the department may enter into a written agreement that identifies the person who will remit to the state the tax due as to those particular sales. The written agreement will contain such other terms and conditions that are acceptable to the department.

(iv) When a person located outside Washington distributes samples in this state, that person must pay the tax on those samples.

~~(5) **Books and records.** Since the tobacco products tax is paid on returns as computed by the taxpayer rather than by affixing of stamps or decals, the law contains stringent provisions requiring that accurate and complete records be maintained. The records must include all pertinent papers and documents relating to the purchase, sale, or disposition of tobacco products and must be kept for a period of at least five years after the date of the document or the date of the entry appearing in the records.~~

~~(a) **Distributors.** Distributors must keep at each registered place of business complete and accurate records for that place of business. The records to be kept by distributors include itemized invoices of tobacco products held, purchased, manufactured, brought in or caused to be brought in from without the state or shipped or transported to retailers in this state, and of all sales of tobacco products except retail sales. The itemized invoice for each purchase or sale must be~~

legible and must show the seller's name and address, the purchaser's name and address, the date of sale, and all prices and discounts. Itemized invoices must be preserved for five years from the date of sale.

(b) ~~Retailers and subjobbers.~~ Retailers and subjobbers must secure itemized invoices of all tobacco products purchased. The itemized invoice for each purchase must be legible and must show the seller's name and address, the purchaser's name and address, the date of sale, and all prices and discounts. Itemized invoices must be preserved for five years from the date of sale.

(c) ~~Warehouses.~~ Records of all deliveries or shipments (including ownership, quantities) of tobacco products from any public warehouse of first destination in this state must be kept by the warehouse.

(6) ~~Nonpayment of tax by retailers.~~ If the department finds that any nonpayment of tax by the retailer was willful, penalties and interest shall be assessed in accordance with chapter 82.32 RCW. In the case of a second or plural nonpayment of tax by the retailer, penalties and interest will be assessed in accordance with chapter 82.32 RCW without regard to willfulness.

(a) Example. In the course of an audit of Retailer, the department determines that on several occasions Retailer failed to pay the tax. The department does not find the nonpayment to be willful. Retailer owes the tax due on all occasions of nonpayment and the penalties and interest is assessed on all but the first occasion of nonpayment. A few years later Retailer is audited again. The department finds one occasion of nonpayment of tax. In addition to the tax due, penalties and interest will be assessed in accordance with chapter 82.32 RCW.

(b) Example. In the course of an audit of Retailer #2, the department determines that on several occasions Retailer #2 failed to pay the tax. The department determines that the nonpayment of tax was willful. In addition to the tax due on all occasions of nonpayment, Retailer #2 owes penalties and interest on all occasions.

(7) ~~Reports and returns.~~ The tax is reported on the combined excise tax return to be filed according to the reporting frequency assigned by the department. Detailed instructions for preparation of these returns may be secured from the department.

Out of state wholesalers or distributors selling directly to retailers in Washington should apply for a certificate of registration, and the department will furnish returns for reporting the tax.

Retailers, distributors, and subjobbers may be required to file a report with the department in compliance with the provisions of the National Uniform Tobacco Settlement when purchasing tobacco products from certain manufacturers. Please see WAC 458 20 264 and chapter 70.157 RCW.

(8) Interstate sales and sales to U.S.

(a) The tax does not apply to tobacco products sold to federal government agencies, nor to deliveries to retailers outside the state for resale by such retailers, and a credit may be taken for the amount of tobacco products tax previously paid on such products. RCW 82.26.110. The credit is not available for sales made for delivery outside this state other than sales for resale to retailers. For example, no credit may

be taken for a sale of tobacco products delivered to a consumer outside the state.

(b) To document that the tobacco products were sold to a retailer outside the state for resale by such retailer, the person may obtain from the retailer a certificate which substantially conforms to the following:

Retailer's Certification of Purchase of Tobacco Products for Resale Outside Washington

The undersigned buyer/retailer hereby certifies that the tobacco products specified below are purchased for resale outside this state by the undersigned. This certificate shall be considered a part of each order which the undersigned may give to the seller, unless otherwise specified, and shall be valid until revoked in writing by the undersigned or until it expires, whichever occurs first. This certificate expires four years from the effective date

Name of Seller Effective Date
UBI/Registration #
Name of Buyer/Retailer Business
Address
Items purchased for resale
Agent for buyer/retailer (print)
Signature

(9) ~~Returned or destroyed goods.~~ A credit may also be taken for tobacco products destroyed or returned to the manufacturer on which tax was previously paid. If the credit is claimed against tax owed by the taxpayer or as a refund of tax paid, taxpayers must retain in their records appropriate documentation, affidavits or certificates conforming to those illustrated below:

(a) Certificate of taxpayer.

Claim for Credit on Tobacco Products
Tax Merchandise Destroyed

The undersigned certifies under penalty of perjury under the laws of the state of Washington that the following is true and correct to the best of his/her knowledge:

That he/she is (Title) of the (Business Name), a dealer in tobacco products; that the dealer has destroyed merchandise unfit for sale, said tobacco products having a wholesale sales price of \$; that tobacco tax had been paid on such tobacco products; that the tobacco products were destroyed in the following manner and in the presence of an authorized agent of the department of revenue:

.....
(State date and manner of destruction)
.....
.....

Attested to:
Date

By
Signature of Taxpayer or
Authorized Representative.
.....
Position with Dealer

.....
 Dealer

Address of Dealer

approved:

.....
 Authorized Agent of
 Department of Revenue of the
 State of Washington

(b) Certificate of manufacturer.

Claim for Credit on Tobacco Products
 Tax Merchandise Returned:

The undersigned certifies under penalty of perjury under the laws of the state of Washington that the following is true and correct to the best of his/her knowledge:

That he/she is (Title) of the (Business Name), a manufacturer of tobacco products; that the manufacturer has received from (Dealer), (Address), a dealer in tobacco products within the State of Washington, certain tobacco products which were unfit for sale, the tobacco products having a wholesale sales price of \$.....; that the tobacco products were destroyed in the following manner:

.....
 (Indicate date and manner of destruction)

Credit issued on Memo No. ....	.....
credit approved by:	Signature of Taxpayer or Authorized Representative
.....
on behalf of the Department of Revenue - State of Washington	Name of Manufacturer Address

(10) Enforcement. Pursuant to RCW 82.26.121 and 66.44.010, enforcement officers of the liquor control board may enforce all provisions of the law with respect to the tax on tobacco products. Retailers, distributors, and subjobbers must allow department personnel and enforcement officers of the liquor control board free access to their premises to inspect the tobacco products contained in the premises and to examine the books and records of the business. Failure to allow free access or to hinder or interfere with department personnel and/or enforcement officers of the liquor control board may result in the revocation of the business license.))

(1) Introduction. This rule explains the tax liabilities of persons engaged in business as retailers or distributors of tobacco products other than cigarettes. The tax on tobacco products (also called "other tobacco products" or OTP tax) is in addition to all other taxes owed, such as retailing or wholesaling business and occupation tax, sales tax, and litter tax. See WAC 458-20-186 for tax liabilities associated with taxes that apply exclusively to cigarettes.

(2) Organization of rule. The information provided in this rule is divided into five parts:

(a) Part I provides definitions and explains the tax liabilities of persons engaged in the business of selling or distributing tobacco products (excluding cigarettes) in this state.

(b) Part II explains the licensing requirements and responsibilities for persons making wholesale or retail sales of tobacco products in this state.

(c) Part III explains the requirements and responsibilities for persons transporting tobacco in Washington.

(d) Part IV explains the recordkeeping requirements and enforcement of the tobacco tax.

(e) Part V describes the credits for tax paid and the procedures that must be followed to qualify for credit.

Part I - Tax on Tobacco Products (excluding Cigarettes)

(101) In general. The Washington state tobacco products tax is due and payable by the first distributor who possesses tobacco products in this state. The measure of the tax in most instances is based on the actual price paid by the distributor for the tobacco product, unless the distributor is affiliated with the seller.

(102) Definitions. For the purposes of this rule, the following definitions apply:

(a) "Actual price" means the total amount of consideration for which tobacco products are sold, valued in money, whether received in money or otherwise, including any charges by the seller necessary to complete the sale such as charges for delivery, freight, transportation, or handling.

(b) "Affiliated" means related in any way by virtue of any form or amount of common ownership, control, operation, or management.

(c) "Board" means the liquor control board.

(d) "Business" means any trade, occupation, activity, or enterprise engaged in for the purpose of selling or distributing tobacco products in this state.

(e) "Cigar" means a roll for smoking that is of any size or shape and that is made wholly or in part of tobacco, irrespective of whether the tobacco is pure or flavored, adulterated or mixed with any other ingredient, if the roll has a wrapper made wholly or in greater part of tobacco. "Cigar" does not include a cigarette.

(f) "Cigarette" has the same meaning as in RCW 82.24.010.

(g) "Department" means the department of revenue.

(h) "Distributor" means:

(i) Any person engaged in the business of selling tobacco products in this state who brings, or causes to be brought, into this state from without the state any tobacco products for sale;

(ii) Any person who makes, manufactures, fabricates, or stores tobacco products in this state for sale in this state;

(iii) Any person engaged in the business of selling tobacco products from outside this state who ships or transports tobacco products to retailers in this state, to be sold by those retailers;

(iv) Any person engaged in the business of selling tobacco products in this state who handles for sale any tobacco products that are within this state but upon which tax has not been imposed. RCW 82.26.010 (3)(a) through (d). (For example, Sunshine Tobacco Shop ("Sunshine") buys cigars from an out-of-state manufacturer for resale to consumers in this state. The cigars are shipped to Sunshine via

common carrier. In this instance, Sunshine is a distributor, must have both a retailer's and a distributor's license, and must pay the tobacco products tax on the products it brings into the state. However, if Sunshine bought its merchandise exclusively from in-state distributors that have paid the tobacco products tax on that merchandise, Sunshine would not be considered a distributor, and would need only a retailer's license.)

(i) "Indian," "Indian country," and "Indian tribe" have the same meaning as defined in chapter 82.24 RCW and WAC 458-20-192.

(j) "Manufacture" means the production, assembly, or creation of new tobacco products. For the purposes of this rule, "manufacture" does not necessarily have the same meaning as provided in RCW 82.04.120.

(k) "Manufacturer" means a person who manufactures and sells tobacco products.

(l) "Manufacturer's representative" means a person hired by a manufacturer to sell or distribute the manufacturer's tobacco products, and includes employees and independent contractors.

(m) "Person" means any individual, receiver, administrator, executor, assignee, trustee in bankruptcy, trust, estate, firm, copartnership, joint venture, club, company, joint stock company, business trust, municipal corporation, the state and its departments and institutions, political subdivision of the state of Washington, corporation, limited liability company, association, society, any group of individuals acting as a unit, whether mutual, cooperative, fraternal, nonprofit, or otherwise. The term excludes any person immune from state taxation, including the United States or its instrumentalities, and federally recognized Indian tribes and enrolled tribal members, conducting business within Indian country.

(n) "Place of business" means any place where tobacco products are sold or where tobacco products are manufactured, stored, or kept for the purpose of sale, including any vessel, vehicle, airplane, train, or vending machine.

(o) "Retailer" means any person engaged in the business of selling tobacco products to ultimate consumers.

(p) "Retail outlet" means each place of business from which tobacco products are sold to consumers.

(q) "Sale" means:

(i) Any transfer, exchange, or barter, in any manner or by any means whatsoever, for a consideration, and includes and means all sales made by any person.

(ii) The term "sale" includes a gift by a person engaged in the business of selling tobacco products, for advertising, promoting, or as a means of evading the provisions of this chapter.

(r) "Sample" and "sampling" have the same meaning as in RCW 70.155.010. Sampling is prohibited in this state. See chapter 70.155 RCW.

(s) "Store," "stores," or "storing" means the holding of tobacco products for later sale or delivery inside or outside this state. For example:

(i) Wilderness Enterprises ships products from out-of-state to its Kent warehouse. All products are intended for future sale to Alaska. Wilderness Enterprises is a distributor that stores tobacco products in this state. Wilderness Enterprises is liable for tobacco products tax on the products stored

in this state. (However, see subsection (401) of this section for credits that may be available to Wilderness Enterprises for out-of-state sales.)

(ii) Cooper Enterprises brings tobacco products into this state for sale. It rents storage space from a third party, Easy Storage. Cooper Enterprises, not Easy Storage, is responsible for the tax and reporting requirements on the stored tobacco products.

(t) "Taxable sales price" means:

(i) In the case of a taxpayer that is not affiliated with the manufacturer, distributor, or other person from whom the taxpayer purchased tobacco products, the actual price for which the taxpayer purchased the tobacco products. For purposes of this subsection, "person" includes both persons as defined in (m) of this subsection and any person immune from state taxation, including the United States or its instrumentalities, and federally recognized Indian tribes and enrolled tribal members, conducting business within Indian country:

(ii) In the case of a taxpayer that purchases tobacco products from an affiliated manufacturer, affiliated distributor, or other affiliated person, and that sells those tobacco products to unaffiliated distributors, unaffiliated retailers, or ultimate consumers, the actual price for which that taxpayer sells those tobacco products to unaffiliated distributors, unaffiliated retailers, or ultimate consumers.

For purposes of this subsection, "person" includes both persons as defined in (m) of this subsection and any person immune from state taxation, including the United States or its instrumentalities, and federally recognized Indian tribes and enrolled tribal members, conducting business within Indian country:

(iii) In the case of a taxpayer that sells tobacco products only to affiliated distributors or affiliated retailers, the price, determined as nearly as possible according to the actual price for which other distributors sell similar tobacco products of like quality and character to unaffiliated distributors, unaffiliated retailers, or ultimate consumers;

(iv) In the case of a taxpayer that is a manufacturer selling tobacco products directly to ultimate consumers, the actual price for which the taxpayer sells those tobacco products to ultimate consumers;

(v) In the case of a taxpayer that has acquired tobacco products under a sale as defined in (q)(ii) of this subsection, the price, determined as nearly as possible according to the actual price for which the taxpayer or other distributors sell the same tobacco products or similar tobacco products of like quality and character to unaffiliated distributors, unaffiliated retailers, or ultimate consumers; or

(vi) In any case where (t)(i) through (v) of this subsection do not apply, the price, determined as nearly as possible according to the actual price for which the taxpayer or other distributors sell the same tobacco products or similar tobacco products of like quality and character to unaffiliated distributors, unaffiliated retailers, or ultimate consumers.

(u) "Taxpayer" means a person liable for the tax imposed by chapter 82.26 RCW.

(v) "Tobacco products" means cigars, cheroots, stogies, periques, granulated, plug cut, crimp cut, ready rubbed, and other smoking tobacco, snuff, snuff flour, cavendish,

plug and twist tobacco, fine-cut and other chewing tobaccos, shorts, refuse scraps, clippings, cuttings and sweepings of tobacco, and other kinds and forms of tobacco, including wrapping papers or tubes that contain any amount of tobacco (such as "blunts"), prepared in such manner as to be suitable for chewing or smoking in a pipe or otherwise, or both for chewing and smoking, but shall not include cigarettes as defined in RCW 82.24.010.

(w) "Unaffiliated distributor" means a distributor that is not affiliated with the manufacturer, distributor, or other person from whom the distributor has purchased tobacco products.

(x) "Unaffiliated retailer" means a retailer that is not affiliated with the manufacturer, distributor, or other person from whom the retailer has purchased tobacco products.

(103) Imposition of tax. RCW 82.26.030 as amended effective July 1, 2005, states: "It is the further intent and purpose of this chapter that the distributor who first possesses the tobacco product in this state shall be the distributor liable for the tax and that in most instances the tax will be based on the actual price that the distributor paid for the tobacco product, unless the distributor is affiliated with the seller." The tax is imposed at the time the first distributor possesses the product in this state for sale. RCW 82.26.020(2).

Examples. The following examples, while not exhaustive, illustrate some of the circumstances in which the tax is imposed. These examples should be used only as a general guide. The status of each situation must be determined after a review of all of the facts and circumstances.

(a) BET Wholesalers sells and ships tobacco products from Kentucky via common carrier to Surprise Enterprises in Washington. The tax is due from Surprise Enterprises, because it is the first possessor in Washington that holds the product for sale. However, BET Distributors must give the liquor control board (LCB) notice of its intent to ship tobacco products into this state.

(b) BET Wholesalers sells and ships tobacco products in its own trucks from Kentucky to Jamie's Enterprises in Washington. The tax is due from BET Wholesalers, because it is the first possessor in Washington that holds the product for sale.

(c) Garden State Cigars is located in New Jersey. It ships its products to Washington retailers via National Common Carrier. The retailers must be licensed as distributors and are liable for the tax. However, Garden State Cigars must give the liquor control board (LCB) notice of its intent to ship tobacco products into this state.

(104) Rates. The Washington state tobacco tax is an excise tax levied on the taxable sales price as defined in RCW 82.26.010. The rate is a combination of statutory rates found in RCW 82.26.020.

(105) Promotions.

(a) Tobacco products sold, provided at a reduced cost, or given away for advertising or any other purpose are taxed in the same manner as if they were sold, used, consumed, handled, possessed, or distributed in this state. RCW 82.26.010 (5)(b). The taxable sales price for the tobacco products is the actual price for which the taxpayer or other distributors sell the same tobacco products, or a maximum of 67 cents each for cigars.

For example, Etta's (an out-of-state manufacturer) gives Joe's Distributing 500 cigars and 200 cans of snuff as a promotion. Etta's and Joe's Distributing are unaffiliated. Joe's Distributing normally sells this brand of cigars for \$1.00 each and the snuff for \$2.50 each to unaffiliated distributors and/or retailers. Joe's Distributing owes tobacco products tax on this merchandise. Because Joe's Distributing normally sells each cigar for more than 67 cents, the tobacco products tax is calculated on the cigars at 50 cents each ($500 \times 0.50 = \$250$). The tobacco products tax on the snuff is calculated at 75% of Joe's normal selling price to unaffiliated buyers ($200 \times \$2.50 = \$500 \times 75\% = \$375$) for a total tobacco products tax of \$625.

(b) If a product is purchased or sold at a discount in a promotion characterized as a "2 for 1" or similar sale, the tax is calculated on the actual prorated consideration the buyer paid to the unaffiliated distributor, or a maximum of 67 cents a cigar.

For example:

(i) Duke Distributing (an out-of-state wholesaler) ships tobacco products via common carrier to Lem's Tobacco Shop (an unaffiliated Washington retailer). Duke invoices Lem's for \$1,500. The sale includes 200 cigars priced "buy one for \$2 and get one free"; the balance of the sale is chewing tobacco priced at \$1,300. Lem's Tobacco Shop is liable for the tax. The tax on the chewing tobacco is \$975 ($\$1,300 \times 75\%$). Each cigar costs Lem's Tobacco Shop \$1 ($\$200/200$ cigars = \$1 per cigar). Because each cigar costs more than 67 cents, the tax on the cigars is capped at \$0.50 each. The tax on the cigars is \$100 (200 cigars \times $\$0.50 = \100). Total tobacco tax due on the invoice is \$1,075.

(ii) Shasta Distributing (an out-of-state wholesaler) ships OTP in its own trucks to Lem's Tobacco Shop (an unaffiliated Washington retailer). Shasta invoices Lem's for \$1,500. The sale includes 200 cigars priced "buy one for \$2 and get one free"; the balance of the sale is chewing tobacco priced at \$1,300. Shasta Distributing owes the tax. Shasta originally purchased the products from an unaffiliated manufacturer for \$300 (\$100 for the cigars and \$200 for the chewing tobacco). The tax on the chewing tobacco is \$150 ($\$200 \times 75\%$). The tax on the cigars is \$75 ($\$100 \times 75\% = \75), because the cigars cost less than 67 cents each ($\$100/200$ cigars = 50 cents per cigar). Total tobacco tax due on the invoice is \$225.

(iii) Wind Blown Distributing (an out-of-state wholesaler) ships tobacco products in its own trucks to Lem's Tobacco Shop (an unaffiliated retailer located in this state). Wind Blown invoices Lem's for \$1,500. The sale includes 200 cigars priced "buy one for \$2 and get one free"; the balance of the sale is chewing tobacco priced at \$1,300. Wind Blown Distributing owes the tax. Wind Blown originally purchased the products from an affiliated manufacturer for \$100 (\$25 for the cigars and \$75 for the chewing tobacco). The measure of the tax is the actual price for which Wind Blown sells these products to unaffiliated buyers, i.e., Lem's. The tax due on the chewing tobacco is \$975 ($\$1,300 \times 75\%$). The tax on the cigars is \$100 (200 cigars \times 50 cents). The tax on the cigars is capped at \$0.50 each, because each cigar costs more than 67 cents ($\$200/200$ cigars = \$1 per cigar). Total tobacco tax due on the invoice is \$1,075.

**Part II - Wholesale and Retail Tobacco Products Vendor
Licensing Requirements and Responsibilities**

(201) License required. No person may engage in the retail or wholesale distribution of tobacco products in this state without a license.

(202) Distributor's license. Prior to selling or distributing tobacco products from a stock of goods in Washington or to retailers in Washington, each distributor must first obtain a tobacco distributor's license from the department of licensing.

(a) Background check. Each distributor must undergo a criminal background check before a license will be issued. Chapter 82.26 RCW. The background check must be completed to the satisfaction of the liquor control board and the department. Failure to provide information sufficient to complete the background check may result in denial of the license. A background check will not be required if the applicant has had a background check for a license issued under chapter 66.24 or 82.24 RCW.

(b) Application. Application for license or renewal of license is made on forms supplied by the department of licensing and must be accompanied by the annual license fee as provided in chapter 82.26 RCW. A distributor's license is valid for one year from the date it is issued. The annual fees will not apply if the licensee pays the corresponding annual distributor cigarette fees under RCW 82.24.510.

(c) Multiple locations. If the distributor sells, intends to sell, or stores tobacco products at more than one place of business, whether temporary or permanent, a separate license with a license fee as provided in chapter 82.26 RCW is required for each additional place of business. Each license must be exhibited in the place of business for which it is issued.

(203) Duties and responsibilities of licensed distributors.

(a) Sales restricted. Wholesalers selling tobacco products in this state may sell tobacco products only to Washington retailers or wholesalers who have a current tobacco license, to other licensed wholesalers, the federal government or its instrumentalities, or to Indian tribal entities authorized to possess untaxed tobacco products.

(b) Manufacturer's representatives. Manufacturers selling tobacco products through manufacturer's representatives must provide the department a current list of the names, addresses and telephone numbers of all such representatives. The list is mailed to: Washington State Department of Revenue, P.O. Box 47477, Olympia, WA 98504. The manufacturer must have a distributor's license and its representatives must carry a copy of the manufacturer's distributor license at all times when selling or distributing the manufacturer's tobacco products.

(204) Retail license. Prior to the retail sale or distribution of tobacco products, each retailer must first be issued a retail tobacco license from the department of licensing. A license is required for each location at which tobacco products are sold at retail. Each license must be exhibited at the place of business for which it is issued.

Application. Applications for license or renewals of license are made on forms supplied by the department of

licensing and must be accompanied by the annual license fee as provided in chapter 82.26 RCW. A retail tobacco license is valid for one year from the date it is issued. The annual fees will not apply if the licensee pays the corresponding annual retailer cigarette fees under RCW 82.24.510.

(205) Duties and responsibilities of retailers. A retailer that obtains tobacco products from an unlicensed distributor or any other person that is not licensed under this chapter must be licensed both as a retailer and a distributor and is liable for the tax imposed under RCW 82.26.020 with respect to the tobacco products acquired from the unlicensed person that are held for sale, handling, or distribution in this state. For example, if a retailer buys tobacco products from an Indian smoke shop or an out-of-state wholesaler who does not have a tobacco distributor license, the retailer must obtain a distributor license and pay the tobacco tax due.

(206) Suspension or revocation of wholesale or retail tobacco licenses.

(a) The department has full power and authority to suspend or revoke the license of any wholesale or retail tobacco dealer in the state upon sufficient showing that the license holder has violated the provisions of chapter 82.26 RCW or this rule. See RCW 82.26.220 and WAC 458-20-10001 for information on the procedures pertaining to suspension or revocation of cigarette licenses.

(b) Any person possessing both a tobacco products license and a cigarette license is subject to suspension and revocation of both licenses for violation of either chapter 82.24 or 82.26 RCW. For example, if a person has both a cigarette license and a tobacco license, revocation of the tobacco license will also result in revocation of the cigarette license.

(c) A person whose license has been suspended or revoked must not sell or permit the sale of tobacco products or cigarettes on premises occupied or controlled by that person during the period of the suspension or revocation.

(d) Any person whose license has been revoked must wait one year following the date of revocation before requesting a hearing for reinstatement. Reinstatement hearings are held pursuant to WAC 458-20-10001.

Part III - Transporting Tobacco Products in Washington

(301) Transportation of tobacco products restricted.

(a) Only licensed distributors or retailers in their own vehicles, or manufacturer's representatives authorized to sell or distribute tobacco products in this state, can transport tobacco products in this state. Individuals transporting the product must have a copy of a valid retailer's or distributor's license in their possession and evidence that they are representatives of the licensees. Individuals transporting tobacco products for sale must also have in their possession invoices or delivery tickets for the tobacco products that show the name and address of the consignor or seller, the name and address of the consignee or purchaser, and the quantity and brands of the tobacco products being transported. It is the duty of the distributor, retailer, or manufacturer responsible for the delivery or transportation of the tobacco products to ensure that all drivers, agents, representatives, or employees have the delivery tickets or invoices in their possession for all such shipments.

(b) All other persons must give notice to the board in advance of transporting or causing tobacco products to be transported in this state for sale. This includes those transporting tobacco products in this state via common carrier. For example: Peg's Primo Cigars (PPC), a small out-of-state distributor, sells tobacco products to retailers in Washington. PPC ships the products via National Common Carrier. Before placing the product in shipment to Washington, PPC must give notice to the board of the pending shipment. The notice must include the name and address of the consignor or seller, the name and address of the consignee or purchaser, the quantity and brands of the tobacco products being transported, and the shipment date.

Part IV - Recordkeeping and Enforcement

(401) **Books and records.** An accurate set of records showing all transactions related to the purchase, sale, or distribution of tobacco products must be retained. RCW 82.26.060, 82.26.070 and 82.26.080. All records must be preserved for five years from the date of the transaction.

(a) **Distributors.** Distributors must keep at each place of business complete and accurate records for that place of business. The records to be kept by distributors include itemized invoices of tobacco products held, purchased, manufactured, brought in or caused to be brought in from without the state or shipped or transported to retailers in this state, and of all sales of tobacco products. The itemized invoice for each purchase or sale must be legible and must show the seller's name and address, the purchaser's name and address, the date of sale, and all prices and discounts. Itemized invoices must be preserved for five years from the date of sale.

(b) **Retailers.** Retailers must secure itemized invoices of all tobacco products purchased. The itemized invoice for each purchase must be legible and must show the seller's name and address, the purchaser's name and address, the date of sale, and all prices and discounts. Itemized invoices must be preserved for five years from the date of sale. Retailers are responsible for the tax on any tobacco products for which they do not have invoices.

(402) **Reports and returns.** The department may require any person dealing in tobacco products in this state to complete and return forms, as furnished by the department, setting forth sales, inventory, shipments, and other data required by the department to maintain control over trade in tobacco.

(a) **Tax returns.** The tax is reported on the combined excise tax return that must be filed according to the reporting frequency assigned by the department. Detailed instructions for preparation of these returns may be obtained from the department.

(b) **Reports.** Retailers and distributors may be required to file a report with the department in compliance with the provisions of the National Uniform Tobacco Settlement when purchasing tobacco products (e.g., "roll your own tobacco") from certain manufacturers. Please see WAC 458-20-264 and chapter 70.157 RCW.

(403) **Criminal provisions.** Chapter 82.26 RCW prohibits certain activities with respect to tobacco products. Persons handling tobacco within this state must refer to these statutes.

(404) **Search, seizure, and forfeiture.** Any tobacco products in the possession of a person selling tobacco in this state without a license or transporting tobacco products without the proper invoices or delivery tickets may be seized without a warrant by any agent of the department, agent of the board, or law enforcement officer of this state. In addition, all conveyances, including aircraft, vehicles, or vessels used to transport the illegal tobacco product may be seized and forfeited.

(405) **Enforcement.** Pursuant to RCW 82.26.121 and 66.44.010, enforcement officers of the liquor control board may enforce all provisions of the law with respect to the tax on tobacco products. Retailers and distributors must allow department personnel and enforcement officers of the liquor control board free access to their premises to inspect the tobacco products on the premises and to examine the books and records of the business. If a retailer fails to allow free access, or hinders, or interferes with department personnel and/or enforcement officers of the liquor control board, that retailer's registration certificate issued under RCW 82.32.030 is subject to revocation. Additionally, any licenses issued under chapter 82.26 or 82.24 RCW are subject to suspension or revocation by the department.

(406) **Penalties.** Penalties and interest may be assessed in accordance with chapter 82.32 RCW for nonpayment of tobacco tax.

Part V - Credits

(501) Credits.

(a) **Interstate and foreign sales.** A credit is available to distributors for tobacco products sold to retailers and wholesalers outside the state for resale. This credit may be taken only for the amount of tobacco products tax reported and previously paid on such products. RCW 82.26.110. No credit may be taken for a sale of tobacco products from a stock of goods in this state to a consumer outside the state.

(b) **Returned or destroyed goods.** A credit may be taken for tax previously paid when tobacco products are destroyed or returned to the manufacturer. Credits claimed against tax owed or as a refund of tax paid, must be supported by documentation.

(c) **Documentation.** Credits claimed against tax owed or as a refund of tax paid, must be supported by documentation. Affidavits or certificates are required, and must substantially conform to those illustrated below. The affidavits or certificates must be completed by the taxpayer prior to claiming the credit, and must be retained with the taxpayer's records as set forth in Part VI of this rule.

Claim for Credit on Tobacco Products Sold for Resale Outside Washington

The undersigned distributor under penalty of perjury under the laws of the state of Washington certifies that the following is true and correct to the best of his/her knowledge:

(Business name), (tax reporting number), purchased the tobacco products specified below for resale outside this state. Tobacco products tax has been paid on such tobacco products as set forth below.

Products were purchased from: (name of business)

Date

Products were sold to: (name of out-of-state buyer)

Address

Date

Date, manner, and place of destruction:

Signature of Taxpayer or Authorized Representative:

Name:

Title:

Witnessed or approved:

Authorized Agent, Department of Revenue

<u>Product</u>	<u>Taxable sales price</u>	<u>Quantity</u>	<u>Tax paid</u>
Cigars exceeding \$0.67 per cigar	N/A		
Cigars not exceeding \$0.67 per cigar		N/A	
All tobacco products that are not cigars		N/A	

Signature of Taxpayer or Authorized Representative:

Name

Title:

Claim for Credit on Tobacco Products Returned Merchandise

(ii) Certificate of manufacturer.

<u>Product</u>	<u>Taxable sales price</u>	<u>Quantity</u>	<u>Tax paid</u>
Cigars exceeding \$0.67 per cigar	N/A		
Cigars not exceeding \$0.67 per cigar		N/A	
All tobacco products that are not cigars		N/A	

The undersigned certifies under penalty of perjury under the laws of the state of Washington that the following is true and correct to the best of his/her knowledge:

(Business name), (tax reporting number), a dealer in tobacco products, has returned merchandise unfit for sale. Tobacco tax has been paid on such tobacco products as set forth above.

Returned to:

Date:

Method of transport:

Manufacturer's credit issued on:

Credit memo number:

Signature of Taxpayer or Authorized Representative:

Name:

Title:

Claim for Credit on Tobacco Products Destroyed Merchandise

(i) Certificate of taxpayer.

<u>Product</u>	<u>Taxable sales price</u>	<u>Quantity</u>	<u>Tax paid</u>
Cigars exceeding \$0.67 per cigar	N/A		
Cigars not exceeding \$0.67 per cigar		N/A	
All tobacco products that are not cigars		N/A	

The undersigned certifies under penalty of perjury under the laws of the state of Washington that the following is true and correct to the best of his/her knowledge:

(Business name), (tax reporting number), a dealer in tobacco products, has destroyed tobacco products unfit for sale. Tobacco tax has been paid on such tobacco products as set forth above. The tobacco products were destroyed in the manner set forth below. The destruction occurred either:

(A) In the presence of an authorized agent of the department of revenue; or

(B) With prior authorization from the department to destroy the product without an agent of the department present.

**WSR 06-20-114
PROPOSED RULES
DEPARTMENT OF REVENUE**

[Filed October 4, 2006, 10:43 a.m.]

Supplemental Notice to WSR 06-16-141.
Preproposal statement of inquiry was filed as WSR 06-11-181.

Title of Rule and Other Identifying Information: Amending sections WAC 458-12-005 Definition—Property—

Personal and 458-16-115 Personal property exemptions for household goods, furnishings, and personal effects, and for the head of a family; and new sections WAC 458-50-150 Intangible personal property exemption—Introduction, 458-50-160 Exempt intangible property distinguished from other intangibles, 458-50-170 Valuation principles, 458-50-180 Appraisal practices relating to valuing intangible personal property, and 458-50-190 Valuation of particular assets.

Hearing Location(s): Capital Plaza Building, 4th Floor Executive Large Conference Room, 1025 Union Avenue S.E., Olympia, WA, on November 9, 2006, at 9:30 a.m.

Date of Intended Adoption: November 16, 2006.

Submit Written Comments to: James A. Winterstein, P.O. Box 47471, Olympia, WA 98504-7471, fax (360) 586-7602, e-mail JimWi@dor.wa.gov, by November 9, 2006.

Assistance for Persons with Disabilities: Contact Sandy Davis at (360) 725-7499 no later than ten days before the hearing date. Deaf and hard of hearing individuals may call 1-800-451-7985 (TTY users).

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The department proposes five new rules proposed to be added to chapter 458-50 WAC, Intercounty utilities and transportation, dealing with valuation of state-assessed utility companies. The purpose of the rules is to clarify the statute (RCW 84.36.070) and assist taxpayers, the department, and assessors in consistently applying the exemption for intangible personal property. The department also proposes to revise one rule in chapter 458-12 WAC, Rules for assessors, and another in chapter 458-16 WAC, Exemptions, to reference these new rules.

Reasons Supporting Proposal: The statute exempting intangible personal property, RCW 84.36.070, was substantially amended in 1997 and no rules have been adopted since then to clarify what the exemption entails. These rules are intended to provide all interested parties with guidelines used by assessing officials relative to the exemption of intangible personal property.

Statutory Authority for Adoption: RCW 84.08.010, 84.08.070, and 84.36.865.

Statute Being Implemented: Chapter 84.36 RCW.

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: Department of revenue, governmental.

Name of Agency Personnel Responsible for Drafting: James A. Winterstein, 1025 Union Avenue S.E., Suite #200, Olympia, WA, (360) 570-5880; Implementation and Enforcement: Brad Flaherty, 1025 Union Avenue S.E., Suite #200, Olympia, WA, (360) 570-5860.

No small business economic impact statement has been prepared under chapter 19.85 RCW. A small business economic impact statement is not required for the reason that the rules do not impose any new performance requirement or administrative burden on any small business.

A cost-benefit analysis is not required under RCW 34.05.328. The proposed rules are not significant legislative rules as defined by RCW 34.05.328.

October 4, 2006
Alan R. Lynn
Rules Coordinator

NEW SECTION

WAC 458-50-150 Intangible personal property exemption—Introduction. (1) **Goal of these rules relative to exemption of intangible personal property.** Although the Washington Constitution allows for property taxation of all property subject to ownership, "whether tangible or intangible," the legislature has exempted some intangible property from property taxation for many years. In 1997, the legislature expanded the property tax exemption for intangible personal property and provided examples of exempt property. The following rules are intended to provide additional clarification of the statute and provide guidelines to be used by assessing officials in determining the taxable value of property. The goal is to ensure, in as fair and equitable a manner as possible, that all taxable property is assessed and all non-taxable property is not assessed.

(2) **Application of these rules.** These rules primarily implement RCW 84.36.070, which establishes a property tax exemption for intangible personal property, but also apply to chapters 84.12 and 84.16 RCW, the statutory chapters dealing with the assessment of public utility, and private car company property, respectively, by the state, and to chapter 84.40 RCW, which deals with assessment of property by the county assessor.

NEW SECTION

WAC 458-50-160 Exempt intangible property distinguished from other intangibles. (1) **Distinction between property, and characteristics or attributes of property.** The statute (RCW 84.36.070) draws a distinction between intangible personal property and the characteristics or attributes of property, both real and personal. Intangible personal property is exempt from property taxation. However, some characteristics or attributes of property, even though intangible, may be considered in establishing the taxable value of tangible property.

(2) **What intangible personal property is exempt?** The listings of examples of intangible personal property contained in RCW 84.36.070(2) must be consulted, but those listings can be summarized as follows:

(a) Financial intangible property, such as moneys, credits, and publicly issued bonds and warrants, and the bonds, stocks, or shares of private corporations;

(b) Private personal service contracts and athletic or sports franchises, or sports agreements that do not pertain to the use or possession or any interest in tangible personal or real property; and

(c) Miscellaneous types of intangible personal property, such as trademarks, trade names, brand names, patents, copyrights, trade secrets, franchise agreements, licenses, permits, core deposits of financial institutions, noncompete agreements, customer lists, patient lists, favorable contracts, favorable financing agreements, reputation, exceptional management, prestige, good name, integrity of a business, and other similar types of intangible personal property.

(3) **Identifying exempt intangible personal property.** Intangible property is only exempt if it is personal property capable of being individually owned, used, transferred, or held separately from other property. The market value of

separate items of intangible personal property should not be identified or characterized solely using residual accounting methods, or other indirect techniques, such as isolating "excess earnings," from a total business valuation. Market value of exempt intangible personal property should be verifiable, to the extent possible, in an openly traded market where the value of comparable intangible properties can be observed and considered.

(4) **What intangible characteristics, attributes or other factors affect value and may be considered?** Non-property intangible characteristics or attributes are elements or components of value associated with a real or tangible asset. These characteristics or attributes are "intangible" but they are not "property" and therefore are not tax exempt intangible personal property. They are contingent and dependent upon other property and cannot be owned, used, transferred, or held separately from other property. To the extent that these characteristics, attributes, or other factors contribute to, or affect, the value of property, they must be appropriately considered when determining taxable value. They include the following types:

(a) Zoning, location, view, geographic features, easements, covenants, proximity to raw materials, condition of surrounding property, proximity to markets, or the availability of a skilled work force;

(b) Grants of licenses, permits, and franchises by a government agency that affect the use of the property being valued; and

(c) Other characteristics of property, such as scarcity, uniqueness, adaptability, or utility as an integrated unit.

NEW SECTION

WAC 458-50-170 Valuation principles. (1) **What is meant by "true and fair value"?** One hundred percent of true and fair value is the standard used by assessing officials for valuing both taxable property and exempt property. True and fair value is the same as market value or fair market value. It is the amount of money a buyer of property willing but not obligated to buy would pay a seller of property willing but not obligated to sell, taking into consideration all uses to which the property is adapted and might in reason be applied. This term incorporates all the rights and benefits, present and future, associated with the ownership of property.

(2) **Approaches to value.** All three traditional and generally accepted approaches to value may be used by assessing officials. These approaches are cost, including the actual cost new or historical cost less depreciation, the cost of reproduction new less any depreciation, the cost of replacement new less any depreciation; income, including the past, present, and prospective gross and net earnings of the whole system as a unit; and comparable sales (commonly called "market"), including, but not limited to, a technique known as the stock and debt method that considers the par value, actual value and market value of the company's outstanding stocks and bonds during one or more preceding years.

(3) **Generally accepted appraisal practices.** "Generally accepted appraisal practices" are the appropriate application in the valuation of real, and tangible and intangible personal property, of accepted standards of professional

appraisal practice as described in the Uniform Standards of Professional Appraisal Practice issued by the Appraisal Standards Board of the Appraisal Foundation or the accepted standards of other nationally recognized professional appraisal organizations.

NEW SECTION

WAC 458-50-180 Appraisal practices relating to valuing intangible personal property. (1) **Unit valuation.** Unit valuation is a method of determining the market value of a company, business, or property as a whole without reference to individual parts or components. For example, a railroad company may have many miles of track, or a pipeline company may have many miles of pipe, but if the track or the pipe is not connected in a useful and interdependent way to the rest of the company's system as a whole, the track or the pipe have considerably less value. However, when all the interdependent assets of a company are working together and functioning synergistically as a unit, the value of the company as a whole is independent of the value of the component parts. Similarly, the roof or the walls of a house may have value independently of the structure as a whole, but the market value of the house, for purposes of taxation, is determined as a unit. Market value is the value of the unit as a whole, not a summation of fractional appraisals of the component parts. The unit value may have enhanced taxable value above, taxable value equal to, or taxable value lower than what the sum of the value of the component parts may indicate. The department is specifically authorized to take into consideration, among other things, "the value of the whole system as a unit," when valuing companies with operating property in more than one county or more than one state. (RCW 84.12.-300; *see also* RCW 84.16.050.)

(2) **Situs, allocation, and apportionment.** Property taxes may only be levied upon property having situs in this state, in other words, upon property located in this state. The process of dividing up the unit value of a company among the states where it has a presence is called allocation. The process of dividing up the allocated state value among the taxing jurisdictions within a state is called apportionment. Once the taxable value, meaning the total value of a company's operating property in this state less the exempt value, has been determined, the taxable value is apportioned as required by law.

(3) **Valuation of exempt intangible personal property.** Assessing officials may use one of two methods, as appropriate, to determine the value of intangible personal property that is exempted from a company's unit value. The first method is the method by which the true and fair value of the exempt intangible personal property is deducted from the true and fair value of the operating property at the system level to arrive at taxable value at the system or entity level. The second method is the method by which the true and fair value of exempt intangible personal property is excluded from the value of the operating property at the system level by using a valuation model that approximates the value of the nonexempt assets only. These two methods are explained in more detail as follows.

(a) The first method is a two step-process that involves valuing the entire company operation, the unit, as the first step, using any or a combination of the three traditional approaches to value. Then the exempt property is separately identified, valued, and deducted from the unit value. In valuing the exempt property, assessors use generally accepted appraisal practices, including sales of similar intangible personal property, capitalization rates obtained through those sales, or by identifying cash flows attributable to each intangible personal property asset. When using this method, the value resulting from deducting the exempt value of intangible personal property from the entire company value, is the taxable value at the system or entity level. From that value, the proper value must then be allocated to this state and apportioned to the local taxing jurisdictions by law.

(b) The second method involves an appraisal process using an appraisal model that intrinsically approximates the exclusion of exempt intangible value. This process assumes the existence of intangible personal property in the overall value of the company being valued, but does not specifically identify or value individual intangible personal property assets. Although the model may not actually exclude the value of exempt intangible personal property, it simulates the effect of exempting intangible personal property by producing a lower assessed value equivalent to the exclusion of exempt intangible property.

(4) **Unit value at the county level.** When a business operates in more than one location within a county, but is physically, economically, and functionally integrated, it may also be valued by the assessor as a unit. However, properties that share a name, for example, but are independently operated, such as bank branches, retail outlets, radio stations, or hotels or motels that are part of a chain, should generally be valued as stand-alone enterprises, and not as physically, economically, and functionally integrated units. An assessor should consider the unit being assessed to be the same unit a typical purchaser would consider in an openly traded market. If the property being assessed would typically be purchased as a stand-alone and independent operation without reference to a larger entity, then that is how it should be assessed. If the property being assessed would typically be included in the purchase of a larger entity, then the assessor should consider the influence on value that being included within the larger unit would have on the property being assessed.

NEW SECTION

WAC 458-50-190 Valuation of particular assets.

Computer software. (1) Computer software is generally exempt from property taxation. The exemption is specifically dealt with in RCW 84.36.600 (exemption), RCW 84.04.150 (definitions), and WAC 458-12-251. Computer software and embedded software is valued in accordance with RCW 84.40.037. RCW 84.36.070 and these rules (WAC 458-50-150 through 458-50-190) do not apply to computer software, and nothing in that statute or these rules may be construed to amend or modify that existing statute and the rule dealing with the property tax treatment of computer software.

(2) In valuing low income or other housing which qualifies for federal income tax credits, those tax credits are exempt from property taxation to the extent that they are transferable separate and apart from any interest in the housing property.

AMENDATORY SECTION (Amending Order PT 68-6, filed 4/29/68)

WAC 458-12-005 Definition—Property—Personal.

(1) Introduction. The terms "personal property" and "real property" are defined in RCW 84.04.080 and 84.04.090, respectively. These definitions should routinely be consulted in any case where it is at all doubtful whether a given piece of property is real or personal.

Personal property, as defined in RCW 84.04.080, falls into two categories; namely, *tangible* personal property, that is to say, things which have a physical existence, and *intangible* personal property which consists of rights and privileges having a legal but not a physical existence.

(2) Tangible personal property. The category of tangible personal property includes but is not limited to the following:

~~((+))~~ **(a)** Goods and chattels. RCW 84.04.080. This category includes most tangible movables, such as:

~~((+))~~ **(i)** Inventories, AGO 57-58, No. 206 (1958);

~~((+))~~ **(ii)** Farm machinery, AGO 1909-1910, p. 51;

~~((+))~~ **(iii)** Livestock and poultry (~~RCW 84.44.060~~);

~~((+))~~ **(iv)** Logs and lumber, RCW 84.44.030;

~~((+))~~ **(v)** Motor vehicles, RCW 84.44.050;

~~((+))~~ **(vi)** Books, *Booth & Henford Abstract Company v. Phelps*, 8 Wash. 549 (1894);

~~((+))~~ **(vii)** Coin collections and coin inventories of coin dealers, AGO 63-64, No. 116 (1964); and

~~((+))~~ **(viii)** Tools.

~~((+))~~ **(b)** All standing timber held or owned separately from the ownership of the land on which it stands, RCW 84.04.080; *Leuthold v. Davis*, 56 Wn.2d 710 (1960).

~~((+))~~ **(c)** All fish traps, pound net, reef net, set net and drag seine fishing locations, RCW 84.04.080.

~~((+))~~ **(d)** All ~~((privately owned))~~ privately owned improvements, including buildings and the like, upon publicly owned lands which have *not* become part of the realty, RCW 84.04.080; *Pier 67, Inc. v. King County*, 71 W.D.2d 89 (1967); AGO 1935-1936, p. 167; AGO 3-25-52; TCR 6-17-1947.

~~((+))~~ **(e)** All gas and water mains and pipes laid in roads, streets or alleys, RCW 84.04.080.

~~((+))~~ **(f)** Water craft of all descriptions, RCW 84.04.080, *Black v. State*, 67 Wn.2d 97 (1965), provided they have acquired an actual situs in the taxing county pursuant to RCW 84.44.050.

~~((+))~~ **(g)** Foxes, mink, marten, fish, oysters and all other animals held or raised in captivity for business or commercial purposes, including livestock. (~~RCW 16.72.050; AGO 4-16-1900; AGO 1927-1928, p. 88; TCR 1-6-36.~~)

~~((+))~~ **(h)** The roads and bridges of plank roads, gravel roads, turnpike or bridge companies. (~~RCW 84.44.040.~~)

~~((+))~~ **(i)** Trade fixtures. This concept, which is peculiar to the landlord-tenant relationship, refers to the machinery or

equipment of any commercial or industrial business which operates on leased land or in rented quarters. Such machinery or equipment is a trade fixture; i.e., the tenant's personal property, no matter how firmly it may be attached to the landlord's realty, unless it could not be removed without virtually destroying the building housing it, or otherwise seriously damaging the landlord's realty. Brown on *Personal Property* (2d Edition 1955), Sec. 144.

~~((10))~~ (j) All engines and machinery of every description used or designed to be used in any process of refining or manufacturing, unless such engines and machinery shall have been included as part of any parcel of real property as defined in WAC 458-12-010(3).

~~((11))~~ (k) All buildings and other permanent improvements constructed or placed upon the easements of public service corporations other than railroads.

~~((12))~~ (l) All surface leases, whether of public or ~~(privately-owned)~~ privately owned land, except leases for the life of the lessee. RCW 84.04.080; AGO 49-51, No. 476 (1951); TCR 8-8-41: *In Re Barclay's Estate*, 1 Wn.2d 82 (1939). This category includes practically all leases to corporations because the legal life of a corporation is almost always longer than the term of any lease to it. *Pier 67, Inc., v. King County*, 71 W.D.2d 89 (1967).

(3) Intangible personal property. Intangible personal property includes but is not necessarily limited to the following:

~~((1))~~ (a) Contract rights to cut timber on either public or ~~(privately-owned)~~ privately owned land under which title to the timber has not yet passed. AGO 53-55, No. 29 (1953) (~~(PTB 222 (1-13-53))~~). A contract right to cut timber is a mere license, and all contractual licenses to use someone else's realty are personal property. (~~See WAC 458-12-005 (5-Intangibles)~~).

~~((2))~~ (b) All mining claims, whether patented or unpatented, which are located on public land. TCR 10-3-35; TCR 4-4-1950; AGO 55-57, No. 327 (1956); *American Smelting and Refining Company v. Whatcom County*, 13 Wn.2d 295 (1942).

~~((3))~~ (c) All mining or prospecting *leases*, whether on public or ~~(privately-owned)~~ privately owned land, except leases for the life of the lessee. RCW 84.04.080; TCR 4-22-36; *Walla Walla Oil, Gas & Pipe Line Company v. Vallentine*, 103 Wash. 359 (1918).

~~((4))~~ (d) All contractual licenses to use public or someone else's land for specified purposes, or to take something from public or someone else's land, which have a specified minimum term. Examples: Timber contracts, AGO 53-55, No. 29, (1953); oil and gas prospecting permits, *Walla Walla Oil, Gas & Pipe Line Company v. Vallentine*, 103 Wash. 359 (1918); grazing permits; permits to take gravel or other minerals, TCR 4-22-1936. However, a license or permit which is revocable at the will of the landowner is not property at all because it gives the licensee no ~~(legally-protected)~~ legally protected right or interest whatsoever.

~~((5))~~ (e) All possessory rights in realty which are divorced from the title to the realty. TCR 10-3-35; AGO 1937-1938, p. 353. Such possessory rights are analogous to leases; hence they are personal property unless they are coextensive with the life of their holder. This category includes

the possessory interest which an installment contract for the sale of public or ~~(privately-owned)~~ privately owned land creates in the vendee. See RCW 84.40.230.

~~((6))~~ (f) Public utility franchises owned by public service corporations. A public utility franchise is the right to use publicly owned real estate for power lines, gas or water lines, sewers or some other public utility facility. *Commercial Electric Light and Power Company v. Judson*, 21 Wash. 49 (1899); *Chehalis Broom Company v. Chehalis County*, 24 Wash. 135 (1901). Such public utility franchises are very similar to public utility easements, which are personal property under Paragraph 8 thereof. However, a Washington corporation's primary franchise to exist and do business in corporate form is not taxable property. *Bank of Fairfield v. Spokane County*, 173 Wash. 145 (1933).

~~((7))~~ (g) Public utility easements owned by public service corporations other than railroads. RCW 84.20.010.

(h) See WAC 458-50-150 through 458-50-190 for rules relating to exemption of intangible personal property under RCW 84.36.070.

AMENDATORY SECTION (Amending WSR 02-19-004, filed 9/4/02, effective 10/5/02)

WAC 458-16-115 Personal property exemptions for household goods, furnishings, and personal effects, and for the head of a family. (1) Introduction. This rule explains the personal property tax exemption for household goods, furnishings, and personal effects. It also explains the exemption available to the head of a family for otherwise taxable personal property up to a value of three thousand dollars. These exemptions are provided by RCW 84.36.110. (For rules dealing with exemptions of intangible personal property under RCW 84.36.070, see WAC 458-50-150 through 458-50-190.)

(2) Exemption for household goods, furnishings, and personal effects. All household goods and furnishings actually being used to equip and outfit the owner's residence or place of abode and all personal effects held by any person for his or her exclusive use and benefit are exempt from property taxation. Any household goods and furnishings or personal effects held for sale or commercial use do not qualify for this exemption. RCW 84.36.110(1).

(a) What are household goods and furnishings? "Household goods and furnishings" are all items of tangible personal property normally located in or about a residence and used or held to enhance the value or enjoyment of the residence, including its premises. The phrase includes, but is not limited to, movable items of necessity, convenience, or decoration, such as furniture, appliances, food, pictures, and tools and equipment used to maintain the residence. Personal property qualifying for this exemption retains its exempt status while temporarily in storage or while being used temporarily at locations other than the owner's residence.

"Household goods and furnishings" do not include items of personal property constructed primarily for use independent of and separate from a residence such as boats, motor vehicles, campers, and travel trailers. However, certain motor vehicles, campers, and travel trailers may be entitled to an exemption from property taxation under RCW 84.36.595.

Also, some boats may be wholly or partially exempt from property taxation under RCW 84.36.080 and 84.36.090.

(b) **What are personal effects?** "Personal effects" are items of tangible property of a personal or intimate nature that usually and ordinarily accompany a person such as wearing apparel, jewelry, and articles of a similar nature. RCW 84.36.120.

(c) **When are household goods, furnishings, and personal effects not exempt?** Personal property held for sale or used for any business or commercial purpose does not qualify for the household goods exemption. Thus, property used to equip and outfit a motel, hotel, apartment, sorority, fraternity, boarding house, rented home, duplex, or any other premises not used by the owner for his or her own personal residence or place of abode does not qualify for this exemption. Likewise, a hairdresser who uses any portion of his or her home as a beauty salon cannot claim a household goods exemption for personal property held for sale or otherwise used in the business. Business inventories, however, are exempt from property taxation under RCW 84.36.477.

Following is a nonexclusive list of items that are exempt as household goods or furnishings if they are used in a residence or place of abode but are fully taxable if they are used for business or commercial purposes.

(i) Desks are exempt as household goods if they are used in a residence but are taxable if they are used in a business office, including an office located in the owner's residence.

(ii) Silverware and china are exempt if they are used in a residence but are taxable if they are used in a restaurant.

(iii) Art or other collections are exempt if they are located in a residence but are taxable if they are located in a public display or used for commercial purposes.

(iv) Power equipment such as lawnmowers used exclusively to enhance the value or enjoyment of a residence, including its premises, are exempt, but they are taxable when used to maintain a golf course or for any other business or commercial purpose.

(3) **Exemption for the head of a family.** Each head of a family is entitled to an exemption from his or her taxable personal property in an amount up to three thousand dollars of actual value. RCW 84.36.110(2). For purposes of this exemption, "actual value" has the same meaning as "true and fair value" as defined in WAC 458-07-030. The taxpayer must qualify for the head of a family exemption on January 1st of the assessment year (the assessment date) or the exemption is lost for taxes payable the following year. As noted above, household goods, furnishings, and personal effects not used for business or commercial purposes are exempt from property taxation; therefore, the exemption for the head of a family does not apply to such property.

(a) **Who qualifies as the head of a family?** The exemption for the head of a family applies only to individuals (i.e., natural persons); it does not apply to artificial entities such as corporations, limited liability companies, or partnerships. The "head of a family" includes the following residents of the state of Washington:

(i) Any person receiving an old age pension under the laws of this state;

(ii) Any citizen of the United States, over the age of sixty-five years, who has resided in the state of Washington continuously for ten years;

(iii) The husband or wife, when the claimant is a married person, or a surviving spouse not remarried; and

(iv) Any person who resides with, and has under his or her care and maintenance, any of the following:

(A) His or her minor child or grandchild, or the minor child or grandchild of his or her deceased spouse;

(B) His or her minor brother or sister or the minor child of a deceased brother or sister;

(C) His or her father, mother, grandmother, or grandfather, or the father, mother, grandmother, or grandfather of a deceased spouse; or

(D) Any of the other relatives mentioned in this subsection who have attained the age of majority and are unable to take care of or support themselves.

(b) **What property is not exempt?** The personal property exemption for the head of a family does not apply to the following:

(i) Private motor vehicles. A "private motor vehicle" is any motor vehicle used for the convenience or pleasure of the owner, which carries a licensing classification other than motor vehicle for hire, auto stage, auto stage trailer, motor truck, motor truck trailer, or dealer's license. RCW 84.36.-120;

(ii) Mobile homes. A "mobile home" is a trailer designed for human habitation, which is capable of being moved upon the public streets and highways and is either more than thirty-five feet in length or more than eight feet in width. RCW 84.36.120;

(iii) Floating homes. A "floating home" is a building on a float, used in whole or in part for human habitation as a single-family dwelling and is on the property tax rolls of the county in which it is located. A floating home is not designed for self-propulsion by mechanical means or by means of wind. RCW 82.45.032; or

(iv) Houses, cabins, boathouses, boat docks, or other similar improvements that are located on publicly owned land.

(c) **Examples.** The following examples identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The status of each situation must be determined after a review of all of the facts and circumstances.

(i) A husband and wife operate a catering business as a limited liability company (LLC). The wife also operates a consulting business as a sole proprietor out of the family home. Husband and wife are not entitled to the head of family exemption for property held by the LLC. However, the wife is entitled to the head of family exemption for the taxable personal property used in her consulting business.

(ii) Jane Doe is a citizen of the United States, over the age of sixty-five, and has resided in the state of Washington continuously for over ten years. Jane owns a farm. She has transferred title to the farm property, both real and personal, into a trust. An attorney is the trustee, and Jane is the sole beneficiary. Since Jane Doe has beneficial ownership of the trust property and she qualifies as the head of a family, Jane

may claim the head of a family exemption for the taxable personal property held in the trust.

(4) **How do the exemptions included in this rule affect listing?** If the county assessor is satisfied that all of the personal property of any person is exempt from taxation, no listing is required by the owner or taxpayer. If the value of taxable personal property exceeds three thousand dollars, then the taxpayer must make a complete listing, and the assessor will deduct three thousand dollars from the total amount of the assessment and assess the remainder. RCW 84.36.110(2).

WSR 06-20-117

PROPOSED RULES

HEALTH CARE AUTHORITY

[Order 06-10—Filed October 4, 2006, 10:49 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 06-16-123.

Title of Rule and Other Identifying Information: WAC 182-55-005 Health technology assessment program.

Hearing Location(s): Health Care Authority (HCA), 676 Woodland Square Loop S.E., the Center Conference Room, Olympia, WA, on November 7, 2006, at 8:30 a.m.

Date of Intended Adoption: November 9, 2006.

Submit Written Comments to: Leah Hole-Curry, 676 Woodland Square Loop S.E., P.O. Box 42712, e-mail leah.hole-curry@hca.wa.gov, fax (360) 923-2766, by close of business on November 7, 2006.

Assistance for Persons with Disabilities: Contact Nikki Johnson by October 27, 2006, TTY (888) 923-5622 or (360) 923-2805.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The purpose of the proposed rule is to use a transparent and public process to implement new legislation. The proposed rules govern a new health technology assessment program that uses evidence to make coverage determinations for participating state purchased health care programs. The health technology assessment program (a) selects health technologies for assessment; (b) contracts with an evidence based practice center to produce health technology assessments; (c) establishes an independent health technology committee; and (d) maintains a centralized, internet based communication tool.

There are no existing rules related to this program.

Reasons Supporting Proposal: The 2006 legislature enacted E2SHB 2575 (chapter 307, Laws of 2006), creating new sections in chapter 70.14 RCW (RCW 70.14.080 - 70.14.140) and amending RCW 41.05.013. This legislation requires HCA to establish a new health technology assessment program and a health technology clinical committee. The agency must therefore adopt rules governing their operation.

Statutory Authority for Adoption: RCW 41.05.013, 41.05.160, and 70.14.090.

Statute Being Implemented: RCW 70.14.080 - 70.14.140.

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: Health care authority, governmental.

Name of Agency Personnel Responsible for Drafting, Implementation and Enforcement: Leah Hole-Curry, 676 Woodland Square Loop, Lacey, WA, (360) 923-2748.

No small business economic impact statement has been prepared under chapter 19.85 RCW. The joint administrative rules review committee has not requested the filing of a small business impact statement, and these rules set forth the internal processes that the health care authority will use to administer the health technology assessment program and the clinical committee. There are no requirements, or costs to comply with requirements imposed on businesses, including small businesses.

A cost-benefit analysis is not required under RCW 34.05.328. RCW 34.05.328 does not apply to HCA rules unless requested by the joint administrative rules review committee or applied voluntarily.

October 4, 2006

Cyndi Presnell

Assistant Rules Coordinator

Chapter 182-55 WAC

HEALTH TECHNOLOGY ASSESSMENT PROGRAM

NEW SECTION

WAC 182-55-005 Authority and purpose. Under RCW 70.14.080 through 70.14.140, the administrator of the Washington state health care authority is required to establish and support, and is authorized to adopt rules to govern, a health technology assessment program that uses evidence to make coverage determinations for participating state purchased health care programs. The health technology assessment program:

- (1) Selects health technologies for assessment;
- (2) Contracts with an evidence-based practice center to produce health technology assessments;
- (3) Establishes an independent health technology committee; and
- (4) Maintains a centralized, internet based communication tool.

NEW SECTION

WAC 182-55-010 Definitions. When used in this chapter:

- (1) "Administrator" means the administrator of the Washington state health care authority under chapter 41.05 RCW, as set forth in RCW 70.14.080, as amended.
- (2) "Advisory group" means a group established under RCW 70.14.110 (2)(c).
- (3) "Committee" means the health technology clinical committee established under RCW 70.14.090.
- (4) "Coverage determination" means a determination of the circumstances, if any, under which a health technology will be included as a covered benefit in a state purchased health care program, as set forth in RCW 70.14.080, as amended.

(5) "Health technology" means medical and surgical devices and procedures, medical equipment, and diagnostic tests. Health technologies do not include prescription drugs governed by RCW 70.14.050.

(6) "Participating agency" means the department of social and health services, the state health care authority, and the department of labor and industries, as set forth in RCW 70.14.080, as amended.

(7) "Reimbursement determination" means a determination to provide or deny reimbursement for a health technology included as a covered benefit in a specific circumstance for an individual patient who is eligible to receive health care services from the state purchased health care program making the determination, as set forth in RCW 70.14.080, as amended.

(8) "Health technology assessment" means a report produced by a contracted evidence-based practice center as provided for in RCW 70.14.100(4) that is based on a systematic review of evidence of a technology's safety, efficacy, and cost-effectiveness.

NEW SECTION

WAC 182-55-015 Committee purpose. The purpose of the committee is to make coverage determinations for the participating agencies based on a health technology assessment of the scientific evidence of the relative safety, efficacy, and cost; information from any special advisory groups; and their professional knowledge and expertise.

NEW SECTION

WAC 182-55-020 Committee selection. (1) The administrator, in consultation with the participating state agencies, shall make appointments to vacant committee positions, including the appointment of a chair, from a pool of interested applicants. Interested persons will be provided an opportunity to submit applications to the administrator for consideration.

(2) When appointing committee members, the administrator will consider, in addition to the membership requirements imposed by RCW 70.14.090 and any other relevant information, the following factors: Practitioner specialty or type and use of health technologies, especially in relation to current committee member specialty or types; practice location and community knowledge; length of practice experience; knowledge of and experience with evidence-based medicine, including formal additional training in fields relevant to evidence-based medicine; medical quality assurance experience; health technology assessment review experience.

NEW SECTION

WAC 182-55-025 Committee member requirements and terms. (1) As a continuing condition of appointment, committee members:

(a) Shall not have a substantial financial conflict of interest, such as an interest in a health technology company, including the holding of stock options, or the receipt of honoraria, or consultant moneys;

(b) Must complete a conflict of interest disclosure form, update the form annually, and keep disclosure statements current;

(c) Must abide by confidentiality requirements and keep all personal medical information and proprietary information confidential; and

(d) Shall not utilize information gained as a result of committee membership outside of committee responsibilities, unless such information is publicly available. The administrator, in his/her sole discretion, may disqualify members if he/she determines that committee member has violated a condition of appointment.

(2) Committee members shall be appointed to a term of three years and shall serve until a successor is appointed. A member may be reappointed for additional three-year terms for a total of nine years. One year after the end of a nine-year term, a person is eligible for appointment to one additional three-year term. Committee members serve staggered three-year terms. Of the initial members, in order to provide for staggered terms, some members may be appointed initially for less than three years. If an initial appointment is for less than twenty-four months, that period of time shall not be counted toward the limitation of years of appointment. Vacancies on the committee will be filled for the balance of the unexpired term.

(3) The appointed committee chair shall select a vice-chair from among the committee membership; ratify committee bylaws approved by the administrator; and operate the committee according to the bylaws and committee member agreements.

NEW SECTION

WAC 182-55-030 Committee coverage determination process. (1) In making a coverage determination, committee members shall review and consider the health technology assessment. The committee may also consider other information it deems relevant, including other information provided by the administrator, reports and/or testimony from an advisory group, and submissions or comments from the public.

(2) The committee shall give the greatest weight to the evidence determined, based on objective factors, to be the most valid and reliable, considering the nature and source of the evidence, the empirical characteristic of the studies or trials upon which the evidence is based, and the consistency of the outcome with comparable studies. The committee may also consider additional evidentiary valuation factors such as recency (date of information); relevance (the applicability of the information to the key questions presented or participating agency programs and clients); and bias (conflict of interest or political considerations).

NEW SECTION

WAC 182-55-035 Committee coverage determination. Based on the evidence regarding safety, efficacy, and cost-effectiveness of the health technology, the committee shall:

(1) Determine the conditions, if any, under which the health technology will be included as a covered benefit in

health care programs of participating agencies by deciding that:

(a) Coverage is allowed without special conditions because the evidence is sufficient to conclude that the health technology is safe, efficacious, and cost-effective for all populations; or

(b) Coverage is allowed with special conditions because the evidence is sufficient to conclude that the health technology is safe, efficacious, and cost-effective in only certain situations; or

(c) Coverage is not allowed because either the evidence is insufficient to conclude that the health technology is safe, efficacious, and cost-effective or the evidence is sufficient to conclude that the health technology is unsafe, ineffectual, or not cost-effective.

(2) Identify whether the determination is consistent with the identified Medicare decisions and expert guidelines.

(3) For decisions that are inconsistent with either the identified Medicare decisions or expert guidelines, specify the reason(s) for the decision and the evidentiary basis.

(4) For covered health technologies, specify criteria for participating agencies to use when deciding whether the health technology is medically necessary or proper and necessary treatment.

NEW SECTION

WAC 182-55-040 Publication of committee determinations. (1) The administrator shall publish final committee determinations by posting on a centralized, internet-based communication tool within ten days.

(2) Upon publication, participating agencies will implement the committee determination according to their statutory, regulatory, or contractual process unless:

(a) The determination conflicts with an applicable federal statute or regulation, or applicable state statute; or

(b) Reimbursement is provided under an agency policy regarding experimental or investigational treatment, services under a clinical investigation approved by an institutional review board, or health technologies that have a humanitarian device exemption from the federal food and drug administration.

NEW SECTION

WAC 182-55-045 Advisory group. (1) The committee chair, upon an affirmative vote of the committee members, may establish ad hoc temporary advisory group(s) if specialized expertise or input from enrollees or clients is needed to review a particular health technology or group of health technologies. The purpose or scope of the advisory group and time period shall be stated. The advisory group shall provide a report and/or testimony to the committee on the key questions identified by the committee as requiring the input of the advisory group.

(2) Advisory group membership: An ad hoc temporary advisory group shall include at least three members. Membership should reflect the diverse perspectives and/or technical expertise that drive the need for the specialized advisory group. The advisory group will generally include at least one enrollee, client, or patient; and two or more experts or spe-

cialists within the field relevant to the health technology, preferably with demonstrated experience in the use, evaluation, or research of the health technology. If substantial controversy over the health technology is present, at least one expert that is a proponent or advocate of the health technology and at least one expert that is an opponent or critic of the health technology should be appointed. A majority of each advisory group shall have no substantial financial interest in the health technology under review.

(3) As a continuing condition of appointment, advisory group members:

(a) Must complete an advisory group member agreement, including a conflict of interest disclosure form, and keep disclosure statements current;

(b) Must abide by confidentiality requirements and keep all personal medical information and proprietary information confidential; and

(c) Shall not utilize information gained as a result of advisory group membership outside of advisory group responsibilities, unless such information is publicly available.

NEW SECTION

WAC 182-55-050 Health technology selection. (1) Prior to selection of a health technology for review or rereview, the administrator shall consider nominations from participating agencies and recommendations from the committee. The administrator may also consider petitions from interested parties. The administrator shall make available, including publication to the centralized internet-based communication tool required at RCW 70.14.130, a petition for interested parties to request a health technology be selected for a review or rereview. Interested parties shall complete the petition and submit it to the administrator. The administrator, or designee, will provide copies of the petition to participating agencies and the committee for comment, and provide the completed petition, with any comments, to the administrator for consideration.

(2) Interested parties that have submitted a petition for the review or rereview of a health technology that was not selected by the administrator may submit the petition to the committee for review or rereview.

(3) The committee may consider petitions submitted by interested parties for review or rereview of a health technology. The committee shall apply the priority criteria set forth in RCW 70.14.100.

(4) A health technology selected by the committee shall be referred to the administrator for the next available contract for health technology assessment review.

NEW SECTION

WAC 182-55-055 Health technology assessment. (1) Upon notice of the selection of the health technology for review, the administrator shall post an invitation for interested parties to submit information relevant to the health technology for consideration by the evidence-based practice center. Such information shall be required to be submitted to the administrator, or designee, no earlier than thirty days from the date of the notice.

(2) Upon notice of the selection of the health technology for review, the administrator shall request participating agencies to provide information relevant to the health technology, including data on safety, health outcome, and cost. Such information shall be required to be submitted to the administrator, or designee, no earlier than thirty days from the date of the notice.

(3) Upon notice of the selection of the health technology for review, the administrator shall require staff to identify and organize relevant federal Medicare national coverage determinations and expert treatment guidelines, and any referenced information used as the basis for such determinations and/or guidelines.

(4) The administrator shall provide all information relevant to the selected health technology to the evidence-based practice center; and shall post such information, along with the key questions for review, on a centralized, internet based communication tool.

(5) Upon completion of the health technology assessment by the evidence-based practice center, the administrator shall provide the committee with:

- (a) Final copy of the health technology assessment;
- (b) Information as to whether the federal Medicare program has made a national coverage determination;
- (c) A copy of identified national coverage decisions and accompanying information describing the basis for the decision;
- (d) Information as to whether expert treatment guidelines exist, including those from specialty physician organizations and patient advocacy organizations; and
- (e) A copy of identified guidelines and accompanying information describing the basis for the guidelines.

WSR 06-20-119
PROPOSED RULES
DEPARTMENT OF
FISH AND WILDLIFE
 [Filed October 4, 2006, 11:06 a.m.]

Supplemental Notice to WSR 06-19-116.

Title of Rule and Other Identifying Information: WAC 232-12-027 Game farm license provisions.

Hearing Location(s): Comfort Inn and Conference Center, 1620 74th Avenue S.W., Tumwater, WA 98501, on December 8-9, 2006, at 8:00 a.m.

Date of Intended Adoption: December 8-9, 2006.

Submit Written Comments to: Attn: Wildlife Program Commission Meeting Public Comments, 600 Capitol Way North, Olympia, WA 98501-1091, e-mail Wildthing@dfw.wa.gov, fax (360) 902-2162, by November 15, 2006.

Assistance for Persons with Disabilities: Contact Nancy Burkhart by December 4, 2006, TTY (800) 833-6388 or (360) 902-2267.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: WAC 232-12-027 Game farm license provisions, the proposal establishes an annual avian influenza (AI) testing requirement and an "as needed" disease-testing requirement for licensed game farms.

The proposal will affect one rule (WAC 232-12-207) as it is integrated into other game license requirements.

This is a supplemental notice that includes the small business economic impact statement that was not included with the original submission.

Reasons Supporting Proposal: WAC 232-12-027 Game farm license provisions, several changes are taking place in Washington as the agricultural and wildlife communities address the ever-increasing concern about AI. Currently, the Washington department of fish and wildlife (WDFW) is sampling wild shorebirds and waterfowl for AI in an effort to document any introduction of the highly pathogenic form of the virus. WDFW licensed game farms should be part of the overall AI monitoring program as a matter of responsible management and as a matter of wildlife and potential human health.

Statutory Authority for Adoption: RCW 77.12.047.

Statute Being Implemented: RCW 77.12.047.

Name of Proponent: Washington fish and wildlife commission, governmental.

Name of Agency Personnel Responsible for Drafting and Implementation: Dave Brittell, Natural Resources Building, Olympia, (360) 902-2504; and Enforcement: Bruce Bjork, Natural Resources Building, Olympia, (360) 902-2932.

A small business economic impact statement has been prepared under chapter 19.85 RCW.

Small Business Economic Impact Statement

1. Description of the Reporting, Record-keeping, and Other Compliance Requirements of the Proposed Rule: The testing laboratory will keep records for birds tested for avian influenza with test results being sent to licensee.

2. Kinds of Professional Services That a Small Business is Likely to Need in Order to Comply with Such Requirements: Licensed veterinarian and certified testing laboratory (usually Washington State University Extension - Puyallup).

3. Costs of Compliance for Businesses, Including Costs of Equipment, Supplies, Labor, and Increased Administrative Costs:

- Sample collection by veterinarian: Less than \$50.00 in most cases.
- Avian influenza testing: \$1.00 per sample - total bill will vary by size of facility.

4. Will Compliance with the Rule Cause Businesses to Lose Sales or Revenue? No. It may help sales because the licensee can sell "blood tested, disease free birds."

5. Cost of Compliance for the 10% of Businesses That are the Largest Businesses Required to Comply with the Proposed Rules Using One or More of the Following as a Basis for Comparing Costs: Cost per employee, cost per hour of labor, or cost per \$100 of sales: Costs should not exceed \$3.00 per \$100 of sales (based on 10% sample of 200 birds and each bird selling for \$15.00).

6. Steps Taken by the Agency to Reduce the Costs of the Rule on Small Businesses or Reasonable Justification for Not Doing So: WDFW is working with the Washington state department of agriculture who has offered to pay for avian influenza testing at WDFW licensed game farms whenever funding is available to do so.

7. A Description of How the Agency Will Involve Small Businesses in the Development of the Rule: WDFW sent the proposed rule change to every licensed game farm with an offer to discuss concerns about the change. Ways to reduce impacts to game farms while maintaining adequate testing will be discussed.

8. A List of Industries That Will Be Required to Comply with the Rule: Persons who elect to apply for and maintain a licensed game farm facility (i.e., businesses who raise game birds for sale, trade, or barter).

A copy of the statement may be obtained by contacting Mick Cope, Washington Department of Fish and Wildlife, 600 Capitol Way North, Olympia, WA 98501-1091, phone (360) 902-2691, fax (360) 902-2162, e-mail copemgc@dfw.wa.gov.

A cost-benefit analysis is not required under RCW 34.05.328. These are not hydraulics rules.

October 4, 2006
Morris W. Barker
Rules Coordinator

WSR 06-20-120
PROPOSED RULES
PROFESSIONAL EDUCATOR
STANDARDS BOARD

[Filed October 4, 2006, 11:18 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 06-14-070.

Title of Rule and Other Identifying Information: WAC 181-01-001 WEST-B exemption, 181-01-002 WEST-B exemptions, and 181-01-003 WEST-E extension.

Hearing Location(s): The Red Lion Hotel on Fifth Avenue, 1415 Fifth Avenue, Seattle, WA 98101, on November 16, 2006, at 8:30 a.m.

Date of Intended Adoption: November 16, 2006.

Submit Written Comments to: Nasue Nishida, P.O. Box 47236, Olympia, WA 98504-7236, e-mail nasue.nishida@k12.wa.us, fax (360) 586-4548, by November 5, 2006.

Assistance for Persons with Disabilities: Contact Nasue Nishida by November 5, 2006, TTY (360) 664-3631 or (360) 725-6238.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: Purpose of this proposal is to lessen the barriers onto teaching for those people coming from out-of-state. Therefore, this proposal exempts National Board Certified Teachers coming from other states from passing the WEST-B assessment and eliminates the requirement of three years teaching experience for out-of-state candidates prior to taking the WEST-E assessment.

Reasons Supporting Proposal: Proposal lessens the barriers and hoops once required for people to teach in Washington schools.

Statutory Authority for Adoption: RCW 28A.410.220.

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: Professional educator standards board, governmental.

Name of Agency Personnel Responsible for Drafting: Nasue Nishida, 600 South Washington Street, Olympia, WA 98504, (360) 725-6238; Implementation and Enforcement: Esther Baker, 600 South Washington Street, Olympia, WA 98504, (360) 725-6277.

No small business economic impact statement has been prepared under chapter 19.85 RCW. The proposed rule making does not have [an] impact on small business.

A cost-benefit analysis is required under RCW 34.05.328. A preliminary cost-benefit analysis may be obtained by contacting Nasue Nishida, P.O. Box 47236, Olympia, WA 98504, phone (360) 725-6238, fax (360) 586-4548, e-mail nasue.nishida@k12.wa.us.

October 2, 2006
Nasue Nishida
Policy and Research Analyst

AMENDATORY SECTION (Amending WSR 02-21-014, filed 10/8/02, effective 11/8/02)

WAC 181-01-001 WEST-B exemption. ~~((Individuals))~~ Candidates who are prepared and/or certified out-of-state applying for a Washington state residency teaching certificate ~~((who have completed a teacher preparation program in another state or country))~~ under WAC 181-79A-257 (1)(b) or 181-79A-260 have up to one calendar year from issuance of temporary permit to pass the WEST-B basic skills test, provided that they have completed all other requirements for residency certification other than passage of the WEST-B and are thus eligible for a temporary permit under WAC ~~((180-79A-128))~~ 181-79A-128.

AMENDATORY SECTION (Amending WSR 06-11-162 and 06-12-020, filed 5/24/06 and 5/30/06, effective 6/24/06 and 6/30/06)

WAC 181-01-002 WEST-B exemptions. (1) Candidates who are prepared and/or certified out-of-state applying for a Washington state residency teaching certificate under WAC ~~((180-79A-257 (1)(b)))~~ 181-79A-257 (1)(b) or 181-79A-260, or out-of-state candidates applying to masters-degree level teacher preparation programs residing outside of the state of Washington at time of application, in lieu of passing the WEST-B, may provide official documentation of scores on the Praxis I of 177 for the reading subtest, 176 for the mathematics subtest and 174 for the writing subtest, or scores on the Praxis I CBT computer-administered test of 325 for the reading subtest, 321 for the mathematics subtest, and 321 for the writing subtest, or passing scores from California or Oregon on the CBEST.

(2) Candidates applying for a Washington state residency or professional teaching certificate under WAC 181-79A-257 (1)(b) who hold a certificate through the National Board for Professional Teaching Standards are exempt from passing the WEST-B.

AMENDATORY SECTION (Amending WSR 04-08-048, filed 4/1/04, effective 5/2/04)

WAC 181-01-003 WEST-E time extension. (~~Individuals~~) Candidates who are prepared and/or certified out-of-state applying for a Washington state residency or professional teaching certificate based on WAC (~~(480-79A-257 and possessing at least three years state certified teaching experience)~~) 181-79A-257 (1)(b) have up to one calendar year from issuance of the temporary permit to pass the WEST-E subject knowledge test, provided they are eligible for a temporary permit under WAC (~~(480-79A-128)~~) 181-79A-128.

WSR 06-20-121

PROPOSED RULES PROFESSIONAL EDUCATOR STANDARDS BOARD

[Filed October 4, 2006, 11:18 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 06-05-060.

Title of Rule and Other Identifying Information: WAC 181-78A-100 Existing approved programs 181-78A-105 Procedures for initial approval of an educator preparation program, and 181-78A-110 Length of time for which program approval status shall be granted.

Hearing Location(s): The Red Lion Hotel on Fifth Avenue, 1415 Fifth Avenue, Seattle, WA 98101, on November 16, 2006, at 8:30 a.m.

Date of Intended Adoption: November 16, 2006.

Submit Written Comments to: Nasue Nishida, P.O. Box 47236, Olympia, WA 98504-7236, e-mail nasue.nishida@k12.wa.us, fax (360) 586-4548, by November 5, 2006.

Assistance for Persons with Disabilities: Contact Nasue Nishida by November 5, 2006, TTY (360) 664-3631 or (360) 725-6238.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: Provide more specific processes and procedures to assess higher education preparation programs for state approval and review.

Reasons Supporting Proposal: The PESB comprehensive analysis report identified the need for a state level system for assessing preparation program quality. Changes to these areas of WAC were recommended by a subcommittee of the PESB and lay out specific processes and procedures that help better assess the quality of higher education preparation programs for state approval and review.

Statutory Authority for Adoption: RCW 28A.410.210.

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: Professional educator standards board, governmental.

Name of Agency Personnel Responsible for Drafting: Nasue Nishida, 600 South Washington Street, Olympia, WA 98504, (360) 725-6238; Implementation and Enforcement: Lin Douglas, 600 South Washington Street, Olympia, WA 98504, (360) 725-4951.

No small business economic impact statement has been prepared under chapter 19.85 RCW. The proposed rule making does not have [an] impact on small business.

A cost-benefit analysis is required under RCW 34.05.328. A preliminary cost-benefit analysis may be obtained by contacting Nasue Nishida, P.O. Box 47236, Olympia, WA 98504, phone (360) 725-6238, fax (360) 586-4548, e-mail nasue.nishida@k12.wa.us.

October 2, 2006

Nasue Nishida

Policy and Research Analyst

AMENDATORY SECTION (Amending WSR 06-14-010, filed 6/22/06, effective 7/23/06)

WAC 181-78A-100 Existing approved programs.

Chapter 181-78A WAC rules shall govern all policies related to programs upon adoption by the professional educator standards board, which shall provide assistance to colleges and universities in the revision of their existing programs.

(1) All professional education programs shall be reviewed for approval under the 1997 program approval standards of chapter 181-78A WAC by August 31, 2000. Colleges and universities may permit individuals accepted into teacher preparation programs on or before August 31, 2000, to obtain certification by meeting requirements of programs approved under approval standards described in chapter 181-78 WAC if the individuals complete the program on or before August 31, 2003, and the college or university verifies program completion to the superintendent of public instruction on or before December 31, 2003: Provided, That the professional educator standards board or its designee may waive this deadline on a case-by-case basis.

(2) All principal/program administrator programs shall be reviewed for approval under the 2002 program approval standards of chapter 181-78A WAC by August 31, 2004. Colleges and universities may permit individuals accepted into principal/program administrator programs on or before August 31, 2004, to obtain a residency certificate by meeting requirements of programs approved under 1997 approval standards described in chapter 181-78A WAC if the individuals complete the program on or before August 31, 2006, and the college or university verifies program completion to the superintendent of public instruction on or before December 31, 2006. Provided, That the professional educator standards board or its designee may waive this deadline on a case-by-case basis.

(3) All school counselor, school psychologist, or school social worker programs shall be approved under the 2004 program approval standards of chapter 181-78A WAC by August 31, 2005. Colleges and universities may permit individuals accepted into the school counselor, school psychologist, or school social worker programs on or before August 31, 2005, to obtain a residency certificate by meeting requirements of programs approved under the 1997 approval standards described in chapter 181-78A WAC if the individuals complete the program on or before August 31, 2007, and the college or university verifies program completion to the superintendent of public instruction on or before December 31, 2007. Provided that the professional educator standards

board or its designee may waive this deadline on a case-by-case basis.

(4) Individuals who completed a principal/program administrator program on or before August 31, 2004, shall be granted an initial certificate if the preparing college or university verifies completion by December 31, 2004. Individuals who complete an educational staff associate program on or before August 31, 2005, shall be granted an initial certificate if the preparing college or university verifies completion by December 31, 2005.

(5) Institutions shall be given at least one year notification prior to a professional educator standards board review for compliance with these standards: Provided, That if an institution requests a visit with less than a year's notice, the professional educator standards board shall consider that request.

(6) The professional educator standards board shall determine the schedule for such approval reviews and whether an on-site visit or other forms of documentation and validation shall be used for the purposes of granting approval under the 1997 program approval standards. In determining the schedule for site visits, the board shall take into consideration the partnership agreement between the state and the National Council for the Accreditation of Teacher Education (NCATE) as such agreement relates to the NCATE accreditation cycle and allow NCATE accredited colleges/universities to follow the NCATE schedule for their state site visit. Non-NCATE accredited colleges/universities shall have a state approval site visit every five years. The professional educator standards board may require more frequent site visits at their discretion pursuant to WAC 181-78A-110(2).

(7) Each institution shall submit its program for review when requested by the professional educator standards board to ensure that the program meets the state's program approval standards and to provide assessment data relative to the performance standards to the professional educator standards board for the year prior to the site visit.

(a) Thirty days prior to the visit, institutions will submit a previsit report that shall:

(i) Describe how the program approval standards are met for each educator preparation program scheduled for review (NCATE reports may fulfill this requirement);

(ii) Describe how "unmet" standards or program weaknesses, identified during the previous site visit, have been corrected;

(iii) Describe major program(s) changes implemented since the last site visit;

(iv) Summarize all WEST-E data since the last site visit;

(v) Summarize all program completer survey data compiled since the last site visit;

(vi) Include all professional education advisory board reports submitted since the last site visit;

(vii) Summarize complaints related to the program(s) and actions taken to remedy the complaints; and

(viii) Describe the criteria used by the program(s) to assess, in multiple ways over time, its candidates' knowledge and skills, including evidence of positive impact on student learning.

(b) The site visit shall be conducted by a team whose membership includes one member of the professional educa-

tor standards board, one peer institution representative, one individual with assessment expertise, two practitioners, the office of the superintendent of public instruction liaison, the director of professional education and certification, and the professional certificate program specialist if a professional certificate program will be reviewed. All members, including substitutes, shall be trained.

(c) The site visit shall be conducted in compliance with the protocol and process adopted and published by the professional educator standards board.

(d) The final site visit report and other appropriate documentation will be submitted to the professional educator standards board.

(e) Institutions may submit a rejoinder to the report within two weeks following the public posting of the report.

(f) In considering the report, the professional educator standards board may grant approval according to WAC 181-78A-110 and 181-78A-100(6).

(g) Institutions may request a hearing in instances where it disagrees with the professional educator standards board's decision. The hearing will be conducted by an appeal team whose members shall include three individuals selected from a cadre of trained site visit team members, including at least one higher education representative and one K-12 practitioner.

(8) Institutions seeking National Council for the Accreditation of Teacher Education, Council for Accreditation of Counseling and Related Education Programs, and National Association of School Psychologist accreditation may request from the professional educator standards board approval for concurrent site visits which would utilize the same documentation with the exception of material submitted by the institution to the state for the professional education advisory boards and the accountability standards.

~~((9) In submitting a request for approval under these standards, the approved program shall provide a description of the criteria that the program will use to assess, in multiple ways, over time, its certification candidates' knowledge and skills, including, where appropriate, evidence related to positive impact on student learning. Based on the documentation submitted and/or an on-site visit, the professional educator standards board shall grant approval or request specific revisions that need to be made in order to obtain professional educator standards board approval.))~~

AMENDATORY SECTION (Amending WSR 06-14-010, filed 6/22/06, effective 7/23/06)

WAC 181-78A-105 Procedures for initial approval of an educator preparation program. Each college or university desiring to establish a preparation program shall comply with the following:

(1) Advise the professional educator standards board of its desire to establish a preparation program.

(2) ~~((Establish the appropriate professional education advisory board pursuant to WAC 181-78A-205.~~

~~(3))~~ Develop with the assistance of the professional education advisory board and designated ~~((officials))~~ staff of the ~~((professional educator standards board))~~ office of the superintendent of public instruction, a written preproposal plan

which ~~((provides timelines for the implementation of all applicable program approval standards during the first year of the preparation program))~~ addresses all preproposal components adopted and published by the professional educator standards board and submit such ~~((report))~~ plan to the designated official of the professional educator standards board for review and comment ~~((and, if requested,))~~. Resubmit such plan to the designated official.

(3) Submit such plan to the professional educator standards board. The college or university may be granted approval for full proposal development or denied approval.

(a) If approved, the college or university shall comply with the following:

(i) Establish the appropriate professional education advisory board pursuant to WAC 181-78A-205;

(ii) Develop with assistance of the professional education advisory board and designated staff of the office of the superintendent of public instruction, a written plan which includes the following:

(A) Timelines for the implementation of all applicable program approval standards during the first year of the program;

(B) The criteria that the program will use to assess, in multiple ways over time, its candidates' knowledge and skills including evidence related to positive impact on student learning (WAC 181-78A-205(4));

(C) How the professional education advisory board was involved in program development, including a letter of support; and

(D) Letters of support from partnership districts and/or other agencies.

(iii) Present the written plan to the professional educator standards board.

(A) The program may be conditionally approved for up to a two-year period in a specific location(s). If not approved, the college or university may resubmit its revised plan or request a contested hearing via an appeal team appointed by the professional educator standards board.

(B) During the second year of approval, staff of the office of the superintendent of public instruction shall conduct a site visit and/or other forms of documentation to determine if the program is in full compliance with the 1997 program approval standards.

(b) If denied, the college or university may resubmit its plan based upon the suggestions of the professional educator standards board.

(4) ((Describe the criteria that the approved preparation program will use to assess, in multiple ways, over time, its candidates' knowledge and skills, including, where appropriate, evidence related to positive impact on student learning.

(5) Present the written plan to the professional educator standards board which shall approve it and grant initial approval status if the professional educator standards board is satisfied that the college or university will meet all program approval standards in accordance with reasonable and practical timelines and that the college or university has made the needed commitments, specifically personnel and other resources, to implement the plan.

(6) The newly approved preparation program shall be approved for up to a two-year period.

(7) During the second year of approval, the superintendent of public instruction shall conduct a site visit to determine if the program is in full compliance with the 1997 program approval standards.) Programs shall be approved for a specific location(s) identified in the written plan presented to the professional educator standards board. Institutions seeking to expand an existing program to a new location shall submit a request to the professional educator standards board which contains the following:

(a) A description of the location and facilities;

(b) Verification that no complaints have been filed against the program in its current location(s);

(c) A summary of the findings from the most recent site review, including how weaknesses, if any, have been addressed;

(d) A statement that supports need for the program;

(e) Cost to the students;

(f) Mode(s) of the program delivery; and

(g) Letters of support from program partners. The length of time for which the program approval status shall be granted shall coincide with the length of time for which the program in its current location(s) last received approval. The program review cycle for programs at all locations shall be the same.

AMENDATORY SECTION (Amending WSR 06-14-010, filed 6/22/06, effective 7/23/06)

WAC 181-78A-110 Length of time for which program approval status shall be granted. (1) The professional educator standards board shall approve all preparation programs ~~((under the 1997 program approval standards for five years unless the professional educator standards board approves a variation with the exception of new programs approved for up to two years under WAC 181-78A-105))~~ as follows:

(a) A preparation program will be given full approval of five to seven years if no standards are identified as "unmet." If program weaknesses are identified, institutions will need to address their progress in the annual professional education advisory board report; or

(b) A preparation program will be given a one year conditional approval if one standard is identified as "unmet." Programs will need to address their progress towards meeting this standard in the annual professional education advisory board report and through a focused site visit; or

(c) A preparation program will be asked to withdraw their program for approval and finish their current candidates if two or more standards are identified as "unmet." Programs will be revoked for two years, and have two options:

(i) Programs may call for a hearing, at which time an appeal team will be appointed; or

(ii) Programs may reapply for approval and follow the criteria and processes outlined in WAC 181-78A-105.

(2) The superintendent of public instruction, upon receipt of a complaint from any source or upon her or his initiative, or initiative of the professional educator standards board may review all or any part of a preparation program for compliance with the provisions of this chapter. If deviations are found, the professional educator standards board is autho-

rized to rescind program approval until the college or university submits an acceptable compliance agreement which will bring the preparation program into compliance as soon as reasonably practicable, but no later than the commencement of the succeeding academic year or six calendar months, whichever is later.

(3) If an acceptable compliance agreement is not developed and approved by the professional educator standards board, the preparation program shall be placed on probationary status and the probationary status provision of WAC 181-78A-115 shall apply.

WSR 06-20-122
PROPOSED RULES
PROFESSIONAL EDUCATOR
STANDARDS BOARD

[Filed October 4, 2006, 11:19 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 06-05-063.

Title of Rule and Other Identifying Information: WAC 181-82A-206 Endorsement program approval.

Hearing Location(s): The Red Lion Hotel on Fifth Avenue, 1415 Fifth Avenue, Seattle, WA 98101, on November 16, 2006, at 8:30 a.m.

Date of Intended Adoption: November 16, 2006.

Submit Written Comments to: Nasue Nishida, P.O. Box 47236, Olympia, WA 98504-7236, e-mail nasue.nishida@k12.wa.us, fax (360) 586-4548, by November 5, 2006.

Assistance for Persons with Disabilities: Contact Nasue Nishida by November 5, 2006, TTY (360) 664-3631 or (360) 725-6238.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: Provide more specific processes and procedures to approve and review higher education endorsement programs.

Reasons Supporting Proposal: The PESB comprehensive analysis report identified the need for a state level system for assessing preparation program quality. Changes to this area of WAC were recommended by a subcommittee of the PESB and lay out specific processes and procedures that help better assess the quality of higher education endorsement programs for state approval and review.

Statutory Authority for Adoption: RCW 28A.410.210.

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: Professional educator standards board, governmental.

Name of Agency Personnel Responsible for Drafting: Nasue Nishida, 600 South Washington Street, Olympia, WA 98504, (360) 725-6238; Implementation and Enforcement: Lin Douglas, 600 South Washington Street, Olympia, WA 98504, (360) 725-4951.

No small business economic impact statement has been prepared under chapter 19.85 RCW. The proposed rule making does not [an] have impact on small business.

A cost-benefit analysis is required under RCW 34.05.328. A preliminary cost-benefit analysis may be obtained by contacting Nasue Nishida, P.O. Box 47236, Olympia, WA 98504, phone (360) 725-6238, fax (360) 586-4548, e-mail nasue.nishida@k12.wa.us.

October 2, 2006

Nasue Nishida
Policy and Research Analyst

AMENDATORY SECTION (Amending WSR 06-14-010, filed 6/22/06, effective 7/23/06)

WAC 181-82A-206 Endorsement program approval.

(1) The professional educator standards board shall approve endorsement programs at Washington colleges and universities pursuant to the requirements of this chapter. Only colleges and universities with professional educator standards board-approved residency certificate teacher preparation programs are eligible to apply for approval to offer endorsement programs.

(2) The professional educator standards board will establish performance/competency criteria for obtaining an endorsement. Revision in adopted endorsement competencies may occur only as approved by the professional educator standards board. Each college or university desiring to seek reapproval of an endorsement program for which the competencies have been revised and adopted by the professional educator standards board shall submit a proposal to the board that includes the following information:

(a) A narrative statement that describes changes to the endorsement program based on the revised competencies; and

(b) A description of assessment strategies that will be used to assess candidates' capacity/performance related to the revised competencies.

(3) The professional educator standards board shall reapprove programs, based upon revised competencies, for a length of time to coincide with the date of the next regularly scheduled site visit/program review.

(4) The superintendent of public instruction will publish, and make available, competencies for all endorsement areas identified in chapter 181-82A WAC.

~~((4) By August 31, 2003, each college or university desiring to establish an endorsement program shall submit a timeline to meet the following requirements for full approval by August 31, 2004:))~~ (5) Each college or university desiring to establish a new endorsement program shall submit a proposal to the professional educator standards board that includes the following information:

(a) Identification of strategies that will be used to assess candidates' capacity/performance related to the competencies;

(b) A description of evidences that candidates will provide to document their positive impact on student learning in the endorsement area; and

(c) A description of the assessment system by which candidate performance, relative to the competencies, will be aggregated, analyzed, and used for program improvement.

~~((5))~~ (6) The professional educator standards board shall approve new endorsement programs for a ((maximum

~~of five years. Each institution shall submit endorsement programs for review when requested by the professional educator standards board to ensure that the endorsement programs meet the competencies and to provide assessment data relative to candidate performance)) length of time to coincide with the date of the next regularly scheduled site visit/program review.~~

~~((6)) (7) The professional educator standards board shall determine the schedule and process for endorsement program reviews.~~

~~(a) Each institution shall submit endorsement programs for review when requested by the professional educator standards board to ensure that the endorsement programs meet the competencies and to provide assessment data relative to candidate performance.~~

~~(b) The professional educator standards board shall approve endorsement programs, based upon program review, for a maximum of five to seven years.~~

WSR 06-20-123
PROPOSED RULES
PROFESSIONAL EDUCATOR
STANDARDS BOARD

[Filed October 4, 2006, 11:20 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 06-05-060.

Title of Rule and Other Identifying Information: WAC 181-78A-507 Overview—Principal/program administrator professional certificate programs and 181-78A-535 Approval standard—Program design.

Hearing Location(s): The Red Lion Hotel on Fifth Avenue, 1415 Fifth Avenue, Seattle, WA 98101, on November 16, 2006, at 8:30 a.m.

Date of Intended Adoption: November 16, 2006.

Submit Written Comments to: Nasue Nishida, P.O. Box 47236, Olympia, WA 98504-7236, e-mail nasue.nishida@k12.wa.us, fax (360) 586-4548, by November 5, 2006.

Assistance for Persons with Disabilities: Contact Nasue Nishida by November 5, 2006, TTY (360) 664-3631 or (360) 725-6238.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: Change rules and clarify language for the principal/program administrator professional certificate programs.

Reasons Supporting Proposal: When the state board of education established requirements for teacher professional certificate programs, it simultaneously enacted identical rules for administrator programs on the assumption that the process would look the same for all roles. The office of superintendent of public instruction convened a workgroup to look at this and found that there are specific needs for school administrators that are different from teachers, therefore, requiring rule changes.

Statutory Authority for Adoption: RCW 28A.410.210.

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: Professional educator standards board, governmental.

Name of Agency Personnel Responsible for Drafting, Implementation and Enforcement: Nasue Nishida, 600 South Washington Street, Olympia, WA 98504, (360) 725-6238.

No small business economic impact statement has been prepared under chapter 19.85 RCW. The proposed rule making does not have [an] impact on small business.

A cost-benefit analysis is required under RCW 34.05.328. A preliminary cost-benefit analysis may be obtained by contacting Nasue Nishida, P.O. Box 47236, Olympia, WA 98504, phone (360) 725-6238, fax (360) 586-4548, e-mail nasue.nishida@k12.wa.us.

October 2, 2006

Nasue Nishida

Policy and Research Analyst

AMENDATORY SECTION (Amending WSR 06-14-010, filed 6/22/06, effective 7/23/06)

WAC 181-78A-507 Overview—Principal/program administrator professional certificate programs. By September 1, 2007, all colleges and universities offering a professional certificate program for principals/program administrators must be in compliance with the new program standards. To obtain a professional certificate, the residency principal will need to complete a ~~((professional educator standards board approved))~~ professional certificate program approved by the professional educator standards board, have satisfactory district evaluations for an administrator role, and document three contracted school years of employment as a principal or assistant principal; the residency program administrator will need to complete a ~~((professional educator standards board approved))~~ professional certificate program approved by the professional educator standards board and have satisfactory district evaluations for an administrator role.

The professional certificate for principals/program administrators requires successful demonstration of six standards at the professional certification benchmark levels, or above, and the candidate will need to provide evidence that he/she has had a positive impact on student learning.

The candidate and college or university shall develop an individual professional growth plan ~~((to be reviewed and agreed upon after input from and consultation and collaboration with his/her professional growth team. The individual growth plan))~~ that shall address the six knowledge and skills standards, focus on activities that enhance student learning, and be informed by the performance evaluation process, and an analysis of the administrative context and assignment.

AMENDATORY SECTION (Amending WSR 06-14-010, filed 6/22/06, effective 7/23/06)

WAC 181-78A-535 Approval standard—Program design. The following requirements shall govern the design of the professional certificate program:

(1) **Teacher.**

(a) To be eligible to apply for admission to a professional certificate program, a candidate shall hold a contract as a

teacher in a public or a professional educator standards board-approved private school or state agency providing educational services for students and shall have completed provisional status with a school district under RCW 28A.405.220 or the equivalent with a professional educator standards board-approved private school or state agency providing educational services for students or the candidate provides to the program a letter from the candidate's employing district, professional educator standards board-approved private school, or state agency providing educational services for students, documenting the employer's support for the candidate's full admission to the professional certificate program: Provided, That a candidate for the professional teacher's certificate may enroll in and complete the preassessment seminar described in subsection (4)(a) of this section prior to admission to a professional certificate program.

(b) The professional certificate program must be available to all qualified candidates.

(c) Using the descriptions of practice related to the criteria for the professional certificate, as approved by the professional educator standards board and published by the office of the superintendent of public instruction, which may not be changed without prior professional educator standards board approval, the professional certificate program shall be developed by a college or university and its professional education advisory board. Additional agencies may participate in the development of the program if the college or university and professional education advisory board so choose.

(d) Each program shall consist of:

(i) A preassessment seminar which considers input from the candidate's "professional growth team" (WAC 181-78A-505), the candidate's past experience, the context in which he/she teaches, information from past annual evaluations if the individual chooses, the candidate's personal and professional goals, his/her self-evaluation, and evidences of the candidate's impact on student learning.

The seminar will culminate in preparation and approval of the candidate's individual professional growth plan designed to provide the candidate with the knowledge and skills needed to demonstrate successfully the standards and criteria required by WAC 181-78A-540.

A representative of the college/university and the candidate shall develop the professional growth plan to be reviewed and agreed upon after input from and consultation and "collaboration" (WAC 181-78A-010(9)) with his/her "professional growth team" (WAC 181-78A-010(10)).

The individual professional growth plan shall be based on:

(A) An analysis of the instructional context and teaching assignment(s) to determine strategies which the teacher should use to achieve a positive impact on student learning.

(B) An assessment of the candidate's ability to demonstrate successfully the professional certificate standards and criteria.

(C) Specifications of assistance and instructional components needed and any required course work.

(ii) Course work, past and current experience, inservice, continuing education and other activities directed at developing and verifying that the candidate has achieved acceptable knowledge, skill and performance on all criteria required

statewide as essential to "effective teaching" as defined in WAC 181-78A-540(1).

(iii) Course work, past and current experience, inservice, continuing education and other activities directed at developing and verifying that the candidate has achieved acceptable knowledge, skill and performance on all criteria required statewide as essential to "professional development" as defined in WAC 181-78A-540(2).

(iv) Course work, past and current experience, inservice, continuing education and other activities directed at developing and verifying that the candidate has achieved acceptable knowledge, skill and performance on all criteria required statewide as essential to professional contributions as defined in WAC 181-78A-540(3).

(v) A culminating seminar in which the candidate presents his/her final documentation and evidence of professional certificate level knowledge, skill and performance; positive impact on student learning; identification of future goals and professional/career interests; and specification of areas for continuing education and development. The candidate must provide multiple forms of evidence which shall include, but are not limited to, the descriptions of practice related to the criteria for the professional certificate as approved by the professional educator standards board and published by the office of the superintendent of public instruction, which may not be changed without prior professional educator standards board approval.

(vi) Candidates who do not successfully complete a culminating seminar shall receive an individualized analysis of strengths and weaknesses and a plan for appropriate assistance and instruction.

(vii) No limits shall be placed on the number of times a candidate with a valid residency certificate may participate in the culminating seminar.

(2) Principal/program administrator.

(a) To be eligible to apply for enrollment in a professional certificate program, a candidate shall hold a contract as an administrator for which the credential is required in a public school or professional educator standards board-approved private school.

(b) The professional certificate program must be available to all qualified candidates.

(c) Using the six knowledge and skills standards, and the standards-based benchmarks as approved by the professional educator standards board and published by the office of the superintendent of public instruction, which may not be changed without professional educator standards board approval, the professional certificate program shall be developed by a college or university and its professional education advisory board. Additional agencies may participate in the development of the program if the college or university and professional education advisory board so choose.

(d) Each program shall consist of:

(i) ~~((A preassessment))~~ An entry seminar during which the professional growth plan shall be developed. The plan ~~((will be agreed upon after input from and consultation with his/her professional growth team (WAC 181-78A-010(10)(b)). The individual professional growth plan))~~ shall be based on an assessment of the candidate's ability to demonstrate six standards at the professional certificate benchmark

level (WAC 181-78A-270 (2)(b)), performance evaluation data, and an analysis of the administrative context and assignment.

(ii) Formalized learning opportunities, past and current experience, professional development opportunities, and other activities directed at developing and verifying that the candidate has achieved acceptable knowledge, skill, and performance at the professional certificate benchmark level, or above, on all standards as defined in WAC 181-78A-270 (2)(b).

(iii) A ~~((culminating seminar in))~~ final presentation to a panel that includes experienced administrators, during which the candidate ((presents his/her final documentation and)) provides evidence of professional certificate level knowledge, skill and performance; positive impact on student learning; ~~((development of))~~ and a professional growth plan that includes the identification of future goals and professional/career interests as well as a five-year plan for professional development designed to meet the requirements for certificate renewal.

(e) Candidates who do not successfully complete a ~~((culminating seminar))~~ final presentation shall receive an individualized analysis of strengths and weaknesses and a plan for assistance, and shall be allowed additional opportunities to present evidence pertaining to benchmarks not previously met.

~~((f) No limit shall be placed on the number of times a candidate with a valid residency certificate may enroll in the culminating seminar.))~~

(3) Educational staff associate (ESA) - school counselor, school psychologist, school social worker.

(a) To be eligible for enrollment in a professional certificate program, a candidate shall be employed in his/her ESA role in a public school, a professional educator standards board-approved private school, or state agency providing educational services for students.

(b) The professional certificate must be available to all qualified candidates.

(c) Using the knowledge and skills standards in WAC 181-78A-270 (5), (7), and (9), and the standards-based benchmarks as approved by the professional educator standards board and published by the office of the superintendent of public instruction, which may not be changed without professional educator standards board approval, the professional certificate program shall be developed by a college or university and its professional education advisory board. Additional agencies may participate in the development of the program if the college or university and professional education advisory board so choose.

(d) Each program shall consist of:

(i) A preassessment seminar during which the professional growth plan shall be developed. The plan will be agreed upon after input from and consultation with the ESA candidate's professional growth team (WAC 181-78A-010 (10)(c)). The individual's professional growth plan shall be based on an assessment of the candidate's ability to demonstrate the standards at the professional certificate benchmark level in the specific ESA role pursuant to WAC 181-78A-270 (5), (7), or (9).

(ii) Formalized learning opportunities, and other activities directed at developing and verifying that the candidate has achieved acceptable knowledge, skill, and performance at the professional certificate benchmark level, or above, on all standards in the specific ESA role as defined in WAC 181-78A-270 (5), (7), or (9).

(iii) A culminating seminar in which the candidate presents his/her final documentation and evidence of professional certificate level knowledge, skill, and performance; positive impact on student learning; and specification of areas for continuing education and development.

(e) Candidates who do not successfully complete a culminating seminar shall receive an individualized analysis of strengths and weaknesses and a plan for assistance.

(f) No limit shall be placed on the number of times a candidate with a valid residency certificate may enroll in the culminating seminar.

WSR 06-20-128

PROPOSED RULES

DEPARTMENT OF AGRICULTURE

[Filed October 4, 2006, 11:25 a.m.]

Original Notice.

Exempt from preproposal statement of inquiry under RCW 34.05.310(4).

Title of Rule and Other Identifying Information: WAC 16-575-015, wine commission rate of assessment, the Washington state wine commission petitioned the Washington state department of agriculture to proceed with a proposal to increase the ceiling, or top range, of the winery and grape grower mandatory assessment rate.

Hearing Location(s): Three Rivers Convention Center, 7016 West Grandridge Boulevard, Kennewick, WA 99336, on November 28, 2006, at 3:00 p.m.

Date of Intended Adoption: February 16, 2007.

Submit Written Comments to: Dannie McQueen, Program Manager, Washington State Department of Agriculture, Administrative Regulations Program, P.O. Box 42560, Olympia, WA 98504-2560, e-mail dmcqueen@agr.wa.gov, fax (360) 902-2092, by November 28, 2006, 5:00 p.m.

Assistance for Persons with Disabilities: Contact Rochelle Painter at (360) 902-2060, by November 17, 2006, TTY (360) 902-1996.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The proposal amends the winery and grape grower mandatory assessment by increasing the top end of the assessment range as follows: For vinifera grapes grown in this state, the assessment shall not be less than three dollars per ton nor more than twelve dollars per ton; and the proposed assessment rate for wine producers shall not be less than \$0.02 per gallon nor more than \$0.08 per gallon.

Reasons Supporting Proposal: The Washington wine commission has developed a five-year strategic plan for marketing and developing the Washington wine industry. Amending the range of the assessment paid by wineries and grape growers will allow the flexibility needed to implement

and fund the activities approved by the Washington wine commission in its plan.

Statutory Authority for Adoption: RCW 15.88.110 and 66.24.215.

Statute Being Implemented: Chapter 15.88 RCW.

Rule is not necessitated by federal law, federal or state court decision.

Agency Comments or Recommendations, if any, as to Statutory Language, Implementation, Enforcement, and Fiscal Matters: Any rule proposal that results from this rule-making process will not be adopted unless the proposed rules are also approved in a referendum conducted pursuant to RCW 15.88.110 and 66.24.215. The proposed assessment increase is exempt from the provisions of Initiative 601 under RCW 43.135.055.

Name of Proponent: Washington wine commission, governmental.

Name of Agency Personnel Responsible for Drafting: Dannie McQueen, Washington State Department of Agriculture, Program Manager, P.O. Box 42560, Olympia, WA 98504-2560, (360) 902-1809; Implementation and Enforcement: Robin Pollard, Executive Director, Washington Wine Commission, 1000 Second Avenue, Suite 1700, Seattle, WA 98104-3621, (206) 667-9463.

No small business economic impact statement has been prepared under chapter 19.85 RCW. Any adoption of amendments to chapter 16-575 WAC would ultimately be determined by a referendum vote of the affected parties required under RCW 15.88.110 and 66.24.215. A formal small business economic impact statement under chapter 19.85 RCW is not required under the exemption granted in RCW 19.85.025(3) and 34.05.310 (4)(f).

A cost-benefit analysis is not required under RCW 34.05.328. The Washington state department of agriculture and the Washington wine commission are not named agencies in RCW 34.05.328 (5)(a)(i).

October 4, 2006
Valoria H. Loveland
Director

AMENDATORY SECTION (Amending WSR 99-12-104, filed 6/2/99, effective 7/3/99)

WAC 16-575-015 Rate of assessment—Method of adjustment—Notice. (1) Beginning on July 1, (~~(1999)~~) 2007, the assessment rate for vinifera grapes grown in this state shall not be less than three dollars per ton nor more than (~~six~~) twelve dollars per ton. The assessment rate for wine producers shall not be less than \$0.02 per gallon nor more than ~~\$(0.04)~~ 0.08 per gallon. The Washington wine commission may adjust the assessment amount levied on wine producers and grape growers as needed to fund necessary commission activities. Provided, that any adjustment in the assessment rate by the commission be levied in an equal and proportional manner upon both the wine producers and grape growers. In determining whether to adjust the assessment amount the commission shall consider the following factors:

(a) The commission's budgetary needs, including but not limited to a qualitative and quantitative review of programs carried out in the preceding year by the commission. This

review should consider whether the program met its goals, benchmarks and objectives and whether the program constitutes the best use of the wine commission's finite resources;

(b) Projected grape production;

(c) Changes in administrative costs;

(d) Changes in the industry outside the control of the wine commission.

(2) The commission shall provide grape growers and wine producers notice of changes in assessment rates in a timely and reasonable manner and in no instance shall the notice be less than thirty days from the date the assessment is due.