WSR 10-01-062
EXPEDITED RULES
DEPARTMENT OF FINANCIAL INSTITUTIONS
(Division of Credit Unions)

[Filed December 10, 2009, 10:34 a.m.]

Title of Rule and Other Identifying Information: Amendment of WAC 208-418-040, credit union quarterly assessments, to correct typographical error.

NOTICE

THIS RULE IS BEING PROPOSED UNDER AN EXPEDITED RULE-MAKING PROCESS THAT WILL ELIMINATE THE NEED FOR THE AGENCY TO HOLD PUBLIC HEARINGS, PREPARE A SMALL BUSINESS ECONOMIC IMPACT STATEMENT, OR PROVIDE RESPONSES TO THE CRITERIA FOR A SIGNIFICANT LEGISLATIVE RULE. IF YOU OBJECT TO THIS USE OF THE EXPEDITED RULE-MAKING PROCESS, YOU MUST EXPRESS YOUR OBJECTIONS IN WRITING AND THEY MUST BE SENT TO Linda Jekel, Director, Division of Credit Unions, Department of Financial Institutions, 150 Israel Road, Tumwater, WA 98504, AND RECEIVED BY February 23, 2010.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The purpose is to correct typographical errors in WAC 208-418-040.

Reasons Supporting Proposal: To correct typographical errors, clarifying the Washington Administrative Code section.

Statutory Authority for Adoption: RCW 31.12.516, 43.320.040, chapter 43.135 RCW.

Statute Being Implemented: Chapter 31.12 RCW.

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

Name of Proponent: Department of financial institutions, governmental.

Name of Agency Personnel Responsible for Drafting: Cindy Fazio, 150 Israel Road S.W., Tumwater, WA 98504, (360) 902-8800; Implementation and Enforcement: Linda Jekel, 150 Israel Road S.W., Tumwater, WA 98504, (360) 902-8778.

December 10, 2009
Linda Jekel, Director
Division of Credit Unions

AMENDATORY SECTION (Amending WSR 08-24-057, filed 11/26/08, effective 12/31/08)

WAC 208-418-040 Quarterly asset assessments. (1) The director will charge each credit union a quarterly asset assessment at the rate set forth in subsection (2) of this section. Asset assessments will be due on January 1, April 1, July 1, and October 1. Asset assessments must be paid no later than thirty days after their due date. The assessments will be computed on total assets as of the prior June 30 for the October 1 and January 1 assessments, and as of the prior December 31 for the April 1 and July 1 assessments.

(2)

Credit Union's Total Assets	Quarterly Asset Assessment
over $500M	$21,163 + (.00001729 x total assets over $500M)
over $100M up to $500M	$5,883 + (.00003819 x total assets over $100M)
over $25M up to $100M	0.00005883 x total assets
over $10M up to $25M	$1,296
over $2M up to $10M	$863
over $500K up to $2M	$575
up to $500K	$0

M = Million K = Thousand

(3) Quarterly asset assessments are charged for the calendar quarter that begins on the due date of the assessment. No rebates will be made to credit unions that cease to be state-chartered during the quarter. A credit union converting to state charter will pay a prorated quarterly asset assessment for the quarter during which the conversion is completed.

(4) From time to time, the director may determine that asset assessments on an out-of-state credit union or foreign credit union are inappropriate relative to the level of examination and supervision of that credit union by the division. In that event, the director may charge the credit union hourly fees for examination and supervision of the credit union, including, but not limited to, offsite monitoring, in lieu of asset assessments. Such fees are due upon receipt of billing from the division.

WSR 10-01-124
EXPEDITED RULES
DEPARTMENT OF LICENSING

[Filed December 18, 2009, 12:00 p.m.]

Title of Rule and Other Identifying Information: WAC 308-300-160 Total fee payable—Handling of fees.

NOTICE

THIS RULE IS BEING PROPOSED UNDER AN EXPEDITED RULE-MAKING PROCESS THAT WILL ELIMINATE THE NEED FOR THE AGENCY TO HOLD PUBLIC HEARINGS, PREPARE A SMALL BUSINESS ECONOMIC IMPACT STATEMENT, OR PROVIDE RESPONSES TO THE CRITERIA FOR A SIGNIFICANT LEGISLATIVE RULE. IF YOU OBJECT TO THIS USE OF THE EXPEDITED RULE-MAKING PROCESS, YOU MUST EXPRESS YOUR OBJECTIONS IN WRITING AND THEY MUST BE SENT TO Walt Fahrer, Department of Licensing, P.O. Box 9020, Olympia, WA 98507-9020, AND RECEIVED BY February 23, 2010.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: To add credit and debit card as payment options when submitting a master business application on-line or in person. To align rule with current business practices.

Reasons Supporting Proposal: This is part of an agency-wide customer service initiative.

Statutory Authority for Adoption: RCW 19.02.030(3).

Statute Being Implemented: RCW 19.02.070, 19.02.-075.

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

Name of Proponent: Department of licensing, governmental.

Name of Agency Personnel Responsible for Drafting, Implementation and Enforcement: Nancy Skewis, DO1, Olympia, Washington, (360) 664-1446.

December 18, 2009
Walt Fahrer
Rules Coordinator

AMENDATORY SECTION (Amending Order 476-DOL, filed 12/30/77)

WAC 308-300-160 Total fee payable—Handling of fees. (1) The ((~~total~~)) fee payable ((~~shall~~)) will be the total amount of all individual license fees, late filing fees, other penalty fees, ((~~and the industrial insurance premium deposit on original application, if applicable. Payment shall be by check or money order, payable to the department of licensing at the time of application~~)) and handling fees, and may include additional fees charged to cover credit or debit card processing.

(2) ((~~The total fee payments in subsection (1) will be deposited within one working day of receipt by the department into an undistributed receipts account. The amount of the total fee payment attributable to the assigned initial risk classification and resulting industrial insurance premium deposit will be transferred to the account of the department of labor and industries. An itemization of the amounts received from each applicant and pertinent application information will be transmitted to the department of labor and industries.~~

~~(3)~~)) The department will distribute the fees received for individual licenses issued or renewed ((~~at least once a month~~)) to the appropriate agencies on an established schedule. ((~~Liquor license fees and fees received for other licenses for which the appropriate agency has withheld notification of approval or denial will be held in the undistributed receipts account of the department until those licenses are issued or denied.~~

~~(4)~~)) (3) The master license will not be issued until the full amount of the total fee payable is collected. When the fee payment received is less than the total fee payable, the department will bill the applicant for the balance.

(((~~(5)~~)) (4) When an individual license is denied or when an applicant withdraws an application, a refund ((~~shall~~)) of any refundable portion of the total payment will be made ((~~if authorized by the appropriate agency~~)) as appropriate.

WSR 10-01-135

EXPEDITED RULES

SUPERINTENDENT OF PUBLIC INSTRUCTION

[Filed December 21, 2009, 11:26 a.m.]

Title of Rule and Other Identifying Information: Chapter 392-341 WAC, State assistance in providing school plant facilities—Preliminary provisions; chapter 392-342 WAC, State assistance in providing school plant facilities—Educational specifications and site selection; chapter 392-343 WAC, State assistance in providing school plant facilities—Basic state support; chapter 392-344 WAC, State assistance in providing school plant facilities—Procedural regulations; chapter 392-345 WAC, State assistance in providing school plant facilities—Interdistrict cooperation in financing school plant construction; chapter 392-346 WAC, State assistance in providing school plant facilities—Interdistrict transportation cooperatives; and chapter 392-347 WAC, State assistance in providing school plant facilities—Modernization.

NOTICE

THIS RULE IS BEING PROPOSED UNDER AN EXPEDITED RULE-MAKING PROCESS THAT WILL ELIMINATE THE NEED FOR THE AGENCY TO HOLD PUBLIC HEARINGS, PREPARE A SMALL BUSINESS ECONOMIC IMPACT STATEMENT, OR PROVIDE RESPONSES TO THE CRITERIA FOR A SIGNIFICANT LEGISLATIVE RULE. IF YOU OBJECT TO THIS USE OF THE EXPEDITED RULE-MAKING PROCESS, YOU MUST EXPRESS YOUR OBJECTIONS IN WRITING AND THEY MUST BE SENT TO Scott Black, Office of the Superintendent of Public Instruction, P.O. Box 47200, Olympia, WA 98504-7200, AND RECEIVED BY February 22, 2010.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: Adopts more accurate and descriptive names for the components of the state funding formula for the allotment of appropriations for school plant facilities. The legislation is based on recommendations made by the joint legislative task force on school construction funding, to promote clarity and transparency in the funding formula.

Reasons Supporting Proposal: These are legislative mandated definitional changes, SB 5980.

Statutory Authority for Adoption: RCW 28A.525.020.

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

Name of Agency Personnel Responsible for Drafting: Scott Black, 600 Washington Street, (360) 725-6268; Implementation and Enforcement: Gordon Beck, 600 Washington Street, (360) 725-6265.

December 21, 2009
Randy I. Dorn
Superintendent of
Public Instruction

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-341-005 Authority. This chapter is adopted pursuant to RCW 28A.525.020 which authorizes the superintendent of public instruction to prescribe rules and regulations governing the administration, control, terms, conditions, and disbursements of ((~~moneys~~)) state funding assistance to school districts to assist them in providing school facilities. In accordance with RCW 28A.525.200, the only provisions of chapter 28A.525 RCW currently applicable to state funding assistance for school facilities are RCW 28A.525.030, 28A.525.040, 28A.525.050, 28A.525.162 through 28A.525.178.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-341-010 Purpose. The purpose of this chapter is to set forth provisions applicable to a district's official application for state funding assistance, including conditions preceding, in the construction of school facilities.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-341-020 District application—Study and survey. Prior to the superintendent of public instruction consideration of state funding assistance in providing school facilities, the board of directors of a school district shall file with the superintendent of public instruction an application for each school facility project, whether new construction or modernization of an existing facility, and shall request the superintendent of public instruction to study and survey existing and proposed school facilities within the district.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-341-025 State study and survey—Content. The study and survey to be conducted by the superintendent of public instruction with the cooperation of the local school district shall include the following:

(1) An inventory and area analysis of existing school facilities within the district, a description of the types and kinds of systems and subsystems used in those facilities and their physical condition;

(2) A long-range (i.e., minimum of six years) educational and facilities plan setting forth the projected facility needs and priorities of the district based on the educational plan;

(3) Demographic data including population projections and projected economic growth and development;

(4) The ability of such district to provide capital funds by local effort;

(5) The existence of a school housing emergency;

(6) The need to improve racial balance and/or to avoid creation or aggravation of racial imbalance;

(7) The type and extent of new and/or additions to existing school facilities required and the urgency of need for such facilities;

(8) A cost/benefit analysis on the need to modernize and/or replace existing school facilities in order to meet current educational needs and the current state building code;

(9) The need and the estimated capital cost to restore, to design specifications, the major systems and subsystems in the facilities that have deteriorated due to deferred maintenance.

(10) A determination of the district's time line for completion of the school facilities project;

(11) An inventory of accessible unused or underutilized school facilities in neighboring school districts and the physical condition of such school facilities;

(12) The need for adjustments of school attendance areas among or within such districts; and

(13) Such other matters as the superintendent of public instruction deems pertinent to decision making in the allocation of funds for school facilities. Cooperation by the applicant school district in conducting the study and survey is a requisite for the superintendent of public instruction to complete the study and survey and to establish the eligibility of the district for state funding assistance in school facility construction.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-341-030 State study and survey—Local involvement. When in the judgment of the superintendent of public instruction information is not readily available to complete the state study and survey or the superintendent of public instruction determines that an existing study and survey, although completed within the previous six years, is out of date, the superintendent of public instruction shall approve a district's request for a state ((~~assistance~~)) planning grant to offset all or a portion of the cost of acquiring such information unless it is determined that there is no possibility that the district will be eligible for state funding assistance within the next seventy-two months. ((~~Such assistance~~)) The state planning grant shall be based on a minimum flat ((~~grant~~)) amount for each enrollment category plus a variable allocation based on the district's estimated gross square footage of existing school facilities and in accordance with the following schedule:

Headcount Enrollment Categories

Enrollment of 1 to 500—Minimum state planning grant plus square footage allocation

Enrollment of 501 to 3,000—Minimum state planning grant plus square footage allocation

Enrollment of 3,001 to 10,000—Minimum state planning grant plus square footage allocation

Enrollment of above 10,000—Minimum state planning grant plus square footage allocation

The dollar amount for the minimum grants and the square footage allocations for these categories shall be established annually by the superintendent of public instruction.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-341-037 Out of date state study and survey. The ((~~state board of education, commencing January 1, 1985, or the~~)) superintendent of public instruction, commencing June 7, 2006, shall not grant approval of state funding assistance pursuant to WAC 392-341-040 to a district without consideration of a state study and survey conducted within the preceding six years that addresses such project.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-341-040 State study and survey—Superintendent of public instruction approval or denial. Upon receipt of a request for one or more project approvals and after review of the state study and survey, together with recommendations and comments, the superintendent of public instruction shall in accordance with WAC 392-341-045 take one of the following actions:

(1) Deny approval of state funding assistance for the construction and/or modernization of school facilities; or

(2) Grant approval of state funding assistance for the construction and/or modernization of school facilities by authorizing the maximum area ((~~allowance~~)) allocation eligible for state ((~~financial~~)) funding assistance for each school plant project approved and for which the superintendent of public instruction shall issue an appropriate SPI form and state any conditions that may or may not be applicable including whether eligibility was approved or denied for additional state funding assistance pursuant to WAC 392-343-115 for one or more approved school plant projects or whether such decision for any approved school plant project has been deferred due to insufficient factual information for a determination or due to a request by the district to present the necessary factual information to the superintendent of public instruction. Upon receipt of the superintendent of public instruction approval, the school district is authorized to prepare educational specifications pursuant to chapter 392-342 WAC. Project approval shall become null and void one year from the date of the superintendent of public instruction action unless the district:

(a) Obtains ((~~local~~)) capital funds to provide the ((~~districts share of the estimated cost~~)) local share required for state funding assistance;

(b) Completes the educational specifications pursuant to chapter 392-342 WAC; and

(c) Selects a site pursuant to chapter 392-342 WAC.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-341-043 Superintendent of public instruction commitment at project approval. The superintendent of public instruction project approval pursuant to WAC 392-341-040 defines the type of project and the maximum allowable square footage in which the state conditionally agrees to participate. There is no commitment whatsoever by the superintendent of public instruction or the state to any project or to any amount of state funding assistance. The superintendent of public instruction reserves the right to amend and/or repeal any rule(s) respecting state funding assistance in school building construction. Such rule changes may be made regardless of the negative and/or positive impact of such changes upon the eligibility of any project for state funding assistance and/or the extent of eligibility of any project for state funding assistance.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-341-045 Approval criteria for state funding assistance. The superintendent of public instruction shall conditionally agree to state funding assistance for a school facility or facilities for a school district that demonstrates the following:

(1) The existence of unhoused students which for the purpose of this section shall mean current or projected enrolled students who are in excess of the capacity calculated for existing facilities within the district pursuant to chapter 392-343 WAC: Provided, That current or projected enrolled students shall not be designated as unhoused for a high school district of application which has a student enrollment of four hundred or less in grades nine through twelve, if the students involved or affected can be served without undue inconvenience in a neighboring school, or schools of larger size and the neighboring school district has indicated a willingness to serve, and has the capacity to house the applying district high school students; and

(2) The ability of the district to ((~~provide any necessary capital funds by local effort~~)) obtain capital funds to provide the local share required for state funding assistance: Provided, That the existence of unhoused students provision of subsection (1) of this section shall not be required for approval of the following school facilities projects: Interdistrict cooperative centers authorized by chapter 392-345 WAC, interdistrict transportation cooperatives authorized by chapter 392-346 WAC, and modernization and new construction authorized by chapter 392-347 WAC.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-341-060 Eligibility for state funding assistance for new construction—Definition—Contiguous school district. As used in this chapter the term "contiguous school district" means a school district sharing a common boundary with another school district.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-341-065 Eligibility for state funding assistance for new construction—Definition—Negotiate in good faith. As used in this chapter the term "negotiate in good faith" means approach a school district with an available and suitable school facility with the intent to enter into an agreement to lease the facility.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-341-070 Eligibility for state funding assistance for new construction—Survey of suitable school facilities in contiguous school districts that are unused or underutilized. A school district applying for state funding assistance for new construction shall conduct a documented survey of suitable school facilities in contiguous school districts that are unused or underutilized.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-341-075 Eligibility for state funding assistance for new construction—Contents of survey. The survey required in WAC 392-341-070 shall include at a minimum:

(1) A listing of contiguous school districts.

(2) Name and title of each person contacted regarding availability of facilities.

(3) A listing of available facilities including location.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-341-080 Eligibility for state funding assistance for new construction—Application to superintendent of public instruction—Necessary documentation. As part of the application submitted to the superintendent of public instruction, the district applying for state funding assistance for new construction shall include:

(1) A copy of the survey conducted pursuant to WAC 392-341-070.

(2) A board resolution certifying one of the following:

(a) No suitable space is available in any contiguous district;

(b) Space is available in a contiguous district but the facilities do not meet needs of the applicant district. The applicant district shall provide substantial evidence to support the unsuitability of the available facility;

(c) Space is available in a contiguous district but good faith negotiations did not lead to an agreement between the applicant district and the district containing the available facility. The applicant district shall provide substantial evidence to support the lack of lease agreement including a history of the negotiations and proposed offers by each district.

(3) Other information deemed pertinent by the applicant district.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-341-085 Eligibility for state funding assistance for new construction—Review of survey of available and suitable school plant facilities in contiguous school districts. The superintendent of public instruction shall review and approve the applicant school boards certification and supporting documentation submitted pursuant to WAC 392-341-080, if the certification is complete, technically accurate, and complies with all applicable rules and regulations. Until this certification and supporting documentation is approved by the superintendent of public instruction, the school district's application for state funding assistance will not be given further consideration.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-341-090 Eligibility for state funding assistance for new construction—Approval by the superintendent of public instruction of applicant's school district certification. The superintendent of public instruction shall approve an applicant school district's certification of the unavailability of suitable school plant facilities in contiguous school districts if it is established to the superintendent of public instruction's satisfaction that vacant, available, and suitable school plant facilities neither exist nor are scheduled to exist within the foreseeable future in a contiguous school district.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-341-200 Forms. ((~~Commencing January 1, 1986,~~)) Forms applicable to provisions of this chapter for school facilities ((~~requested after such date~~)) shall be as follows:

(1) Applications for a state study and survey by a district pursuant to WAC 392-341-020 shall be designated as SPI Form D-1.

(2) State planning grants to districts pursuant to WAC 392-341-030 shall be awarded to such districts through SPI Form D-2.

(3) Applications for approval of a school project by a district pursuant to WAC 392-341-040 shall be designated as SPI Form D-3.

(4) Project approval for districts pursuant to WAC 392-341-040 shall be awarded to such district through SPI Form D-4.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-342-005 Authority. This chapter is adopted pursuant to RCW 28A.525.020 relating to authority of the superintendent of public instruction to prescribe rules and regulations governing the administration, control, terms, conditions, and disbursements of allocations to school districts to assist them in providing school facilities. In accordance with RCW 28A.525.200, the only provisions of chapter 28A.525 RCW currently applicable to state funding assistance for school facilities are RCW 28A.525.030, 28A.525.040, 28A.525.050, and 28A.525.162 through 28A.525.178.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-342-020 Site review and evaluation. The superintendent of public instruction together with the school district shall conduct a review and evaluation of sites for new

and existing state funding assisted projects. In selecting sites for schools, a district shall consider the following:

(1) The property upon which the school facility is or will be located is free of all encumbrances that would detrimentally interfere with the construction, operation, and useful life of the facility;

(2) The site is of sufficient size to meet the needs of the facility. The minimum acreage of the site should be five usable acres and one additional usable acre for each one hundred students or portion thereof of projected maximum enrollment plus an additional five usable acres if the school contains any grade above grade six. A district considering the use of a site that is less than the recommended minimum usable acreage should assure that:

(a) The health and safety of the students will not be in jeopardy;

(b) The internal spaces within the proposed facility will be adequate for the proposed educational program;

(c) The neighborhood in which the school facility is or will be situated will not be detrimentally impacted by lack of parking for students, employees, and the public; and

(d) The physical education and recreational program requirements will be met.

(3) A site review or predesign conference has been conducted with all appropriate local code agencies in order to determine design constraints;

(4) A geotechnical engineer has conducted a limited subsurface investigation to gather basic information regarding potential foundation and subgrade performance.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-342-025 Racial imbalance prohibition—Definition and acceptance criteria. The superintendent of public instruction shall not accept a site unless the applicant district provides assurances that its attendance policies for the proposed or modernized school facility will not create or aggravate racial imbalance within the boundaries of the applicant school district. For the purpose of this chapter, racial imbalance shall be defined as the situation that exists when minority enrollment (as defined by current federal categories) of a school plant facility is as follows:

(1) General rule. As a general rule—except for greater than fifty percent minority school districts—racial imbalance shall be defined as the situation that exists:

(a) When the combined minority enrollment of a school exceeds the district-wide combined minority percentage by twenty percentage points or more; or

(b) When a school's enrollment of a single minority group with a district-wide enrollment of less than thirty percent exceeds fifty percent; or

(c) When a school's enrollment of a single minority group with a district-wide enrollment of thirty percent or more exceeds the minority group's district-wide percentage by twenty percentage points or more.

(2) Greater than fifty percent minority districts. This is a school district with a district-wide combined minority enrollment that exceeds fifty percent. Racial imbalance in a greater than fifty percent minority, nonmultiracial school district shall be defined as existing:

(a) When the combined minority enrollment of a school varies from the district-wide combined minority percentage by more than plus or minus twenty-five percentage points; or

(b) When a school's enrollment of a single minority group with a district-wide enrollment of less than thirty percent exceeds fifty percent; or

(c) When a school's enrollment of a single minority group with a district-wide enrollment of thirty percent or more exceeds the minority group's district-wide percentage by twenty percentage points or more.

(3) Greater than fifty percent minority, multiracial districts. This is a school district with a district-wide combined minority enrollment that exceeds fifty percent and consists of two or more minority group enrollments which are each greater than twenty percent. Racial imbalance in a greater than fifty percent minority, multiracial school district shall be defined as existing:

(a) When the combined minority enrollment of a school varies from the district-wide combined minority percentage by more than plus or minus twenty-five percent percentage points; or

(b) When a school's enrollment of a single minority exceeds the combined district-wide minority percentage.

(4) Exclusions—This policy does not apply to:

(a) Public schools located on American Indian reservations; or

(b) School ((~~buildings~~)) facilities which are the sole site within a school district for the conduct of a regular or special needs program for students of the age(s) or grade level(s) served at the site; or

(c) Student enrollments in programs established and conducted to address extraordinary educational needs, such as bilingual orientation programs, where the assignment and enrollment of students are based solely upon their extraordinary educational needs, the enrollment of students in the program is limited to the duration of their extraordinary educational need, and adherence to the policy would defeat the educational purpose of the program.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-342-050 Option to request preliminary funding status prior to proceeding pursuant to WAC 392-342-040. As used in chapters 392-342, 392-343, and 392-344 WAC, the term "preliminary funding status" shall mean the project shall be considered for approval pursuant to WAC 392-344-107 prior to projects without such preliminary funding status and shall be eligible for state funding assistance pursuant to the superintendent of public instruction rules pertaining to eligible square footage, ((~~area cost allowance~~)) construction cost allocation for the fiscal year funded, and priorities in effect at the time such status is granted. Any district may request the superintendent of public instruction to grant preliminary funding status for any project ((~~with secured local~~)) that obtained capital funds to provide the local share required for state funding assistance and has the authority to proceed pursuant to WAC 392-342-040. The superin-

tendent of public instruction shall grant such approval if in the judgment of the superintendent of public instruction such project will receive approval pursuant to WAC 392-344-107 within one year.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-342-057 The superintendent of public instruction project commitment at preliminary funded status. When preliminary funding status for a project is requested and granted pursuant to WAC 392-342-050, the superintendent of public instruction commitment is limited to the eligibility of the project for state funding assistance, the eligible square footage, the ((~~area~~)) construction cost ((~~allowance~~)) allocation for the fiscal year funded and the priority standing of the project as determined pursuant to the state ((~~building~~)) construction assistance rules in effect at that time. This commitment is effective only for the initial one-year period set forth at WAC 392-342-060. The superintendent of public instruction reserves the right to amend and/or repeal any rule(s) respecting state funding assistance in school ((~~building~~)) facility construction. Such rule changes may be made regardless of the impact upon the eligibility of any project and/or the extent of eligibility of any project for state funding assistance.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-342-200 Forms. ((~~Commencing January 1, 1986,~~)) Forms applicable to the provisions of this chapter for school facilities ((~~projects after such date~~)) shall be as follows:

(1) Applications for preliminary funding status pursuant to WAC 392-342-050 shall be designated as SPI Form D-5.

(2) Grants of preliminary funding status pursuant to WAC 392-342-050 shall be given to districts through SPI Form D-6.

Chapter 392-343 WAC

STATE FUNDING ASSISTANCE IN PROVIDING SCHOOL PLANT FACILITIES—BASIC STATE SUPPORT

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-343-005 Authority. This chapter is adopted pursuant to RCW 28A.525.020 relating to authority of the superintendent of public instruction to prescribe rules and regulations governing the administration, control, terms, conditions, and disbursements of allotments to school districts to assist them in providing school facilities. In accordance with RCW 28A.525.200, the only provisions of chapter 28A.525 RCW currently applicable to state funding assistance for school plant facilities are RCW 28A.525.030, 28A.525.040, 28A.525.050, and 28A.525.162 through 28A.525.178.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-343-010 Purpose. The purpose of this chapter is to set forth provisions applicable to ((~~basic~~)) state ((~~support and~~)) funding assistance in the construction of school facilities, including the superintendent of public instruction approval criteria. The limitations set forth represent the level of state ((~~support~~)) funding assistance within moneys available and are not to be interpreted as maximum criteria to meet the educational requirements of all school districts, the determination of such criteria being the prerogative of respective school districts.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-343-015 State board policy. (1) In the interpretation of the regulations in this chapter, the superintendent of public instruction shall be guided by the following state board of education policy:

(a) To equate insofar as possible the efforts by districts to provide capital moneys;

(b) To equalize insofar as possible the educational opportunities for the students of the state;

(c) To establish a level of state ((~~support~~)) funding assistance for the construction and modernization of school facilities consistent with moneys available; and

(d) To recognize that districts may have reasons to remove district facilities from current inventories and provide consistent statewide policies for removal.

(2) Nonhigh district participation in financing the cost of secondary school facilities shall be established pursuant to the provisions of chapter 28A.540 RCW.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-343-016 Rules determining eligibility and timing of state funding assistance. The eligibility for and the amount of state funding assistance shall be determined as outlined in WAC 392-343-020. The prioritization and timing for receipt of state funding assistance for eligible projects shall be determined by WAC 392-343-500.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-343-020 Related factors and formula for determining amount of state funding assistance. (1) The amount of state funding assistance to a school district to provide school facilities shall be determined on the basis of component factors, as hereinafter set forth in this chapter, relating to:

(a) The number of unhoused students;

(b) Space allocations;

(c) Reduction of the number of operating schools as per chapter 392-347 WAC;

(d) ((~~Area~~)) Construction cost ((~~allowance~~)) allocation for the fiscal year funded;

(e) Allowances for furniture and equipment purchases;

(f) The amount of insurance, federal, or other nontax source local moneys applied to a school facilities project;

(g) Certain specified costs which must be financed directly by the school district; and

(h) The amount of fees for professional services.

(2) State funding assistance for an approved project shall be derived by multiplying the state funding assistance percentage ((~~of state assistance~~)) determined pursuant to RCW 28A.525.166 by the following:

(a) The eligible construction cost which shall be calculated by multiplying the approved square foot area of the project as set forth in WAC 392-343-035 by the ((~~area~~)) construction cost ((~~allowance~~)) allocation as set forth in WAC 392-343-060;

(b) The cost of preparing educational specifications as set forth in WAC 392-343-065;

(c) The cost of architectural and engineering services as set forth in WAC 392-343-070;

(d) The cost of preparing and reviewing the energy conservation report as set forth in WAC 392-343-075;

(e) The cost of a value engineering study, a constructability review, and building commissioning as set forth in WAC 392-343-080;

(f) The construction cost savings—sharing incentive as set forth in WAC 392-343-085;

(g) The cost of furniture and equipment as set forth in WAC 392-343-095;

(h) The cost of special inspections and testing as set forth in WAC 392-343-100; and

(i) The cost of construction management as set forth in WAC 392-343-102.

Any cost in excess of the maximum allowable shall be financed entirely by the school district.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-343-025 State ((~~matching~~)) funding assistance percentage—General. (1) The ((~~percentage of~~)) state funding assistance percentage for which a school district is eligible, if otherwise qualified under prevailing statutory provisions and rules and regulations of the superintendent of public instruction, shall be determined in accordance with the ((~~matching~~)) state funding assistance percentage formula set forth in RCW 28A.525.166.

(2) In the event the ((~~percentage of~~)) state funding assistance percentage to any school district computed in accordance with RCW 28A.525.166(2) is less than twenty percent and such school district otherwise is eligible for state funding assistance under statutory provisions and the superintendent of public instruction regulations, the percentage for such district shall be twenty percent of the ((~~matchable cost~~)) state allowable costs of the project.

(3) In addition to the computed ((~~percent of~~)) state funding assistance percentage as stated above, a school district as provided in RCW 28A.525.166(3), shall be entitled to additional percentage points determined by the average percentage of growth for the past three years. One percent shall be added to the computed ((~~percent of~~)) state funding assistance percentage for each average percent of student growth for the past three years, with a maximum addition of twenty percent. In no case shall the state ((~~dollars matched~~)) funding assistance exceed one hundred percent of the maximum allowable cost of the project.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-343-030 Applicable state ((~~matching~~)) funding assistance percentage for project. Pursuant to provisions of RCW 28A.525.168, the ((~~percentage of~~)) state funding assistance percentage used for the allocation of state moneys shall be the highest amount prevailing at the time of:

(1) Passage of bonds and/or levies by the voters of the school district to ((~~meet the requirement for local funding~~)) provide the local share required for state funding assistance;

(2) The superintendent of public instruction project approval; or

(3) Superintendent of public instruction approval to bid.

In the event that a district is otherwise eligible to receive approval to bid one or more projects but a lack of state ((~~matching funds~~)) funding assistance precludes the issuance of such approval(s), the district shall retain the higher ((~~percentage of~~)) state funding assistance percentage as provided for in this section for such approval(s). This provision shall apply to all projects having received project approval by the state board of education after September 1, 1997, or by the superintendent of public instruction after June 6, 2006.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-343-032 Growth impact fees and mitigation payments. Notwithstanding the financial requirements of WAC 392-343-030, districts may use growth impact fees as provided for in RCW 82.02.020, 82.02.050 through 82.02.100, 58.17.060 and 58.17.110 and mitigation payments as provided for in RCW 43.21C.060 of the State Environmental Policy Act to assist in capital construction projects. The impact fees and payments collected pursuant to the above cited statutes((~~,~~)) may be used by the district ((~~as~~)) to provide the local ((~~match~~)) funding share required for state ((~~assisted capital projects~~)) funding assistance and may not be substituted for the amount of state funding assistance that would otherwise be provided for school capital projects. ((~~Mitigation payments as provided for in RCW 43.21C.060 of the State Environmental Policy Act may be used by the district as local match funding and may not be substituted for the amount of state assistance that would otherwise be provided for school capital projects.~~))

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-343-035 Space allocations. (1) State funding assistance in the construction of school facilities for grades kindergarten through twelve and classrooms planned for the exclusive use of students with developmental disabilities shall be based on a space ((~~allowance~~)) allocation per enrolled student and for state ((~~matching~~)) funding assistance

purposes shall be computed in accordance with the following table:

Grade or Area	Through June 30, 2006 Maximum ((~~Matchable Area~~)) Space Allocation Per Student	Beginning July 1, 2006 Maximum ((~~Matchable Area~~)) Space Allocation Per Student
Grades kindergarten through six	80 square feet	90 square feet
Grades seven and eight	110 square feet	117 square feet
Grades nine through twelve	120 square feet	130 square feet
Classrooms for students with developmental disabilities	140 square feet	144 square feet

For purposes of this subsection, students with developmental disabilities shall be counted as one student for each such student assigned to a specially designated self-contained classroom for students with developmental disabilities for at least one hundred minutes per school day, calculated on actual headcount enrollment submitted to the superintendent of public instruction.

(2) State funding assistance for construction of vocational skill centers shall be based on one-half of students enrolled on October 1 and computed as follows:

Type of Facility	Maximum ((~~Matchable Area~~)) Space Allocation Per One-Half Enrolled Student
Skill Centers	140 square feet

(3) Space ((~~allowance~~)) allocation for state ((~~matching~~)) funding assistance purposes for districts with senior or four-year high schools with fewer than four hundred students shall be computed in accordance with the following formula:

Number of Headcount Student-Grades 9-12	Maximum ((~~Matchable Area~~)) Space Allocation Per Facility
0-100	37,000 square feet
101-200	42,000 square feet
201-300	48,000 square feet
301-or more	52,000 square feet

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-343-045 Space allocations—Enrollment projection provisions. In planning for construction of all school facilities, a school district shall estimate capacity needs on the basis of the following:

(1) A three or five-year cohort survival enrollment projection for growth districts, whichever is greater;

(2) A three or five-year cohort survival enrollment projection for a declining district, whichever is lesser;

(3) Actual enrollment of preschool students with developmental disabilities; and

(4) Supplemental information regarding district growth factors which may include but not be limited to the following types of information:

(a) County live birth rates;

(b) New housing starts;

(c) Utility/telephone hookups; and

(d) Economic/industrial expansion.

For the purpose of this section, kindergarten students and students with developmental disabilities shall be counted as provided under WAC 392-343-035 and all other grade one through twelve students shall be counted as October count day full-time equivalent students as reported to the superintendent of public instruction: Provided, That a school district which has or has had an annual average full-time equivalent enrollment of over five hundred, and which applied for and received additional state basic education allocation moneys based upon an enrollment increase after the first of the month enrollment count, may use the average of the two highest monthly full-time equivalent enrollment counts during the school year.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-343-050 Space allocations—Computing building capacity. The net total area of a school facility eligible for state ((~~matching purposes~~)) funding assistance shall be calculated as follows:

(1) The capacity of existing buildings within the district based on the school district's assigned grade spans shall be computed in accordance with the tables set forth in WAC 392-343-035 and the square foot area analysis set forth in WAC 392-343-040.

(2) The number of students projected at each grade span shall be multiplied by appropriate numbers of square feet as set forth in WAC 392-343-035. (Note: The area generated at each grade level determines district eligibility, if any.)

(3) The amount of housing the district is eligible to construct at each grade span is determined by subtracting the area computed in subsection (2) of this section from the existing housing capacity at each grade span in the school district. Using this formula, over housing at the secondary grade level, grades nine through twelve, or elementary grade level, kindergarten through eight, will not negatively affect unhoused eligibility at the elementary grade level or secondary grade level respectively.

(4) Appropriate grade assignment is a local determination.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-343-053 State moneys for studies and surveys. State ((~~moneys~~)) planning grant for school district studies and surveys conducted pursuant to chapter 392-341 WAC

shall be available even though the superintendent of public instruction deems it necessary to order a priority approval process pursuant to WAC 392-343-054. At the beginning of each biennium, the superintendent of public instruction shall estimate the amount of money((~~s~~)) necessary for allocation to districts for studies and surveys and not make such money((~~s~~)) available for any other purpose. In the event the estimated amount proves to be insufficient, the superintendent shall set aside additional money((~~s~~)).

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-343-056 Funding during the period of a priority approval process order by the superintendent of public instruction. During the period of a priority approval process imposed by order of the superintendent of public instruction school construction projects shall receive final approval pursuant to WAC 392-344-107 as follows:

(1) On or after July 1 following the superintendent of public instruction order for the implementation of a priority approval process the superintendent of public instruction shall rank all projects for which final approval has been requested pursuant to WAC 392-344-107 as per the applicable priority list in WAC 392-343-500. Only school construction projects with the superintendent of public instruction approval under WAC 392-341-045 and secured ((~~local~~)) capital funds to provide the local share required for state funding assistance by January 31 of the previous state fiscal year and eligible for final approval pursuant to WAC 392-344-107 by June 30 of the previous state fiscal year shall be placed on the priority list.

(2) Each fiscal year the superintendent of public instruction shall give final approval to school construction projects on the priority list pursuant to WAC 392-344-107 based on the level and conditions of legislative appropriations. For the purpose of this subsection the term "estimated revenue available for the state fiscal year" shall mean the estimated revenue from the common school construction fund for the current state fiscal year and the subsequent state fiscal year, the result of which is divided by two.

(3) In the event the superintendent of public instruction does not rescind the order for the implementation of a priority approval process by the close of the state fiscal year, school construction projects remaining on the priority list without final approval and, therefore, without secured funding status pursuant to WAC 392-344-107 shall be combined with new school construction projects that have secured ((~~local~~)) capital funds to provide the local share required for state funding assistance by January 31 of the state fiscal year and that are eligible, pursuant to WAC 392-344-107, for final approval by the close of the state fiscal year, and a new priority list shall be established on or after July 1 of the next state fiscal year and such remaining and new school construction projects shall be eligible for final approval pursuant to the provisions of subsections (1) and (2) of this section.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-343-057 State funding assistance—Deferred payment. In the event state ((~~moneys are~~)) funding assistance is not sufficient for a school district project, a school district may proceed at its own financial risk. At such time state ((~~moneys~~)) funding assistance becomes available, reimbursement may be made for the project provided the provisions of chapter 392-344 WAC have been complied with.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-343-060 Determining the ((~~area~~)) construction cost ((~~allowance~~)) allocation. (1) The ((~~area~~)) construction cost ((~~allowance~~)) allocation for state funding assistance shall apply to the cost of construction of the total facility and grounds, including state sales and use taxes generally levied throughout the state of Washington and excluding those local option sales and use taxes levied by political subdivisions.

(2) The ((~~area~~)) construction cost ((~~allowance~~)) allocation used in calculating state ((~~financial~~)) funding assistance for construction of school facilities shall be determined by the superintendent of public instruction using the prior year's ((~~area~~)) construction cost ((~~allowance~~)) allocation, plus a construction inflation factor.

(3) The superintendent of public instruction's office shall work with appropriate parties to develop a method for determining the annual construction inflation factor.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-343-065 Educational specifications. (1) Only school facility projects which are complete new facilities or modernization projects pursuant to chapter 392-347 WAC are eligible for state funding assistance in the preparation of education specifications.

(2) The construction of interdistrict transportation cooperatives, or additions of less than fifteen thousand square feet to existing facilities, unless combined with modernization, are not eligible.

(3) The amount of state funding assistance for which a district is eligible for the preparation of educational specifications shall be the state ((~~matching~~)) funding assistance percentage multiplied by the greater of the following:

(a) One quarter of one percent of the ((~~area~~)) construction cost ((~~allowance~~)) allocation multiplied by the square foot area for the fiscal year funded; or

(b) Ten thousand dollars.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-343-070 Architectural and engineering services. School districts shall select their architectural and engineering consultants in accordance with chapter 39.80 RCW. As required by RCW 39.80.050, the district shall negotiate a contract with the most qualified consultants at a

price which the school district determines is fair and reasonable. In making its determination, the district shall take into account the estimated value of the services to be rendered based upon the scope and complexity of the project.

The ((~~allocation of state moneys for matching purposes for a school facility project shall be based on architectural and engineering services as defined by~~)) state maximum allowable cost for architecture and engineering services shall be based on the latest edition of the *American Institute of Architects Handbook of Professional Practice* and calculated by the percentage(s) in relation to the square foot area of construction as calculated in WAC 392-343-040 and project type, as set forth below:

(1) **New construction projects:**

Architectural and Engineering Team Fee ((~~Matching~~)) Funding Assistance Limitations

Square Feet of Construction			Percent of Construction Cost
0	-	3,699	10.0
3,700	-	7,349	9.0
7,350	-	10,999	8.75
11,000	-	14,649	8.5
14,650	-	18,299	8.25
18,300	-	25,699	8.0
25,700	-	36,699	7.75
36,700	-	54,999	7.5
55,000	-	73,399	7.25
73,400	-	100,999	7.0
101,000	-	128,449	6.75
128,450	-	155,999	6.5
156,000	-	183,499	6.25
183,500	& above		6.0

(2) **Modernization projects:**

For modernization projects, the limits of state ((~~participation~~)) funding assistance shall be one and one-half times the amount calculated for new construction.

(3) **Combination projects:**

For those projects which include a combination of new construction and modernization, the limits of state participation shall be prorated as set forth in subsection (1) and (2) of this section.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-343-075 Energy conservation report. In compliance with the provisions of chapter 39.35 RCW, school districts constructing school facilities shall complete an energy conservation report for any new construction or for additions to and modernization of existing school facilities which will be reviewed by the Washington state department of general administration. One copy of the energy conservation report, approved by the district board of directors, shall be filed with the superintendent of public instruction. The amount of state funding assistance for which a district is eligible for the preparation of the energy conservation report shall be the state ((~~matching~~)) funding assistance percentage multiplied by ten thousand dollars. The amount of state funding assistance for which a district is eligible shall be the state ((~~matching~~)) funding assistance percentage multiplied by the fee charged.

AMENDATORY SECTION (Amending WSR 08-09-023, filed 4/8/08, effective 5/9/08)

WAC 392-343-080 Value engineering studies, constructability reviews, and building commissioning—Requirements and definition. At the appropriate time in the design process for a school facility approved by the superintendent of public instruction, the district shall prepare a value engineering study, complete a constructability review, and perform building commissioning for all projects greater than fifty thousand square feet. Value engineering studies and constructability reviews shall be optional for projects larger than fifteen thousand square feet but less than fifty thousand square feet. Any project which includes fifteen thousand square feet or less shall be exempt from this requirement. For projects subject to chapter 39.35D RCW, building commissioning must be performed for all projects over five thousand square feet. For the purpose of this section, a value engineering study is defined as a cost control technique which is based on the use of a systematic, creative analysis of the functions of the facility with the objective of identifying unnecessary high costs or functions and/or identifying cost savings that may result in high maintenance and operation costs. The study shall consist of a forty-hour workshop involving a minimum of a five-person team pursuant to WAC 392-344-065. A constructability review is defined as a cost control technique which is based on the review of project documents by mechanical, electrical, structural, construction, and design professionals prior to a request for bids. The purpose of a constructability review is to identify potential claim or problem areas and deficiencies that may occur as a result of errors, ambiguities, omissions, discrepancies, and conflicts in design documents. The study shall consist of a forty-hour workshop involving a minimum of a five-person team pursuant to WAC 392-344-066. Building commissioning is defined as the process of verifying that the installation and performance of selected building systems meet or exceed the specified design criteria and therefore satisfy the design intent. Building commissioning shall include a physical inspection, functional performance testing, listing of noted deficiencies, and a final commissioning report. Building commissioning shall be performed by a professional agent or authority not contractually or otherwise financially associated with the project design team or contractor. A district shall be eligible for state funding assistance for a value engineering study, a constructability review, and building commissioning for each qualifying project. ((~~The maximum amount of assistance for value engineering studies and constructability reviews of the study package shall be the state matching percentage multiplied by the greater of the following:~~

~~(1) Two-fifths of one percent of the area cost allowance multiplied by the square foot area for the fiscal year funded; or~~

~~(2) Twenty thousand dollars.~~

~~The maximum amount of assistance for building commissioning shall be as follows:~~

~~(a) Seven thousand five hundred dollars for projects larger than five thousand square feet but less than ten thousand square feet;~~

~~(b) Ten thousand dollars for projects ten thousand square feet but less than fifteen thousand square feet;~~

~~(c) The larger of the following for projects fifteen thousand square feet and above:~~

~~(i) Two-fifths of one percent of the area cost allowance multiplied by the square foot area for the fiscal year funded; or~~

~~(ii) Twenty thousand dollars.~~)) (1) The maximum amount of state funding assistance for value engineering studies and constructability reviews of the study package shall be the state funding assistance percentage multiplied by the greater of the following:

(a) Two-fifths of one percent of the construction cost allocation multiplied by the square foot area for the fiscal year funded; or

(b) Twenty thousand dollars.

(2) The maximum amount of state funding assistance for building commissioning shall be:

(a) Seven thousand five hundred dollars for projects larger than five thousand square feet but less than ten thousand square feet;

(b) Ten thousand dollars for projects ten thousand square feet but less than fifteen thousand square feet;

(c) The larger of the following for projects fifteen thousand square feet and above:

(i) Two-fifths of one percent of the construction cost allocation multiplied by the square foot area for the fiscal year funded; or

(ii) Twenty thousand dollars.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-343-085 Construction cost savings—Sharing incentive. The purpose of this section is to set forth provisions designed to further enhance cost effectiveness in the construction of exclusively new school facilities.

(1) Districts become eligible for a cost saving incentive equal to sixty percent of the state share of the construction cost savings if the cost of new construction at bid is less than the ((~~approved~~)) state ((~~matchable~~)) maximum allowable construction cost((~~,~~)) as set forth in WAC 392-343-020 (2)(a).

(2) The state ((~~matched~~)) funding assistance fee for basic architectural and engineering services shall not be reduced if the project is bid and is awarded below the ((~~approved state matchable construction cost~~)) state maximum allowable costs for architectural and engineering services (WAC 392-343-070) or the cost contracted for between the school district and architect/engineer, whichever is less.

(3) Any project attached to or adjacent to or otherwise designed to operate in conjunction with an existing facility and which contains additional area equal to or less than fifty percent of the area in the existing facility shall be classified as an addition and shall not be eligible for the cost saving incentive option authorized in this section.

(4) Districts shall not be eligible for a cost-saving incentive where the entire project, or any part of the project, qualifies for state ((~~support~~)) funding assistance under chapter 392-347 WAC.

(5) Receipt of a portion of the state share of construction cost savings shall not reduce the district's future eligibility and entitlement to state funding assistance in providing school facilities and shall not result in the district receiving more than one hundred percent of the cost of construction.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-343-095 Support level—Furniture and equipment allowances. (1) ((~~A matchable~~)) State funding assistance allowance for furniture and equipment purchases shall be added to total construction cost of an approved school facilities project. The amount of state funding assistance for which a district is eligible shall be the eligible square foot area of the project multiplied by the ((~~area~~)) construction cost ((~~allowance~~)) allocation for the fiscal year funded and that product multiplied by:

(a) Two percent for elementary schools;

(b) Three percent for middle and junior high schools;

(c) Four percent for high schools;

(d) Five percent for facilities for students with developmental disabilities;

(e) Five percent for interdistrict cooperative occupational skill centers; and

(f) Seven percent for interdistrict transportation cooperatives.

(2) For those projects where the eligible square footage is allocated to grade spans which do not conform to those listed above, the equipment allowance shall be allocated based on eligibility as established in WAC 392-343-035.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-343-100 Special inspections and testing. All special inspections and testing to be performed by independent sources as specified in the construction documents shall be ((~~matched~~)) allowed for state funding assistance in addition to the construction costs subject to the approval of the superintendent of public instruction. For the purposes of this section, special inspections shall be those special inspections required under the State Building Code.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-343-102 Construction management. Prior to commencing with project design the district shall employ or contract personnel to perform professional construction management. Construction management shall be required for

all projects greater than fifty thousand square feet and is optional for projects fifty thousand square feet or less. For the purpose of this section construction management is defined as the process of professional management applied to a construction program for the purpose of controlling time, cost, and quality.

The construction manager shall have appropriate and demonstrable experience in the management of construction projects including procurement, contract administration, scheduling, budgets, quality assurance, information management, and health and safety.

The amount of state funding assistance for which a district shall be eligible for construction management shall be the state ((~~matching~~)) funding assistance percentage multiplied by two and one-half percent of the ((~~area~~)) construction cost ((~~allowance~~)) allocation multiplied by the square foot area for the fiscal year funded.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-343-110 Support level—Federal moneys. A school district determined to be eligible for moneys made available by acts of congress for school facility construction, including but not limited to Public Law 815 moneys, shall complete the following steps:

(1) Make application for such moneys, which requirement shall be prerequisite for a preliminary or provisional allocation of state ((~~matching moneys~~)) funding assistance;

(2) Furnish evidence of the availability of such federal moneys, which requirement shall be a prerequisite for a final allocation of state moneys: Provided, That nothing in this section shall restrict a school district from receipt of federal moneys otherwise provided for specific purposes in accordance with the conditions imposed by the federal government incumbent upon the recipient school district; and

(3) Include the number of square feet in school facilities constructed with federal moneys and used for instructional purposes in the district's inventory which will decrease district eligibility for state ((~~moneys~~)) funding assistance by an equal number.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-343-115 Support level—Additional state funding assistance. State funding assistance in addition to the amount determined pursuant to WAC 392-343-020 may be allowed for the purposes and in accordance with the requirements set forth in this section: Provided, That in no case shall the state funding assistance exceed one hundred percent of the amount calculated for ((~~matching~~)) state funding assistance purposes: In each of the following exceptions, either at the time the project is approved pursuant to WAC 392-341-040 or at any time prior to receiving secured funding status pursuant to WAC 392-344-107, written school district application for additional state funding assistance and the superintendent of public instruction approval is required:

(1) A school facility subject to abatement and an order to vacate.

A school district required to replace a school facility determined to be hazardous to the safety and health of school children and staff—as evidenced by reports of architects or engineers licensed to practice in the state of Washington, the health agency having jurisdiction, and/or the fire marshal and building official having jurisdiction—shall be eligible for additional assistance if the voters of the school district authorize the issuance of bonds and/or the levying of excess taxes to meet the statutory limits. If the superintendent of public instruction determines that the voters of the school district have authorized the issuance of bonds to its legal limit, the superintendent of public instruction shall provide state ((~~financial~~)) funding assistance for the remaining cost of the building to a level not exceeding the ((~~area~~)) construction cost ((~~allowance~~)) allocation for the fiscal year funded: Provided, That at any time thereafter when the superintendent of public instruction finds that the capital financial position of such district has improved, the amount of the additional allocation provided pursuant to this subsection shall be recovered by deducting an amount equal to all or a portion of such additional allocation from any future state ((~~school facility construction funds~~)) funding assistance which might otherwise be provided to such district.

(2) Interdistrict cooperative centers.

In the financing of interdistrict cooperative projects as set forth in chapter 392-345 WAC, the superintendent of public instruction shall allocate at seventy-five percent of the total approved project cost determined eligible for state ((~~matching~~)) funding assistance purposes if the planned school facility meets the following criteria:

(a) Provides educational opportunities, including vocational skills programs, not otherwise provided; or

(b) Avoids unnecessary duplication of specialized or unusually expensive educational programs or facilities.

(3) School housing emergency.

A school district found by the superintendent of public instruction to have a school housing emergency requiring an allocation of state ((~~moneys~~)) funding assistance in excess of the amount allocable under the statutory formula may be considered for an additional allocation of ((~~moneys~~)) state funding assistance: Provided, That the school district must have authorized the issuance of bonds to its legal capacity to meet the statutory and the superintendent of public instruction fiscal requirements for state funding assistance in providing school facilities.

The total amount of state ((~~moneys~~)) funding assistance allocated shall be the total approved project cost determined eligible for state ((~~matching~~)) funding assistance purposes multiplied by the districts' regular ((~~match rate~~)) state funding assistance percentage as calculated pursuant to RCW 28A.525.166 plus twenty percent and not to exceed ninety percent in total: Provided further, That at any time thereafter when the superintendent of public instruction finds that the capital financial position of such district has improved, the amount of the additional allocation provided pursuant to this subsection shall be recovered by deducting an amount equal to all or a portion of such additional allocation from any future state school facility construction funds which might otherwise be provided to such district.

(4) Improved school district organization.

If two or more school districts reorganize into a single school district and the construction of new school facilities results in the elimination of a small high school with a full-time equivalent enrollment in grades 9-12 of less than four hundred students and/or an elementary school with a full-time equivalent enrollment of less than one hundred students, the superintendent of public instruction shall ((~~match~~)) provide state funding assistance based on the total approved cost of the project at seventy-five percent.

(5) Racial imbalance.

Any school district that contains a school facility which is racially imbalanced as defined in WAC 392-342-025 shall receive state funding assistance under this subsection in the amount of an additional ten percentage points above the ((~~matching~~)) state funding assistance percentage as calculated pursuant to RCW 28A.525.116 (b) and (c) which will not exceed a total of ninety percent of the total approved cost of construction: Provided, school construction projects for racial balance that meet the following conditions shall be provided state funding assistance at seventy-five percent of the ((~~square foot~~)) construction cost ((~~allowance~~)) allocation for the fiscal year funded under the provisions of this subsection as they existed prior to the amendment of this subsection in 1993:

(a) Voter approved local ((~~matching~~)) funds were authorized before December 31, 1992;

(b) The superintendent of public instruction approved a comprehensive desegregation plan with specific construction and modernization projects under additional state funding assistance criterion in effect at that time, which will be identified on or before September 15, 1993; and

(c) The superintendent of public instruction confirms at the time of project approval pursuant to WAC 392-341-040 the continued existence of racial balance needs.

In the case of a school district which contains a racially imbalanced school facility the district must demonstrate that, as a result of new construction or modernization, the particular school facility will no longer be racially imbalanced, that the combined minority enrollment in the particular school facility will be reduced by more than ten percentage points, and that the above stated results will be obtained as a direct result of increased enrollment of nonminority students in the particular school facility: Provided, That the particular school facility shall remain racially balanced for a period of at least five years after the date of actual building occupancy: Provided further, That if the superintendent of public instruction finds that the school facility does not remain racially balanced for five years then the amount of additional state funding assistance provided pursuant to this subsection shall be recovered by deducting an amount equal to all of the additional allocation from any future state ((~~school facility construction funds~~)) funding assistance which might otherwise be provided to such district.

(6) Any project that has received approval for additional state funding assistance under provisions of this section as they existed prior to the amendment of this section in 1993 shall retain authorization for additional state funding assistance under the provisions in effect at the time of such approval.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-343-120 Costs to be financed entirely with school district funds. The cost of the following areas, facilities, and items shall not be eligible for ((~~the~~)) state ((~~matching purposes~~)) funding assistance:

(1) The cost of area in excess of the space allocations as set forth in WAC 392-343-035;

(2) Acquisition cost of site;

(3) Maintenance and operation;

(4) Alterations, repair, and demolitions, except alterations necessary to connect new construction to an existing building;

(5) Central administration buildings;

(6) Stadia/grandstands;

(7) Costs incidental to advertising for bids, site surveys, soil testing for site purchase, and costs other than those connected directly with the construction of facilities;

(8) Bus garages, except interdistrict cooperatives;

(9) Sales and/or use taxes levied by local governmental agencies other than those sales and/or use taxes levied by the state of Washington;

(10) All costs in excess of state ((~~support level factors~~)) allocations established by the superintendent of public instruction for state ((~~participation~~)) funding assistance in financing school construction; and/or

(11) All costs associated with the purchase, installation, and relocation of portable classrooms.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-343-125 Unforeseen costs. The superintendent of public instruction shall not provide additional state funding assistance for unforeseen circumstances related to the construction project after the filing of construction contract(s) with the superintendent of public instruction except those required by change to the state building code as set forth in chapter 19.27 RCW.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-343-405 Instructional space inventory of school facilities—Eligibility. For purposes of determining district eligibility for state ((~~financial~~)) funding assistance for the new construction of school facilities, except for the new construction of school facilities for which an acceptable Form D-3 project request was on file with the superintendent of public instruction and local ((~~matching~~)) funds were secured prior to March 31, 1989, the superintendent of public instruction shall establish and maintain an instructional space inventory of all school facilities within the state of Washington. Such listing shall consist of the following:

(1) Facility name;

(2) Location (address);

(3) Gross square footage;

(4) Gross square footage of available instructional space (if different than subsection (3) of this section);

(5) Date of construction, additions, and/or modernizations; and

(6) Grade spans served in the facility.

School facilities that are surplus and under lease per the provision of RCW 28A.335.040 are considered to be available for instructional activities and shall be included in the instructional space inventory.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-343-425 Removal from instructional space inventory—Replacement. A school facility shall be removed from the superintendent of public instruction's instructional space inventory after it has been replaced with a school facility accepted by the school district board of directors on a square footage basis through one of the following actions:

(1) The replacement school facility is wholly financed with local ((~~district~~)) funds; or

(2) The replacement school facility is constructed with state funding assistance authorized under the authority of chapter 392-347 WAC.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-343-500 State funding assistance—Priorities after June 30, 1992. The priority system for the funding of school construction projects after June 30, 1992, shall be as follows: For all new construction and modernization projects for school districts, there will be a unique priority score determined by the elements and formulas contained in WAC 392-343-505 through 392-343-520. The total score shall be used to rank all projects that have secured local funding and state board of education approval after January 26, 1991, or the superintendent of public instruction approval after June 6, 2006, and are otherwise eligible for state funding assistance. The elements are divided into three groups:

(1) Common elements;

(2) New construction for growth elements; and

(3) Modernization or new-in-lieu of modernization elements.

In the case of a combined project (i.e., new construction for growth and modernization), the respective scores in each group will be prorated on the basis of each group's related gross square footage in the total project.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-343-505 State funding assistance—Common priority elements. The four priority elements that are common to all projects are as follows:

(1) Type of space - Ten possible points. In this element the net assignable square feet (NASF) of a project are identified by planned space inventory category. Category One is space used for scheduled instruction and libraries (classrooms, laboratories, PE teaching space, libraries, and learning resource centers). Category Two is space used in support of instruction (assembly, student services, office space, and classroom/lab service and support). Category Three space is cafeteria/food service, spectator seating, covered play areas, and general support space. The formula for determining points prorates the NASF with weightings of ten for Category One, seven for Category Two, and four for Category Three as shown below.

NASF of Category One	X	10 points = X
NASF of Category Two	X	7 points = X
NASF of Category Three	X	4 points = X

Then: The sum of X divided by the sum of NASF equals points.

(2) Local priority - Five points. For this element, five maximum points are awarded to the district's first priority project. Each priority from there has one point deducted from it, to a minimum of zero points awarded.

(3) Joint funding - Five possible points. A binding agreement between the school district and another governmental entity for the joint financing of new construction or modernization of space which is not otherwise eligible for state funding assistance.

Total Project Cost	Required Joint Funding
Up to $1,000,000	25% of total project cost
Between $1,000,000 and $2,000,000	$275,000
Between $2,000,000 and $3,000,000	$300,000
Between $3,000,000 and $4,000,000	$325,000
Between $4,000,000 and $5,000,000	$350,000
Between $5,000,000 and $6,000,000	$375,000
Between $6,000,000 and $7,000,000	$400,000
Between $7,000,000 and $8,000,000	$425,000
Between $8,000,000 and $9,000,000	$450,000
Between $9,000,000 and $10,000,000	$475,000
$10,000,000 and over	$500,000

(4) Modified calendar or schedule - Five possible points. For this element, up to five points utilizing the table below will be awarded to a project in a district which has adopted a modified school calendar or schedule that enables more students to use school buildings each year over what current state capacity standards at WAC 392-343-035 recognize for state funding assistance purposes. The modified calendar or schedule shall utilize either extended school day or additional days for instruction in the year. The enrollment percentage shall be calculated on the same grade span groupings as for eligibility in WAC 392-343-050. For the purpose of this subsection, the enrollment shall include all students enrolled at the facility as opposed to only those students in attendance.

Enrollment Percentage Increase Over Capacity	Priority Points
20 to above	5
16 to 19.9	4
12 to 15.9	3
8 to 11.9	2

Enrollment Percentage Increase Over Capacity	Priority Points
4 to 7.9	1
Below 4	0

The scores for this group of elements will be determined after district compliance with the requirements of WAC 392-344-107.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-343-510 State funding assistance—New construction for growth priority factors. The three factors that are related to new construction for growth are as follows:

(1) Projected percent unhoused - Fifty-five possible points. The district percent unhoused five years in the future is based on the projection of enrollment per WAC 392-343-045 for two grade categories, including preschool special education, compared to the formula capacity of existing space based on WAC 392-343-035 as computed per WAC 392-343-050.

If the projected district percent unhoused for the applicable grade category is equal to or greater than forty percent, full points are awarded. If the projected district percent unhoused is less than five percent but greater than zero percent, then a minimum of fifteen points are awarded. If the projected percent unhoused is between five percent and forty percent, then the forty remaining points (55-15) are proportionately awarded.

(2) Mid-range projection - Five possible points. This factor is to recognize the degree of immediacy of a district's capacity problem. The district's point score in subsection (1) of this section is first multiplied by .091 to reflect the relationship between the fifty-five possible points in subsection (1) of this section and the five points in this subsection. This produces the maximum points a project can be awarded in this factor. The actual points are determined by the relationship between the district's unhoused percentage three years in the future divided by the unhoused percentage five years in the future. For example, if a district received 43.57 points in subsection (1) of this section due to a projected thirty percent unhoused condition and its three-year projection is that it will be twenty-four percent unhoused, it will receive 3.17 points (i.e., ((42.57 x .091) x (24 percent/30 percent)) = 3.17).

(3) Number of years unhoused - Five possible points. This factor is to recognize the duration of an unhoused problem. One point is awarded for each year the district has had an unhoused condition in the applicable grade category during the past five years, up to the five points maximum.

The scores shall be determined at the time of project approval per WAC 392-341-045. These scores shall be carried for a period of twenty-four months, at which time new scores shall be determined utilizing the then most current enrollment projections and facts. A district may request a redetermination of scores at any time.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-343-515 Modernization or new-in-lieu of modernization priority elements. The three priority elements that are related to modernization or new-in-lieu projects are as follows:

(1) Health & safety - Twenty possible points. A maximum of sixteen points are awarded based on the evaluation contained in the Building Condition Evaluation Form (BCEF) (WAC 392-343-535) and are awarded as follows:

15 - 19 percent = 16 points, 20 - 24 percent = 15 points, 25 - 29 percent = 14 points, etc., until 95 percent at which no points are awarded.

The health and safety condition points are combined with an additional:

Two points if school does not meet seismic code requirements.
Two points if school is not asbestos free.

(2) Condition of building - Thirty possible points. The score is based on the Building Condition Evaluation Form (WAC 392-343-535) analysis for all categories other than access for persons with developmental disabilities. If the building condition score is thirty-one or less, then the maximum thirty points are awarded to the project. If the condition score is ninety-one or more, then no points are awarded. If the condition score is from thirty-two to ninety, the condition score is subtracted from ninety-one and multiplied by fifty percent to determine the points. In cases where projects affect multiple buildings, the BCEF score is weighted by the proportion of gross square feet (GSF) affected.

(3) Cost/benefit factor - Ten minus points possible. If the proposed project is a modernization and the BCEF score is less than forty, one point is deducted for each point the BCEF score is less than forty up to a total possible deduction of ten points.

If the proposed project is a new-in-lieu of modernization and the BCEF score is greater than sixty, one point is deducted for each point the BCEF score is higher than sixty to a total possible deduction of ten points.

The scores shall be determined at the time of project approval per WAC 392-341-045. These scores shall be carried until the district requests a redetermination.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-343-525 State funding assistance—Priorities for co-ops. For cooperative projects approved by the superintendent of public instruction under the authority of chapters 392-345 and 392-346 WAC, the following priority scores shall be assigned with similar projects ranked in order of date of approval with the earliest date ranked highest:

Type of Interdistrict Cooperative Facility	Priority Score
Vocational Skill Centers	25
Transportation Centers	10

Type of Interdistrict Cooperative Facility	Priority Score
Other Cooperative Facilities	20

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-343-535 Existing building condition—Evaluation. Building condition and health and safety evaluations for purposes of determining priority scores and completing building inventories shall be conducted and reported to the superintendent of public instruction, utilizing an evaluation model and reporting forms for building type, history, equipage, condition, health and safety factors, and portables on site that shall be adopted and subject to revision from time to time by the superintendent of public instruction. The information provided by the district on these forms shall be subject to review by the staff or agents of the superintendent of public instruction, or to audit by the state auditor. Compliance with this requirement for all schools in a district is a requirement for the receipt of any state construction funding assistance for projects approved after January 26, 1991.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-343-615 Emergency repair grant applications—Repayment conditions. Grants of emergency repair moneys shall be conditioned upon the written commitment and plan of the school district board of directors to repay the grant by waiving the school district's current or future eligibility for state ((~~building~~)) funding assistance under chapters 392-341 through 392-347 WAC, or with insurance payments, or with any judgment(s) that have been awarded, or with other means and sources of repayment. Any such written commitment and plan for repayment may subsequently be modified by mutual agreement between the school district board of directors and the superintendent of public instruction.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-344-005 Authority. This chapter is adopted pursuant to RCW 28A.525.020 relating to authority of the superintendent of public instruction to prescribe rules and regulations governing the administration, control, terms, conditions, and disbursements of allotments to school districts to assist them in providing school facilities. In accordance with RCW 28A.525.200, the only provision of chapter 28A.525 RCW currently applicable to state funding assistance for school plant facilities are RCW 28A.525.030, 28A.525.040, 28A.525.050, and 28A.525.162 through 28A.525.178.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-344-010 Purpose. The purpose of this chapter is to set forth the procedures governing all applications for state funding assistance, allocations of state funds, and disbursements by school districts and the superintendent of public instruction for school facility projects approved for state funding assistance by the superintendent of public instruction. The superintendent of public instruction shall prescribe and furnish forms for the purposes set forth in this chapter.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-344-025 Superintendent of public instruction review. Upon completion of the study and survey by the superintendent of public instruction and review by district board of directors, the study and survey and an application for state funding assistance from the district for the project(s) to be considered shall be reviewed by the superintendent of public instruction. Superintendent of public instruction approval of a proposed project(s) shall establish the maximum ((~~matchable~~)) eligible area and estimated amount of state ((~~financial~~)) funding assistance based upon the information furnished in the study and survey.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-344-055 Architect-engineer contracts. Architects and engineers employed on approved school facility projects involving state school ((~~building moneys~~)) funding assistance shall be licensed to practice in the state of Washington. Contract(s) between the school district and the architects and engineers shall stipulate the maximum amount of the fee and the duties, i.e., scope of work, to be performed as required in chapter 392-343 WAC.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-344-075 Contracts—Filing. The school district shall submit to the superintendent of public instruction one copy of the following contracts for projects approved by the superintendent of public instruction for state funding assistance:

(1) Educational specifications (WAC 392-344-050);
(2) Architect-engineer (WAC 392-344-055);
(3) Energy conservation report (WAC 392-344-060);
(4) Value engineering (WAC 392-344-065);
(5) Constructability review (WAC 392-344-066);
(6) Building commissioning (WAC 392-344-067);
(7) Construction management (WAC 392-344-068).

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-344-080 Construction documents—Bids and contract provisions. The construction documents shall include the following bid and contract provisions:

(1) Separate or combined bids. The school district shall determine if the bids for general, mechanical, or electrical are to be separate or combined.

(2) Combination projects. For those projects which include a combination of both new construction and modernization, bid documents shall provide for separate and distinct

bids for each and shall, when combined, be the low bid for the project.

(3) Ineligible items. Items ineligible for state ((~~matching~~)) funding assistance shall be bid separate or as an alternate.

(4) Bid law. All items included in the construction documents shall be bid in accordance with RCW 28A.335.190 and 43.19.1906.

(5) Commercial all-risk property insurance. Provision for commercial all-risk property insurance is mandatory for all school facilities under construction. The insurance shall cover at a minimum the amount of the work in place and materials to be used in the project which is in place and on the site. A certificate of insurance shall be submitted to the superintendent of public instruction that insurance is provided for by the contractor or the school district. Only costs for insurance provided for in the construction documents will be ((~~matched~~)) eligible for state funding assistance.

AMENDATORY SECTION (Amending WSR 08-20-008, filed 9/18/08, effective 10/19/08)

WAC 392-344-085 Construction and other documents—Submittal. (1) For the purpose of determining that the provisions set forth in chapters 392-341 through 392-344 WAC have been complied with prior to the opening of bids of any project to be financed with state ((~~moneys~~)) funding assistance, the school district shall have on file with the superintendent of public instruction the following:

(a) One copy of the construction documents forwarded by others;

(b) Cost estimate of construction on a form approved by the superintendent of public instruction, completed and signed by the architect-engineer;

(c) Signed copy or photocopy of letters of approval by other governmental agencies in accordance with WAC 392-344-090;

(d) Area analysis on a form approved by the superintendent of public instruction in accordance with chapter 392-343 WAC;

(e) Complete listing of construction special inspections and/or testing to be performed by independent sources that are included in the project pursuant to WAC 392-343-100;

(f) School district board acceptance of a value engineering report and its implementation.

The report shall include the following:

(i) A brief description of the original design;

(ii) A brief description of the value engineering methodology used;

(iii) The areas analyzed;

(iv) The design alternatives proposed;

(v) The cost changes proposed;

(vi) The alternates accepted; and

(vii) A brief statement explaining why each alternate not accepted was rejected;

(g) Certification by the school district that a constructability review report was completed.

The report shall include:

(i) A brief description of the constructability review methodology used;

(ii) The area analyzed;

(iii) The recommendations accepted; and

(iv) A brief statement explaining why each recommendation not accepted was rejected;

(h) Completed Building Condition Evaluation Forms (BCEF) as required by WAC 392-343-535 for every school facility in the district.

(2) If the above documents reflect an increase in square foot size from the application approved by the superintendent of public instruction as per WAC 392-344-025 which will result in an increase in state ((~~support~~)) funding assistance, a new application must be submitted to the superintendent of public instruction.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-344-107 Bid opening—Superintendent of public instruction approval. (1) A school district shall not open bids until receiving written approval of the superintendent of public instruction. Such approval shall not be granted if more than one year has passed since the project received preliminary funding status pursuant to WAC 392-342-050.

(2) The superintendent of public instruction shall grant approval if moneys are available for state funding assistance and the required documents pursuant to WAC 392-344-075, 392-344-080, 392-344-085, 392-344-090, 392-344-095, and 392-344-100 are complete.

(3) If the superintendent of public instruction determines that the required documents are incomplete, the superintendent of public instruction shall hold the project and notify the school district in writing as to the incomplete items.

(4) If moneys are not available for state funding assistance in construction, the school district shall notify the superintendent of public instruction that they are proceeding with their own moneys with the expectation that they will be reimbursed as per WAC 392-343-057.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-344-1075 Superintendent of public instruction commitment when district is authorized to open bids. When a district is granted approval to open bids pursuant to WAC 392-344-107, the superintendent of public instruction is committed as provided at WAC 392-344-107 as well as to all other state ((~~building~~)) funding assistance determinations including but not limited to additional state funding assistance and professional fees determined pursuant to state ((~~building~~)) funding assistance rules and regulations in effect at the time such approval to open bids is granted. This commitment is subject to the district's compliance with the time limitation for requesting an authorization for contract award as set forth in WAC 392-344-108.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-344-108 Condition precedent to approval to bid. Any project for which the superintendent of public instruction authorizes a district to open bids pursuant to

WAC 392-344-107 shall request an authorization for contract award pursuant to WAC 392-344-110 within ninety calendar days of receipt of approval pursuant to WAC 392-344-107: Provided, That the ninety-day period shall be automatically extended for an additional ninety calendar days if:

(1) The lowest legally acceptable base bid, exclusive of alternates, received by a district exceeds the cost estimate submitted to the superintendent of public instruction pursuant to WAC 392-344-085 by ten percent or more; and

(2) Prior to the expiration on or after June 15, 1989, of the initial ninety-day period the district has rejected, or hereafter rejects, all bids in order to solicit new bids.

A district which fails to request an authorization for contract award pursuant to WAC 392-344-110 within the time period allowed by this section shall have its authority to proceed withdrawn. Districts with such projects withdrawn may reinitiate an application for state funding assistance by first reapplying for project approval pursuant to WAC 392-341-040.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-344-115 Authorization for contract award. (1) Upon receipt of the items as per WAC 392-344-110, the superintendent of public instruction shall:

(a) Analyze the bids;

(b) Determine the amount of state ((~~moneys allocable~~)) funding assistance; and

(c) Make an allocation of state ((~~moneys~~)) funding assistance for construction and other items as per chapter 392-343 WAC.

(2) Authorization for contract award and allocation of state ((~~moneys~~)) funding assistance shall be contingent upon the following:

(a) The contract price for the construction has been established by competitive bid(s); and

(b) The school district has available sufficient local funds pursuant to chapter 392-341 WAC.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-344-125 Award of contract(s). Upon receipt of authorization to award contract(s) from the superintendent of public instruction, the board of directors of the school district shall award contract(s) for construction of the school facility project no later than the expiration of the time period permitted by the terms and conditions of the bid(s) for the award of contract(s). Immediately following the awarding of contract(s), the board of directors of the school district shall forward to the superintendent of public instruction one copy of each properly executed contract, one copy of the contractor's cost breakdown, and one copy of the contract(s) payment schedule. Such cost breakdown and payment schedule shall be displayed on a form issued and approved by the superintendent of public instruction in accordance with WAC 392-344-085 (1)(b). All state funding assistance-related approvals granted by the superintendent of public instruction under this chapter shall lapse and be null and void if a school district fails to award contract(s) within the time period permitted by the terms and conditions of the bid(s), unless noncompliance is waived for extraordinary reasons by the superintendent of public instruction.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-344-130 Disbursement of moneys—Sequence of payments. The order in which funds shall be disbursed for school facility construction shall be as follows:

(1) Prior to payment ((~~from~~)) of state ((~~moneys~~)) funding assistance, the school district shall make payments on all claims submitted until such time as the total amount of ((~~school district moneys~~)) local funds obligated by the district have been expended.

(2) When local ((~~moneys~~)) funds have been expended as in subsection (1) of this section, payments ((~~from~~)) of state ((~~moneys~~)) funding assistance shall then be made: Provided, That for projects authorized for state funding assistance pursuant to WAC 392-344-115(2) after June 30, 1993, payment shall be made after receipt of written certification by the school district board of directors that the school facility project authorized for state ((~~matching funds~~)) funding assistance has been or will be completed according to the purposes for which the state ((~~matching funds are~~)) funding assistance is being provided.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-344-140 Disbursements of moneys by school district(s)—Superintendent of public instruction filing. At such time as the total amount of ((~~school district moneys~~)) local funds obligated by the school district have been expended, a signed statement by an authorized agent of the board of directors comprising a listing of all payments to contractors and others, including retainage, shall be submitted to the superintendent of public instruction.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-344-145 Disbursement of moneys by superintendent of public instruction. All school district claims for payment from state ((~~moneys~~)) funding assistance shall be submitted to the superintendent of public instruction on invoice vouchers provided by the superintendent of public instruction and shall be signed by the authorized agent of the school district. State warrants issued in payments, unless the school district agent designates a specific payee, shall be drawn payable to the school district. In all cases, warrants shall be transmitted to the school district for disposition.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-344-147 Retained percentage law related requirements. (1) State ((~~school building~~)) funding assistance is conditioned upon a school district's compliance with the cash, or bond in lieu of cash, retained percentage requirements of chapter 60.28 RCW and this section. A school dis-

trict may elect to administer compliance with all requirements of chapter 60.28 RCW or, in part, designate the superintendent of public instruction as agent of the school district for purposes of administering retained percentage moneys reserved under RCW 60.28.011.

(2) Under RCW 60.28.011, a school district either:

(a) Must provide for the reservation of five percent of all moneys earned by a contractor either by the district, deposited by the district in an interest-bearing account or placed in escrow as provided in RCW 60.28.011(4); or

(b) Must accept a bond submitted by the contractor from any portion of the retainage in a form acceptable to the superintendent of public instruction and the school district and from a bonding company which meets the standards established at subsection (4)(b) of this section and by the school district, unless the school district can demonstrate good cause for refusing to accept the bond.

As a general rule, the superintendent of public instruction prefers and recommends the cash retainage option for reasons which include the security and ease of enforcement which the cash option affords.

(3) Cash retainage.

(a) If the school district reserves five percent of all moneys earned by the contractor in a retainage trust fund administered by the school district in accordance with RCW 60.28.011(1), moneys deposited in that trust fund (whether retained by the district, deposited by the district in an interest-bearing account, or placed in escrow), may be paid to the contractor without prior written consent by the superintendent of public instruction. The superintendent of public instruction shall make available to the school district model procedures and forms for setting up the trust fund selected by the contractor under RCW 60.28.011(4).

(b) At the request of the school district, the superintendent of public instruction may be designated as agent of the school district for cash retainage and will:

(i) Administer the retained percentage trust fund in accordance with RCW 60.28.011, inclusive of depositing, releasing and accounting for such moneys;

(ii) Establish and administer the retained percentage trust fund in accordance with the terms of chapter 60.28 RCW, and such terms as may be established by the superintendent of public instruction to ensure compliance with chapter 60.28 RCW, the security of trust fund moneys and efficient administration; and

(iii) Ensure that no moneys lawfully deposited in the retained percentage trust fund shall be paid to the contractor without the prior written consent of the superintendent of public instruction, except for the payment of interest earnings as may be required by law.

(4) If at the request of the contractor the bond in lieu of cash retained percentage option is implemented the following conditions apply:

(a) The bond shall be in terms and of a form approved and established by the superintendent of public instruction to ensure that the bond adequately addresses the purposes of chapter 60.28 RCW; and

(b) The bond shall be signed by a surety that is:

(i) Registered with the Washington state insurance commissioner; and

(ii) On the currently authorized insurance list published by the Washington state insurance commissioner.

(c) Whatever additional requirements for the bonding company as may be established by the school district.

(5) The release of retainage, whether cash or bond-in-lieu, shall be conditioned upon satisfactory compliance with the provisions of WAC 392-344-165.

AMENDATORY SECTION (Amending WSR 06-16-032, filed 7/25/06, effective 8/25/06)

WAC 392-344-150 Changes in contract cost. The final contract cost shall be determined after inclusion of the net change due to additive and/or deductive change orders. If the final contract cost results in an increase above the original bid amount, the school district shall finance the entire increase. If the final contract cost results in a decrease from the original bid amount, the school district and the state shall share the amount of the decrease based on the ((~~matching ratio~~)) state funding assistance percentage in effect at the time of contract award. Copies of all change orders when executed and signed by the school district's authorized agent and the project architect/engineer shall be forwarded to the superintendent of public instruction.

Chapter 392-345 WAC

STATE FUNDING ASSISTANCE IN PROVIDING SCHOOL PLANT FACILITIES—INTERDISTRICT COOPERATION IN FINANCING SCHOOL PLANT CONSTRUCTION

AMENDATORY SECTION (Amending WSR 06-16-031, filed 7/25/06, effective 8/25/06)

WAC 392-345-005 Authority. This chapter is adopted pursuant to RCW 28A.525.020 relating to authority of the superintendent of public instruction to prescribe rules and regulations governing the administration, control, terms, conditions and disbursements of allotments to school facilities. In accordance with RCW 28A.525.200, the only provisions of chapter 28A.525 RCW currently applicable to state funding assistance for school plant facilities are RCW 28A.525.030, 28A.525.040, 28A.525.050, and 28A.525.162 through 28A.525.178.

AMENDATORY SECTION (Amending WSR 06-16-031, filed 7/25/06, effective 8/25/06)

WAC 392-345-020 Cooperative plan subject to the superintendent of public instruction approval. Any interdistrict financial plan for construction or modernization of school facilities utilizing state ((~~moneys~~)) funding assistance in the financing of the proposed project, shall require approval by the superintendent of public instruction prior to carrying into effect the provisions of such plan. The superintendent of public instruction approval is only required for projects utilizing state ((~~moneys~~)) funding assistance.

AMENDATORY SECTION (Amending WSR 06-16-031, filed 7/25/06, effective 8/25/06)

WAC 392-345-025 Application provisions. For projects utilizing state ((~~moneys~~)) funding assistance, the host district shall submit a written application to the superintendent of public instruction which shall include but not be limited to the following documents and data:

(1) A joint resolution by the board of directors of all participating school districts which shall:

(a) Confer contractual authority and subsequent ownership on the board of directors in which jurisdiction the school facility is to be located (host district) or, in the event of modernization, the board of directors in which jurisdiction the facility is located (host district);

(b) Designate such board of directors of the host district as the legal applicant. Evidence shall be submitted that the said resolution has been incorporated in the official record of the board of directors of each participating school district; and

(c) Certify that the facility shall be used for the purpose for which it was constructed unless an exception is granted by the superintendent of public instruction.

(2) Copy of contracts(s) between applicant district and participating school districts prepared in accordance with provisions in WAC 392-345-030.

(3) A statement defining the education program or services to be offered and the number and grade level(s) by district of all students to be housed in the proposed new or modernized facility.

(4) A description of the proposed project including size in terms of square feet and the estimated cost of construction including professional services, sales tax, site acquisition and site development.

(5) An area map indicating location of schools within the participating school districts and the location of the proposed new or modernized school facility.

(6) A statement certifying that a separate account has been established into which participating districts make deposits in order to pay for all future minor repair and renovation costs.

AMENDATORY SECTION (Amending WSR 06-16-031, filed 7/25/06, effective 8/25/06)

WAC 392-345-035 Approval of program or services by superintendent of public instruction. Approval by the superintendent of public instruction of the educational program or services to be offered in the proposed new or modernized facility and the proposed administration of such program or services shall be a prerequisite for approval by the superintendent of public instruction of an interdistrict cooperative financial plan for construction of new or modernization of facilities when state ((~~moneys are~~)) funding assistance is provided.

AMENDATORY SECTION (Amending WSR 06-16-031, filed 7/25/06, effective 8/25/06)

WAC 392-345-040 Dissolution provisions. (1) Procedures for the dissolution of the operation of school facilities pursuant to an interdistrict cooperative agreement shall not be instituted prior to the expiration of ten years after the date of the superintendent of public instruction approval of the financial plan for the construction of such school facilities when such facilities were constructed with state ((~~moneys~~)) funding assistance: Provided, That a request for dissolution prior to such ten-year period may be approved when, in the judgment of the superintendent of public instruction, there is substantiation of sufficient cause therefor.

(2) Any plan for dissolution as described in subsection (1) of this section shall be submitted to the superintendent of public instruction for review and approval prior to proceeding with dissolution action.

AMENDATORY SECTION (Amending WSR 06-16-031, filed 7/25/06, effective 8/25/06)

WAC 392-345-045 Interdistrict cooperation in financing school construction—Project construction approval required—Rules and regulations governing. A project to be constructed under interdistrict cooperative financing pursuant to provisions of RCW 28A.335.160 shall be subject to approval by the superintendent of public instruction only when state ((~~funds are~~)) funding assistance is involved in the financing thereof and shall be in conformity with the applicable rules and regulations hereinafter prescribed. The applicant school district shall be responsible for compliance with said rules and regulations.

(1) Projects financed with state funding assistance.

(a) All rules and regulations promulgated by the superintendent of public instruction relating to school building construction shall govern the approval of an application for state funding assistance in financing an interdistrict cooperative project except such rules deemed by the superintendent of public instruction to be inapplicable to the said construction: Provided, That in the interest of program improvement and/or improvement in equalization of educational opportunities, the pertinent requirements relating to eligibility on the basis of number of unhoused children may be waived as shall be determined by the superintendent of public instruction.

(b) In determining the amount of state funding assistance, the principle to be applied shall be that each participating district, otherwise eligible for state funding assistance, shall receive such assistance on the basis of the computed area ratio. The amount that each participating district shall provide may be the percentage proportion that the value of its taxable property bears to the total value of taxable property of all participating districts or such other amounts as set forth in the contract submitted as are accepted and approved by the superintendent of public instruction.

(2) Application for additional state funding assistance. In the financing of interdistrict cooperative projects, applications for state funding assistance, in addition to the amount determined allocable under basic state support level provisions, shall be judged by the superintendent of public instruction on the basis of the need for said facilities for the expressed purpose of:

(a) Providing educational opportunities, including vocational skills programs not otherwise provided;

(b) Avoiding unnecessary duplication of specialized or unusually expensive educational programs or facilities; or

(c) Improving racial balance within and among participating districts.

(3) Determination of amount of additional state funding assistance. When in the judgment of the superintendent of public instruction an expressed need exists for an interdistrict cooperative project to achieve one or more of the expressed purposes as set forth in subsection (2) of this section and additional state funding assistance in financing said joint construction is necessary to meet such need, additional state funding assistance may be allowed in an amount to be determined by the superintendent of public instruction: Provided, That the total amount allotted shall not exceed ninety percent of the total project cost determined eligible for state ((~~matching~~)) funding assistance purposes: Provided further, That the total funds available to the superintendent of public instruction for the biennial period are sufficient to meet statewide needs for state funding assistance in providing necessary school facilities to individual school districts as well as for this purpose.

Chapter 392-346 WAC

STATE FUNDING ASSISTANCE IN PROVIDING SCHOOL PLANT FACILITIES—INTERDISTRICT TRANSPORTATION COOPERATIVES

AMENDATORY SECTION (Amending WSR 06-16-031, filed 7/25/06, effective 8/25/06)

WAC 392-346-005 Authority. This chapter is adopted pursuant to RCW 28A.525.020 which authorizes the superintendent of public instruction to prescribe rules and regulations governing the administration, control, terms, conditions, and disbursements of moneys to school districts to assist them in providing school facilities. In accordance with RCW 28A.525.200, the only provisions of chapter 28A.525 RCW currently applicable to state funding assistance for school facilities are RCW 28A.525.030, 28A.525.040, 28A.525.050, and 28A.525.162 through 28A.525.178.

AMENDATORY SECTION (Amending WSR 06-16-031, filed 7/25/06, effective 8/25/06)

WAC 392-346-010 Purpose. The purpose of this chapter is to set forth provisions applicable prior to a district's application for state funding assistance in the construction of interdistrict transportation cooperative facilities. Except as otherwise noted in this chapter, the rules and regulations which apply to state funding assistance in financing school facilities set forth below shall apply to the construction of interdistrict transportation cooperatives:

(1) ((~~Basic~~)) State ((~~support~~)) funding assistance: WAC 392-343-040, 392-343-060, and 392-343-070 through 392-343-125.

(2) Procedural regulations: WAC 392-344-055 through 392-344-170.

AMENDATORY SECTION (Amending WSR 06-16-031, filed 7/25/06, effective 8/25/06)

WAC 392-346-015 Interdistrict transportation cooperative members—Definition. As used in this chapter:

(1) "Participating member" means a district in a cooperative which anticipates making full use of all the services offered by the cooperative and provides its agreed share of ((~~matching~~)) local funds required by the superintendent of public instruction. A participating member must be a member of the cooperative for at least ten years.

(2) "Contract member" means a district which contracts to use the services of the cooperative as outlined in the initial agreement for at least three years. At a minimum, contracts for service shall include lubrication, oil and filter changes on a regular basis.

(3) "Applicant district" means the school district in which the proposed interdistrict transportation cooperative facility is to be located or in which the facility proposed for modernization is located. It shall be the responsibility of said applicant district to submit the application for financial plan approval.

AMENDATORY SECTION (Amending WSR 06-16-031, filed 7/25/06, effective 8/25/06)

WAC 392-346-020 Interdistrict transportation cooperative—Cooperative plan subject to the superintendent of public instruction approval. Any financial plan for construction of an interdistrict transportation cooperative utilizing state ((~~moneys~~)) funding assistance in the financing of the proposed project, shall require approval by the superintendent of public instruction prior to implementing the provisions of such plan. The superintendent of public instruction approval is only required for projects utilizing state ((~~moneys~~)) funding assistance.

AMENDATORY SECTION (Amending WSR 06-16-031, filed 7/25/06, effective 8/25/06)

WAC 392-346-025 Application provisions. For projects utilizing state ((~~moneys~~)) funding assistance, the host school district shall submit a written application to the superintendent of public instruction which shall include but not be limited to the following documents and data:

(1) A joint resolution by the board of directors of all participating school districts which shall:

(a) Confer contractual authority and subsequent ownership on the board of directors in which jurisdiction the facility is to be located or, in the event of modernization, in which jurisdiction the facility is located (host district);

(b) Designate such board of directors as the legal applicant; and

(c) A copy of the official record of the board of directors of each participating school district indicating that the resolution has been formally adopted.

(2) Copy of contract(s) between districts prepared in accordance with chapter 392-345 WAC.

(3) A written description of services to be offered in the proposed interdistrict transportation cooperative, including number of districts involved and whether or not cooperating

members are participating districts or contract districts; the number of buses from each participating and contract district to be serviced, and number of bus miles traveled per year for each participating and contract district.

(4) A description of the proposed project including square footage and the estimated cost of construction including professional services, sales tax, site costs, and site development.

(5) An area map indicating location of the facility in relationship to the participating and contract school districts.

(6) A statement certifying that a separate account has been established into which participating districts make deposits in order to pay for all future minor repair and renovation costs.

AMENDATORY SECTION (Amending WSR 06-16-031, filed 7/25/06, effective 8/25/06)

WAC 392-346-035 Approval—The superintendent of public instruction. Approval by the superintendent of public instruction of services to be offered in the proposed interdistrict transportation cooperative and the proposed district administration of such program or services shall be a prerequisite for approval by the superintendent of public instruction of an interdistrict cooperative financial plan for construction of new facilities or modernization of existing facilities when state ((~~moneys are~~)) funding assistance is provided.

AMENDATORY SECTION (Amending WSR 06-16-031, filed 7/25/06, effective 8/25/06)

WAC 392-346-040 Dissolution provisions. (1) Procedures for the dissolution of the operation of interdistrict cooperatives under an interdistrict cooperative agreement shall not be instituted prior to the expiration of ten years after the date of the superintendent of public instruction approval of the financial plan for the construction of such school facilities when such facilities were constructed with state ((~~moneys~~)) funding assistance: Provided, That a request for dissolution prior to the expiration of ten years may be approved when in the judgment of the superintendent of public instruction there is substantiation of sufficient cause therefor.

(2) Any plan for dissolution as described in subsection (1) of this section shall be submitted to the superintendent of public instruction for review and written approval prior to proceeding with dissolution action.

AMENDATORY SECTION (Amending WSR 06-16-031, filed 7/25/06, effective 8/25/06)

WAC 392-346-045 Interdistrict transportation cooperative—Types. Except as otherwise noted, the amount of the final allocation of state ((~~funds~~)) funding assistance in the construction of an approved interdistrict transportation cooperative facility shall be based on the number of buses in actual service and the number of buses for which the cooperative has contracted from other districts at the time of application and in accordance with the following cooperative types and square footage allowances:

Type	Number of Buses	Square Footage Minimum	Square Footage Maximum
One	96 or more	21,000	Negotiable
Two	46-95	15,000	20,999
Three	0-45	10,000	14,999

AMENDATORY SECTION (Amending WSR 06-16-031, filed 7/25/06, effective 8/25/06)

WAC 392-346-050 Site review and evaluation. The superintendent of public instruction together with the proposing district(s) shall conduct an on-site review and evaluation of sites for new and existing state ((~~assisted~~)) funding assistance projects. In selecting sites, the district(s) should assure that:

(1) The property upon which the facility is or will be located is free and clear of all encumbrances that would detrimentally interfere with the construction and operation or useful life of the facility.

(2) The site is of sufficient size to meet the needs of the facility.

(3) A geotechnical engineer has conducted a limited subsurface investigation to gather basic information regarding potential foundation and subgrade performance.

(4) The site accessibility is convenient and efficient for participating and contract school districts with the least amount of disturbance to the area in which it is located.

(5) The site topography is conducive to desired site development.

(6) A site review or predesign conference has been conducted with all local code agencies in order to determine design constraints.

AMENDATORY SECTION (Amending WSR 06-16-031, filed 7/25/06, effective 8/25/06)

WAC 392-346-060 Design team—Architect/engineering services. Architect/engineering service fees for ((~~matching~~)) state funding assistance purposes shall be determined pursuant to WAC 392-343-070.

AMENDATORY SECTION (Amending WSR 06-16-031, filed 7/25/06, effective 8/25/06)

WAC 392-346-065 Support level—Furniture and equipment allowances. An allowance for furniture and equipment purchases shall be added to the total construction costs of a project determined eligible for state ((~~matching~~)) funding assistance. The equipment allowance shall be determined by multiplying the approved square foot area of the project by the ((~~area~~)) construction cost ((~~allowance~~)) allocation of state support for the fiscal year funded and that product multiplied by seven percent.

AMENDATORY SECTION (Amending WSR 06-16-031, filed 7/25/06, effective 8/25/06)

WAC 392-346-070 Interdistrict transportation cooperatives—State funding assistance. In the financing of an approved interdistrict transportation cooperative, the superin-

tendent of public instruction shall provide ninety percent of the total approved project cost determined eligible for state ((~~matching purposes~~)) funding assistance.

Chapter 392-347 WAC

STATE FUNDING ASSISTANCE IN PROVIDING SCHOOL PLANT FACILITIES—MODERNIZATION

AMENDATORY SECTION (Amending WSR 06-16-031, filed 7/25/06, effective 8/25/06)

WAC 392-347-005 Authority. This chapter is adopted pursuant to RCW 28A.525.020 which authorizes the superintendent of public instruction to prescribe rules and regulations governing the administration, control, terms, conditions, and disbursements of moneys to school districts to assist them in providing school facilities. In accordance with RCW 28A.525.200, the only provisions of chapter 28A.525 RCW currently applicable to state funding assistance for school facilities are RCW 28A.525.030, 28A.525.040, and 28A.525.162 through 28A.525.178.

AMENDATORY SECTION (Amending WSR 06-16-031, filed 7/25/06, effective 8/25/06)

WAC 392-347-007 Purpose. The purpose of this chapter is to set forth provisions applicable to ((~~basic~~)) state ((~~support and~~)) funding assistance in the modernization of existing school facilities.

AMENDATORY SECTION (Amending WSR 06-16-031, filed 7/25/06, effective 8/25/06)

WAC 392-347-013 Annually determined building replacement value. The annually determined building replacement value for any building in any year is the state determined maximum ((~~area~~)) construction cost ((~~allowance~~)) allocation for July of that year times the gross square footage determined under WAC 392-343-040.

AMENDATORY SECTION (Amending WSR 06-16-031, filed 7/25/06, effective 8/25/06)

WAC 392-347-015 Eligibility for state ((~~financial~~)) funding assistance. (1) In order to be eligible for state ((~~financial~~)) funding assistance, a modernization project shall have as its principal purpose one or more of the following:

(a) Bringing a facility into compliance with current building and health codes when so required by state or local health or safety officials;

(b) Changing the grade span grouping by facility by the addition, deletion, or combination thereof of two or more grades within the affected facility;

(c) The reduction of the number of operating school facilities in a district by combining the remaining school facilities through modernization and new capital construction so as to achieve more cost effective and efficient operation in the combined school facility or facilities. In order to be eligible for state ((~~financial~~)) funding assistance, such a project shall result in additional space for at least 100 additional pupils and the following enrollment in any combined facility:

(i) Elementary school facility—500 pupils;

(ii) Middle or junior high school facility—700 pupils;

(iii) Senior high school facility—850 pupils:

Provided, That modernization projects in school districts with a high school enrollment of less than 850 pupils need not comply with the enrollment figures set forth above: Provided further, That unless the district demonstrates the existence of unhoused students, state ((~~financial~~)) funding assistance for the new construction component of a combined modernization and new construction project shall be limited to the provision of WAC 392-347-040; or

(d) Meeting the educational program of the facility.

(2) School districts shall certify that a proposed modernization project will extend the life of the modernized school facility by at least twenty years.

(3) School districts shall be ineligible for state funding assistance for modernization of any school facility accepted by the school district board of directors prior to January 1, 1993, where the principal purpose of that modernization project is to:

(a) Restore building systems and subsystems that have deteriorated due to deferred maintenance;

(b) Perform piecemeal work on one section or system of a school facility;

(c) Modernize a facility or any section thereof which has been constructed within the previous twenty years;

(d) Modernize a facility or any section thereof which has received state funding assistance under the authority of this chapter within the previous twenty years;

(e) To modernize a senior high school facility in a district with a senior high school where there is existing space available to serve the students involved or affected in a neighboring senior high school without, in the judgment of the superintendent of public instruction, an undue increase in the cost of transporting the students to and from school, decrease in educational opportunity, or proportional increase in the cost of instruction pursuant to chapter 392-341 WAC.

(4) School facilities accepted by the school district board of directors after January 1, 1993, shall be ineligible for state funding assistance for modernization of the facility or any section thereof where:

(a) The facility was constructed and occupied within the previous thirty years;

(b) The facility received state funding assistance under the authority of this chapter within the previous thirty years.

AMENDATORY SECTION (Amending WSR 06-16-031, filed 7/25/06, effective 8/25/06)

WAC 392-347-020 Formula for determining the amount of state funding assistance. State funding assistance in an approved modernization project shall be derived by applying the ((~~percentage of~~)) state funding assistance percentage determined pursuant to provisions of RCW 28A.525.166 and WAC 392-343-025 to the eligible cost which shall be calculated by multiplying the approved square foot area of the modernization project by the ((~~area~~)) construction cost ((~~allowance~~)) allocation for the fiscal year

funded, less any deductions as set forth in WAC 392-347-023 if applicable, by the factor in WAC 392-347-040 set forth, any cost in excess thereof shall be financed entirely by the school district.

AMENDATORY SECTION (Amending WSR 09-10-023, filed 4/28/09, effective 5/29/09)

WAC 392-347-023 State funding assistance in post 1993 facilities. As a condition precedent to receiving state funding assistance for modernization under WAC 392-347-015 or new-in-lieu of modernization under WAC 392-347-042, school districts that received state funding assistance for new and new-in-lieu school buildings and whose buildings were accepted as complete by school board of directors as of January 1, 1994, and later, shall adopt by board resolution and implement an asset preservation program (APP).

(1) Definitions: For purposes of this chapter:

(a) An asset preservation program is a systematic approach to ensure performance accountability; promote student health and safety by maintaining and operating building systems to their design capacity; maintain an encouraging learning environment; and extend building life, thus minimizing future capital needs.

(b) An asset preservation system is a system of tasks or projects that are active, reactive, or proactive in maintaining the day to day health, safety, and instructional quality of the school facility and tasks or projects that are proactive, predictive or preventative in maintaining the school facility over its thirty-year expected life cycle.

(c) A building condition evaluation is an evaluation of the condition of building components and systems using a standardized scoring matrix.

(d) A building condition standard is a numeric scoring table with a scale identifying the expected condition score for each year of the building's expected life cycle.

(2) The office of the superintendent of public instruction shall establish and adopt a uniform program of specifications, standards, and requirements for implementing and maintaining the asset preservation program.

(3) School districts with affected buildings under this chapter are required to:

(a) Adopt or implement an asset preservation system;

(b) Annually perform a building condition evaluation and report the condition of such building to the school district's board of directors no later than April 1st of each year;

(c) Thereafter in six year intervals during the thirty-year expected life span of the building, have a certified evaluator, as approved by the office of the superintendent of public instruction, perform a building condition evaluation and report the condition to the school district's board of directors and to the office of the superintendent of public instruction no later than April 1st.

(4) A school district building affected under this chapter and that does not meet the minimum building condition standard score of forty points at the end of the thirty years from the accepted date shall:

(a) Have its allowable cost per square foot used to determine the amount of state funding assistance in any modernization project reduced at a rate of two percent for each point below forty points, not to exceed a total twenty percent reduction; or

(b) Be ineligible for state funding assistance when the building condition score is less than thirty points.

(5) The following schedule shall apply to school districts with buildings affected under this chapter, and the requirements set forth shall replace the former requirements of this section:

(a) Buildings accepted by the school board in 1994 must begin an asset preservation program in 2009, and shall fully implement the program within no more than one and one-half years;

(b) Buildings accepted by the school board in 1995 must begin an asset preservation program in 2010, and shall fully implement the program within no more than one year;

(c) Buildings accepted by the school board in 1996 through 2010 must begin an asset preservation program in 2011, and shall fully implement the program within no more than six months;

(d) Buildings accepted by the school board after December 31, 2010, must implement an asset preservation program within six months of facility acceptance.

AMENDATORY SECTION (Amending WSR 06-16-031, filed 7/25/06, effective 8/25/06)

WAC 392-347-025 Space eligible for state ((~~financial~~)) funding assistance in modernization. Student space ((~~allowance~~)) allocations and enrollment projection provisions for state ((~~matching purposes~~)) funding assistance.

(1) In planning for modernization in any school facility, under the provisions of WAC 392-347-015 (1)(a) and (b), a school district shall estimate capacity needs on the basis of a cohort survival enrollment as per WAC 392-343-045. Any space above and beyond a school district's estimated capacity needs as calculated on the basis of a five-year cohort survival or adjusted cohort survival enrollment shall not be eligible for state ((~~financial~~)) funding assistance in modernization.

(2) The changes to this section shall take effect January 1, 2006: Provided, That those districts having authorized bond issues and/or excess tax levies for their building funds for specific school construction projects as identified in ballot propositions on or before July 1, 2006, may, when requesting the superintendent of public instruction consideration of state funding assistance for such projects, determine, in computing the amount of eligible space for modernization, ((~~the state will match~~)) state funding assistance will be provided on the entire facility of three quarters of the overall square footage of the school districts' facilities is eligible for state ((~~financial~~)) funding assistance: Provided further, That the provision shall not be applicable to new construction in lieu of modernization facility projects authorized by this chapter.

AMENDATORY SECTION (Amending WSR 06-16-031, filed 7/25/06, effective 8/25/06)

WAC 392-347-030 Certification of continued use. Any school facilities modernized under WAC 392-347-015 must be used for at least five years beyond the completion of modernization. School directors will pass a resolution and submit it to the superintendent of public instruction that the

modernized facility will be used for instructional purposes for five years after the completion of the project. If the school facility is not used for instructional purposes during this five-year period, the amount of state ((~~money~~)) funding assistance allocated and spent for the modernization project must be returned to the state school building construction fund. The five-year use requirement and the five year prohibition against additional modernization funding shall be waived in the event that a facility is rendered permanently unusable before the end of the five-year period by an unforeseen natural event. The definition of "unforeseen natural event" shall be as set forth in RCW 28A.150.290.

AMENDATORY SECTION (Amending WSR 06-16-031, filed 7/25/06, effective 8/25/06)

WAC 392-347-035 Minimum project—Forty percent of replacement costs. (1) State funding assistance in modernization of school facilities shall be limited to projects which may include an entire facility or one or more complete buildings within a facility for which the estimated cost of major structural change is not less than forty percent of the estimated cost of replacement. The estimated cost of major structural change shall not include the estimated capital costs associated with restoring building systems or subsystems due to deterioration as determined in the study and survey to be caused by deferred maintenance. The estimated cost of replacement shall be derived from multiplication of the total square foot area of the facility or facilities proposed for modernization by the ((~~area~~)) construction cost ((~~allowance~~)) allocation for the fiscal year funded as in WAC 392-343-045 set forth.

(2) The superintendent of public instruction may grant a waiver from subsection (1) of this section in the event of an unanticipated increase in the ((~~area~~)) construction cost ((~~allowance~~)) allocation that might cause prior approved projects expecting state funding assistance to become disqualified for such assistance.

AMENDATORY SECTION (Amending WSR 06-16-031, filed 7/25/06, effective 8/25/06)

WAC 392-347-040 Maximum costs eligible for state ((~~matching purposes~~)) funding assistance—One hundred percent of replacement cost. State funding assistance for modernization projects shall not exceed one hundred percent of the cost of new construction of a comparable school facility based on the prevailing level of state support as defined in chapter 392-343 WAC. Costs exceeding one hundred percent shall be paid with local funds by the ((~~local~~)) district.

AMENDATORY SECTION (Amending WSR 06-16-031, filed 7/25/06, effective 8/25/06)

WAC 392-347-042 Replacement option. A district with space eligible for modernization pursuant to WAC 392-347-015 and 392-347-025 may elect to replace such space through new construction in lieu of modernization. In such case, the district shall apply for a new school facility in accordance with applicable rules and regulations pertaining to new school plant facilities and the local board shall certify that after the new construction is finally completed:

(1) The existing building or space to be replaced will not be used for district instructional purposes; and

(2) The existing building or space will be ineligible for any future state ((~~financial~~)) funding assistance.

Further, if the existing building or space is subsequently returned by the district to instructional purposes in whole or in part, the district shall become ineligible for any state ((~~construction financial~~)) funding assistance for a period of ten years from the date that the superintendent of public instruction sends written notice to members of the local board recognizing the return of the building in whole or in part to instructional purposes. Districts exercising this election shall be limited in state funding assistance to the provision of WAC 392-347-040. In the event the district elects to replace a facility and construct a new facility with more space than the facility being replaced, the additional space, in order to be eligible for state funding assistance shall meet the eligibility requirements for new construction or the new construction component requirement of WAC 392-347-015 (1)(c): Provided, That no new construction in lieu of modernization project may qualify for additional state funding assistance pursuant to WAC 392-343-115 unless the facility being replaced would have qualified pursuant to such section for additional state funding assistance as a modernization project.

(3) The superintendent of public instruction may waive the provisions of this section for a period it determines is appropriate to the particular situation. A waiver request must be submitted in writing to the superintendent of public instruction. The superintendent of public instruction shall review the waiver request and approve or deny the request. The waiver request shall include, but not be limited to, the following information:

(a) Description of the district's planning process;

(b) Rationale why the need for the waiver request was not anticipated;

(c) The requested length of time of the waiver;

(d) The availability of funding for proposed projects;

(e) List of specific projects and timelines;

(f) List of the specific student groups that will use the facility;

(g) Rationale why this is the best use of facilities and public funds;

(h) Assurance that the facility meets health and safety standards for occupancy.

AMENDATORY SECTION (Amending WSR 09-16-031, filed 7/25/06, effective 8/25/06)

WAC 392-347-045 Architect and engineering services. In the allocation of state ((~~funds~~)) funding assistance for an approved modernization project, architectural and engineering services eligible for state ((~~matching purposes~~)) funding assistance shall not exceed one and one-half times the architectural and engineering services as in chapter 392-343 WAC set forth.

AMENDATORY SECTION (Amending WSR 09-16-031, filed 7/25/06, effective 8/25/06)

WAC 392-347-050 Study and survey of school district as prerequisite. A survey of facilities proposed for modernization conducted under the direction of the superintendent of public instruction as per chapter 392-341 WAC shall be a prerequisite for consideration of an application for state ((~~participation in financing~~)) funding assistance of a modernization project.

AMENDATORY SECTION (Amending WSR 09-16-031, filed 7/25/06, effective 8/25/06)

WAC 392-347-055 Regulations governing. In addition to the regulations hereinbefore in chapter 392-347 WAC prescribed; all regulations governing the basic assistance program prescribed in chapters 392-341, 392-342, 392-343, and 392-344 WAC shall govern administration of state ((~~participation~~)) funding assistance in financing modernization of school facilities: Provided, That compliance with those regulations not pertinent to modernization projects as determined by the superintendent of public instruction shall not be required.

WSR 10-01-147
EXPEDITED RULES
PROFESSIONAL EDUCATOR STANDARDS BOARD

[Filed December 21, 2009, 3:45 p.m.]

Title of Rule and Other Identifying Information: WAC 181-78A-264, standards for educator preparation program design. In rule making conducted by the board in September 2009, the determination was made that standard III (WAC 181-78A-261) contained requirements for diversity and collaboration that should be placed in WAC 181-78A-264.

NOTICE

THIS RULE IS BEING PROPOSED UNDER AN EXPEDITED RULE-MAKING PROCESS THAT WILL ELIMINATE THE NEED FOR THE AGENCY TO HOLD PUBLIC HEARINGS, PREPARE A SMALL BUSINESS ECONOMIC IMPACT STATEMENT, OR PROVIDE RESPONSES TO THE CRITERIA FOR A SIGNIFICANT LEGISLATIVE RULE. IF YOU OBJECT TO THIS USE OF THE EXPEDITED RULE-MAKING PROCESS, YOU MUST EXPRESS YOUR OBJECTIONS IN WRITING AND THEY MUST BE SENT TO David Brenna, Professional Educator Standards Board, 600 Washington Street South, Room 400, Olympia, WA 98504, AND RECEIVED BY February 22, 2010.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The change will simply place the requirements for preparation programs for educators to include elements of diversity and collaboration in a difference [different] section of the same governing rules.

Reasons Supporting Proposal: Clarifies that functions related to diversity and collaboration are program design elements (WAC 181-78A-264) rather than governance (WAC 181-78A-261).

Statutory Authority for Adoption: Chapter 28A.410 RCW.

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: David Brenna, 600 Washington Street, Room 400, Olympia, WA, (360) 725-6238.

December 21, 2009
David Brenna
Legislative and
Policy Coordinator

AMENDATORY SECTION (Amending WSR 06-14-010, filed 6/22/06, effective 7/23/06)

WAC 181-78A-264 Approval standard—Program design. Building on the mission to prepare educators who demonstrate a positive impact on student learning, the following evidence shall be evaluated to determine whether each preparation program is in compliance with the program design standard of WAC 181-78A-220(4):

(1) The conceptual framework establishes the shared vision for the unit's efforts in preparing educators to work effectively in P-12 schools. It provides the basis for coherence among curriculum, instruction, field experiences, clinical practice, assessment, and evaluation. The conceptual framework is based on current research and best practice, is cohesive and integrated, supports the state's student learning goals and for teacher preparation programs, and reflects the essential academic learning requirements. The conceptual framework reflects the unit's commitment to preparing candidates to support learning for all students and the unit's commitment to preparing candidates who are able to use educational technology to help all students learn.

(2) Candidates who demonstrate potential for acquiring the content and pedagogical knowledge and skills for success as educators in schools are recruited, admitted, and retained (see WAC 181-78A-200 Candidate admission policies). These candidates include members from under represented groups.

(3) Programs shall assure that candidates are provided with opportunities to learn the pedagogical and professional knowledge and skills required for the particular certificate, and for teacher preparation programs, the competencies for endorsement areas.

(4) A set of learner expectations for program completion are identified and published.

(5)(a) The unit and its school partners design, implement, and evaluate field experiences and clinical practices so that candidates develop and demonstrate the knowledge and skills necessary to help all students learn. Provided, That candidates for an administrator certificate shall complete an internship pursuant to WAC 181-78A-325, candidates for a school psychologist certificate shall complete an internship

pursuant to WAC 181-78A-317, and candidates for a school counselor certificate shall complete an internship pursuant to WAC 181-78A-315, and candidates for a school social worker certificate shall complete an internship pursuant to WAC 181-78A-319.

(b) Field experiences are integrated throughout the preparation program and occur in settings with students representing diverse populations.

(c) Clinical practice is sufficiently extensive and intensive for candidates to demonstrate competence in the professional roles for which they are preparing.

(6) The preparing institution shall assure that candidates are provided with appropriate course work and experiences in teaching methods for each endorsement area. The methods should include:

(a) Instructional strategies.

(b) Curriculum frameworks (essential academic learning requirements).

(c) Assessment strategies, including performance-based measurements of student work.

(d) Unit/lesson planning.

(7) Entry and exit criteria exist for candidates in clinical practice.

(8) Programs reflect ongoing collaboration with P-12 schools.

(9) Candidates for a teacher certificate shall hold/obtain a baccalaureate degree from a regionally accredited college or university pursuant to WAC 181-79A-030(5).

(10) Beginning fall 2003, approved programs shall administer the pedagogy assessment adopted by the professional educator standards board and published by the superintendent of public instruction to all candidates in a residency certificate program.

Candidates must take the pedagogy assessment as a condition of residency program completion. However, passage is not required for program completion as long as the program can provide other evidence, separately or in combination with the results of the pedagogy assessment, that the candidate has satisfied all program completion requirements.

(11) Collaboration. The unit ensures faculty collaborate with others to improve the program.

(a) Faculty within the unit;

(b) Faculty from other units;

(c) P-12 school personnel;

(d) Members of the broader professional community.

(12) Interactions with diverse populations. The unit ensures candidates interact with diverse populations.

(a) Diverse higher education faculty;

(b) Diverse candidates;

(c) Diverse P-12 students;

(d) Diverse individuals who work with students in P-12 classrooms.

WSR 10-01-168
EXPEDITED RULES
DEPARTMENT OF LABOR AND INDUSTRIES

[Filed December 22, 2009, 12:17 p.m.]

Title of Rule and Other Identifying Information: Chapter 296-878 WAC, Safety standards for window cleaning.

NOTICE

THIS RULE IS BEING PROPOSED UNDER AN EXPEDITED RULE-MAKING PROCESS THAT WILL ELIMINATE THE NEED FOR THE AGENCY TO HOLD PUBLIC HEARINGS, PREPARE A SMALL BUSINESS ECONOMIC IMPACT STATEMENT, OR PROVIDE RESPONSES TO THE CRITERIA FOR A SIGNIFICANT LEGISLATIVE RULE. IF YOU OBJECT TO THIS USE OF THE EXPEDITED RULE-MAKING PROCESS, YOU MUST EXPRESS YOUR OBJECTIONS IN WRITING AND THEY MUST BE SENT TO Josh Swanson, Department of Labor and Industries, P.O. Box 44001, Olympia, WA 98504-4001, AND RECEIVED BY February 22, 2010.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: In 2002, the department rewrote the window cleaning rules for clarity. As part of that process, an allowance from ANSI/IWCA 1-14.1-2001, Window Cleaning Safety, Section 5.7.12 was omitted from the final rule language. This language would allow employers to use a rope descent system above 300 feet in height if the windows cannot be safely and practicably accessed by other work practices. The purpose of this rule making is to add this allowance to WAC 296-878-20010 Safely use rope descent systems.

Reasons Supporting Proposal: This change would provide consistency with the current requirement in WAC 296-878-20005 Select appropriate rope descent systems, which refers employers to ANSI/IWCA 1-14.1-2001, Section 5.7.12.

Statutory Authority for Adoption: RCW 49.17.010, 49.17.040, 49.17.050, 49.17.060.

Statute Being Implemented: Chapter 49.17 RCW.

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

Name of Proponent: Department of labor and industries, governmental.

Name of Agency Personnel Responsible for Drafting: Tracy Spencer, Tumwater, Washington, (360) 902-5530; Implementation and Enforcement: Michael Silverstein, Tumwater, Washington, (360) 902-4805.

December 22, 2009
Judy Schurke
Director

AMENDATORY SECTION (Amending WSR 02-22-027, filed 10/28/02, effective 1/1/03)

WAC 296-878-20010 Safely use rope descent systems.

You must:

(1) Make sure workers use extreme care when using rope descent equipment around electrical service, heat sources, and turbulent areas, such as air vents.

(2) Connect the seatboard or boatswain's chair to the descent device with a manual or auto locking carabiner.

(3) Make sure workers are positioned in the seatboard or boatswain's chair before being suspended.

(4) Make sure workers do not reach more than six feet in any direction as measured from a centerline straight down from where the suspension rope bears on the building.

(5) Make sure workers do not descend rapidly, swing excessively, or stop suddenly.

(6) Make sure that, in addition to the suspended worker, there is one other person at the jobsite who is skilled in using the rope descent system and rescue procedures.

(7) Make sure you do not exceed a three hundred-foot height of descent as measured from grade or building setback unless the windows cannot be safely and practicably accessed by other means.

(8) Make sure your site-specific service plan addresses the following hazards for descents over one hundred thirty feet as measured from grade or building setback:

• Sudden weather changes, such as wind gusts, micro bursts, or tunneling wind currents

• Inability of the rope descent system to function without using excessive force

• Workers suspended for long periods of time

• Rerigging and movement of main suspension and safety lines.

(9) Stabilize workers suspended from a rope descent system whenever the descent is higher than one hundred thirty feet, as measured from grade or building setback.

(10) Prohibit workers from working when wind speed makes any stabilization equipment ineffective.

Note: Provisions for stabilizing workers may include:
• Continuous stabilization, such as mullion tracks
• Intermittent stabilization, such as detent pins/buttons
• Work station stabilization, such as suction cups.

WSR 10-01-186
EXPEDITED RULES
DEPARTMENT OF HEALTH
(Board of Optometry)
[Filed December 22, 2009, 2:50 p.m.]

Title of Rule and Other Identifying Information: WAC 246-851-495 How to obtain an optometry temporary practice permit while the national background check is completed.

NOTICE

THIS RULE IS BEING PROPOSED UNDER AN EXPEDITED RULE-MAKING PROCESS THAT WILL ELIMINATE THE NEED FOR THE AGENCY TO HOLD PUBLIC HEARINGS, PREPARE A SMALL BUSINESS ECONOMIC IMPACT STATEMENT, OR PROVIDE RESPONSES TO THE CRITERIA FOR A SIGNIFICANT LEGISLATIVE RULE. IF YOU OBJECT TO THIS USE OF THE EXPEDITED RULE-MAKING PROCESS, YOU MUST EXPRESS YOUR OBJECTIONS IN WRITING AND THEY MUST BE SENT TO Judy Haenke, Department of Health, P.O. Box 47852, Olympia, WA 98504-7852, AND RECEIVED BY February 22, 2010.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: To issue temporary practice permits to applicants for a license to practice optometry while a fingerprint-based national background check is completed. The rule will improve access to care by avoiding delays in licensing for qualified applicants who would otherwise be prohibited from providing optometric services while awaiting national background checks.

Reasons Supporting Proposal: The process to complete the national background check is lengthy and has caused delays in licensing that affect the public's access to health care. RCW 18.130.064 authorizes a temporary permit to qualified applicants who must have a background check conducted.

Statutory Authority for Adoption: RCW 18.130.064, 18.130.075, 18.54.070.

Statute Being Implemented: RCW 18.130.064, 18.130.075.

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

Name of Proponent: Department of health, board of optometry, governmental.

Name of Agency Personnel Responsible for Drafting, Implementation and Enforcement: Judy Haenke, Program Manager, P.O. Box 47852, Olympia, WA 98504-7852, (360) 236-4947.

December 4, 2009
Laura Toepfer, O.D., Chair
Board of Optometry

NEW SECTION

WAC 246-851-495 How to obtain a temporary practice permit while the national background check is completed. Fingerprint-based national background checks may cause a delay in licensing. Individuals who satisfy all other licensing requirements and qualifications may receive a temporary practice permit while the national background check is completed.

(1) A temporary practice permit may be issued to an applicant who:

(a) Holds an unrestricted, active license in another state to practice optometry that has substantially equivalent licensing standards to those in Washington state;

(b) Is not subject to denial of a license or issuance of a conditional or restricted license; and

(c) Does not have a criminal record in Washington state.

(2) A temporary practice permit grants the individual the full scope of the practice of optometry.

(3) A temporary practice permit will not be renewed, reissued, or extended. A temporary practice permit expires when any one of the following occurs:

(a) The license is granted;

(b) A notice of decision on application is mailed to the applicant, unless the notice of decision on the application specifically extends the duration of the temporary practice permit; or

(c) One hundred eighty days after the temporary practice permit is issued.

(4) To receive a temporary practice permit, the applicant must:

(a) Submit the necessary application, fee(s), and documentation for the optometry license.

(b) Meet all requirements and qualifications for the license, except the results from a fingerprint-based national background check, if required.

(c) Provide verification of having an active unrestricted license to practice optometry from another state that has substantially equivalent licensing standards to Washington state.

(d) Submit the fingerprint card and a written request for a temporary practice permit when the department notifies the applicant the national background check is required.

WSR 10-01-193
EXPEDITED RULES
DEPARTMENT OF REVENUE

[Filed December 22, 2009, 4:23 p.m.]

Title of Rule and Other Identifying Information: WAC 458-20-110 Delivery charges, explains the manner in which delivery charges are subject to the business and occupation (B&O), retail sales, and use taxes.

WAC 458-20-115 Sales of packing materials and containers, explains the B&O, retail sales, and use taxes which apply to persons who sell packing materials and to those who use packing materials.

WAC 458-20-116 Sales and/or use of labels, name plates, tags, premiums, and advertising material, explains Washington's B&O and retail sales tax applications to the sale of labels, name plates, tags, and advertising material.

WAC 458-20-119 Sales of meals, explains Washington's B&O and retail sales tax application to the sales of meals, meals provided to employees, and meals provided without a specific charge.

WAC 458-20-124 Restaurants, cocktail bars, taverns and similar businesses, explains Washington's B&O and retail sales tax applications to sales by restaurants and similar businesses.

WAC 458-20-135 Extracting natural products, explains the application of the B&O, retail sales, and use taxes to persons extracting natural products. It also provides guidance for determining when an extracting activity ends and the manufacturing activity begins.

WAC 458-20-136 Manufacturing, processing for hire, fabricating, explains the application of the B&O, retail sales, and use taxes to manufacturers.

WAC 458-20-139 Trade shops—Printing plate makers, typesetters, and trade binderies, explains the B&O tax and retail sales tax applications to altering or improving tangible personal property owned by printing plate makers, typesetters or trade binderies intended for sale or altering or improving tangible personal property owned by customers.

WAC 458-20-146 National and state banks, mutual savings banks, savings and loan associations and other financial institutions, explains the applicability of B&O and retail sales tax to gross income earned by such institutions.

WAC 458-20-150 Optometrists, ophthalmologists, and opticians, explains the application of Washington's B&O, retail sales, and use taxes to the business activities of optometrists, ophthalmologists, and opticians.

WAC 458-20-151 Dentists and other health care providers, dental laboratories, and dental technicians, explains the application of B&O, retail sales, and use taxes to the business activities of the same.

WAC 458-20-163 Insurance companies, including surety companies, fraternal benefit societies, fraternal fire insurance associations, beneficiary corporations or societies, and Washington state health insurance pool, explains the applicability of B&O tax to income received by the same.

WAC 458-20-168 Hospitals, nursing homes, boarding homes, adult family homes and similar health care facilities, explains the application of B&O, retail sales, and use taxes to persons operating hospitals as defined in RCW 70.41.020, nursing homes as defined in RCW 18.51.010, boarding homes as defined in RCW 18.20.020, adult family homes as defined in RCW 70.128.010, and similar health care facilities.

NOTICE

THIS RULE IS BEING PROPOSED UNDER AN EXPEDITED RULE-MAKING PROCESS THAT WILL ELIMINATE THE NEED FOR THE AGENCY TO HOLD PUBLIC HEARINGS, PREPARE A SMALL BUSINESS ECONOMIC IMPACT STATEMENT, OR PROVIDE RESPONSES TO THE CRITERIA FOR A SIGNIFICANT LEGISLATIVE RULE. IF YOU OBJECT TO THIS USE OF THE EXPEDITED RULE-MAKING PROCESS, YOU MUST EXPRESS YOUR OBJECTIONS IN WRITING AND THEY MUST BE SENT TO Gayle Carlson, Department of Revenue, P.O. Box 47453, Olympia, WA 98504-7453, fax (360) 586-0127, e-mail GayleC@dor.wa.gov, AND RECEIVED BY February 22, 2010.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: Effective January 1, 2010, reseller permits will replace resale certificates as the means to substantiate wholesale purchases, chapter 563, Laws of 2009. The department is proposing to amend these rules to recognize this change.

The amendments to these rules are being made for the sole purpose of:

- Adding language to state that resale certificates are no longer valid after December 31, 2009, and that reseller permits should be used instead.
- Minor editing and correction of citations not intended to change other provisions of the sections.
- Eliminating tax-reporting information that applies to tax periods now outside the normal limitation periods for assessments and refunds.

The department proposes to remove tax-reporting information applying to tax periods outside the normal limitation periods for assessments and refunds from the following:

- WAC 458-20-119(1), eliminating information referencing food and beverage service workers' permits.
- WAC 458-20-124 (6)(a), eliminating information referencing food and beverage service workers' permits.

- WAC 458-20-146, "Reporting procedures" subsection, eliminating this subsection as provides outdated information (e.g., registration fee amount and tax return due date) and is unnecessary.

Copies of draft rules are available for viewing and printing on our web site at http://dor.wa.gov/content/FindALawOrRule/RuleMaking/agenda.aspx.

Reasons Supporting Proposal: To recognize provisions of SB 6173 (chapter 563, Laws of 2009).

Statutory Authority for Adoption: RCW 82.32.300 and 82.01.060(2).

Statute Being Implemented: Chapters 82.04, 82.08, 82.12 and 82.32 RCW, as they apply to wholesale sales and reseller permits.

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: Gayle Carlson, 1025 Union Avenue S.E., Suite #544, Olympia, WA, (360) 570-6126; Implementation: Alan R. Lynn, 1025 Union Avenue S.E., Suite #544, Olympia, WA, (360) 570-6125; and Enforcement: Gilbert Brewer, 1025 Union Avenue S.E., Suite #544, Olympia, WA, (360) 570-6147.

December 22, 2009
Alan R. Lynn
Rules Coordinator

AMENDATORY SECTION (Amending WSR 08-14-026, filed 6/20/08, effective 7/21/08)

WAC 458-20-110 Delivery charges. (1) **Introduction.** This section explains the manner in which delivery charges are considered for purposes of business and occupation (B&O), retail sales, and use taxes. For information about delivery charges with regard to promotional materials, see WAC 458-20-17803 (Use tax on promotional materials).

(2) **What are delivery charges?** "Delivery charges" means charges by the seller for preparation and delivery to a location designated by the purchaser of tangible personal property or services including, but not limited to, transportation, shipping, postage, handling, crating, and packing. ((~~RCW 82.08.010 and chapter 168, Laws of 2003, adopted the national Streamlined Sales and Use Tax Agreement definition of "delivery charges."~~))

(3) **Do the business and occupation (B&O) and retail sales taxes apply to delivery charges?** The measure of the tax is "gross proceeds of sales" for B&O tax (RCW 82.04.070) and "selling price" for retail sales tax (RCW 82.08.010). Gross proceeds of sales and selling price include all consideration paid by the buyer, without any deduction for costs of doing business such as material, labor, and transportation costs, including delivery charges. Thus, delivery charges by the seller are a component of these tax measures.

(a) **What if delivery charges are separately itemized on the sales invoice?** Amounts received by a seller from a buyer for delivery charges are included in the measure of tax regardless of whether charges for such costs are billed separately, itemized, or whether the seller is also the carrier. Limiting delivery charges to the actual cost of delivery to the seller does not affect taxability.

(b) **Does retail sales tax apply to all delivery charges by the seller?** Delivery charges by the seller making a retail sale are a component of the selling price. If the sale of the tangible personal property or service is exempt from retail sales tax, such as certain "food and food ingredients," retail sales tax does not apply to the selling price, including delivery charges, associated with that sale. Similarly, if the product is sold at wholesale, retail sales tax does not apply to the delivery charges of that sale.

If a retail sale consists of both taxable and nontaxable tangible personal property, and delivery charges are a component of the selling price, retail sales tax applies to the percentage of delivery charges allocated to the taxable tangible personal property. Retail sales tax is not due on delivery charges allocated to exempt tangible personal property.

The seller may use either of the following percentages to determine the taxable portion of the delivery charges:

(i) A percentage based on the total sales price of the taxable tangible personal property compared to the total sales price of all tangible personal property in the shipment; or

(ii) A percentage based on the total weight of the taxable tangible personal property compared to the total weight of all tangible personal property in the shipment.

(c) **Are there any situations in which delivery charges by the seller may be excluded from the measure of tax?** There is no specific exclusion from the measure of tax for delivery charges by the seller. Actual delivery costs, regardless of whether separately charged, may be excluded from the measure of the manufacturing and extracting B&O taxes when the products are delivered outside the state. For further discussion, refer to WAC 458-20-112 (Value of products). WAC 458-20-13501 (Timber harvest operations) provides guidance regarding this issue for persons engaged in activities associated with timber harvesting.

(d) **Delivery charges in cases of payments to third parties.** Delivery charges incurred after the buyer takes delivery of the goods are not part of the selling price when the seller is not liable for payment of the delivery charges. To be excluded from the gross proceeds of sales for B&O tax and selling price for retail sales tax, the seller must document that the buyer alone is responsible to pay the carrier for the delivery charges.

(e) **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 tax results of other situations must be determined after a review of all of the facts and circumstances. In these examples, if the seller had been required to collect use tax (RCW 82.12.040) instead of retail sales tax (RCW 82.08.050), the use tax collection responsibility remains the same as for retail sales tax. This is because, in this context, the "value of article used" has the same meaning as the "purchase price" or "selling price."

(i) **Example 1.** Jane Doe orders a life vest from Marine Sales and requests that the vest be mailed by the United States Postal Service to her home. Marine Sales places the correct postage on the package using its postage meter and separately itemizes a charge on the sales invoice to Jane at the exact amount of the postage cost. Marine Sales is subject to

the retailing B&O tax on the gross proceeds of the sale and must collect retail sales tax on the selling price, both of which measures of tax include the charge for postage.

(ii) **Example 2.** XYZ Corporation orders equipment from ABC Distributors and provides ABC with a properly completed resale certificate (WAC 458-20-102A), for purchases made before January 1, 2010, or a reseller permit (WAC 458-20-102), for purchases made on or after January 1, 2010. ABC ships the equipment using overnight air delivery and itemizes the actual amount of its shipping costs on the sales invoice. ABC must remit wholesaling B&O tax on the gross proceeds of sale, which includes the amount billed as shipping charges. Since the equipment is purchased for resale, ABC does not collect or report retail sales tax.

(iii) **Example 3.** The facts in this example are the same as those in (ii) of this subsection except that XYZ provides ABC with a properly completed exemption certificate. Retail sales tax does not apply to the delivery charge because the selling price, of which the delivery charge is a component, is exempt from retail sales tax. However, the delivery charge is included in the gross proceeds of the sale, and thus, is subject to retailing B&O tax.

(iv) **Example 4.** Jones Computer Supply, a distributor, makes retail sales of computer products primarily by mail order. It is the practice of Jones Computer Supply to add a ten-dollar handling charge for each order. No separate charge is made for actual transportation. The handling charge is part of the measure of tax for the retailing B&O and retail sales taxes.

(v) **Example 5.** ABC Construction in Seattle purchased a new saw from XYZ, Inc. The sales contract specifies that ABC will contract with MNO, Inc. for shipping to Seattle and that MNO, Inc. will pick up the saw in Spokane. ABC does contract with MNO for the shipping and is shown as the consignor on the bill of lading. The transportation charge is not included in the measure of tax for purposes of the retailing B&O and retail sales taxes because ABC, the buyer, is liable for payment to MNO, for shipping the new saw.

(4) **Delivery charges and use tax.** ((~~Beginning June 1, 2002,~~)) "Value of article used," which is the measure of the use tax for tangible personal property, includes the amount of any delivery charge paid or given to the seller or on behalf of the seller with respect to the purchase of such article. Beginning July 1, 2004, both the "value of the article used" and the "value of the service used" will be the "purchase price" in instances where the seller is required under RCW 82.12.040 to collect use tax from the purchaser. RCW 82.12.010. "Purchase price" has the same meaning as "selling price" as described in subsection (3) of this section. Consumers responsible for remitting use tax directly to the department should refer to WAC 458-20-178 (Use tax).

The following examples identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax results of other situations must be determined after a review of all of the facts and circumstances. Presume that all transactions in the following examples occur July 1, 2004, or later.

(a) **Example 1.** ABC Construction ordered replacement parts for a saw from XYZ, Inc., a business located in Chicago that is not required to collect Washington taxes. XYZ contracted with MNO Freight to ship the parts from Chicago. ABC is subject to use tax on the value of the article used (presumed to be the purchase price of the parts) including the cost of the transportation, regardless of whether the transportation costs are itemized.

(b) **Example 2.** The facts in this example are the same as those in (a) of this subsection except that instead of ordering a replacement part, ABC Construction sends a broken part to XYZ, Inc. in Chicago for repair. ABC is subject to use tax on the repair service. The cost of transportation is included in the value of the service used, regardless of whether the transportation costs are itemized.

(c) **Example 3.** ABC Construction ordered replacement parts for a saw from XYZ, Inc., a business located in Chicago that is not required to collect Washington taxes. ABC hired MNO Freight to ship the parts from Chicago and was responsible for payment. ABC may exclude the cost of the transportation from the value on which use tax is due. The transportation costs ABC pays MNO are not a component of the value of the article used because the cost is not part of the consideration paid to XYZ for the replacement parts. ABC is subject to use tax on the value of the parts, which is presumed to be their purchase price.

AMENDATORY SECTION (Amending WSR 93-19-017, filed 9/2/93, effective 10/3/93)

WAC 458-20-115 Sales of packing materials and containers. (1) **Introduction.** This section explains the B&O, retail sales, and use taxes which apply to persons who sell packing materials and to those who use packing materials.

(2) **Definitions.** The term "packing materials" means and includes all boxes, crates, bottles, cans, bags, drums, cartons, wrapping papers, cellophane, twines, gummed tapes, wire, bands, excelsior, waste paper, and all other materials in which tangible personal property may be contained or protected within a container, for transportation or delivery to a purchaser.

(3) **Business and occupation tax.**

(a) Sales of packing materials to persons who sell tangible personal property contained ((~~therein~~)) in or protected ((~~thereby~~)) by packing materials are sales for resale and subject to tax under the wholesaling classification. Sellers must obtain resale certificates for sales made before January 1, 2010, or reseller permits for sales made on or after January 1, 2010, from ((~~the~~)) purchasers to ((~~support that these sales are for resale. Refer to WAC 458-20-102~~)) document the wholesale nature of any sale as provided in WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits). Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by the seller for five years from the date of last use or December 31, 2014.

(b) Sales of containers to persons who sell tangible personal property ((~~therein~~)) contained within the containers, but who retain title to such containers which are to be returned, are sales for consumption and subject to tax under the retailing classification. This class includes wooden or metal bottle cases, barrels, gas tanks, carboys, drums, bags and other items, when title ((~~thereto~~)) to the container remains ((~~in~~)) with the seller of the tangible personal property contained

((~~therein~~)) within the container, and even though a deposit is not made for the containers, and when such articles are customarily returned to the seller. If a charge is made against a customer for the container, with the understanding that such charge will be ((~~cancelled~~)) canceled or rebated when the container is returned, the amount charged is deemed to be made as security for the return of the container and is not part of the selling price for tax purposes. However, refer to the comments below for sales of containers for beverages and foods.

(c) Title to containers, whether designated as returnable or nonreturnable, for beverages and food sold at retail, including beer, milk, soft drinks, mixers and the like, will be deemed to pass to the customer along with the contents. In such cases, amounts charged for the containers are part of the selling price of the food or beverage and subject to retailing tax when sold to consumers. Sales to persons who will resell the food or beverages are wholesale sales.

(d) Persons who perform custom or commercial packing for others are generally taxable under the service B&O tax classification on the income from the packing activity.

(i) Under RCW 82.04.190, persons taxable under the service B&O tax classification are consumers of any materials used in performing the service. Sales of packing materials to persons engaged in the business of custom or commercial packing are sales for consumption and are subject to the retail sales tax. However, there is a specific statutory exemption from the B&O tax for persons who perform packing of fresh perishable horticultural products for the grower. These persons are also exempt from retail sales tax on the purchase of any materials and supplies used in performing the packing service.

(ii) Persons who perform custom or commercial packing for others and who also manufacture the boxes, containers, or other packaging materials used by them in the packing are subject to the manufacturing tax and use tax on the value of the packing materials which they manufacture. Refer to WAC 458-20-136 Manufacturing, processing for hire, fabricating.

(e) Persons who operate cold storage warehouses or who perform processing for hire for others, which includes packaging the processed items, are not the consumers of the containers or other packaging materials. Sales of boxes, cartons, and packaging materials to these persons are taxable under the wholesaling tax classification. Refer to WAC 458-20-136 and 458-20-133 Frozen food lockers.

(f) Persons who manufacture packing materials for delivery outside Washington or for their own commercial or industrial use are manufacturers and should refer to WAC 458-20-136, 458-20-134 Commercial or industrial use, and WAC 458-20-112 Value of products.

(4) **Retail sales tax.**

(a) All sales taxable under the retailing classification of the business and occupation tax as indicated above are also subject to retail sales tax except those specifically distinguished hereafter in this subsection.

(b) Retail sales tax does not apply to sales of returnable food and beverage containers, and vendors may take a deduction from gross retail sales for the amount of such sales in reporting sales tax due, providing (i) the seller separately states the charge for the container and (ii) the separately stated charge is the amount the vendor will pay for a repurchase of the container. Return of the containers is a repurchase by the vendor, and sales tax is not due on amounts paid to the customer on such repurchases, since the vendor will resell the containers in the regular course of business. (RCW 82.08.0282.)

(c) No deduction is allowed in computing tax under the retail sales tax classification where the retail sales tax is collected from the customer upon the charge for the container.

(d) Sales of packing materials to cooperative marketing associations, agents, or independent contractors for the purpose of packing fresh perishable horticultural products for the growers thereof, are not subject to retail sales tax. See also WAC 458-20-214 Cooperative marketing associations and independent dealers acting as agents of others with respect to the sale of fruit and produce.

(5) **Use tax.**

(a) The use tax applies to uses of packing materials and containers to which retail sales tax would apply but, for any reason, was not paid at the time such materials and containers were acquired.

(b) The use tax applies to the use of packing materials, such as boxes, cartons, and strapping materials, by a manufacturer in Washington where the packing materials are used to protect materials while being transported to another site of the manufacturer for further processing.

(c) The use tax applies to the use of pallets by a manufacturer or seller where the pallets will not be sold with the product, but are for use in the manufacturing plant or warehouse.

(6) **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 tax status of each situation must be determined after a review of all of the facts and circumstances.

(a) ABC Packing Co. does custom packing of small parts for a Washington manufacturer. The parts are sent by truck to ABC who then places the parts into plastic bags and seals the bags through a heat fusion process. ABC is the consumer of the bags and must pay either retail sales tax or use tax on the use of the bags. This is true even though the bags will remain with the parts until delivered to the ultimate user of the parts.

(b) XY manufactures paper products in Washington. The paper is placed on large rolls. These large rolls are shipped to another of its own plants where the paper goes through a slitter for conversion into reams of paper. These large rolls involve the use of "cores" made of heavy fiber board on which the paper is rolled. "Plugs" are placed in the ends to give additional support. The rolls are also wrapped and banded with steel banding. The cores, plugs, wrapping materials, and banding are all eventually removed during the additional processing. XY is the consumer of the plugs, cores, and other packing materials and must pay retail sales or use tax on these items.

(c) XY uses three types of pallets in its manufacturing operation. One type of pallet is used strictly for storing paper which is in the manufacturing process. A second type of pallet is returnable and the customer is charged a deposit which is refunded at the time the pallet is returned. The third type of pallet is nonreturnable and is sold with the product. XY is

required to pay retail sales or use tax on the first two types of pallets. The third type of pallets may be purchased by XY without the payment of retail sales or use tax since these pallets are sold with the paper products.

(d) Cold Storage Co. does custom fish processing for various customers. The processing involves cutting whole fish into fillets or steaks, vacuum packaging the pieces, and freezing the packages. The packing activity is considered to be part of a processing for hire activity. As a processor for hire, Cold Storage Co. is not the consumer of the packing materials.

AMENDATORY SECTION (Amending WSR 93-19-018, filed 9/2/93, effective 10/3/93)

WAC 458-20-116 Sales and/or use of labels, name plates, tags, premiums, and advertising material. (1) **Introduction.** This section explains Washington's B&O and retail sales tax applications to the sale of labels, name plates, tags, and advertising material. It also gives tax reporting information to persons offering premiums at reduced or no cost to customers.

(2) **Definitions.** For the purposes of this section, the following definitions apply:

(a) "Labels," "name plates," and "tags" are slips, generally made of paper or cloth, which are affixed to articles or containers for identification or description.

(b) A "premium" is an item offered free of charge or at a reduced price to prospective customers as an inducement to buy.

(3) **Sales for resale.** Sales of labels, name plates, tags, premiums, and advertising material to persons for use in the following manner are sales for resale (wholesale sales) and not subject to retail sales tax:

(a) Sales of labels, name plates, and tags to persons who will attach these items to articles or containers sold by them, or enclose these items with articles sold by them. However, the labels, name plates, or tags may not be purchased for resale if they will be put to intervening use by such persons.

(b) Sales of premiums to persons who pass title to the premium along with other articles which are sold by them, when the passing of title to the premiums is not contingent upon the returning of coupons or other evidence of prior purchase.

(c) Sales of premiums to persons who in turn sell the same to customers at a reduced price.

(d) Sales of advertising material to persons who enclose the advertising material with articles sold by them, when such advertising material relates primarily to the articles with which it is enclosed. Persons who enclose advertising material with articles being sold for the purpose of promoting sales of other products are consumers and may not purchase this advertising material for resale. (See RCW 82.12.010(5).)

(4) **Retail sales tax.** Sales of labels, name plates, tags, premiums, and advertising material to consumers are retail sales. The retail sales tax applies to the following:

(a) Sales of labels, name plates, and tags to persons who attach the same to containers enclosing articles sold by them, when such persons retain title to the containers which are to be returned. Such sales are sales for consumption and subject to the retail sales tax. Since the container is not being resold, any labels, name plates, tags, or similar items attached to the container are also not being resold.

(b) Sales of labels, name plates, and tags to persons who use them for inventory, statistical, or other business purposes. Such sales are sales for consumption and the retail sales tax applies, notwithstanding the labels, name plates, or tags remain attached to the articles or containers delivered to the customer.

(c) Sales of premiums to persons who do not pass title thereto with other articles which are sold by them, but which are given as an inducement to perform a service, or are given upon the returning of coupons or other evidence of prior purchase. Such sales are sales for consumption and are subject to the retail sales tax.

(d) Sales of premiums to persons who offer them as an inducement to potential customers at no charge and with no requirement that the customer purchase any other article or service as a condition to receive the premium. Such sales are sales for consumption and subject to the retail sales tax.

(5) **Business and occupation tax.** The B&O tax applies to the sale of labels, name plates, tags, premiums, and advertising material as follows:

(a) **Wholesaling.** Persons who sell labels, name plates, tags, premiums, and advertising material to persons who will resell these items as described in subsection (3) of this section are subject to the wholesaling B&O tax on the gross proceeds of these sales. Sellers must obtain resale certificates for sales made before January 1, 2010, or reseller permits for sales made on or after January 1, 2010, from their customers to ((~~support the resale nature of these transactions. (Refer to WAC 458-20-102.)~~)) document the wholesale nature of any sale as provided in WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits). Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by the seller for five years from the date of last use or December 31, 2014.

(b) **Retailing.** Persons who sell labels, name plates, tags, premiums, and advertising material to consumers are subject to the retailing B&O tax on such sales.

(6) **Deferred sales or use tax.** If the seller fails to collect the appropriate retail sales tax, the purchaser is required to pay the deferred sales or use tax directly to the department.

(7) **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 tax status of each situation must be determined after a review of all of the facts and circumstances.

(a) ABC Timber purchases log tags which are attached to logs as they are received in ABC's yard. These tags are used by ABC to keep track of the logs for inventory purposes. These tags remain on the logs after sale, and are also used by ABC's customers to verify receipt of the logs. ABC must remit retail sales or use tax upon the purchase of the log tags, notwithstanding they remain attached to the logs after sale to ABC's customers. The use of these tags for inventory purposes by ABC prior to actual sale is intervening use as a consumer.

(b) MT Gas, a gasoline and service station, offers customers a free set of stemware with any gasoline purchase of

ten gallons or more. Customer purchasing seven to nine gallons of gasoline may purchase the same set of stemware for a nominal amount. MT Gas may purchase the stemware without paying retail sales tax. The stemware is offered as a premium, and is considered to be resold along with the gasoline. It is immaterial that the sale of gasoline is exempt from the retail sales tax. MT Gas must report the retailing B&O tax and collect and remit retail sales tax on the price charged for the stemware sold to those customers purchasing seven to nine gallons of gasoline.

(c) KMP Company is a camping club which purchases gift items which are used as premiums. These gift items are offered free of charge to potential customers on condition that the potential customer attend a sales presentation. No purchase of a membership or anything else is required to receive the premium. KMP must remit retail sales or use tax upon the purchase of the premiums. KMP is the consumer of premiums given away free of charge where the recipient has no requirement to purchase any service or article as a condition of receiving the premium.

(d) BC Bank offers a choice of various premiums to customers opening new savings accounts. In some cases, a charge may be made to the customer for the premium, with the amount of the charge based on the amount of deposit the customer makes in the new savings account. BC Bank may give a resale certificate (WAC 458-20-102A) for purchases made before January 1, 2010, or a reseller permit (WAC 458-20-102) for purchases made on or after January 1, 2010, to its suppliers for those premiums which will be resold to its new customers. For those premiums which will be given to customers without charge, BC Bank must pay either the retail sales tax to its suppliers or use tax to the department on the cost of the premiums. (((~~Refer to WAC 458-20-102.~~))) It also must report the retailing B&O tax and collect and remit retail sales tax on any amounts charged to its customers.

AMENDATORY SECTION (Amending WSR 99-11-107, filed 5/19/99, effective 6/19/99)

WAC 458-20-119 Sales of meals. (1) **Introduction.** This ((~~rule~~)) section explains Washington's B&O and retail sales tax applications to the sales of meals. This ((~~rule~~)) section also gives tax reporting information to persons who provide meals without a specific charge. It explains how meals furnished to employees are taxed. Persons in the business of operating restaurants should also refer to WAC 458-20-124 and persons operating hotels, motels, or similar businesses should refer to WAC 458-20-166.

((~~Retail sellers who are required by law to have a food and beverage service worker's permit under RCW 69.06.010 are subject to the retailing B&O tax and must collect and remit retail sales tax on sales of prepared food products, unless a specific exemption applies. For additional information regarding sales by persons required to have a food and beverage worker's permit, refer to WAC 458-20-244 (Food products).~~))

(2) **Business and occupation tax.** The sales of meals and the providing of meals as a part of services rendered are subject to tax as follows:

(a) **Retailing.** The retailing B&O tax applies as follows.

(i) **Restaurants, cafeterias and other eating places.** Sales of meals to consumers by restaurants, cafeterias, clubs, and other eating places are subject to the retailing tax. (See WAC 458-20-124((-)) restaurants, etc.)

(ii) **Caterers.** Sales of meals and prepared food by caterers are subject to the retailing tax when sold to consumers. "Caterer" means a person who provides, prepares and serves meals for immediate consumption at a location selected by the customer. The tax liability is the same whether the meals are prepared at the customer's site or the caterer's site. The retailing tax also applies when caterers prepare and serve meals using ingredients provided by the customer. Persons providing a food service for others should refer to the subsection below entitled "Food service contractors."

(iii) **Hotels, motels, bed and breakfast facilities, resort lodges and other establishments offering meals and transient lodging.** Sales of meals by hotels, motels, and other persons who provide transient lodging are subject to the retailing tax.

(iv) **Boarding houses, American plan hotels, and other establishments offering meals and nontransient lodging.** Sales of meals by boarding houses and other such places are subject to retailing tax.

(A) Except for guest ranches and summer camps, when a lump sum is charged to nontransients for providing both lodging and meals, the fair selling price of the meals is subject to the retailing tax. Unless accounts are kept showing the fair selling price, the tax will be computed upon double the cost of the meals served. This cost includes the price paid for food and drinks served, the cost of preparing and serving meals, and all other incidental costs, including an appropriate portion of overhead expenses.

(B) It will be presumed that guest ranches and summer camps are not making sales of meals when a lump sum is charged for the furnishing of lodging, and meals are included.

(v) **Railroad, Pullman car, ship, airplane, or other transportation company diners.** Sales of meals by a railroad, Pullman car, ship, airplane, or other transportation company served at fixed locations in this state, or served upon the carrier itself while within this state, are subject to the retailing tax.

Where no specific charge is made for meals separate and apart from the transportation charge, the entire amount charged is deemed a charge for transportation and the retailing tax does not apply to any part of the charge.

(vi) **Hospitals, nursing homes, and other similar institutions.** The serving of meals by hospitals, nursing homes, sanitariums, and similar institutions to patients as a part of the service rendered in the course of business by such institutions is not a sale at retail. However, many hospitals and similar institutions have cafeterias or restaurants through which meals are sold for cash or credit to doctors, visitors, nurses, and other employees. Some of these institutions have agreements where the employees are paid a fixed wage in payment for services rendered and are provided meals at no charge. Under those circumstances, all sales of meals to such persons are subject to the retailing tax, including the value of meals provided at no charge to employees. Refer to the subsection below entitled "Meals furnished to employees."

(vii) **School, college, or university dining rooms.** Public schools, high schools, colleges, universities, or private schools operating lunch rooms, cafeterias, dining rooms, or snack bars for the exclusive purpose of providing students and faculty with meals or prepared foods are not considered to be engaged in the business of making retail sales of meals. However, if guests are permitted to dine with students or faculty in such areas, the sales of meals to the guests are retail sales.

(A) Unless the eating area is situated so that it is available only to students and faculty, the lunch room, cafeteria, dining room, or snack bar must have a posted sign stating that the area is only open to students and faculty. In the absence of such a sign, there will be a presumption that the facility is not exclusively for the use of students and faculty. The actual policy in practice in these areas must be consistent with the posted policy.

(B) If the cafeteria, lunch room, dining room, or snack bar is generally open to the public, all sales of meals, including meals sold to students, are considered retail sales.

(C) For some educational institutions, the meals provided to students is considered to be part of the charge for tuition and may not be subject to the B&O tax. Public schools, high schools, colleges, universities, and private schools should refer to WAC 458-20-167 to determine whether the retailing B&O tax applies to the sales of meals described above. (See also WAC 458-20-189 for a discussion of B&O tax for schools operated by the state.)

(viii) **Fraternities and sororities.** Fraternities, sororities, and other groups of individuals who reside in one place and jointly share the expenses of the household including expense of meals are not considered to be making sales when meals are furnished to members.

(b) **Wholesaling-other.** Persons making sales of prepared meals to persons who will be reselling the meals are subject to the wholesaling-other tax classification. Sellers must obtain resale certificates for sales made before January 1, 2010, or reseller permits for sales made on or after January 1, 2010, from their customers to ((~~support the resale nature of any transaction. (See WAC 458-20-102.)~~)) document the wholesale nature of any sale as provided in WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits). Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by the seller for five years from the date of last use or December 31, 2014.

(c) **Service and other business activities.** Private schools, which do not meet the definition of "educational institutions," operating lunch rooms, cafeterias, or dining rooms for the exclusive purpose of providing meals to students and faculty are subject to the service and other business activities B&O tax on the charges to students and faculty for meals. (See WAC 458-20-167 for definitions of the terms "private school" and "educational institution.") Persons managing a food service operation for a private school should refer to the subsection below entitled "Food service contractors."

(3) **Retail sales tax.** The sales of meals, upon which the retailing tax applies under the provisions above, are generally subject to tax under the retail sales tax classification. However, a retail sales tax exemption is available for the following sales of meals:

(a) Prepared meals sold under a state-administered nutrition program for the aged as provided for in the Older Americans Act (Public Law 95-478 Title III) and RCW 74.38.040(6).

(b) Prepared meals sold to or for senior citizens, disabled persons, or low-income persons by a not-for-profit organization organized under chapter 24.03 or 24.12 RCW. However, this exemption does not apply to purchases of prepared meals by not-for-profit organizations, such as hospitals, which provide the meals to patients as a part of the services they render.

(c) Prepared meals sold to the federal government. (See WAC 458-20-190.) However, meals sold to federal employees are taxable, even if the federal employee will be reimbursed for the cost of the meals by the federal government.

(4) **Deferred sales or use tax.** If the seller fails to collect the appropriate retail sales tax, the purchaser is required to pay the deferred sales or use tax directly to the department.

(a) Purchases of dishes, kitchen utensils, linens, and items which do not become an ingredient of the meal, are subject to retail sales tax.

(b) Retail sales tax or use tax applies to purchases of equipment, repairs, appliances, and construction.

(c) The retail sales or use tax does not apply to purchases of food or beverage products which are ingredients of meals being sold at retail or wholesale.

(d) Purchases of food products and prepared meals by persons who are not in the business of selling meals at retail or wholesale are subject to the retail sales tax. However, certain food products are statutorily exempt of retail sales or use tax. (See WAC 458-20-244 Food and food ingredients.)

(e) Private schools, educational institutions, nursing homes, and similar institutions who are not making sales of meals at retail or wholesale are required to pay retail sales tax on all purchases of paper plates, paper cups, paper napkins, toothpicks, or any other articles which are furnished to customers, the first actual use of which renders such articles unfit for further use. However, purchases of such items by restaurants and similar businesses which are making retail or wholesale sales of meals are not subject to the retail sales or use tax.

(f) Transportation companies not segregating their charges for meals, and transporting persons for hire in interstate commerce, generally will be liable to their sellers for retail sales tax upon the purchase of the food supplies or prepared meals to the extent that the meals will be served to passengers in Washington. Certain food items are statutorily exempt of retail sales or use tax. (See WAC 458-20-244 Food and food ingredients.)

(5) **Food service contractors.** The term "food service contractor" means a person who operates a food service at a kitchen, cafeteria, dining room, or similar facility owned by an institution or business. Food service contractors may manage the food service operation on behalf of the institution or business, or may actually make sales of meals or prepared foods.

(a) Sales of meals. Food service contractors who sell meals or prepared foods to consumers are subject to the retailing B&O and retail sales taxes upon their gross proceeds

of sales. For example, the operation of a cafeteria which provides meals to employees of a manufacturing or financial business is generally a retail activity. The food service contractor is considered to be making retail sales of meals, whether payment for the meal is made by the employees or the business, unless the business itself is reselling the meals to the employees.

In all cases where the meals are prepared at offsite facilities not owned by the institution or business, the food service contractor is considered to be making sales of meals and the retailing B&O and retail sales taxes apply to the gross proceeds of sale, or gross income for sales to consumers.

(b) Food service management. ((~~Effective July 1, 1998,~~)) The gross proceeds derived from the management of a food service operation are subject to the service and other business activities B&O tax. (((~~Chapter 7, Laws of 1997.) For the period of July 1, 1993, through June 30, 1998, these proceeds were subject to the selected business services classification of the B&O tax.~~)) These tax reporting provisions apply whether the staff actually preparing the meals or prepared foods are employed by the institution or business hiring the food service contractor, or by the food service contractor itself. If the food service contractor merely manages the food service operation on behalf of an institution or business, that institution or business is considered to be selling meals or providing the meals as a part of the services the institution or business renders to its customers. These institutions and businesses should refer to the subsections (2) and (3) above to determine their B&O and retail sales tax liabilities.

Food service management includes, but is not limited to, the following activities:

(i) Food service contractors operating a cafeteria or similar facility which provides meals and prepared food for employees and/or guests of a business, but only where the business owning the facility is the one actually selling the meals to its employees.

(ii) Food service contractors managing and/or operating a cafeteria, lunch room, or similar facility for the exclusive use of students or faculty at an educational institution or private school. The educational institution or private school provides these meals to the students and faculty as a part of its educational services. The food service contractor is managing a food service operation on behalf of the institution, and is not making retail sales of meals to the students, faculty, or institution. Sales of meals or prepared foods to guests in such areas are, however, subject to the retailing B&O and retail sales taxes. (Refer also to the subsection above entitled "School, college, or university dining rooms.")

(iii) Food service contractors managing and/or operating the dietary facilities of a hospital, nursing home, or similar institution, for the purpose of providing meals or prepared foods to patients or residents thereof. These meals are provided to the patients or residents by the hospital, nursing home, or similar institution as a part of the services rendered by the institution. The food service contractor is managing a food service operation on behalf of the institution, and is not considered to be making retail sales of meals to the patients, residents, or institution. Meals sold to doctors, nurses, visitors, and other employees through a cafeteria or similar facility are, however, subject to the retailing B&O and retail sales taxes. (Refer also to the subsection above entitled "Hospitals, nursing homes, and other similar institutions.")

(c) The following examples explain the application of the B&O and retail sales taxes to typical situations involving food service contractors managing a food service operation. These examples should be used only as a general guide. The tax results of other situations must be determined after a review of all facts and circumstances.

(i) GC Inc. is a food service contractor managing and operating an on-site cafeteria for B College. This cafeteria is operated for the exclusive use of students and faculty. Guests of students or faculty members, however, are allowed to use the facilities. All moneys collected in the cafeteria are retained by B College. College B pays GC's direct costs for managing and operating the cafeteria, including the costs of the unprepared food products, employee salaries, and overhead expenses. GC also receives a management fee.

GC Inc. is managing a food service operation. The measure of tax is the gross proceeds received from B College. GC Inc. may not claim a deduction on account of cost of materials, salaries, or any other expense. ((~~For periods prior to July 1, 1998, the gross proceeds are subject to the selected business services B&O tax. On and after July 1, 1998, these~~)) GC Inc.'s proceeds are subject to the service and other activities B&O tax classification. B College is considered to be making retail sales of meals to the guests and must collect and remit retail sales taxes on the gross proceeds of these sales. B College should refer to WAC 458-20-167 to determine whether the retailing B&O tax applies.

(ii) DF Food Service contracts with Hospital A to manage and operate Hospital A's dietary and cafeteria facilities. DF is to receive a per meal fee for meals provided to Hospital A's patients. DF Food Service retains all proceeds for sales of meals to physicians, nurses, and visitors in the cafeteria.

The gross proceeds received from Hospital A in regards to the meals provided to the patients is derived from the management of a food service operation. ((~~For periods prior to July 1, 1998, these proceeds are subject to the selected business services B&O tax. On and after July 1, 1998,~~)) These proceeds are subject to the service and other activities B&O tax classification. DF, however, is making retail sales of meals to physicians, nurses, and visitors in the cafeteria. DF Food Service must pay retailing B&O, and collect and remit retail sales tax, on the gross proceeds derived from the cafeteria sales.

(6) **Meals furnished to employees.** Sales of meals to employees are sales at retail and subject to the retailing B&O and retail sales taxes. This is true whether individual meals are sold, whether a flat charge is made, or whether meals are furnished as a part of the compensation for services rendered.

(a) Where a specific and reasonable charge is made to the employee, the measure of the tax is the selling price.

(b) Where no specific charge is made, the measure of the tax will be the average cost per meal served to each employee, based upon the actual cost of the food.

(c) It is often impracticable to collect the retail sales tax from employees on such sales. The employer may, in lieu of collecting such tax from employees, pay the tax directly to the department of revenue.

(d) Where meals furnished to employees are not recorded as sales, the tax due shall be presumed to apply according to the following formula for determining meal count:

(i) Those employees working shifts up to five hours, one meal; and

(ii) Employees working shifts of more than five hours, two meals.

(7) **Sales of meals, beverages, and food at prices including sales tax.** Persons who advertise and/or sell meals, alcoholic or other beverages, or any kind of food products upon which retail sales tax is due should refer to WAC 458-20-244 (Food ((~~products~~)) and food ingredients), WAC 458-20-124 (restaurants, etc.), and WAC 458-20-107 (Advertised prices including sales tax). The taxability of persons operating class H licensed restaurants is specifically addressed in WAC 458-20-124.

(8) **Gratuities.** Tips or gratuities representing donations or gifts by customers under circumstances which are clearly voluntary are not part of the selling price subject to tax. However, mandatory additions to the price by the seller, whether labeled service charges, tips, gratuities, or otherwise must be included in the selling price and are subject to both the retailing classification of the B&O tax and the retail sales tax.

(9) **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 tax results of other situations must be determined after a review of all facts and circumstances.

(a) ABC Hospital operates a cafeteria and sells meals to physicians and to persons who are visiting patients in the hospital. Meals are also provided to its employees at no charge. However, there is no accounting for the number of meals consumed by the employees. Payroll records do record the number of hours worked. On average, employees working shifts of up to five hours consume one meal while those working shifts of more than five hours consume two meals.

ABC Hospital is subject to retailing and retail sales taxes on the gross proceeds derived from the sales of meals to physicians and visitors. The retailing and retail sales taxes also apply to the value of meals consumed by ABC's employees. The value subject to tax is determined by the average cost of meals consumed by the employees, based upon the actual cost of the food items, multiplied by the number of meals as determined through a review of the payroll records. While the presumption is that employees working shifts of up to five hours consume one meal with those working shifts of five to eight hours consuming two, this presumption may be rebutted under particular circumstances.

(b) X operates a boarding house and provides lodging and meals to ten nontransient residents. Each resident is charged a lump sum to cover both lodging and meals with no accounting for a fair selling price for the meals. X is making retail sales of meals to its residents. Retailing and retail sales taxes are due on the value of the meals served. This value must be computed as double the cost of the meal, including the cost of the food and drink ingredients, costs of meal preparation, and other costs associated with the meal preparation such as overhead expenses.

(c) Y Motor Inn contracts with Z Company to provide catering services for a function to be held at the motor inn. During discussions concerning the services to be provided, Z Company is informed that a 15% gratuity is generally recommended. Z Company negotiates the gratuity percentage to 10% and signs a catering contract stating that the agreed gratuity will be added. The gratuity charged to Z Company is subject to both the retailing B&O and retail sales taxes. This is not a voluntary gratuity since it is required to be paid as a condition of the contract. Gratuities are not part of the selling price only when they are strictly voluntary.

AMENDATORY SECTION (Amending WSR 93-23-018, filed 11/8/93, effective 12/9/93)

WAC 458-20-124 Restaurants, cocktail bars, taverns and similar businesses. (1) **Introduction.** This section explains Washington's B&O and retail sales tax applications to sales by restaurants and similar businesses. It discusses the sales of meals, beverages and foods at prices inclusive of the retail sales tax. This section also explains how discounted and promotional meals are taxed. Persons operating restaurants and similar businesses should also refer to WAC 458-20-119 and 458-20-244. Persons who merely manage the operations of a restaurant or similar business should refer to WAC 458-20-119 to determine their tax liability. The term "restaurants, cocktail bars, taverns, and similar businesses" means every place where prepared foods and beverages are sold and served to individuals, generally for consumption on the premises where sold.

(2) **Business and occupation tax.** The tax liability of restaurants, cocktail bars, taverns and similar businesses is as follows:

(a) **Retailing.** Sales to consumers of meals and prepared foods by restaurants, cocktail bars, taverns and similar businesses are subject to the retailing tax classification. Meals provided to employees are presumed to be in exchange for services received from the employee and are retail sales and also subject to the retailing tax. (See WAC 458-20-119, Sales of meals.)

(b) **Wholesaling.** Persons making sales of prepared meals to persons who will be reselling the meals are subject to the wholesaling-other tax classification. Sellers must obtain resale certificates for sales made before January 1, 2010, or reseller permits for sales made on or after January 1, 2010, from their customers to ((~~support the resale nature of any transaction. (See WAC 458-20-102.)~~)) document the wholesale nature of any sale as provided in WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits). Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by the seller for five years from the date of last use or December 31, 2014.

(c) **Service.** Compensation received from owners of coin-operated machines for allowing the placement of those machines at the restaurant, cocktail bar, tavern, or similar business is subject to the service and other business activities tax. Persons operating games of chance should refer to WAC 458-20-131.

(3) **Retail sales tax.** Sales to consumers of meals and prepared foods by restaurants, cocktail bars, taverns and similar businesses are generally subject to retail sales tax. This includes the meals sold or furnished to the employees of the business. A retail sales tax exemption is available for the following sales of meals:

(a) Prepared meals sold under a state-administered nutrition program for the aged as provided for in the Older Americans Act (Public Law 95-478 Title III) and RCW 74.38.040 (6);

(b) Prepared meals sold to or for senior citizens, disabled persons, or low-income persons by a not-for-profit organization organized under chapter 24.03 or 24.12 RCW;

(c) Prepared meals sold to the federal government. (See WAC 458-20-190.) However, meals sold to federal employees are taxable, even if the federal employee will be reimbursed for the cost of the meals by the federal government.

(4) **Deferred sales or use tax.** If the seller fails to collect the appropriate retail sales tax, the purchaser is required to pay the deferred sales or use tax directly to the department.

(a) Purchases of dishes, kitchen utensils, linens, and items which do not become an ingredient of the meal, are subject to retail sales tax.

(b) Retail sales tax or use tax applies to purchases of equipment, repairs, appliances, and construction.

(c) The retail sales or use tax does not apply to purchases of food or beverage products which are ingredients of the meals being sold.

(d) Purchases of paper plates, paper cups, paper napkins, toothpicks, or any other articles which are furnished to customers, the first actual use of which renders such articles unfit for further use, are not subject to retail sales tax when purchased by restaurants and similar businesses making actual sales of meals.

(5) **Combination businesses.** Persons operating a combination of two kinds of food sales businesses, of which one is the sale of food for immediate consumption (i.e., a bakery selling food products ready for consumption and in bulk quantities), are required to keep their accounting records and sales receipts segregated between taxable and tax exempt sales. Persons operating a combination business should refer to WAC 458-20-244.

(6) **Discounted meals, promotional meals, and meals given away.** Persons who sell meals on a "two for one" or similar basis are not giving away a free meal, but rather are selling two meals at a discounted price. Both the retailing B&O and retail sales taxes should be calculated on the reduced price actually received by the seller.

(a) Persons who provide meals free of charge to persons other than employees are consumers of those meals. ((~~However, certain food products are statutorily exempt of retail sales or use tax unless sold by a retail vendor where the food product must be handled by a person required to have a food handler's permit. For tax reporting periods beginning with December 1, 1993,~~)) Persons operating restaurants or similar businesses((~~, where a food handler's permit is required, will~~)) are not ((~~be~~)) required to report use tax on food ((~~products~~)) and food ingredients given away, even if the food ((~~products~~)) or food ingredients are part of prepared meals. For example, a restaurant providing meals to the homeless or hot dogs free of charge to a little league team will not incur a retail sales or use tax liability with respect to these items given away. A sale has not occurred, and the food ((~~products~~)) and food ingredients exemption applies. Should the restaurant provide the little league team with ((~~carbonated beverages~~)) soft drinks free of charge, the restaurant will incur a deferred retail sales or use tax liability with respect to those ((~~carbonated beverages. Carbonated beverages are not considered food products for the purposes of the food products exemption.~~)) soft drinks. Soft drinks are excluded from the exemption for food and food ingredients. (See ((~~also~~)) WAC 458-20-244 ((~~for a list of exempt food products~~)) Food and food ingredients.)

(b) Meals provided to employees are presumed to be in exchange for services received from the employee and are not considered to be given away. These meals are retail sales. (See WAC 458-20-119 on employee meals.)

(7) **Sales of meals, beverages and food at prices including sales tax.** Persons may advertise and/or sell meals, beverages, or any kind of food product at prices including sales tax. Any person electing to advertise and/or make sales in this manner must clearly indicate this pricing method on the menus and other price information.

If sales slips, sales invoices, or dinner checks are given to the customer, the sales tax must be separately stated on all such sales slips, sales invoices, or dinner checks. If not separately stated on the sales slips, sales invoices, or dinner checks, it will be presumed that retail sales tax was not collected. In such cases the measure of tax will be gross receipts. (Refer also to WAC 458-20-107.)

(8) **Class H restaurants.** Restaurants operating under the authority of a class H liquor license generally have both dining and cocktail lounge areas. Customers purchasing beverages or food in lounge areas are generally not given sales invoices, sales slips, or dinner checks, nor are they generally provided with menus.

(a) Many class H restaurants elect to sell beverages or food at prices inclusive of the sales tax in the cocktail lounge area. If this pricing method is used, notification that retail sales tax is included in the price of the beverages or foods must be posted in the lounge area in a manner and location so that customers can see the notice without entering employee work areas. It will be presumed that no retail sales tax has been collected or is included in the gross receipts when a notice is not posted and the customer does not receive a sales slip or sales invoice separately stating the retail sales tax.

(b) The election to include retail sales tax in the selling price in one area of a location does not preclude the restaurant operator from selling beverages or food at a price exclusive of sales tax in another. For example, an operator of a class H restaurant may elect to include the retail sales tax in the price charged for beverages in the lounge area, while the price charged in the dining area is exclusive of the sales tax.

(c) Class H restaurants are not required to post actual drink prices in the cocktail lounge areas. However, if actual prices are posted, the advertising requirements expressed in WAC 458-20-107 must be met.

(9) **Gratuities.** Tips or gratuities representing donations or gifts by customers under circumstances which are clearly voluntary are not part of the selling price subject to

tax. However, mandatory additions to the price by the seller, whether labeled service charges, tips, gratuities or otherwise must be included in the selling price and are subject to both the retailing B&O and retail sales taxes. (Refer also to WAC 458-20-119.)

(10) **Vending machines and amusement devices.** Persons owning and operating vending machines and amusement devices should refer to WAC 458-20-187 (Coin operated vending machines, amusement devices and service machines).

(11) **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 tax status of each situation must be determined after a review of all of the facts and circumstances.

(a) ABC Coffee Shop has its own bakery and also a counter and tables where it sells pastries and coffee for immediate consumption. ABC also sells donuts and other bakery items for consumption off the premises. No beverages are sold in unsealed containers except for consumption on the premises. ABC accounts separately for its sales of products which are not intended for immediate consumption through a coding maintained by the cash register. ABC is operating a combination business. It is required to collect retail sales tax on items sold for consumption on the premises, but is not required to collect retail sales tax on baked goods intended for consumption off the premises.

(b) XYZ Restaurant operates both a cocktail bar and a dining area. XYZ has elected to sell drinks and appetizers in the bar at prices including the retail sales tax while selling drinks and meals served in the dining area at prices exclusive of the sales tax. There is a sign posted in the bar area advising customers that all prices include retail sales tax. Customers in the dining area are given sales invoices which separately state the retail sales tax. As an example, a typical well drink purchased in the bar for $2.50 inclusive of the sales tax, is sold for $2.50 plus sales tax in the dining area. The pricing requirements have been satisfied and the drink and food totals are correctly reflected on the customers' dinner checks. XYZ may factor the retail sales tax out of the cocktail bar gross receipts when determining its retailing and retail sales tax liability.

(c) RBS Restaurant operates both a cocktail bar and a dining area. RBS has elected to sell drinks at prices inclusive of retail sales tax for all areas where drinks are served. It has a sign posted to inform customers in the bar area of this fact and a statement is also on the dinner menu indicating that any charges for drinks includes retail sales tax. Dinner checks are given to customers served in the dining area which state the price of the meal exclusive of sales tax, sales tax on the meal, and the drink price including retail sales tax. Because the business has met the sign posting requirement in the bar area and has indicated on the menu that sales tax is included in the price of the drinks, RBS may factor the sales tax out of the gross receipts received from its drink sales when determining its taxable retail sales.

(d) Z Tavern sells all foods and drinks at a price inclusive of the retail sales tax. However, there is no mention of this pricing structure on its menus or reader boards. The gross receipts from Z Tavern's food and drink sales are subject to the retailing and retail sales taxes. Z Tavern has failed to meet the conditions for selling foods and drinks at prices including tax. Z Tavern may not assume that the gross receipts include any sales tax and may not factor the retail sales tax out of the gross receipts.

AMENDATORY SECTION (Amending WSR 04-01-126, filed 12/18/03, effective 1/18/04)

WAC 458-20-135 Extracting natural products. (1) **Introduction.** This ((~~rule~~)) section explains the application of the business and occupation (B&O), retail sales, and use taxes to persons extracting natural products. Persons extracting natural products often use the same extracted products in a manufacturing process. The ((~~rule~~)) section provides guidance for determining when an extracting activity ends and the manufacturing activity begins. In addition to all other taxes, commercial fishermen may be subject to the enhanced food fish excise tax levied by chapter 82.27 RCW (Tax on enhanced food fish).

Persons engaging in activities associated with timber harvest operations should refer to WAC 458-20-13501 (Timber harvest operations). Persons engaged in a manufacturing activity should also refer to WAC 458-20-136 (Manufacturing, processing for hire, fabricating) and 458-20-13601 (Manufacturers and processors for hire—Sales and use tax exemptions for machinery and equipment).

(2) **Who is an "extractor"?** RCW 82.04.100 defines the term "extractor" to mean every person who, from the person's own land or from the land of another under a right or license granted by lease or contract, either directly or by contracting with others for the necessary labor or mechanical services, for sale or for commercial or industrial use mines, quarries, takes or produces coal, oil, natural gas, ore, stone, sand, gravel, clay, mineral, or other natural resource product. The term includes a person who fells, cuts, or takes timber, Christmas trees other than plantation Christmas trees, or other natural products. It also includes any person who takes fish, shellfish, or other sea or inland water foods or products.

(a) **Persons excluded from the definition of "extractor."** The term "extractor" does not include:

(i) Persons performing under contract the necessary labor or mechanical services for others (these persons are extractors for hire, see subsection (4) ((~~below~~)) of this section); or

(ii) Persons who are farmers as defined in RCW 82.04.213. Refer to WAC 458-20-209 and 458-20-210 for tax-reporting information for farmers and persons selling property to or performing horticultural services for farmers.

(b) **When an extractor is also a manufacturer.** An extractor may subsequently take an extracted product and use it as a raw material in a manufacturing process. The following examples explain when an extracting process ends and a manufacturing process begins for various situations. These examples should be used only as a general guide. A determination of when extracting ends and manufacturing begins for other situations can be made only after a review of all of the facts and circumstances.

(i) **Mining and quarrying.** Mining and quarrying operations are extracting activities, and generally include the

screening, sorting, and piling of rock, sand, stone, gravel, or ore. For example, an operation that extracts rock, then screens, sorts, and with no further processing places the rock into piles for sale, is an extracting operation.

(A) The crushing and/or blending of rock, sand, stone, gravel, or ore are manufacturing activities. These are manufacturing activities whether or not the materials were previously screened or sorted.

(B) Screening, sorting, piling, or washing of the material, when the activity takes place in conjunction with crushing or blending at the site where the materials are taken or produced, is considered a part of the manufacturing operation if it takes place after the first screen. If there is no separate first screen, only those activities subsequent to the materials being deposited into the screen are considered a part of the manufacturing operation.

(ii) **Commercial fishing.** Commercial fishing operations, including the taking of any fish in Washington waters (within the statutory limits of the state of Washington) and the taking of shellfish or other sea or inland water foods or products, are extracting activities. These activities often include the removal of meat from the shell and the icing of fish or sea products.

(A) A person growing, raising, or producing a product of aquaculture as defined in RCW 15.85.020 on the person's own land or on land in which the person has a present right of possession is considered a farmer. RCW 82.04.213.

(B) Cleaning (removal of the head, fins, or viscera), filleting, and/or steaking fish are manufacturing activities. The cooking of fish or seafood is also a manufacturing activity. Refer to RCW 82.04.260 and WAC 458-20-136 for information regarding the special B&O tax rate/classification that applies to the manufacturing of seafood products that remain in a raw, raw frozen, or raw salted state.

(C) The removal of meat from the shell or the icing of fish or sea products, when the activity is performed in conjunction with and at the site where manufacturing takes place (e.g., cooking the fish or seafood), is considered a part of the manufacturing operation.

(3) **Tax-reporting responsibilities for income received by extractors.** Extractors are subject to the extracting B&O tax upon the value of the extracted products. (See WAC 458-20-112 regarding "value of products.") Extractors who sell the products at retail or wholesale in this state are subject to either the retailing or wholesaling B&O tax, as the case may be. In such cases, the extractor must report under both the "production" (extracting) and "selling" (wholesaling or retailing) classifications of the B&O tax, and claim a tax credit under the multiple activities tax credit (MATC). See also WAC 458-20-19301 (Multiple activities tax credits) for a more detailed explanation of the MATC reporting requirements.

For example, Corporation quarries rock without further processing. Corporation sells and delivers the rock to Landscaper, who is located in Washington. Landscaper provides Corporation with a resale certificate (WAC 458-20-102A) for purchases made before January 1, 2010, or a reseller permit (WAC 458-20-102) for purchases made on or after January 1, 2010. Corporation should report under both the extracting and wholesaling B&O tax classifications, and claim a MATC per WAC 458-20-19301. Had Corporation delivered the quarried rock to an out-of-state location, Corporation would have incurred only an extracting B&O tax liability.

(a) **When extractors use their products in a manufacturing process.** Persons who extract products, use these extracted products in a manufacturing process, and then sell the products all within Washington are subject to both "production" taxes (extracting and manufacturing) and the "selling" tax (wholesaling or retailing), and may claim the appropriate credits under the MATC. (See also WAC 458-20-136 on manufacturing.)

For example, Company quarries rock (an extracting activity), crushes and blends the rock (a manufacturing activity), and sells the resulting product at retail. The taxable value of the extracted rock is $50,000 (the amount subject to the extracting B&O tax). The taxable value of the crushed and blended rock is $140,000 (the amount subject to the manufacturing B&O tax). The crushed and blended rock is sold for $140,000 (the amount subject to the retailing B&O tax). Assume the tax rates for the extracting and manufacturing B&O taxes are .00484, and the tax rate for the retailing B&O tax is .00471. Company should compute its tax liability as follows:

(i) **Reporting B&O tax on the combined excise tax return:**

(A) Extracting B&O tax liability of $242 ($50,000 x .00484);

(B) Manufacturing B&O tax liability of $678 ($140,000 x .00484); and

(C) Retailing B&O tax liability of $659 ($140,000 x .00471).

(ii) **Completing the multiple activities tax credit (Part II of Schedule C):**

Activity which results in a tax credit	Taxable Amount	Business and Occupation Tax Reported				
		Extracting	Manufacturing	Wholesaling	Retailing	Total Credit
Washington extracted products manufactured in Washington	50,000	242	242			242
Washington extracted products sold in Washington						
Washington manufactured products sold in Washington	140,000		678		659	659

Activity which results in a tax credit	Taxable Amount	Business and Occupation Tax Reported				
		Extracting	Manufacturing	Wholesaling	Retailing	Total Credit
			Multiple Activities Tax Credit Subtotal of taxes paid to Washington state			901
					Credit ID 800	901

Schedule C helps taxpayers calculate and claim the multiple activities tax credit provided by RCW 82.04.440. In the Schedule C example above, materials that a person extracts and then uses in a manufacturing process in Washington are entered at their value when extracting ceases and manufacturing begins ($50,000 shown on the "Washington extracted products manufactured in Washington" line of the Schedule C). The taxable amount reported on the "Washington manufactured products sold in Washington" line of the Schedule C is the value of products at the point that manufacturing ceases ($140,000), not simply the value added by the manufacturing activity. For more information and examples that are helpful in determining the value of products, refer to WAC 458-20-112 (Value of products).

(b) **When extractors sell their products at retail or wholesale.** An extractor making retail sales must collect and remit retail sales tax on all sales to consumers, unless the sale is exempt by law (e.g., see WAC 458-20-244 regarding sales of certain food products). Extractors making wholesale sales must obtain resale certificates for sales made before January 1, 2010, or reseller permits for sales made on or after January 1, 2010, from their customers to document the wholesale nature of any transaction((~~. (Refer to WAC 458-20-102 on resale certificates.)~~)) as provided in WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits). Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by the seller for five years from the date of last use or December 31, 2014.

(4) **Tax-reporting responsibilities for income received by extractors for hire.** Persons performing extracting activities for extractors are subject to the extracting for hire B&O tax upon their gross income from those services.

For example, a person removing ore, waste, or overburden at a mining pit for the operator of the mining operation is an extractor for hire. Likewise, a person drilling to locate or provide access to a satisfactory grade of ore at the mining pit for the operator is also an extractor for hire. The gross income derived from these activities is subject to the extracting for hire B&O tax classification.

(5) **Mining or mineral rights.** Royalties or charges in the nature of royalties for granting another the privilege or right to remove minerals, rock, sand, or other natural resource product are subject to the service and other activities B&O tax. The special B&O tax rate provided by RCW 82.04.2907 does not apply because this statute specifically excludes compensation received for any natural resource. Refer also to RCW 82.45.035 and WAC 458-61-520 (Mineral rights and mining claims) for more information regarding the sale of mineral rights and the real estate excise tax.

Income derived from the sale or rental of real property, whether designated as royalties or another term, is exempt of the B&O tax.

(6) **Tax liability with respect to purchases of equipment or supplies and property extracted and/or manufactured for commercial or industrial use.** The retail sales tax applies to all purchases of equipment, component parts of equipment, and supplies by persons engaging in extracting or extracting for hire activities unless a specific exemption applies. If the seller fails to collect the appropriate retail sales tax, the buyer is required to remit the retail sales tax (commonly referred to as "deferred retail sales tax") or use tax directly to the department.

(a) **Exemption available for certain manufacturing equipment.** RCW 82.08.02565 and 82.12.02565 provide retail sales and use tax exemptions for certain machinery and equipment used by manufacturers and processors for hire. While this exemption does not extend to extractors or extractors for hire, persons engaged in both extracting and manufacturing activities should refer to WAC 458-20-13601 for an explanation of how these exemptions may apply to them.

(b) **Property manufactured for commercial or industrial use.** Persons manufacturing tangible personal property for commercial or industrial use are subject to both the manufacturing B&O and use taxes upon the value of the property manufactured, unless a specific exemption applies. (See also WAC 458-20-134 on commercial or industrial use.)

If the person also extracts materials used in the manufacturing process, the extracting B&O tax is due on the value of the extracted materials and a MATC may be taken. For example, Quarry extracts rock, crushes the rock into desired size, and then uses the crushed rock in its parking lot. The use of the crushed rock by Quarry in its parking lot is a commercial or industrial use. Quarry is subject to the extracting and manufacturing B&O taxes and may claim a MATC. Quarry is also responsible for remitting use tax on the value of the crushed rock applied to the parking lot.

AMENDATORY SECTION (Amending WSR 00-11-096, filed 5/17/00, effective 6/17/00)

WAC 458-20-136 Manufacturing, processing for hire, fabricating. (1) **Introduction.** This ((~~rule~~)) section explains the application of the business and occupation (B&O), retail sales, and use taxes to manufacturers. It identifies the special tax classifications and rates that apply to specific manufacturing activities. The law provides a retail sales and use tax exemption for certain machinery and equipment used by manufacturers. Refer to RCW 82.08.02565, 82.12.02565, and WAC 458-20-13601 (Manufacturers and processors for hire—Sales and use tax exemption for machinery and equipment) for more information regarding this exemption. Persons engaging in both extracting and manufacturing activities should also refer to WAC 458-20-135 (Extracting natural products) and 458-20-13501 (Timber harvest operations).

(2) **Manufacturing activities.** RCW 82.04.120 explains that the phrase "to manufacture" embraces all activities of a commercial or industrial nature wherein labor or skill is applied, by hand or machinery, to materials so that as a result thereof a new, different, or useful substance or articles of tangible personal property is produced for sale or commercial or industrial use. The phrase includes the production or fabrication of special-made or custom-made articles.

(a) "To manufacture" includes, but is not limited to:

(i) The production or fabrication of dental appliances, devices, restorations, substitutes, or other dental laboratory products by a dental laboratory or dental technician((~~, effective October 1, 1998 (chapter 168, Laws of 1998)~~));

(ii) The cutting, delimbing, and measuring of felled, cut, or taken trees;

(iii) The crushing and/or blending of rock, sand, stone, gravel, or ore; and

(iv) The cleaning (removal of the head, fins, or viscera) of fish.

(b) "To manufacture" does not include:

(i) The conditioning of seed for use in planting;

(ii) The cubing of hay or alfalfa;

(iii) The growing, harvesting, or producing of agricultural products;

(iv) The cutting, grading, or ice glazing of seafood which has been cooked, frozen, or canned outside this state;

(v) The packing of agricultural products, including sorting, washing, rinsing, grading, waxing, treating with fungicide, packaging, chilling, or placing in controlled atmospheric storage; and

(vi) The repairing and reconditioning of tangible personal property for others.

(3) **Manufacturers and processors for hire.** RCW 82.04.110 defines "manufacturer" to mean every person who, either directly or by contracting with others for the necessary labor or mechanical services, manufactures for sale or for commercial or industrial use from his or her own materials or ingredients any articles, substances, or commodities. However, a nonresident of the state of Washington who is the owner of materials processed for it in this state by a processor for hire is not deemed to be a manufacturer in this state because of that processing. Additionally, any owner of materials from which a nuclear fuel assembly is fabricated in this state by a processor for hire is also not deemed to be a manufacturer because of such processing.

(a) The term "processor for hire" means a person who performs labor and mechanical services upon property belonging to others so that as a result a new, different, or useful article of tangible personal property is produced for sale or commercial or industrial use. Thus, a processor for hire is any person who would be a manufacturer if that person were performing the labor and mechanical services upon his or her own materials.

(b) If a particular activity is excluded from the definition of "to manufacture," a person performing the labor and mechanical services upon materials owned by another is not a processor for hire. For example, the cutting, grading, or ice glazing of seafood that has been cooked, frozen, or canned outside this state is excluded from the definition of "to manufacture." Because of this exclusion, a person who performs these activities on seafood belonging to others is not a "processor for hire."

(c) A person who produces aluminum master alloys, regardless of the portion of the aluminum provided by that person's customer, is considered a "processor for hire." RCW 82.04.110. For the purpose of this specific provision, the term "aluminum master alloy" means an alloy registered with the Aluminum Association as a grain refiner or a hardener alloy using the American National Standards Institute designating system H35.3.

(d) In some instances, a person furnishing the labor and mechanical services undertakes to produce an article, substance, or commodity from materials or ingredients furnished in part by the person and in part by the customer. Depending on the circumstances, this person will either be considered a manufacturer or a processor for hire.

(i) If the person furnishing the labor and mechanical services furnishes materials constituting less than twenty percent of the value of all of the materials or ingredients which become a part of the produced product, that person will be presumed to be processing for hire.

(ii) The person furnishing the labor and mechanical services will be presumed to be a manufacturer if the value of the materials or ingredients furnished by the person is equal to or greater than twenty percent of the total value of all materials or ingredients which become a part of the produced product.

(iii) If the person furnishing the labor and mechanical services supplies, sells, or furnishes to the customer, before processing, twenty percent or more in value of the materials or ingredients from which the product is produced, the person furnishing the labor and mechanical services will be deemed to be the owner of the materials and considered a manufacturer.

(e) There are occasions where a manufacturing facility and ingredients used in the manufacturing process are owned by one person, while another person performs the actual manufacturing activity. The person operating the facility and performing the manufacturing activity is a processor for hire. The owner of the facility and ingredients is the manufacturer.

(4) **Tax-reporting responsibilities for income received by manufacturers and processors for hire.** Persons who manufacture products in this state are subject to the manufacturing B&O tax upon the value of the products, including by-products (see also WAC 458-20-112 regarding "value of products"), unless the activity qualifies for one of the special tax rates discussed in subsection (5)((~~, below~~)) <u>of this section</u>. See also WAC 458-20-193 (Inbound and outbound interstate sales of tangible personal property).

For example, Corporation A stains door panels that it purchases. Corporation A also affixes hinges, guide wheels, and pivots to unstained door panels. Corporation B shears steel sheets to dimension, and slits steel coils to customer's requirements. The resulting products are sold and delivered to out-of-state customers. Corporation A and Corporation B are subject to the manufacturing B&O tax upon the value of these manufactured products. These manufacturing activities take place in Washington, even though the manufactured product is delivered out-of-state. A credit may be available if a gross receipts tax is paid on the selling activity to another

state. (See also WAC 458-20-19301 on multiple activities tax credits.)

(a) Manufacturers who sell their products at retail or wholesale in this state are also subject to either the retailing or wholesaling B&O tax, as the case may be. In such cases, the manufacturer must report under both the "production" (manufacturing) and "selling" (wholesaling or retailing) classifications of the B&O tax, and claim a multiple activities tax credit (MATC). See also WAC 458-20-19301 for a more detailed explanation of the MATC reporting requirements.

For example, Incorporated purchases raw fish that it fillets and/or steaks. The resulting product is then sold at wholesale in its raw form to customers located in Washington. Incorporated is subject to both the manufacturing raw seafood B&O tax upon the value of the manufactured product, and the wholesaling B&O tax upon the gross proceeds of sale. Incorporated is entitled to claim a MATC.

(b) Processors for hire are subject to the processing for hire B&O tax upon the total charge made to those services, including any charge for materials furnished by the processor. The B&O tax applies whether the resulting product is delivered to the customer within or outside this state.

(c) The measure of tax for manufacturers and processors for hire with respect to "cost-plus" or "time and material" contracts includes the amount of profit or fee above cost received, plus the reimbursements or prepayments received on account of materials and supplies, labor costs, taxes paid, payments made to subcontractors, and all other costs and expenses incurred by the manufacturer or processor for hire.

(d) A manufacturing B&O tax exemption is available for the cleaning of fish, if the cleaning activities are limited to the removal of the head, fins, or viscera from fresh fish without further processing other than freezing. RCW 82.04.2403. Processors for hire performing these cleaning activities remain subject to the processing for hire B&O tax.

(e) Amounts received by hop growers or dealers for hops shipped outside the state of Washington for first use, even though the hops have been processed into extract, pellets, or powder in this state are exempt from the B&O tax. RCW 82.04.337. However, a processor for hire with respect to hops is not exempt on amounts charged for processing these products.

(f) Manufacturers and processors for hire making retail sales must collect and remit retail sales tax on all sales to consumers, unless the sale is exempt by law (e.g., see WAC 458-20-244 regarding sales of certain food products). A manufacturer or processor for hire making wholesale sales must obtain resale certificates for sales made before January 1, 2010, or reseller permits for sales made on or after January 1, 2010, from the customers to document the wholesale nature of any ((~~transaction. (Refer to WAC 458-20-102 on resale certificates.)~~)) sale as provided in WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits). Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by the seller for five years from the date of last use or December 31, 2014.

(5) **Manufacturing—Special tax rates/classifications.** RCW 82.04.260 provides several special B&O tax rates/classifications for manufacturers engaging in certain manufacturing activities. In all such cases the principles set forth in subsection (4) of this ((~~rule~~)) section concerning multiple activities and the resulting credit provisions are also applicable.

((~~(a)~~)) Special tax classifications/rates are provided for the activities of:

((~~(i)~~)) (a) Manufacturing wheat into flour, barley into pearl barley, soybeans into soybean oil, canola into canola oil, meal, or canola by-products, or sunflower seeds into sunflower oil;

((~~(ii)~~)) (b) Splitting or processing dried peas;

((~~(iii)~~)) (c) Manufacturing seafood products, which remain in a raw, raw frozen, or raw salted state;

((~~(iv)~~)) (d) Manufacturing by canning, preserving, freezing, processing, or dehydrating fresh fruits and vegetables;

((~~(v)~~)) (e) Slaughtering, breaking, and/or processing perishable meat products and/or selling the same at wholesale and not at retail; and

((~~(vi)~~)) (f) Manufacturing nuclear fuel assemblies.

(6) **Repairing and/or refurbishing distinguished from manufacturing.** The term "to manufacture" does not include the repair or refurbishing of tangible personal property. To be considered "manufacturing," the application of labor or skill to materials must result in a "new, different, or useful article." If the activity merely restores an existing article of tangible personal property to its original utility, the activity is considered a repair or refurbishing of that property. (See WAC 458-20-173 for tax-reporting information on repairs.)

(a) In making a determination whether an activity is manufacturing as opposed to a repair or reconditioning activity, consideration is given to a variety of factors including, but not limited to:

(i) Whether the activity merely restores or prolongs the useful life of the article;

(ii) Whether the activity significantly enhances the article's basic qualities, properties, or functional nature; and

(iii) Whether the activity is so extensive that a new, different, or useful article results.

(b) The following example illustrates the distinction between a manufacturing activity resulting in a new, different, or useful article, and the mere repair or refurbishment of an existing article. This example should only be used as a general guide. The tax results of other situations must be determined after a review of all the facts and circumstances. In cases of uncertainty, persons should contact the department for a ruling.

(i) Corporation rebuilds engine cores. When received, each core is assigned an individual identification number and disassembled. The cylinder head, connecting rods, crankshaft, valves, springs, nuts, and bolts are all removed and retained for reassembly into the same engine core. Unusable components are discarded. The block is then baked to burn off dirt and impurities, then blasted to remove any residue. The cylinder walls are rebored because of wear and tear. The retained components are cleaned, and if needed straightened and/or reground. Corporation then reassembles the cores, replacing the pistons, gaskets, timing gears, crankshaft bearings, and oil pumps with new parts. The components retained from the original engine core are incorporated only into that same core.

(ii) Corporation is under these circumstances not engaging in a manufacturing activity. The engine cores are restored to their original condition, albeit with a slightly larger displacement because of wear and tear. The cores have retained their original functional nature as they run with approximately the same efficiency and horsepower. The rebuilding of these cores is not so extensive as to result in a new, different, or useful article. Each engine core has retained its identity because all reusable components of the original core are reassembled in the same core. Corporation has taken an existing article and extended its useful life.

(7) **Combining and/or assembly of products to achieve a special purpose as manufacturing.** The physical assembly of products from various components is manufacturing because it results in a "new, different, or useful" product, even if the cost of the assembly activity is minimal when compared with the cost of the components. For example, the bolting of a motor to a pump, whether bolted directly or by using a coupling, is a manufacturing activity. Once physically joined, the resulting product is capable of performing a pumping function that the separate components cannot.

(a) In some cases the assembly may consist solely of combining parts from various suppliers to create an entirely different product that is sold as a kit for assembly by the purchaser. In these situations, the manufacturing B&O tax applies even if the person combining the parts does not completely assemble the components, but sells them as a package. For example, a person who purchases component parts from various suppliers to create a wheelbarrow, which will be sold in a "kit" or "knock-down" condition with some assembly required by purchaser, is a manufacturer. The purchaser of the wheelbarrow kit is not a manufacturer, however, even though the purchaser must attach the handles and wheel.

(b) The department considers various factors in determining if a person combining various items into a single package is engaged in a manufacturing activity. Any single one of the following factors is not considered conclusive evidence of a manufacturing activity, though the presence of one or more of these factors raises a presumption that a manufacturing activity is being performed:

(i) The ingredients are purchased from various suppliers;

(ii) The person combining the ingredients attaches his or her own label to the resulting product;

(iii) The ingredients are purchased in bulk and broken down to smaller sizes;

(iv) The combined product is marketed at a substantially different value from the selling price of the individual components; and

(v) The person combining the items does not sell the individual items except within the package.

(c) The following examples should be used only as a general guide. The specific facts and circumstances of each situation must be carefully examined to determine if the combining of ingredients is a manufacturing activity or merely a packaging or marketing activity. In cases of uncertainty, persons combining items into special purpose packages should contact the department for a ruling.

(i) Combining prepackaged food products and gift items into a wicker basket for sale as a gift basket is not a manufacturing activity when:

(A) The products combined in the basket retain their original packaging;

(B) The person does not attach his or her own labels to the components or the combined basket;

(C) The person maintains an inventory for sale of the individual components and does sell these items in this manner as well as the combined baskets.

(ii) Combining bulk food products and gift items into a wicker basket for sale as a gift basket is a manufacturing activity when:

(A) The bulk food products purchased by the taxpayer are broken into smaller quantities; and

(B) The taxpayer attaches its own labels to the combined basket.

(iii) Combining components into a kit for sale is not a manufacturing activity when:

(A) All components are conceived, designed, and specifically manufactured by and at the person's direction to be used with each other;

(B) The person's label is attached to or imprinted upon the components by supplier;

(C) The person packages the components with no further assembly, connection, reconfiguration, change, or processing.

(8) **Tax liability with respect to purchases of equipment or supplies and property manufactured for commercial or industrial use.** The retail sales tax applies to purchases of tangible personal property by manufacturers and processors for hire unless the property becomes an ingredient or component part of a new article produced for sale, or is a chemical used in the processing of an article for sale. If the seller fails to collect the appropriate retail sales tax, the buyer is required to remit the retail sales tax (commonly referred to as "deferred retail sales tax") or use tax directly to the department. Refer to WAC 458-20-113 for additional information about what qualifies as an ingredient or component or a chemical used in processing.

(a) RCW 82.08.02565 and 82.12.02565 provide a retail sales and use tax exemption for certain machinery and equipment used by manufacturers and/or processors for hire. Refer to WAC 458-20-13601 for additional information regarding how these exemptions apply.

(b) Persons manufacturing tangible personal property for commercial or industrial use are subject to both the manufacturing B&O and use taxes upon the value of the property manufactured, unless a specific exemption applies. (See also WAC 458-20-134 on commercial or industrial use.) Persons who also extract the product used as an ingredient in a manufacturing process should refer to WAC 458-20-135 for additional information regarding their tax-reporting responsibilities.

AMENDATORY SECTION (Amending Order ET 70-3, filed 5/29/70, effective 7/1/70)

WAC 458-20-139 Trade shops—Printing plate makers, typesetters, and trade binderies. (((~~(Note: This rule covers all the material previously included in WAC 458-20-139 and 458-20-146.)~~)))

The term "printing plate makers" includes, among others, photoengravers, electrotypers, stereotypers, and lithographic plate makers.

Business and Occupation Tax

Printing plate makers, typesetters and trade binderies (referred to in the trade as "trade shops") are primarily engaged in the business of altering or improving tangible personal property owned by them for sale or altering or improving tangible personal property owned by their customers. In either case the gross proceeds (including the value of any property exchanged by the customer in kind) from sales of, or services rendered to, plates, mats, engravings, type, etc., which are delivered in this state are taxable under retailing if the sale is to a "consumer" or wholesaling-all others if the sale is to one who will resell the property in the regular course of business without intervening "use." (See WAC ((~~458-20-102~~)) 458-20-102A Resale certificates and WAC 458-20-102 Reseller permits.) Neither of these classifications is applicable however, if the article sold is delivered to an out-of-state customer at an out-of-state point or if an article is produced for commercial or industrial use (see WAC 458-20-134). In these cases tax is due under the manufacturing classification on the "value of products."

Retail Sales Tax

Sales to the printing industry and others of tangible personal property, or of services of altering or improving tangible personal property, by printing plate makers, typesetters, and trade binderies are sales at retail and subject to the retail sales tax unless the purchaser resells the article in the regular course of business without any intervening "use." For example, a trade shop must collect and account for the retail sales tax where a printing plate is sold to a printer who uses the plate to produce copy for a customer, even though he subsequently sells and delivers both the plate and the copy to the customer. In this situation the printer has made "intervening use" of the plate as a printing tool and is a "consumer" liable for payment of the retail sales tax to the trade shop.

Sales of plates, engravings, etc., to advertising agencies are retail sales and subject to the retail sales tax.

Sales by supply houses to trade shops of metal or other materials becoming a component part of an article produced for sale are not subject to the retail sales tax. As evidence of this, trade shops are required to furnish their vendors resale certificates ((~~in the usual form~~)) for purchases made before January 1, 2010, or reseller permits for purchases made on or after January 1, 2010, to document the wholesale nature of any purchase as provided in WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits). On the other hand, sales to trade shops of items for use such as machinery, equipment, tools, and other articles or materials, including chemicals which are used in the production of plates, mats, engravings, type, etc., are retail sales subject to the retail sales tax.

((~~Revised June 1, 1970.~~))

AMENDATORY SECTION (Amending Order ET 83-15, filed 3/15/83)

WAC 458-20-146 National and state banks, mutual savings banks, savings and loan associations and other financial institutions.

Business and Occupation Tax

((~~Effective March 1, 1970, the legislature repealed RCW 82.04.400 which exempted from the business and occupation tax~~)) The gross income of national banks, states banks, mutual savings banks, savings and loan associations, and certain other financial institutions((~~. Accordingly, the gross income or gross sales of such institutions will become~~)) is subject to the business and occupation tax according to the following general principles.

Services and other activities. Generally, the gross income from engaging in financial businesses is subject to the business and occupation tax under the classification service and other activities. Following are examples of the types of income taxable under this classification: Interest earned (including interest on loans made to nonresidents unless the financial institution has a business location in the state of the borrower's residence which rendered the banking service), commissions earned, dividends earned, fees and carrying charges, charges for bookkeeping or data processing, safety deposit box rentals. See WAC 458-20-14601 Financial institutions—Income apportionment.

The term "gross income" is defined in the law as follows:

"Gross income of the business" means the value proceeding or accruing by reason of the transaction of the business engaged in and includes gross proceeds of sales, compensation for the rendition of services, gains realized from trading in stocks, bonds, or other evidences of indebtedness, interest, discount, rents, royalties, fees, commissions, dividends, and other emoluments however designated, all without any deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses.

The law allows certain deductions from gross income to arrive at the taxable amount (the amount upon which the business and occupation tax is computed). Deductible gross income should be included in the gross amount reported on the excise tax return and should then be shown as a deduction and explained on the deduction schedules ((~~provided on the reverse side of the reporting form~~)). The deductions generally applicable to financial businesses include the following:

(1) Dividends received by a parent from its subsidiary corporations (RCW 82.04.4281).

(2) Interest received on investments or loans primarily secured by first mortgages or trust deeds on nontransient residential properties. (See WAC 458-20-166 for definition of "transient.") (RCW ((~~82.04.4291~~)) 82.04.4292.)

(3) Interest received on obligations of the state of Washington, its political subdivisions, and municipal corporations organized pursuant to the laws thereof. (RCW ((~~82.04.4292~~)) 82.04.4291). A deduction may also be taken for interest received on direct obligations of the federal government, but not for interest attributable to loans or other financial obliga-

tions on which the federal government is merely a guarantor or insurer.

(4) Gross proceeds from sales or rentals of real estate (RCW 82.04.390). These amounts may be entirely excluded from the gross income reported and need not be shown on the return as a deduction.

Retailing. Sales of tangible personal property and certain services are defined as "retail sales" and are subject to the business and occupation tax under the classification retailing. Such sales are also subject to the retail sales tax which the seller must collect and remit to the department of revenue (department). Transactions taxable as sales at retail are not subject to tax under service and other activities.

Following are examples of transactions subject to the retailing classification of the business and occupation tax and to the retail sales tax: Sales of meals or confections, sales of repossessed merchandise, sales of promotional material, leases of tangible personal property, sales of check registers, coin banks, personalized checks((.)) (note: When the financial institution is not the seller of these items but simply takes orders as agent for the supplier, the supplier is responsible for reporting as the retail seller. The financial institution has liability for reporting the retail sales tax on sales made as an agent only if the supplier is an out-of-state firm not registered with the department ((~~of revenue~~))), escrow fees, casual sales (occasional sales of depreciated assets such as used furniture and office equipment—subject to retail sales tax but deductible from the business and occupation tax; see WAC 458-20-106 Casual or isolated sales—Business reorganizations).

Sales for resale ((~~certificates~~)). When a financial institution buys tangible personal property for resale to its customers without intervening use, the sales tax is not applicable. In this case the financial institution should give the vendor a resale certificate ((~~containing the number of its certificate of registration and its statement that the articles purchased are for resale in the course of its business activities. Resale certificates can be given in blanket form covering all future purchases. (See also WAC 458-20-102.)~~)) for purchases made before January 1, 2010, or a reseller permit for purchases made on or after January 1, 2010, to document the wholesale nature of any sale as provided in WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits). Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by the seller for five years from the date of last use or December 31, 2014.

Use Tax

The use tax complements the retail sales tax by imposing a tax of like amount on the use of tangible personal property purchased or acquired without payment of the retail sales tax. Thus, when office equipment or supplies are purchased or leased from an unregistered out-of-state vendor who does not collect the Washington state retail sales tax, the use tax must be paid directly to the department ((~~of revenue~~)). Space for the reporting of this tax will be found on the ((~~regular~~)) excise tax return. (For more information, see WAC 458-20-178 Use tax.)

When tax liability arises. Tax should be reported during the reporting period in which the financial institution receives, becomes legally entitled to receive, or in accord with the system of accounting regularly employed enters the consideration as a charge against the client, purchaser or borrower. Financial institutions may prepare excise tax returns to the department ((~~of revenue~~)) reporting income in periods which correspond to accounting methods employed by each institution for its normal accounting purposes in reporting to its supervisory authority.

((~~**Reporting procedures.** Financial institutions subject to the business and occupation tax, retail sales tax, or use tax must secure a certificate of registration from the department of revenue and pay a registration fee of $15.00. Form 2401, application for certificate of registration, is available at all district offices of the department of revenue or may be obtained by writing directly to the Department of Revenue, Olympia, Washington, 98504.~~

~~Reporting periods will be assigned by the department on the basis of total tax liability incurred. Most financial institutions will be required to report on a monthly basis, although some smaller institutions may qualify for quarterly reporting. Forms for reporting will be mailed shortly before the close of each reporting period and will be due and payable on or before the 15th day of the month following. No penalties will be charged if the return is postmarked on or before the last day of the month in which the due date falls.~~))

AMENDATORY SECTION (Amending WSR 08-16-055, filed 7/30/08, effective 8/30/08)

WAC 458-20-150 Optometrists, ophthalmologists, and opticians. (1) **Introduction.** This section explains the application of Washington's business and occupation (B&O), retail sales, and use taxes to the business activities of optometrists, ophthalmologists, and opticians. It explains the tax liability resulting from the rendering of professional services and the sale of prescription lenses, frames, and other optical merchandise. It also discusses the retail sales tax exemption for the sale of prescription lenses and the B&O tax deduction for prescription drugs administered by a medical service provider. The department of revenue (department) has adopted other ((~~rules~~)) sections dealing with the taxability of various activities relating to the provision of health care. Readers may want to refer to the following ((~~rules~~)) sections for additional information.

(a) WAC 458-20-151 (Dentists and other health care providers, dental laboratories, and dental technicians);

(b) WAC 458-20-168 (Hospitals, nursing homes, boarding homes, adult family homes and similar health care facilities);

(c) WAC 458-20-18801 (Prescription drugs, prosthetic and orthotic devices, ostomic items, and medically prescribed oxygen); and

(d) WAC 458-20-233 (Tax liability of medical and hospital service bureaus and associations and similar health care organizations).

(2) **Taxability of professional services.** Optometrists and ophthalmologists are subject to the service and other activities B&O tax on their gross income from providing professional services. For the purposes of this section, "professional services" include the examination of the human eye,

the examination, identification, and treatment of any defects of the human vision system, and the analysis of the process of vision. It includes the use of any diagnostic instruments or devices for the measurement of the powers or range of vision, or the determination of the refractive powers of the eye or its functions. It does not include the preparation or dispensing of lenses or eyeglasses.

(3) **Purchases and sales of optical merchandise by optometrists, ophthalmologists, and opticians.** Purchases of optical merchandise by optometrists, ophthalmologists, and opticians for resale without intervening use as a consumer are not subject to the retail sales tax. Thus, optometrists, ophthalmologists, and opticians are not required to pay retail sales or use tax on items which will be given to customers as part of a sale of eyeglasses or contact lenses, such as cleaning supplies, carrying cases, and the like. The department considers these items to be sold along with the eyeglasses or contact lenses. An optometrist, ophthalmologist, or optician purchasing tangible personal property for resale must furnish a ((~~properly completed~~)) resale certificate for purchases made before January 1, 2010, or a reseller permit for purchases made on or after January 1, 2010, to the seller to document the wholesale nature of the sale((~~. Resale certificates can be obtained from the department's web site at http://dor.wa.gov, or by calling the department's telephone information center at 1-800-647-7706. For additional information regarding resale certificates, refer to WAC 458-20-102 (Resale certificates).~~)) as provided in WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits). Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by the seller for five years from the date of last use or December 31, 2014.

Sales of optical merchandise to consumers are subject to retailing B&O tax. In addition, the seller must collect retail sales tax unless the sale is specifically exempt by law. For the purposes of this section, "optical merchandise" includes prescription lenses, frames, springs, temples, cases, and other items or accessories to be worn or used with lenses. It also includes nonprescription lenses or eyeglasses.

For purposes of this section, "prescription lens" means any lens, including contact lens, with power or prism correction for human vision, which has been prescribed in writing by a physician or optometrist. The term "prescription lens" includes all ingredients and component parts of the lens itself, including color, scratch resistant or ultraviolet coating, and fashion tints.

(a) **Are sales of prescription lenses and frames exempt from retail sales tax?** As a result of legislation to implement the national Streamlined Sales and Use Tax Agreement, effective July 1, 2004, sales of prescription lenses and frames for prescription lenses are exempt from retail sales tax as prosthetic devices under RCW 82.08.0283.

Before July 1, 2004, sales of prescription lenses were exempt from retail sales tax under RCW 82.08.0281 if the lenses were dispensed by an optician licensed under chapter 18.34 RCW or by a physician or optometrist under a prescription written by a physician or optometrist. Sales of frames for prescription lenses did not qualify for a sales tax exemption. Thus, before July 1, 2004, when prescription lenses were sold with frames, only the prescription lenses were exempt from sales tax.

(b) **Are repairs of prescription lenses and frames subject to retail sales tax?** Beginning July 1, 2004, charges for the repair of prescription lenses or to prescription eyeglass frames, whether the frames are the original frames or replacement frames, are exempt from retail sales tax under RCW 82.08.0283. Before July 1, 2004, charges for the repair of prescription lenses were exempt from retail sales tax. Charges for the repair of frames, however, were subject to retail sales tax.

(c) **Segregation of income from different sources.** To claim a retail sales tax exemption under RCW 82.08.0281 or 82.08.0283, persons providing or selling any combination of professional services, prescription lenses, prescription eyeglass frames, or other optical merchandise must segregate and separately account for the income derived from each source.

(d) **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 tax status of each situation must be determined after a review of all of the facts and circumstances.

(i) Taxpayer is an optometrist who performs eye examinations and sells prescription eyeglasses, contact lenses, and other optical merchandise. All sales of prescription lenses are made under written prescription. Income attributable to the eye examinations, the sale of prescription lenses, and the sale of other optical merchandise is segregated in Taxpayer's books of account.

The income derived from the eye examinations is subject to service and other activities B&O tax. The gross proceeds of sales of the prescription lenses and other optical merchandise are subject to retailing B&O tax. The sales of prescription lenses, including contact lenses, are exempt from retail sales tax. Beginning July 1, 2004, sales of eyeglass frames with prescription lenses are exempt from retail sales tax. Taxpayer, however, must collect retail sales tax on sales of other optical merchandise, including eyeglass frames sold with prescription lenses before July 1, 2004, and remit the tax to the department.

(ii) Taxpayer is a retail drugstore that sells preassembled "off-the-shelf" reading glasses. These eyeglasses have lenses with power or prism correction and are sold without a prescription. In addition, Taxpayer sells magnifiers, binoculars, monoculars, and sunglasses. These items are also sold without a prescription.

The gross proceeds of sales of these items are subject to retailing B&O tax. In addition, Taxpayer must collect retail sales tax on sales of these items and remit the tax to the department. Because these items are not sold under a prescription, nor are they prescribed, fitted, or furnished for the buyer by a person licensed under the laws of this state to prescribe, fit, or furnish prosthetic devices, they are not exempt from retail sales tax under either RCW 82.08.0281 or 82.08.0283.

(4) **Equipment and supplies used by optometrists, ophthalmologists, and opticians.** Purchases of equipment and supplies used by optometrists, ophthalmologists, and opticians are purchases at retail and are subject to retail sales

tax unless specifically exempt by law. If the seller does not collect retail sales tax, the optometrist, ophthalmologist, or optician must remit the retail sales tax (commonly referred to as "deferred sales tax") or use tax directly to the department unless specifically exempt by law. Deferred sales or use tax should be reported on the buyer's excise tax return. The excise tax return does not have a separate line for reporting deferred sales tax. Consequently, deferred sales tax liability should be reported on the use tax line of the buyer's excise tax return. For detailed information about use tax, refer to WAC 458-20-178 (Use tax).

(a) **Prescription drugs.** "Prescription drugs," as defined in RCW 82.08.0281, may be purchased without payment of retail sales or use tax by optometrists and ophthalmologists if all requirements for the exemption are met. For additional information regarding prescription drugs, refer to WAC 458-20-18801.

(b) Prescription drugs administered by the medical service provider. Effective October 1, 2007, RCW 82.04.620 allows a deduction from the service and other activities classification of the B&O tax (RCW 82.04.290(2)) for amounts received by physicians or clinics for drugs for infusion or injection by licensed physicians or their agents for human use pursuant to a prescription. This deduction only applies to amounts that:

(i) Are separately stated on invoices or other billing statements;

(ii) Do not exceed the then current federal rate; and

(iii) Are covered or required under a health care service program subsidized by the federal or state government.

For purposes of this deduction only, amounts that "are covered or required under a health care service program subsidized by the federal or state government" include any required drug copayments made directly from the patient to the physician or clinic.

(A) "Federal rate" means the rate at or below which the federal government or its agents reimburse providers for prescription drugs administered to patients as provided for in the medicare, Part B drugs average sales price information resource as published by the United States Department of Health and Human Services, or any index that succeeds it.

(B) The deduction is available on an "all or nothing" basis against the total of amounts received for a specific drug charge. If the total amount received by the physician or clinic for a specific drug exceeds the federal reimbursement rate, none of the total amount received qualifies for the deduction (including any required copayment received directly from the patient). In other words, a physician or clinic may not simply take an "automatic" deduction equal to the federal reimbursement rate for each drug.

(c) **Samples.** Optometrists, ophthalmologists, and opticians are required to pay use tax on any samples, with the exception of prescription drug samples that they acquire unless retail sales or use tax has been previously paid on these samples.

(d) **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 tax status of each situation must be determined after a review of all of the facts and circumstances.

(i) Taxpayer is an ophthalmologist who performs eye examinations, laser surgery, and cataract surgery. Taxpayer purchases equipment and supplies that are used in performing these services such as surgical instruments, eye shields, cotton swabs, sterile dressings, bandages, and gauze. Taxpayer also purchased a computer, technical publications, and magazines by mail order and over the internet.

Taxpayer is subject to retail sales tax on these purchases. If the seller does not collect sales tax, Taxpayer is liable for deferred sales tax or use tax and must remit the tax directly to the department.

(ii) Taxpayer is an optometrist who performs eye examinations and sells prescription eyeglasses, contact lenses, and other optical merchandise. Taxpayer purchases nonprescription saline and cleaning solutions for contact lenses and carrying cases for eyeglasses and contact lenses. The saline and cleaning solutions are consumed when Taxpayer performs eye examinations. The eyeglass and contact lens carrying cases are provided to customers at the time they purchase eyeglasses or contact lenses.

The purchases of the eyeglass and contact lens carrying cases are purchases for resale and are, therefore, not subject to sales tax if Taxpayer provides the seller with a ((~~properly completed~~)) resale certificate (WAC 458-20-102A) for sales made before January 1, 2010, or a reseller permit (WAC 458-20-102) for sales made on or after January 1, 2010. The purchases of the saline and cleaning solutions are, however, subject to the retail sales tax. These solutions are consumed while providing professional services and cannot be considered to be purchased for resale. They also do not qualify for a sales tax exemption under RCW 82.08.0281 as prescription drugs. If retail sales tax was not paid on the saline and cleaning solutions at the time of purchase, Taxpayer must remit deferred sales tax or use tax directly to the department.

AMENDATORY SECTION (Amending WSR 04-17-022, filed 8/9/04, effective 9/9/04)

WAC 458-20-151 Dentists and other health care providers, dental laboratories, and dental technicians. (1) **Introduction.** This rule explains the application of business and occupation (B&O), retail sales, and use taxes to the business activities of dentists and other health care providers, dental laboratories, and dental technicians. For purposes of this rule, a "health care provider" is a person who is licensed under the provisions of Title 18 RCW to provide health care services to humans in the ordinary course of business or practice of a profession. The department of revenue (department) has adopted other rules dealing with the taxability of various activities relating to the provision of health care. Readers may want to refer to the following rules for additional information:

(a) WAC 458-20-150 (Optometrists, ophthalmologists, and opticians);

(b) WAC 458-20-168 (Hospitals, ((~~medical~~)) nursing homes, boarding homes, adult family homes and similar health care facilities((~~, and adult family homes~~)));

(c) WAC 458-20-18801 (Prescription drugs, prosthetic and orthotic devices, ostomic items, and medically prescribed oxygen); and

(d) WAC 458-20-233 (Tax liability of medical and hospital service bureaus and associations and similar health care organizations).

(2) **Tax-reporting information for dentists and other health care providers.** This subsection provides specific tax-reporting information for dentists and more generalized tax-reporting information for other health care providers. Dentists who employ dental technicians to produce or fabricate dental appliances, devices, restorations, substitutes, or other dental laboratory products should refer to subsection (3)(b) and (d) of this rule for additional information. Dental appliances, devices, restorations, substitutes, or other dental laboratory products are also referred to as "dental prostheses" throughout this rule.

(a) **Taxability of dental and other health care services.** Dentists and other health care providers are subject to the service and other activities B&O tax on their gross income from performing dental and other health care services. The term "gross income" includes any separate charge for drugs, medicines, and other substances administered or provided to a patient as part of the dental or other health care services delivered to the patient. "Gross income" also includes any separate charges for prosthetic devices, including dental prostheses, that are provided as part of the dental or other health care services delivered to patients.

For purposes of this rule, "prosthetic device" means a replacement, corrective, or supportive device, including repair and replacement parts for a prosthetic device, worn on or in the body to artificially replace a missing portion of the body, prevent or correct a physical deformity or malfunction, or support a weak or deformed portion of the body.

(b) **Sales of tangible personal property apart from dental and other health care services.** A dentist or other health care provider may make sales of tangible personal property such as drugs, medicines, and bandages as a convenience to a buyer apart from any health care services provided to the buyer. These are sales of tangible personal property only when the dentist or other health care provider does not supply or administer the drug, medicine, or other item in the course of delivering health care services to the buyer. The gross proceeds of these retail sales of tangible personal property are subject to the retailing B&O tax. In addition, the dentist or other health care provider must collect and remit retail sales tax, unless the sale is specifically exempt by law. See WAC 458-20-18801 for detailed information regarding retail sales tax exemptions available for sales of items commonly associated with health care services. Adequate records must be kept by the dentist or other health care provider to distinguish items of tangible personal property that are supplied or administered to patients as part of health care services from those that are sold apart from health care services delivered to the buyer.

Purchases of tangible personal property for resale without intervening use are not subject to the retail sales tax. A dentist or other health care provider purchasing tangible personal property for resale must furnish a resale certificate ((~~in the usual form~~)) for purchases made before January 1, 2010, or a reseller permit for purchases made on or after January 1, 2010, to the seller to document the wholesale nature of the sale((~~. Resale certificates can be obtained from the department's web site at http://dor.wa.gov, or by calling the department's telephone information center at 1-800-647-7706. For additional information regarding resale certificates, refer to WAC 458-20-102 (Resale certificates)~~)) as provided in WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits). Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by the seller for five years from the date of last use or December 31, 2014.

(c) **Equipment and supplies used by dentists and other health care providers.** Purchases of equipment and supplies used by dentists and other health care providers in performing dental or other health care services are purchases at retail and subject to retail sales tax unless specifically exempt by law. If the seller does not collect retail sales tax, the dentist or other health care provider must remit the retail sales tax (commonly referred to as "deferred sales tax") or use tax directly to the department unless specifically exempt by law. Deferred sales or use tax should be reported on the buyer's excise tax return. However, the excise tax return does not have a separate line for reporting deferred sales tax. Consequently, deferred sales tax liability should be reported on the use tax line of the buyer's excise tax return. For detailed information regarding the use tax, refer to WAC 458-20-178 (Use tax).

Dental prostheses are exempt from retail sales and use taxes if the dental prosthesis meets the definition of "prosthetic device" in subsection (2)(a) of this rule. RCW 82.08.0283 and 82.12.0277. Exempt items include, but are not limited to, full and partial dentures, crowns, inlays, fillings, braces, retainers, collars, wire, screws, bands, splints, night guards, gold, silver, alloys, acrylic materials, filling material, reline material, cement, cavity liner, pins, and endo post.

(d) **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 tax results of other situations must be determined after a review of all of the facts and circumstances.

(i) Dr. A is a physician who specializes in the treatment of allergies. Dr. A treats many patients with injections of allergy extracts (antigens). Dr. A separately itemizes the charges for the antigen, the administration of the injection, and the office call in patients' billings. Dr. A is subject to service and other activities B&O tax on the entire charge for the antigen, administration of the injection, and office call. Even though Dr. A separately itemizes the charges for antigens, these are not retail sales because Dr. A administers the antigens to the patients.

(ii) Dr. B made mail-order purchases of a computer, books, and magazines for use in Dr. B's dental practice. Dr. B did not pay retail sales tax to the sellers on these purchases. Therefore, Dr. B must remit to the department deferred retail sales or use tax on the computer, books, and magazines.

(3) **Tax-reporting information for dental laboratories and dental technicians.** This subsection provides tax-reporting information for dental laboratories and dental technicians.

(a) **Producing or fabricating dental prostheses for sale.** The production or fabrication of dental appliances, devices, restorations, substitutes, or other dental laboratory

products by dental laboratories and dental technicians is a manufacturing activity. RCW 82.04.120. Thus, dental laboratories and dental technicians are subject to manufacturing B&O tax on the value of the dental prostheses they manufacture. The value of products manufactured is generally the gross proceeds of sales of such manufactured products. For additional information about the manufacturing B&O tax, refer to WAC 458-20-136 (Manufacturing, processing for hire, fabricating).

(i) **Sales of dental prostheses manufactured by dental laboratories and dental technicians.** Dental laboratories and dental technicians who make sales within this state of dental prostheses they have manufactured are subject to either the retailing or wholesaling B&O tax, as the case may be. In such cases, the dental laboratory or dental technician must report under the manufacturing B&O tax classification as well as the wholesaling and/or retailing B&O tax classifications. However, a multiple activities tax credit (MATC) may be claimed. For detailed information about the MATC, refer to WAC 458-20-19301 (Multiple activities tax credits). Dental laboratories or dental technicians making wholesale sales must obtain a resale certificate (WAC 458-20-102A) for sales made before January 1, 2010, or a reseller permit (WAC 458-20-102) for sales made on or after January 1, 2010, from the buyer to document the wholesale nature of the sale. ((~~For additional information regarding resale certificates, refer to WAC 458-20-102.~~))

As noted above in subsection (2)(c) of this rule, sales of dental prostheses including, but not limited to, full and partial dentures, crowns, inlays, fillings, braces, and retainers are exempt from retail sales tax if the dental prosthesis meets the definition of "prosthetic device" in subsection (2)(a) of this rule. RCW 82.08.0283.

(ii) **Dental casts, models, and other articles of tangible personal property manufactured by dental laboratories and dental technicians for commercial or industrial use.** Dental laboratories and dental technicians may manufacture dental casts, models, or other articles of tangible personal property that they use in producing or fabricating dental prostheses. In such cases, the dental laboratory or dental technician is manufacturing a product for commercial or industrial use and is subject to the manufacturing B&O tax on the value of the dental cast, model, or other article of tangible personal property. (See WAC 458-20-112 (Value of products) for information regarding the value of products.) As the consumer of the dental cast, model, or other article of tangible personal property manufactured for commercial or industrial use, the dental laboratory or dental technician is also liable for use tax on the value of the dental cast, model, or other article of tangible personal property, unless the use is specifically exempt by law.

(b) **In-house manufacturing of dental prostheses by dentists.** As noted in this rule, the production or fabrication of dental prostheses by dental laboratories and dental technicians is a manufacturing activity. However, the production or fabrication of dental prostheses by dentists in the course of providing dental care services to their patients is not a manufacturing activity under the law and, therefore, manufacturing B&O tax does not apply to this activity. A dentist may personally produce or fabricate dental prostheses, or the dentist may have an employee who is a dental technician produce or fabricate the dental prostheses. These dental prostheses are considered a tangible representation of professional services provided to the dentist's patients. Dentists who manufacture impressions, dental casts, models, or other articles of tangible personal property that they use in producing or fabricating dental prostheses should refer to subsection (3)(a)(ii) of this rule for tax reporting instructions applicable to this activity.

The following examples identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax results of other situations must be determined after a review of all of the facts and circumstances.

(i) **Example.** Jane Doe, an employee of Dentist A, fabricates dental prostheses. Dentist A provides these products to patients in the course of rendering dental care services. Dentist A is subject to service and other activities B&O tax on the gross income received for providing dental care services, including any charge for the dental prostheses even if Dentist A separately charges patients for the dental prostheses. (See subsection (2)(a) of this rule.)

(ii) **Example.** The facts are the same as in the previous example except that Dentist A also sells to Dentist B dental prostheses produced by Jane Doe in the course of Jane's employment with Dentist A. For these sales of dental prostheses to Dentist B, Dentist A is acting as a dental laboratory and, therefore, is liable for both manufacturing B&O tax and retailing B&O tax with respect to the manufacture and sale of dental prostheses to Dentist B. Dentist A may also claim a MATC (see subsection (3)(a) and (a)(i) of this rule.) The sales to Dentist B are exempt from retail sales tax under RCW 82.08.0283 if the items qualify as a prosthetic device as defined above in subsection (2)(a) of this rule.

(c) **Equipment and supplies used by dental laboratories and dental technicians.** Purchases of equipment and supplies by dental laboratories and dental technicians for use in manufacturing dental prostheses are generally purchases at retail and subject to retail sales tax unless specifically exempt by law. If the seller does not collect retail sales tax, the dental laboratory or dental technician must remit the retail sales tax (commonly referred to as "deferred sales tax") or use tax directly to the department unless specifically exempt by law. Deferred sales or use tax should be reported on the buyer's excise tax return. However, the excise tax return does not have a separate line for reporting deferred sales tax. Consequently, deferred sales tax liability should be reported on the use tax line of the buyer's excise tax return. For detailed information regarding use tax, refer to WAC 458-20-178.

(i) **Components of dental prostheses produced for sale.** Purchases of supplies that become components of dental prostheses that are produced for sale are purchases at wholesale and are not subject to retail sales tax if the buyer provides the seller with a properly completed resale certificate (WAC 458-20-102A) for purchases made before January 1, 2010, or a reseller permit (WAC 458-20-102) for purchases made on or after January 1, 2010, to document the wholesale nature of the transaction. ((~~WAC 458-20-102.~~))

(ii) **Example.** The following example identifies a number of facts and then states a conclusion. This example should be used only as a general guide. The tax results of

other situations must be determined after a review of all of the facts and circumstances. A dental lab purchases equipment and supplies including gold, silver, alloys, artificial teeth, cement, and tools. The purchases of gold, silver, alloys, artificial teeth, and cement that become components of dental prostheses are wholesale purchases and are not subject to retail sales tax if the buyer provides the seller with a ((~~properly completed~~)) resale certificate (WAC 458-20-102A) for purchases made before January 1, 2010, or a reseller permit (WAC 458-20-102) for purchases made on or after January 1, 2010. The tools are subject to retail sales or use tax unless they qualify for the manufacturing machinery and equipment sales and use tax exemption. Additional information about this exemption is provided below in subsection (3)(d) of this rule.

(d) **Sales and use tax exemptions for manufacturing machinery and equipment.** A retail sales and use tax exemption is provided by RCW 82.08.02565 and 82.12.-02565 for sales to or use by manufacturers of certain machinery and equipment used directly in a manufacturing operation. This exemption is limited to machinery and equipment used to manufacture products for sale as tangible personal property. Thus, dental laboratories and dental technicians manufacturing dental prostheses for sale may be eligible for this exemption. The exemption is not available if these products are produced or fabricated by a dentist or an employee of a dentist and are provided to patients in the course of delivering dental care services to the patients (as is the case in the example provided in subsection (3)(b)(i) of this rule). Refer to WAC 458-20-13601 (Manufacturers and processors for hire—Sales and use tax exemption for machinery and equipment) for detailed information regarding this exemption.

AMENDATORY SECTION (Amending WSR 07-17-109, filed 8/17/07, effective 9/17/07)

WAC 458-20-163 Insurance companies, including surety companies, fraternal benefit societies, fraternal fire insurance associations, beneficiary corporations or societies and Washington state health insurance pool. (1) **Introduction.** Income earned by insurance companies, including surety companies, fraternal benefit societies, fraternal fire insurance associations, beneficiary corporations or societies, and the Washington state health insurance pool is generally subject to the service and other activities business and occupation (B&O) tax, unless the law provides an exemption or deduction. This section identifies exemptions and deductions available to these businesses. It also explains the reporting responsibilities for retail sales and use taxes for retail purchases and retail services.

(2) **Exemptions.** The law provides the following B&O tax exemptions. These amounts do not need to be reported on the excise tax returns filed with the department of revenue.

(a) RCW 82.04.320 provides an exemption to any person with respect to insurance business upon which a tax based on gross premiums is paid to the state of Washington. It should be noted, however, that the law provides expressly that this exemption does not extend to "any person engaging in the business of representing any insurance company, whether as general or local agent, or acting as broker for such companies" or to "any bonding company...with respect to gross income derived from the completion of any contract as to which it is a surety, or as to any liability as successor to the liability of the defaulting contractor." The exemption also does not apply to any business engaged in by an insurance company other than its insurance business. Thus an insurance company is subject to the retailing or wholesaling B&O tax on sales of salvaged property unless the sales are casual or isolated sales as described in WAC 458-20-106 (Casual or isolated sales—Business reorganizations). Also see WAC ((~~458-20-102~~)) 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits) for ((~~resale certificate~~)) documentation requirements for wholesale sales.

(b) RCW 82.04.322 provides an exemption to any health maintenance organization, health care service contractor, or certified health plan in respect to premiums or prepayments that are taxable under RCW 48.14.0201.

(c) RCW 82.04.370 provides an exemption to fraternal benefit societies or fraternal fire insurance associations organized or licensed pursuant to Title 48 RCW and as defined in RCW 48.36A.010.

The statute also exempts beneficiary corporations or societies organized under and existing by virtue of Title 24 RCW, if such beneficiary corporations or societies provide in their bylaws for the payment of death benefits.

The exemption provided by RCW 82.04.370, however, is limited to gross income from premiums, fees, assessments, dues, or other charges directly attributable to the insurance or death benefits provided by such persons. It is not intended that all the varied, regular business activities (e.g., sales of food, liquor, admissions, and amusement devices receipts) of these societies or organizations be exempt from B&O tax. Only that portion of income which can be demonstrated as directly attributable to charges made for insurance or providing death benefits is exempt.

(3) **Deductions.** For periods prior to July 1, 2006, a B&O tax deduction was provided by RCW 82.04.4329 to a member of the Washington state health insurance pool for assessments paid by that member to the pool. This deduction did not apply to a member who had deducted such assessments from the insurance premiums tax, RCW 48.14.020.

(4) **Retail sales and use tax responsibilities.** Insurance companies are subject to the retail sales tax or use tax upon retail purchases, certain retail services, or articles acquired for their own use.

When insurance companies make sales to consumers of salvaged property (e.g., from automobile collisions, fire loss, burglary, or theft recoveries) or any other tangible personal property, they must collect and report retail sales tax on those sales.

AMENDATORY SECTION (Amending WSR 08-16-057, filed 7/30/08, effective 8/30/08)

WAC 458-20-168 Hospitals, nursing homes, boarding homes, adult family homes and similar health care facilities. (1) **Introduction.** This section explains the application of business and occupation (B&O), retail sales, and use taxes to persons operating hospitals as defined in RCW 70.41.020, nursing homes as defined in RCW 18.51.010,

boarding homes as defined in RCW 18.20.020, adult family homes as defined in RCW 70.128.010, and similar health care facilities.

The department of revenue (department) has adopted other rules dealing with the taxability of various activities relating to the provision of health care. Readers may want to refer to the following rules for additional information:

(a) WAC 458-20-150 Optometrists, ophthalmologists, and opticians;

(b) WAC 458-20-151 Dentists and other health care providers, dental laboratories, and dental technicians;

(c) WAC 458-20-18801 Prescription drugs, prosthetic and orthotic devices, ostomic items, and medically prescribed oxygen; and

(d) WAC 458-20-233 Tax liability of medical and hospital service bureaus and associations and similar health care organizations.

(2) **Personal and professional services of hospitals, nursing homes, boarding homes, and similar health care facilities.** This subsection provides information about the application of B&O tax to the personal and professional services of hospitals, nursing homes, boarding homes, and similar health care facilities. For information regarding B&O tax deductions and exemptions for persons operating health care facilities, readers should refer to subsection (3) of this section.

(a) **Public or nonprofit hospitals.** The gross income of public or nonprofit hospitals derived from providing personal or professional services to inpatients, is subject to B&O tax under the public or nonprofit hospitals classification. RCW 82.04.260. For the purpose of this section, "public or nonprofit hospitals" are hospitals, as defined in RCW 70.41.020, operated as nonprofit corporations, operated by political subdivisions of the state (e.g., a hospital district operated by a county government), or operated by but not owned by the state.

Gross income of public or nonprofit hospitals derived from providing personal or professional services for persons other than inpatients is generally subject to B&O tax under the service and other activities classification. RCW 82.04.290. Thus, for example, amounts received for services provided to outpatients, income received for providing nonmedical services, interest received on patient accounts receivable, and amounts received for providing transcribing services to physicians are subject to service and other activities B&O tax.

(i) **Clinics and departments operated by public or nonprofit hospitals.** Gross income derived from medical clinics and departments providing services to both inpatients and outpatients and operated by a public or nonprofit hospital is subject to B&O tax under the public or nonprofit hospitals classification where the clinic or department is an integral, interrelated, and essential part of the hospital. Otherwise, the gross income derived from medical clinics and departments providing services to both inpatients and outpatients and operated by a public or nonprofit hospital is subject to B&O tax under the service and other activities classification.

Relevant factors for determining whether a medical clinic or department operated by a public or nonprofit hospital is an integral, interrelated, and essential part of the hospital include whether the clinic or department is located at the hospital facility and whether the clinic or department furnishes the type of services normally provided by hospitals, such as twenty-four hour intake and emergency services.

The following examples identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax status of each situation must be determined after a review of all of the facts and circumstances.

(A) Acme Hospital is a nonprofit hospital. Acme has a medical clinic that is separate but physically located within the hospital. However, the clinic is open only during regular business hours and provides no domiciliary care or overnight facilities to its patients. The clinic is staffed, equipped, administered, and provides the type of medical services that one would expect to receive in the average physician's office. Acme's medical clinic is not an integral, interrelated, and essential part of Acme Hospital. Gross receipts by the medical clinic are subject to service and other activities B&O tax.

(B) Acme Hospital is a nonprofit hospital. Acme has a cancer treatment facility that is physically located within the hospital. The cancer treatment facility provides the type of services normally provided by hospitals to cancer patients. Acme's cancer treatment facility is an integral, interrelated, and essential part of Acme Hospital. Gross receipts by the cancer treatment facility are subject to public or nonprofit hospitals B&O tax.

(ii) **Educational programs and services.** Amounts received by public or nonprofit hospitals for providing educational programs and services to the general public are subject to B&O tax under the public or nonprofit hospitals classification if they are an integral, interrelated, and essential part of the hospital. Otherwise, such amounts are subject to B&O tax under the service and other activities classification. Educational services are considered an integral, interrelated, and essential part of the hospital only if they are unique and incidental to the provision of hospitalization services (i.e., services that will be, have been, or are currently being provided to the participants). Only those educational programs and services offered by a hospital that would be very difficult or impossible to duplicate by a person other than a hospital because of the specialized body of knowledge, facilities, and equipment required are unique and incidental to the provision of hospitalization services. Amounts derived from educational programs and services are subject to service and other activities B&O tax when the educational programs or services could be provided by any physician, clinic, or trained lay person.

(b) **Other hospitals, nursing homes, and similar health care facilities.** The gross income derived from personal and professional services of hospitals, clinics, nursing homes, and similar health care facilities, other than public or nonprofit hospitals described above in (a) of this subsection and hospitals owned by the state, is subject to service and other activities B&O tax. The gross income received by the state of Washington from operating a hospital or other health care facility, whether or not the hospital or other facility is owned by the state, is not subject to B&O tax. Nursing homes should refer to subsection (6) of this section for information

regarding the quality maintenance fee imposed under chapter 82.71 RCW.

The following definitions apply for purposes of this section:

(i) "Hospital" has the same meaning as in RCW 70.41.020; and

(ii) "Nursing home" has the same meaning as in RCW 18.51.010.

(c) **Boarding homes.** Effective July 1, 2004, persons operating boarding homes licensed under chapter 18.20 RCW are entitled to a preferential B&O tax rate. See RCW 82.04.2908. Persons operating licensed boarding homes should report their gross income derived from providing room and domiciliary care to residents under the licensed boarding homes B&O tax classification. For the purpose of this section, "boarding home" and "domiciliary care" have the same meaning as in RCW 18.20.020. Refer to subsection (3)(h) of the section for B&O tax deductions and exemptions available to boarding homes.

(d) **Nonprofit corporations and associations performing research and development.** There is a separate B&O tax rate that applies to nonprofit corporations and nonprofit associations for income received in performing research and development within this state, including medical research. See RCW 82.04.260.

(e) **Can a nursing home or boarding home claim a B&O tax exemption for the rental of real estate?** The primary purpose of a nursing home is to provide medical care to its residents. The primary purpose of boarding homes is to assume general responsibility for the safety and well-being of its residents and to provide other services to residents such as housekeeping, meals, laundry, and activities. Boarding homes may also provide residents with assistance with activities of daily living, health support services, and intermittent nursing services. Because the primary purpose of nursing homes and boarding homes is to provide services and not to lease or rent real property, no part of the gross income of a nursing home or boarding home may be exempted from B&O tax as the rental of real estate.

(f) **Adjustments to revenues.** Many hospitals will provide medical care without charge or where some portion of the charge will be canceled. In other cases, medical care is billed to patients at "standard" rates but is later adjusted to reduce the charges to the rates established by contract with medicare, medicaid, or private insurers. In these situations the hospital must initially include the total charges as billed to the patient as gross income unless the hospital's records clearly indicate the amount of income to which it will be entitled under its contracts with insurance carriers. Where tax returns are initially filed based on gross charges, an adjustment may be taken on future tax returns after the hospital has adjusted its records to reflect the actual amounts collected. In no event may the hospital reduce the amount of its current gross income by amounts that were not previously reported on its excise tax return. If the tax rate changes from the time the B&O tax was first paid on the gross charges and the time of the adjustment, the hospital must file amended tax returns to report the B&O tax on the transaction as finally completed at the rate in effect when the service was performed.

(g) **What are the tax consequences when a hospital contracts with an independent contractor to provide medical services at the hospital?** When a hospital contracts with an independent contractor (service provider) to provide medical services such as managing and staffing the hospital's emergency department, the hospital may not deduct the amount paid to the service provider from its gross income. If, however, the patients are alone liable for paying the service provider, and the hospital has no personal liability, either primarily or secondarily, for paying the service provider, other than as agent for the patients, then the hospital may deduct from its gross income amounts paid to the service provider.

In addition, the service provider is subject to service and other activities B&O tax on the amount received from the hospital for providing these services for the hospital. If the service provider subcontracts with third parties, such as physicians or nurses, to help provide medical services as independent contractors, the service provider may not deduct from its gross income amounts paid to the subcontractors where the service provider is personally liable, either primarily or secondarily, for paying the subcontractors. If, however, the hospital is alone liable for paying the subcontractors, and the service provider has no personal liability, either primarily or secondarily, other than as agent for the hospital, then the service provider may deduct from its gross income amounts paid to the subcontractors. For additional information regarding deductible advances and reimbursements, refer to WAC 458-20-111 (Advances and reimbursements).

(3) **B&O tax deductions, credits, and exemptions.** This subsection provides information about several B&O tax deductions, credits, and exemptions available to persons operating medical or other health care facilities.

(a) **Organ procurement organizations.** Amounts received by a qualified organ procurement organization under 42 U.S.C. Sec. 273(b) in effect as of January 1, 2001, to the extent that the amounts are exempt from federal income tax, are exempt from B&O tax. RCW 82.04.326. This exemption is effective March 22, 2002.

(b) **Contributions, donations, and endowment funds.** A B&O tax deduction is provided by RCW 82.04.4282 for amounts received as contributions, donations, and endowment funds, including grants, which are not in exchange for goods, services, or business benefits. For example, B&O tax deduction is allowed for donations received by a public hospital, as long as the donors do not receive any goods, services, or any business benefits in return. On the other hand, a public hospital is not allowed to take a B&O tax deduction on amounts received from a state university for work-study programs or training seminars for doctors, because the university receives business benefits in return, as students receive education and training while enrolled in the university's degree programs.

The deductible amounts should be included in the gross income reported on the excise tax return and then deducted on the return to determine the amount of taxable income. Deductions taken must be identified on the appropriate deduction detail page of the excise tax return.

(c) **Adult family homes.** The gross income derived from personal and professional services of adult family homes licensed by the department of social and health ser-

vices (DSHS), or which are specifically exempt from licensing under the rules of DSHS, is exempt from B&O tax under RCW 82.04.327. The exemption under RCW 82.04.327 does not apply to persons who provide home care services to clients in the clients' own residences.

For the purpose of this section, "adult family home" has the same meaning as in RCW 70.128.010.

(d) **Nonprofit kidney dialysis facilities, hospice agencies, and certain nursing homes and homes for unwed mothers.** B&O tax does not apply to amounts received as compensation for services rendered to patients or from sales of drugs for human use pursuant to a prescription furnished as an integral part of services rendered to patients by kidney dialysis facilities operated as a nonprofit corporation, nonprofit hospice agencies licensed under chapter 70.127 RCW, and nursing homes and homes for unwed mothers operated as religious or charitable organizations. RCW 82.04.4289. This exemption applies only if no part of the net earnings received by such an institution inures, directly or indirectly, to any person other than the institution entitled to this exemption. This exemption is available to nonprofit hospitals for income from the operation of kidney dialysis facilities if the hospital accurately identifies and accounts for the income from this activity.

Examples of nursing homes and homes for unwed mothers operated as religious or charitable organizations include nursing homes operated by church organizations or by nonprofit corporations designed to assist alcoholics in recovery and rehabilitation. Nursing homes and homes for unwed mothers operated by governmental entities, including public hospital districts, do not qualify for the B&O tax exemption provided in RCW 82.04.4289.

(e) **Government payments made to health or social welfare organizations.** A B&O tax deduction is provided by RCW 82.04.4297 to a health or social welfare organization, as defined in RCW 82.04.431, for amounts received directly from the United States, any instrumentality of the United States, the state of Washington, or any municipal corporation or political subdivision of the state of Washington as compensation for health or social welfare services. A deduction is not allowed, however, for amounts that are received under an employee benefit plan. The deductible amounts should be included in the gross income reported on the excise tax return and then deducted on the tax return to determine the amount of taxable income. Deductions taken must be identified on the appropriate deduction detail page of the excise tax return. Readers should refer to WAC 458-20-169 (Nonprofit organizations) for additional information regarding this deduction.

For purposes of the deduction provided by RCW 82.04.4297, "employee benefit plan" includes any plan, trust, commingled employee benefit trust, or custodial arrangement that is subject to the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. Sec. 1001 et seq., or that is described in sections 125, 401, 403, 408, 457, and 501 (c)(9) and (17) through (23) of the Internal Revenue Code of 1986, as amended, or a similar plan maintained by a state or local government, or a plan, trust, or custodial arrangement established to self-insure benefits required by federal, state, or local law.

(f) **Amounts received under a health service program subsidized by federal or state government.** A public hospital that is owned by a municipal corporation or political subdivision, or a nonprofit hospital, or a nonprofit community health center, or a network of nonprofit community health centers, that qualifies as a health and social welfare organization as defined in RCW 82.04.431, may deduct from the measure of B&O tax amounts received as compensation for health care services covered under the federal medicare program authorized under Title XVIII of the federal Social Security Act; medical assistance, children's health, or other program under chapter 74.09 RCW; or for the state of Washington basic health plan under chapter 70.47 RCW. RCW 82.04.4311. This deduction applies to amounts received directly or through a third party from the qualified programs or plans. However, this deduction does not apply to amounts received from patient copayments or patient deductibles. The deductible amounts should be included in the gross income reported on the excise tax return and then deducted on the return to determine the amount of taxable income. Deductions taken must be identified on the appropriate deduction detail page of the excise tax return.

For purposes of the deduction provided by RCW 82.04.4311, "community health center" means a federally qualified health center as defined in 42 U.S.C. Sec. 1396d as existed on August 1, 2005.

(i) **Effective date of deduction.** The deduction for a public hospital owned by a municipal corporation or political subdivision and for a nonprofit hospital is effective April 2, 2002. Taxpayers who have paid B&O taxes between January 1, 1998, and April 2, 2002, on amounts that would qualify for this deduction are entitled to a refund. In addition, tax liability for accrued but unpaid taxes that would be deductible under this subsection (3)(f) are waived. For information regarding refunds, refer to WAC 458-20-229 (Refunds).

The deduction for a nonprofit community health center or a network of nonprofit community health centers is effective August 1, 2005.

(ii) **Example.** Acme Hospital is a nonprofit hospital that qualifies as a health and social welfare organization as defined in RCW 82.04.431. Acme receives $1,000 for providing health care services to Jane, who qualifies for the federal medicare program authorized under Title XVIII of the federal Social Security Act. Jane is covered in a health care plan that is a combination of medicare, which is B&O tax deductible by Acme, and a medicare plus plan, which is paid for by Jane and is not B&O tax deductible by Acme. Jane pays $20 to Acme as patient copayments. Medicare pays $600 to Acme for the health care services, and the medicare plus plan pays $380. Acme may only deduct the $600 received from medicare.

(g) **Blood and tissue banks.** Amounts received by a qualifying blood bank, a qualifying tissue bank, or a qualifying blood and tissue bank are exempt from B&O tax to the extent the amounts are exempt from federal income tax. RCW 82.04.324. For the purposes of this exemption, the following definitions apply:

(i) **Qualifying blood bank.** "Qualifying blood bank" means a blood bank that qualifies as an exempt organization under 26 U.S.C. 501 (c)(3) as existing on June 10, 2004, is

registered under 21 C.F.R., part 607 as existing on June 10, 2004, and whose primary business purpose is the collection, preparation, and processing of blood. "Qualifying blood bank" does not include a comprehensive cancer center that is recognized as such by the National Cancer Institute.

(ii) **Qualifying tissue bank.** "Qualifying tissue bank" means a tissue bank that qualifies as an exempt organization under 26 U.S.C. 501 (c)(3) as existing on June 10, 2004, is registered under 21 C.F.R., part 1271 as existing on June 10, 2004, and whose primary business purpose is the recovery, processing, storage, labeling, packaging, or distribution of human bone tissue, ligament tissue and similar musculoskeletal tissues, skin tissue, heart valve tissue, or human eye tissue. "Qualifying tissue bank" does not include a comprehensive cancer center that is recognized as such by the National Cancer Institute.

(iii) **Qualifying blood and tissue bank.** "Qualifying blood and tissue bank" is a bank that qualifies as an exempt organization under 26 U.S.C. 501 (c)(3) as existing on June 10, 2004, is registered under 21 C.F.R., Part 607 and Part 1271 as existing on June 10, 2004, and whose primary business purpose is the collection, preparation, and processing of blood, and the recovery, processing, storage, labeling, packaging, or distribution of human bone tissue, ligament tissue and similar musculoskeletal tissues, skin tissue, and heart valve tissue. "Qualifying blood and tissue bank" does not include a comprehensive cancer center that is recognized as such by the National Cancer Institute.

(h) **Boarding homes.** Effective July 1, 2004, licensed boarding home operators are entitled to a B&O tax deduction for amounts received as compensation for providing adult residential care, enhanced adult residential care, or assisted living services under contract with the department of social and heath services authorized by chapter 74.39A RCW to residents who are medicaid recipients. RCW 82.04.4337. For the purpose of this section, "adult residential care," "enhanced adult residential care," and "assisted living services" have the same meaning as in RCW 74.39A.009.

Effective July 1, 2005, B&O tax does not apply to the amounts received by a nonprofit boarding home licensed under chapter 18.20 RCW for providing room and domiciliary care to residents of the boarding home. ((~~Chapter 514, Laws of 2005.~~)) RCW 82.04.4264. For purposes of this section, "nonprofit boarding home" means a boarding home that is operated as a religious or charitable organization, is exempt from federal income tax under 26 U.S.C. Sec. 501 (c)(3), is incorporated under chapter 24.03 RCW, is operated as part of a nonprofit hospital, or is operated as part of a public hospital district.

(i) **Comprehensive cancer centers.** Effective July 1, 2006, B&O tax does not apply to the amounts received by a comprehensive cancer center to the extent the amounts are exempt from federal income tax. ((~~Chapter 514, Laws of 2005.~~)) RCW 82.04.4265. For purposes of this section, "comprehensive cancer center" means a cancer center that has written confirmation that it is recognized by the National Cancer Institute as a comprehensive cancer center and that qualifies as an exempt organization under 26 U.S.C. Sec. 501 (c)(3) as existing on July 1, 2006.

(j) **Hospital safe patient handling credit.**

(i) RCW 82.04.4485 allows a hospital to take a credit against the B&O tax for the cost of purchasing mechanical lifting devices and other equipment that are primarily used to minimize patient handling by health care providers. In order to qualify for credit, the purchases must be made as part of a safe patient handling program developed and implemented by the hospital in compliance with RCW 70.41.390. The credit is equal to one hundred percent of the cost of the mechanical lifting devices or other equipment.

(ii) No application is necessary for the credit; however, a hospital taking a credit under this section must maintain records, as required by the department, necessary to verify eligibility for the credit under this subsection. The hospital is subject to all of the requirements of chapter 82.32 RCW. A credit earned during one calendar year may be carried over to be credited against taxes incurred in a subsequent calendar year. No refunds shall be granted for credits under this subsection.

(iii) The maximum credit that may be earned under this section for each hospital is limited to one thousand dollars for each acute care available inpatient bed.

(iv) Credits are available on a first in-time basis. The department shall disallow any credits, or portion thereof, that would cause the total amount of credits claimed statewide under this subsection to exceed ten million dollars. If the ten million dollar limitation is reached, the department will notify hospitals that the annual statewide limit has been met. In addition, the department will provide written notice to any hospital that has claimed tax credits after the ten million dollar limitation in this subsection has been met. The notice will indicate the amount of tax due and shall provide that the tax be paid within thirty days from the date of such notice. The department will not assess penalties and interest as provided in chapter 82.32 RCW on the amount due in the initial notice if the amount due is paid by the due date specified in the notice, or any extension thereof.

(v) Credit may not be claimed under this section for the acquisition of mechanical lifting devices and other equipment if the acquisition occurred before June 7, 2006.

(vi) Credit may not be claimed under this section for any acquisition of mechanical lifting devices and other equipment that occurs after December 30, 2010.

(vii) The department shall issue an annual report on the amount of credits claimed by hospitals under this section, with the first report due on July 1, 2008.

(viii) For the purposes of this subsection, "hospital" has the meaning provided in RCW 70.41.020.

(k) **Prescription drugs administered by the medical service provider.** Effective October 1, 2007, RCW 82.04.-620 allows a deduction from the service and other activities classification of the B&O tax (RCW 82.04.290(2)) for amounts received by physicians or clinics for drugs for infusion or injection by licensed physicians or their agents for human use pursuant to a prescription. This deduction only applies to amounts that:

(i) Are separately stated on invoices or other billing statements;

(ii) Do not exceed the then current federal rate; and

(iii) Are covered or required under a health care service program subsidized by the federal or state government.

For purpose of this deduction only, amounts that "are covered or required under a health care service program subsidized by the federal or state government" include any required drug copayments made directly from the patient to the physician or clinic.

(A) "Federal rate" means the rate at or below which the federal government or its agents reimburse providers for prescription drugs administered to patients as provided for in the medicare, Part B drugs average sales price information resource as published by the United States Department of Health and Human Services, or any index that succeeds it.

(B) The deduction is available on an "all or nothing" basis against the total of amounts received for a specific drug charge. If the total amount received by the physician or clinic for a specific drug exceeds the federal reimbursement rate, none of the total amount received qualifies for the deduction (including any required copayment received directly from the patient). In other words, a physician or clinic may not simply take an "automatic" deduction equal to the federal reimbursement rate for each drug.

(C) For physicians or clinics reporting their taxes on the accrual basis, the total amount charged for a drug must be included in the gross income at the time of billing if it is in excess of the federal rate. However, in some cases the gross income from charges may be adjusted, as indicated in subsection (2)(f) of this section. If such an adjustment to gross income is appropriate, the exemption discussed in this subsection may also be taken at the time of billing if the adjustment leaves the physician or clinic contractually liable to receive a total amount (including any copayment received from the patient) that is not in excess of the federal rate.

(l) **Temporary medical housing provided by a health or social welfare organization.** ((~~House Bill No. 2544, chapter 137, Laws of 2008,~~)) Effective July 1, 2008, ((~~creates~~)) RCW 82.08.997 created an exemption from state and local sales taxes and lodging taxes for temporary medical housing provided by a health or social welfare organization. The term "health or social welfare organization" is defined in RCW 82.04.431. "Temporary medical housing" means transient lodging and related services provided to a patient or the patient's immediate family, legal guardian, or other persons necessary to the patient's mental or physical well-being.

(i) The exemption applies to the following taxes:

(A) Retail sales tax levied under RCW 82.08.020;

(B) Lodging taxes levied under chapter 67.28 RCW;

(C) Convention and trade center tax levied under RCW 67.40.090 and 67.40.130;

(D) Public facilities tax levied under RCW 36.100.040; and

(E) Tourism promotion areas tax levied under RCW 35.101.050.

(ii) The exemptions in this subsection apply to charges made for "temporary medical housing" only:

(A) While the patient is receiving medical treatment at a hospital required to be licensed under RCW 70.41.090 or at an outpatient clinic associated with such hospital, including any period of recuperation or observation immediately following such medical treatment; and

(B) By a person that does not furnish lodging or related services to the general public.

(4) **Sales of tangible personal property.** Retailing B&O tax applies to sales of tangible personal property sold and billed separately from the performance of personal or professional services by hospitals, nursing homes, boarding homes, adult family homes, and similar health care facilities. This includes charges for making copies of medical records. In addition, retail sales tax must be collected from the buyer and remitted to the department unless the sale is specifically exempt by law.

(a) **Tangible personal property used in providing medical services to patients.** Retailing B&O and retail sales taxes do not apply to charges to a patient for tangible personal property used in providing medical services to the patient, even if separately billed. Tangible personal property used in providing medical services is not considered to have been sold separately from the medical services simply because those items are separately invoiced. These charges, even if separately itemized, are for providing medical services and are subject to B&O tax under either the public or nonprofit hospital B&O tax classification or the service and other activities classification depending on the person making the charge. For example, charges for drugs physically administered by the seller are subject to B&O tax under either the public or nonprofit hospital classification or the service and other activities classification depending on the person making the charge. On the other hand, charges for drugs sold to patients or their caregivers, either for patient self-administration or administration by a caregiver other than the seller, are subject to retailing B&O tax and retail sales tax unless specifically exempt by law. Readers should refer to WAC 458-20-18801 for detailed information regarding retail sales tax exemptions that apply to sales of prescription drugs and other medical items.

(b) **Sales of meals.** Although the sale of meals is generally considered to be a retail sale, hospitals, nursing homes, boarding homes, and similar health care facilities that furnish meals to patients or residents as a part of the services provided to those patients or residents are not considered to be making retail sales of meals. Thus amounts received by hospitals, nursing homes, boarding homes, and similar health care facilities for furnishing meals to patients or residents as part of the services provided to those patients or residents are subject to B&O tax under the service and other activities, public or nonprofit hospital, or licensed boarding homes classifications, depending upon the person furnishing the meals.

Prepared meals sold to senior citizens, disabled persons, or low-income persons by a not-for-profit organization organized under chapter 24.03 or 24.12 RCW are exempt from retail sales and use taxes. RCW 82.08.0293 and 82.12.0293. The exemptions apply to sales of prepared meals to not-for-profit organizations organized under chapter 24.03 or 24.12 RCW, that provide the meals to senior citizens, disabled persons, or low-income persons as a part of the patient services they render.

Hospitals, nursing homes, boarding homes, and similar health care facilities may have restaurants, cafeterias, or other dining facilities where meals are sold for cash or credit to doctors, nurses, other employees, and visitors. Some of these

facilities may provide meals to their employees at no charge. Under these circumstances, all sales of meals to such persons are subject to retailing B&O and retail sales taxes, including the value of meals provided at no charge to employees. For additional information regarding the sale of meals, including meals furnished to employees, refer to WAC 458-20-119 (Sales of meals). Hospitals, nursing homes, boarding homes, and similar health care facilities that provide free meals to persons other than employees, such as visitors, should refer to WAC 458-20-124 (Restaurants, cocktail bars, taverns and similar businesses) for information about the taxability of meals given away free of charge.

(c) **Sales of medical supplies, chemicals, or materials to a comprehensive cancer center.** Effective July 1, 2006, sales of medical supplies, chemicals, or materials to a comprehensive cancer center are exempt from retail sales and use tax. ((~~Chapter 514, Laws of 2005.~~)) RCW 82.08.808 and 82.12.808. This exemption, however, does not apply to the sales of construction materials, office equipment, building equipment, administrative supplies, or vehicles.

(i) **Medical supplies.** For purposes of this exemption, "medical supplies" means any item of tangible personal property, including any repair and replacement parts for such tangible personal property, used by a comprehensive cancer center for the purpose of performing research on, procuring, testing, processing, storing, packaging, distributing, or using blood, bone, or tissue. The term includes tangible personal property used to:

(A) Provide preparatory treatment of blood, bone, or tissue;

(B) Control, guide, measure, tune, verify, align, regulate, test, or physically support blood, bone, or tissue; and

(C) Protect the health and safety of employees or others present during research on, procuring, testing, processing, storing, packaging, distributing, or using blood, bone, or tissue.

(ii) **Chemicals.** For purposes of this exemption, "chemical" means any catalyst, solvent, water, acid, oil, or other additive that physically or chemically interacts with blood, bone, or tissue.

(iii) **Materials.** For purposes of this exemption, "materials" means any item of tangible personal property, including, but not limited to, bags, packs, collecting sets, filtering materials, testing reagents, antisera, and refrigerants used or consumed in performing research on, procuring, testing, processing, storing, packaging, distributing, or using blood, bone, or tissue.

(iv) **Research.** For purposes of this exemption, "research" means basic and applied research that has as its objective the design, development, refinement, testing, marketing, or commercialization of a product, service, or process.

(5) Equipment and supplies used by health care providers. Hospitals, nursing homes, adult family homes, boarding homes, and similar health care providers are required to pay retail sales tax on purchases of equipment and supplies unless specifically exempt by law. Readers should refer to WAC 458-20-18801 for detailed information regarding exemptions that are available to these health care providers, as well as persons performing medical research and organ procurement organizations.

(a) **Purchases for resale.** Purchases of tangible personal property for resale without intervening use are not subject to retail sales tax. Persons purchasing tangible personal property for resale must furnish a ((~~properly completed~~)) resale certificate for purchases made before January 1, 2010, or a reseller permit for purchases made on or after January 1, 2010, to the seller to document the wholesale nature of the sale((~~. Resale certificates may be obtained from the department's web site at http://dor.wa.gov, or by calling the department's taxpayer information center at 1-800-647-7706. For additional information regarding resale certificates, refer to WAC 458-20-102 (Resale certificates)~~)) as provided in WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits). Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by the seller for five years from the date of last use or December 31, 2014.

(b) **Buyer's responsibility to remit deferred sales or use tax.** If the seller does not collect retail sales tax on a retail sale, the buyer must remit the retail sales tax (commonly referred to as "deferred sales tax") or use tax directly to the department unless specifically exempt by law. For detailed information regarding the use tax, refer to WAC 458-20-178 (Use tax).

(i) **How do I report deferred sales or use tax.** Persons registered with the department and required to file tax returns should report deferred sales or use tax on their excise tax return. The excise tax return does not have a separate line for reporting deferred sales tax. Consequently, deferred sales tax liability should be reported on the use tax line of the buyer's excise tax return. If a deferred sales tax or use tax liability is incurred by a person who is not required to obtain a tax registration endorsement from the department, the person must report the tax on a "Consumer Use Tax Return" and remit the appropriate tax to the department.

(ii) **Where can I obtain a Consumer Use Tax Return?** The Consumer Use Tax Return may be obtained from the department's ((~~web~~)) internet site at: http://dor.wa.gov, or by calling the department's telephone information center at 1-800-647-7706.

(6) **Quality maintenance fee imposed on nursing homes.** Effective July 1, 2007, the quality maintenance fee imposed on operators of nonexempt nursing facilities in Washington was repealed. Legislation passed in 2006 (section 1, chapter 241, Laws of 2006) repealed chapter 82.71 RCW, which imposed the fee. Originally effective on July 1, 2003, RCW 82.71.020 imposed a quality maintenance fee on every nursing home in this state not exempt from the fee under RCW 74.46.091. The amount of the quality maintenance fee was in addition to any other tax imposed upon nursing homes. Nursing homes were required to report the number of patient days and remit the fee to the department on a monthly basis. Persons with questions about how the quality maintenance fee affected individual nursing home operators or about the exemption provided by RCW 74.46.091 should contact the department of social and health services.

For purposes of this section, "patient day" means a calendar day of care provided to a nursing home resident, exclud-

ing a medicare patient day. Patient days include the day of admission and exclude the day of discharge; except that, when admission and discharge occur on the same day, one day of care shall be deemed to exist. "Medicare patient day" means a patient day for medicare beneficiaries on a medicare Part A stay and a patient day for persons who have opted for managed care coverage using their medicare benefit.

WSR 10-01-194
EXPEDITED RULES
DEPARTMENT OF REVENUE

[Filed December 22, 2009, 4:26 p.m.]

Title of Rule and Other Identifying Information: WAC 458-20-169 Nonprofit organizations, explains how the business and occupation (B&O), retail sales, and use taxes apply to activities often performed by nonprofit organizations.

WAC 458-20-173 Installing, cleaning, repairing or otherwise altering or improving personal property of consumers, explains when persons performing these services are taxable under retailing B&O tax, wholesaling B&O tax, and when retail sales tax must be collected.

WAC 458-20-189 Sales to and by the state of Washington, counties, cities, towns, school districts, and fire districts, explains the B&O, retail sales, use, and public utility taxes applications to sales made to and by these entities.

WAC 458-20-193 Inbound and outbound interstate sales of tangible personal property, explains the B&O tax and retail sales tax applications to interstate sales of tangible personal property.

WAC 458-20-209 Farming for hire and horticultural services performed for farmers, provides tax reporting information for persons performing horticultural services to farmers.

WAC 458-20-211 Leases or rentals of tangible personal property, bailments, explains the tax-reporting responsibilities of persons that rent or lease tangible personal property or rent equipment with an operator.

WAC 458-20-218 Advertising agencies, explains when advertising agencies are subject to service, retailing, or wholesaling B&O tax, and when retail sales tax should be collected.

WAC 458-20-222 Veterinarians, explains the B&O tax, retail sales tax, and use tax applications to sales and services provided by veterinarians. It also explains the taxability of persons who provide other services for
live animals.

WAC 458-20-226 Landscape and horticultural services, provides reporting instructions for persons who provide landscape and horticultural services.

WAC 458-20-24001 Sales and use tax deferral—Manufacturing and research/development activities in rural counties—Applications filed after March 31, 2004, explains the purpose of the deferral program provided in chapter 82.60 RCW, and who and what equipment is eligible for deferral.

WAC 458-20-24002 Sales and use tax deferral—New manufacturing and research/development facilities, explains the deferral program provided in chapter 82.61 RCW.

WAC 458-20-274 Staffing services, explains the application of B&O tax, public utility tax; and retail sales tax collection responsibilities of staffing businesses.

NOTICE

THIS RULE IS BEING PROPOSED UNDER AN EXPEDITED RULE-MAKING PROCESS THAT WILL ELIMINATE THE NEED FOR THE AGENCY TO HOLD PUBLIC HEARINGS, PREPARE A SMALL BUSINESS ECONOMIC IMPACT STATEMENT, OR PROVIDE RESPONSES TO THE CRITERIA FOR A SIGNIFICANT LEGISLATIVE RULE. IF YOU OBJECT TO THIS USE OF THE EXPEDITED RULE-MAKING PROCESS, YOU MUST EXPRESS YOUR OBJECTIONS IN WRITING AND THEY MUST BE SENT TO Gayle Carlson, Department of Revenue, P.O. Box 47453, Olympia, WA 98504-7453, fax (360) 586-0127, e-mail GayleC@dor.wa.gov, AND RECEIVED BY February 22, 2010.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: Effective January 1, 2010, reseller permits will replace resale certificates as the means to substantiate wholesale purchases, chapter 563, Laws of 2009. The department is proposing to amend these rules to recognize this change.

The amendments to these rules are being made for the sole purpose of:

- Adding language to state that resale certificates are no longer valid after December 31, 2009, and that reseller permits should be used instead.
- Minor editing and correction of citations not intended to change other provisions of the sections.
- Updating definitions to match current statutes.
- Eliminating tax-reporting information applying to tax periods outside the normal limitation periods for assessments and refunds.

The department proposes to update definitions to match statute revisions and remove tax-reporting information applying to tax periods outside the normal limitation periods for assessments and refunds from the following:

- WAC 458-20-189 (4)(a)(i), eliminating information referencing taxability of physical fitness activities and saunas prior to July 1, 1993.
- WAC 458-20-209(1), eliminating reference to WAC 458-20-122 which no longer exists. Subsection (2), definitions of "farmer" and "agricultural product" are being updated to match current statutory language.
- WAC 458-20-211(1), eliminating reference to the 1993 law that specifically added rental of equipment with operator as a retail sale.
- WAC 458-20-226 (4)(c), eliminating reference to the selected business service classification.

Copies of draft rules are available for viewing and printing on our web site at http://dor.wa.gov/content/FindALawOrRule/RuleMaking/agenda.aspx.

Reasons Supporting Proposal: To recognize provisions of SB 6173 (chapter 563, Laws of 2009).

Statutory Authority for Adoption: RCW 82.32.300 and 82.01.060(2).

Statute Being Implemented: Chapters 82.04, 82.08, 82.12, 82.32 RCW, as they apply to wholesale sales and reseller permits.

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: Gayle Carlson, 1025 Union Avenue S.E., Suite #544, Olympia, WA, (360) 570-6126; Implementation: Alan R. Lynn, 1025 Union Avenue S.E., Suite #544, Olympia, WA, (360) 570-6125; and Enforcement: Gilbert Brewer, 1025 Union Avenue S.E., Suite #544, Olympia, WA, (360) 570-6147.

December 22, 2009
Alan R. Lynn
Rules Coordinator

AMENDATORY SECTION (Amending WSR 01-09-066, filed 4/16/01, effective 5/17/01)

WAC 458-20-169 Nonprofit organizations. (1) **Introduction.** Unlike most states' and the federal tax systems, Washington's tax system, specifically its business tax, applies to nonprofit organizations. Washington's business tax is imposed upon all entities that generate gross receipts or proceeds, unless there is a specific statutory exemption or deduction. This ((~~rule~~)) section reviews how the business and occupation (B&O), retail sales, and use taxes apply to activities often performed by nonprofit organizations. Although some nonprofit organizations may be subject to other taxes (e.g., public utility or insurance premium taxes on income from utility or insurance activities), these taxes are not discussed in this ((~~rule~~)) section. The ((~~rule~~)) section describes the most common exemptions and deductions for the B&O, retail and use taxes specifically provided to nonprofit organizations by state law. Other exemptions and/or deductions not specific to nonprofit organizations may also apply.

Other ((~~rules~~)) sections that may be relevant to specific activities of nonprofit organizations include the following:

(a) Artistic or cultural organizations, WAC 458-20-249;

(b) Educational institutions, school districts, student organizations, and private schools, WAC 458-20-167;

(c) Hospitals, nursing homes, ((~~and~~)) boarding homes, adult family homes and similar health care facilities, WAC 458-20-168;

(d) Membership organizations, nonprofit groups and clubs providing amusement, recreation, or physical fitness services, WAC 458-20-183; and

(e) Organizations holding trade shows, conventions, or seminars, WAC 458-20-256.

(2) **Registration requirements.** Nonprofit organizations with $12,000 or more per year in gross receipts from sales, and/or gross income from services subject to the B&O tax or who are required to collect or pay to the department of revenue (department) retail sales tax or any other tax or fee which the department administers (regardless of the level of annual gross receipts) must register with the department. Nonprofit organizations that have gross receipts of less than $12,000 per year and who are not required to collect retail sales tax or any other tax or fee administered by the department are not required to register with the department.

For more details on registration requirements see WAC 458-20-101 (Tax registration and tax reporting).

(3) **Filing tax returns.** Nonprofit organizations making retail sales that require the collection of the retail sales tax must file a tax return, regardless of the annual level of gross receipts or gross income and whether or not any B&O tax is due. (See also WAC 458-20-104 (Small business tax relief based on ((~~volume~~)) income of business).) The ((~~combined~~)) excise tax return with payment is generally filed on a monthly basis. However, under certain conditions the department may authorize taxpayers to file and remit payment on either a quarterly or annual basis. Refer to WAC 458-20-22801 for more information regarding how reporting frequencies are assigned.

Nonprofit organizations that do not have retail sales tax to remit, but are required to register, do not have to file a tax return if they meet certain statutory requirements (e.g., annual gross income of less than $28,000) and are placed on an "active nonreporting" status by the department. Refer to WAC 458-20-101 for more information regarding the "active nonreporting" status.

(4) **General tax reporting responsibilities.** While Washington state law provides some tax exemptions and deductions specifically targeted toward nonprofit organizations, these organizations otherwise have the same tax-reporting responsibilities as those of for-profit organizations.

(a) **Business and occupation tax.** Chapter 82.04 RCW imposes a B&O tax upon all persons engaged in business activities within this state, unless the income is specifically exempt or deductible under state law. The B&O tax applies to the value of products, gross proceeds of sales, or gross income of the business, as the case may be. RCW 82.04.220.

(i) **Common B&O tax classifications.** Chapter 82.04 RCW provides a number of classifications that apply to specific activities. The most common B&O tax classifications that apply to income received by nonprofit organizations are the service and other activities, retailing, and wholesaling classifications. If an organization engages in more than one kind of business activity, the gross income from each activity must be reported under the appropriate tax classification.

(ii) **Measure of tax.** The most common measures of the B&O tax are "gross proceeds of sales" and "gross income of the business." RCW 82.04.070 and 82.04.080, respectively. These measures include the value proceeding or accruing from the sale of tangible personal property or services rendered without any deduction for the cost of property sold, cost of materials used, labor costs, discounts paid, delivery costs, taxes, losses or any other expenses.

(b) **Retail sales tax.** A nonprofit organization must collect and remit retail sales tax on all retail sales, unless the sale is specifically exempt by statute. Examples of retail sales tax exemptions that commonly apply to nonprofit organizations are those for sales of certain food products (see WAC 458-20-244 for more information regarding sales of food ((~~products~~)) and food ingredients), construction materials purchased by a health or social welfare organization for new construction of alternative housing for youth in crisis, to be licensed as a family foster home (RCW 82.08.02915), and

fund-raising activities (see subsection (5)(e) of this ((~~rule~~)) section). New construction includes renovating an existing structure to provide new housing for youth in crisis.

A nonprofit organization must pay retail sales tax when it purchases goods or retail services for its own use as a consumer, unless the purchase is specifically exempt by statute. Items purchased for resale without intervening use are purchases at wholesale and are not subject to the retail sales tax. The purchaser should provide the seller with a resale certificate((~~. (See WAC 458-20-102 for information regarding resale certificates.) Organizations not required to register should indicate on the resale certificate that the group is a qualifying nonprofit organization and the items will be resold at a tax exempt nonprofit fund-raiser.~~)) for purchases made before January 1, 2010, or a reseller permit for purchased made on or after January 1, 2010, to document the wholesale nature of any sale as provided in WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits). Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by the seller for five years from the date of last use or December 31, 2014.

(c) **Use tax.** The use tax is imposed on every person, including nonprofit organizations, using tangible personal property within this state as a consumer, unless such use is specifically exempt by statute. The use tax applies only if retail sales tax has not previously been paid on the item. The rate of tax is the same as the sales tax rate that applies at the location where the property is first used.

A common application of the use tax occurs when items are purchased from an out-of-state seller who has no presence in Washington. Because the out-of-state seller is under no obligation to collect Washington's retail sales or use tax, the buyer is statutorily required to remit use tax directly to the department. (See also WAC 458-20-178 for more information regarding the use tax.)

Except for fund-raising, exemptions from use tax generally correspond to the retail sales tax exemptions. For example, a use tax exemption for construction materials acquired by a health or social welfare organization for new construction of alternative housing for youth in crisis, to be licensed as a family foster home, RCW 82.12.02915, corresponds with the retail sales tax exemption described in subsection (4)(b) above for purchasing these construction materials.

(i) **Use tax exemption for donated items.** RCW 82.12.02595 provides a use tax exemption for property donated to a nonprofit charitable organization. This exemption is available for the nonprofit charitable organization((~~,~~)) and the donor, if the donor did not previously use the item as a consumer. It also applies to the use of property by a donor who is incorporating the property into a nonprofit organization's real or personal property for no charge.

The exemption also applies to another person using property originally donated to a charitable nonprofit organization that is subsequently donated or bailed to that person by the charitable nonprofit organization, provided that person uses the property in furtherance of the charitable purpose for which the property was originally donated to the charitable nonprofit organization. For example, a hardware store donates an industrial pressure washer to a nonprofit community center for neighborhood cleanup, the community center bails this washer to people enrolled in its neighborhood improvement group for neighborhood clean-up projects. No use tax is due from any of the participants in these transactions. An example of a gift that would not qualify is when a car is donated to a church for its staff and the church gives that car to its pastor. The pastor must pay use tax on the car because it serves multiple purposes. It serves the church's charitable purpose, but it also acts as compensation to the pastor and is available for the pastor's personal use. The subsequent donation of property from the charity to another person must be solely for a charitable purpose. If the property is donated or bailed to the third party for a charitable purpose in line with the nonprofit organization's charitable activities, generally, no additional proof is required that this was the charitable purpose for which the property was originally donated.

(ii) **Use tax implications with respect to fund-raising activities.** Subsection (5)(e) below explains that a retail sales tax exemption is available for certain fund-raising sales. However, there is no comparable use tax exemption provided to the buyer/user of property purchased at these fund-raising sales. While the nonprofit organization is under no obligation to collect use tax from the buyer, the organization is encouraged to inform the buyer of the buyer's possible use tax obligation.

(5) **Exemptions.** The following sources of income are specifically exempt from tax. As such they should not be included or reported as gross income if the organization is required to file ((~~a combined~~)) an excise tax return.

(a) **Adult family homes.** The B&O tax does not apply to income earned by a licensed adult family home or an adult family home exempt from licensing. RCW 82.04.327.

(b) **Camp or conference centers.** RCW 82.04.363 and 82.08.830 respectively provide B&O and retail sales exemptions to amounts received by a nonprofit organization from the sale or furnishing of certain items or services at a camp or conference center conducted on property exempt from the property tax under RCW 84.36.030 (1), (2), or (3).

Income derived from the sale of the following items and services is exempt:

(i) Lodging, conference and meeting rooms, camping facilities, parking, and similar licenses to use real property;

(ii) Food and meals;

(iii) Books, tapes, and other products that are available exclusively to the participants at the camp, conference, or meeting and are not available to the public at large.

The property tax exemptions are further discussed at WAC 458-16-210 (Church camps), WAC 458-16-220 (Nonprofit organizations or associations organized and conducted for nonsectarian purposes), and WAC 458-16-230 (Character building organizations).

(c) **Child care resource and referral services.** The B&O tax does not apply to nonprofit organizations with respect to amounts received for child care resource and referral services. Child care resource and referral services do not include child care services provided directly to children. RCW 82.04.3395.

(d) **Credit and debt services.** RCW 82.04.368 provides a B&O tax exemption for amounts received by nonprofit

organizations for providing specialized credit and debt services. These services include:

(i) Presenting individual and community credit education programs including credit and debt counseling;

(ii) Obtaining creditor cooperation allowing a debtor to repay debt in an orderly manner;

(iii) Establishing and administering negotiated repayment programs for debtors; and

(iv) Providing advice or assistance to a debtor with regard to (i), (ii), or (iii) of this subsection.

(e) **Day care provided by churches.** The B&O tax does not apply to income derived by a church for the care of children of any age for periods of less than twenty-four hours, provided the church is exempt from property tax under RCW 84.36.020. RCW 82.04.339.

(f) **Fund-raising.** RCW 82.04.3651 provides a B&O tax exemption for amounts received from certain fund-raising activities. RCW 82.08.02573 provides a comparable retail sales tax exemption.

It is important to note that these exemptions apply only to the fund-raising income received by the nonprofit organization. For example, the commission income received by a nonprofit organization selling books owned by a for-profit entity on a consignment basis is exempt of tax if the statutory requirements are satisfied. The nonprofit organization is generally responsible for collecting and remitting retail sales tax upon the gross proceeds of sales when selling items for another person (see WAC 458-20-159).

(i) **What nonprofit organizations qualify?** Nonprofit organizations that qualify for this exemption are those that are:

(A) A tax-exempt nonprofit organization described by section 501 (c)(3) (educational and charitable), (4) (social welfare), or (10) (fraternal societies operating as lodges) of the Internal Revenue Code;

(B) A nonprofit organization that would qualify for tax exemption under these codes except that it is not organized as a nonprofit corporation; or

(C) A nonprofit organization that does not pay its members, stockholders, officers, directors, or trustees any amounts from its gross income, except as payment for services rendered, does not pay more than reasonable compensation to any person for services rendered, and does not engage in a substantial amount of political activity. Political activity includes, but is not limited to, influencing legislation and participating in any campaign on behalf of any candidate for political office.

A nonprofit organization may meet (A), (B), or (C) above.

(ii) **Qualifying fund-raising activities.** For the purpose of this exemption, "fund-raising activity" means soliciting or accepting contributions of money or other property, or activities involving the anticipated exchange of goods or services for money between the soliciting organization and the organization or person solicited, for the purpose of furthering the goals of the nonprofit organization.

(A) Money raised by a nonprofit charitable group from its annual telephone fund drive to fund its homeless shelters where nothing is promised in return for a donor's pledge is exempt as fund-raising contributions of money to further the goals of the nonprofit organization.

(B) A nonprofit group organized as a community playhouse has an annual telephone fund drive. The group gives the caller a mug, jacket, dinner, or vacation trip depending on the amount of pledge made over the phone. The community playhouse does not sell or exchange the mugs, jackets, dinners or trips for cash or property, except during this pledge drive. The money is used to produce the next season's plays. The money earned from the pledges is exempt from both retail sales tax and business and occupation tax to the extent these amounts represent an exchange for goods and services for money to further the goals of the nonprofit group. The money earned from the pledges above the value of the goods and services exchanged is exempt as a fund-raising contribution of money to further the goals of the nonprofit organization.

(C) A nonprofit group sells ice cream bars at booths leased during the two-week runs of three county fairs, for a total of six weeks during the year, to fund youth camps maintained by the nonprofit group. The money earned from the booths is exempt from both retail sales tax and business and occupation tax as a fund-raising exchange of goods for money to further the goals of the nonprofit group.

(iii) **Contributions of money or other property.** The term contributions includes grants, donations, endowments, scholarships, gifts, awards, and any other transfer of money or other property by a donor, provided the donor receives no significant goods, services, or benefits in return for making the gift. For example, an amount received by a nonprofit educational broadcaster from a group that conditions receipt upon the nonprofit broadcaster airing its seminars is not a contribution regardless of how the amount paid was titled by the two organizations.

It is not unusual for the person making a gift to require some accountability for how the gift is used as a condition for receiving the gift or future gifts. Such gifts remain exempt, provided the "accountability" required does not result in a direct benefit to the donor (examples of direct benefits to a donor are: Money given for a report on the soil contamination levels of land owned by the donor, medical services provided to the donor or the donor's family, or market research benefitting the donor directly). This "accountability" can take the form of conditions or restrictions on the use of the gift for specific charitable purposes or can take the form of written reports accounting for the use of the gift. Public acknowledgment of a donor for the gift does not result in a significant service or benefit simply because the gift is publicly acknowledged.

(iv) **Nonqualifying activities.** Fund-raising activity does not include the operation of a regular place of business in which services are provided or sales are made during regular hours such as a bookstore, thrift shop, restaurant, legal or health clinic, or similar business. It also does not include the operation of a regular place of business from which services are provided or performed during regular hours such as the provision of retail, personal, or professional services. A regular place of business and the regular hours of that business depend on the type of business being conducted.

(A) In the example demonstrating that an amount received by a nonprofit broadcaster was not a contribution because services were given in return for the funds, this activity must also be examined to see whether the exchange was for services as part of a fund-raising activity. The broadcaster was in the business of broadcasting programs. It had a regular site for broadcasting programs and ran broadcasts for twenty-four hours every day. Broadcasting was a part of its business activity performed from a regular place of business during regular hours. The money received from the group with the requirement that its seminars be broadcast would not qualify as money received from a fund-raising activity even though the parties viewed the money as a "donation."

(B) A nonprofit organization that makes catalog sales throughout the year with a twenty-four hour telephone line for taking orders has a regular place of business at the location where the sales orders are processed and regular hours of twenty-four hours a day. Catalog sales are not exempt as fund-raising amounts even though the funds are raised for a nonprofit purpose.

(C) A nonprofit group organized as a community playhouse has three plays during the year at a leased theatre. The plays run for a total of six weeks and the group provides concessions at each of the performances. The playhouse has a regular place of business with regular hours for that type of business. The concessions are done at that regular place of business during regular hours. The concessions are not exempt as fund-raising activities even though amounts raised from the concessions may be used to further the nonprofit purpose of that group.

(D) A nonprofit student group, that raises money for scholarships and other educational needs, sets up an espresso stand that is open for two hours every morning during the school year. The espresso stand is a regular place of business with regular hours for that type of business. The money earned from the espresso stand is not exempt, even though the amounts are raised to further the student group's nonprofit purpose.

(v) **Fund-raising sales by libraries.** RCW 82.04.3651 specifically provides that the sale of used books, used videos, used sound recording, or similar used information products in a library is not the operation of a regular place of business, if the proceeds are used to support the library. The library must be a free public library supported in whole or in part with money derived from taxes. RCW 27.12.010.

(g) **Group training homes.** RCW 82.04.385 provides a B&O tax exemption for amounts received from the department of social and health services for operating a nonprofit group training home. The amounts excluded from gross income must be used for the cost of care, maintenance, support, and training of developmentally disabled individuals. A nonprofit group training home is an approved nonsectarian facility equipped, supervised, managed, and operated on a full-time nonprofit basis for the full-time care, treatment, training, and maintenance of individuals with developmental disabilities.

(h) **Sheltered workshops.** RCW 82.04.385 provides a B&O tax exemption for amounts received by a nonprofit organization for operating a sheltered workshop.

(i) **What is a sheltered workshop?** A sheltered workshop is that part of the nonprofit organization engaged in business activities that are performed primarily to provide evaluation and work adjusted services for a handicapped person or to provide gainful employment or rehabilitation services to a handicapped person. The sheltered workshop can be maintained on or off the premises of the nonprofit organization.

(ii) **What is meant by "gainful employment or rehabilitation services to a handicapped person"?** Gainful employment or rehabilitation services must be an interim step in the rehabilitation process which is provided because the person cannot be readily absorbed into the competitive labor market or because employment opportunities for the person do not exist during that time in the competitive labor market.

"Handicapped," for the purposes of this exemption, means a physical or mental disability that restricts normal achievement, including medically recognized addictions and learning disabilities. However, this term does not include social or economic disadvantages that restrict normal achievement (e.g., prior criminal history or low-income status).

(i) **Student loan services.** RCW 82.04.367 provides a B&O tax exemption for the gross income of nonprofit organizations that are exempt from federal income tax under section 501 (c)(3) of the Internal Revenue Code that:

(i) Are guarantee agencies under the federal guaranteed student loan program or that issue debt to provide or acquire student loans; or

(ii) Provide guarantees for student loans made through programs other than the federal guaranteed student loan program.

(6) **B&O tax deduction of government payments made to health or social welfare organizations.** RCW 82.04.4297 provides a B&O tax deduction to health or social welfare organizations for amounts received from the United States, any instrumentality of the United States, the state of Washington, or any municipal corporation or political subdivision of the state of Washington as compensation for health or social welfare services. A deduction is not allowed, however, for amounts that are received under an employee benefit plan. These deductible amounts should be included in the gross income reported on the return, and then deducted on the return when determining the amount of the organization's taxable income.

(a) **What is a health or social welfare organization?** A health or social welfare organization is a nonprofit organization providing health or social welfare services that is also:

(i) A corporation sole under chapter 24.12 RCW or a not-for-profit corporation under chapter 24.03 RCW. It does not include a corporation providing professional services authorized under chapter 18.100 RCW;

(ii) Governed by a board of not less than eight individuals who are not paid corporate employees when the organization is a not-for-profit corporation;

(iii) Not paying any part of its corporate income directly or indirectly to its members, stockholders, officers, directors, or trustees except as executive or officer compensation or as services rendered by the corporation in accordance with its

purposes and bylaws to a member, stockholder, officer, or director or as an individual;

(iv) Only paying compensation to corporate officers and executives for actual services rendered. This compensation must be at a level comparable to like public service positions within Washington;

(v) Irrevocably dedicating its corporate assets to health or social welfare activities. Upon corporate liquidation, dissolution, or abandonment, any distribution or transfer of corporate assets may not inure directly or indirectly to the benefit of any member or individual, except for another health or social welfare organization;

(vi) Duly licensed or certified as required by law or regulation;

(vii) Using government payments to provide health or social welfare services;

(viii) Making its services available regardless of race, color, national origin, or ancestry; and

(ix) Provides access to the corporation's books and records to the department's authorized agents upon request.

(b) **Qualifying health or welfare services.** Health or social welfare services are limited exclusively to the following services:

(i) Mental health, drug, or alcoholism counseling or treatment;

(ii) Family counseling;

(iii) Health care services;

(iv) Therapeutic, diagnostic, rehabilitative or restorative services for the care of the sick, aged, physically-disabled, developmentally-disabled, or emotionally-disabled individuals;

(v) Activities, including recreational activities, intended to prevent or ameliorate juvenile delinquency or child abuse;

(vi) Care of orphans or foster children;

(vii) Day care of children;

(viii) Employment development, training, and placement;

(ix) Legal services to the indigent;

(x) Weatherization assistance or minor home repairs for low-income homeowners or renters;

(xi) Assistance to low-income homeowners and renters to offset the cost of home heating energy, through direct benefits to eligible households or to fuel vendors on behalf of eligible households; and

(xii) Community services to low-income individuals, families and groups that are designed to have a measurable and potentially major impact on the poverty in Washington.

AMENDATORY SECTION (Amending Order ET 83-16, filed 3/15/83)

WAC 458-20-173 Installing, cleaning, repairing or otherwise altering or improving personal property of consumers.

Business and Occupation Tax

Retailing. Persons installing, cleaning, decorating, beautifying, repairing or otherwise altering or improving tangible personal property of consumers or for consumers are taxable under the retailing classification upon the gross proceeds received from sales of tangible personal property and the rendition of services.

Wholesaling. Persons who sell tangible personal property to, or render any of the above services for others than consumers, are taxable under the wholesaling classification upon the gross proceeds of sales received ((~~therefrom~~)).

There must be included within gross amounts reported for tax all fees for services rendered and all charges recovered for expenses incurred in connection therewith, such as transportation costs, hotel, restaurant, telephone and telegraph charges, etc.

Retail Sales Tax

Persons engaged in the business of installing, cleaning, decorating, beautifying, repairing or otherwise altering or improving tangible personal property of consumers or for consumers are required to collect the retail sales tax upon the total charge made for the rendition of such services, even though no tangible personal property in the form of materials or supplies is sold or used in connection with such services. Where tangible personal property in the form of materials and supplies is sold or used in connection with such services, the retail sales tax applies to the total charges made for the sale of the materials and supplies and the services rendered in connection therewith.

The following are illustrative of services upon which the retail sales tax applies to the total charge made to consumers:

Laundering, dyeing and cleaning;

Automobile repairing, washing and painting;

Boat repairing (see WAC 458-20-175 and 458-20-176 for certain exemptions); shoe repairing and shining;

Altering or repairing wearing apparel.

In general, the repairing of any personal property, such as radios, refrigerators, machines, watches and jewelry and other articles.

The retail sales tax does not apply to sales ((~~to such persons~~)) of materials which are resold as a part of the articles of tangible personal property being repaired, altered or improved. Therefore, ((~~upon~~)) for buyers giving a resale certificate for purchases made before January 1, 2010, or a reseller permit for purchases made on or after January 1, 2010, to sellers to document the wholesale nature of any sale as provided in WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits), the retail sales tax will not apply to purchases such as:

(1) Parts or paint by an automotive repairman;

(2) Lumber, chandlery, etc., by a boat repairman;

(3) Shoe findings, thread, nails, polish and dyes by a shoe repairman;

(4) Solder, wire, condensers, etc., by a radio or television repairman.

Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by the seller for five years from the date of last use or December 31, 2014.

On the other hand the retail sales tax does apply to the purchase of all other supplies which may be consumed and utilized by such persons in the rendition of such services, such as fuel, lubricant, machines, hand tools, stationery and other supplies and equipment.

REPAIRS FOR OUT-OF-STATE PERSONS. Persons residing outside this state may ship into this state articles of tangible personal property for the purpose of having the ((~~same~~)) articles repaired, cleaned, or otherwise altered, and ((~~thereafter~~)) then returned to them. The retail sales tax is not applicable to the charge made for labor and/or materials, provided the seller, as a requirement of the agreement, delivers the property to the purchaser at a point outside this state or delivers the property to a common or bona fide private carrier consigned to the purchaser at a point outside this state. Proof of exempt sales will be the same as that required for sales of tangible personal property in interstate commerce. See WAC 458-20-193((~~, Part A~~)). No deduction is allowed, however, under the business and occupation tax.

For taxability of ((~~warranty, service, or~~)) warranties and maintenance ((~~contracts~~)) agreements, see WAC ((~~458-20-107~~)) 458-20-257.

AMENDATORY SECTION (Amending WSR 95-24-104, filed 12/6/95, effective 1/6/96)

WAC 458-20-189 Sales to and by the state of Washington, counties, cities, towns, school districts, and fire districts. (1) **Introduction.** This section discusses the business and occupation (B&O), retail sales, use, and public utility tax applications to sales made to and by the state of Washington, counties, cities, towns, school districts, and fire districts. Hospitals or similar institutions operated by the state of Washington, or a municipal corporation thereof, should refer to WAC 458-20-168 (Hospitals, nursing homes, boarding homes, adult family homes and similar health care facilities). School districts should also refer to WAC 458-20-167 (Educational institutions, school districts, student organizations, and private schools). Persons providing physical fitness activities and amusement and recreation activities should also refer to WAC 458-20-183 (Amusement, recreation, and physical fitness services).

Persons providing public utility services may also want to refer to the following sections ((~~of chapter 458-20 WAC~~)):

(a) WAC 458-20-179 (Public utility tax);

(b) WAC 458-20-180 (Motor transportation, urban transportation);

(c) WAC 458-20-250 (((~~Refuse-solid waste collection business—Core deposits and credits, battery core charges, and tires~~)) Solid waste collection tax); and

(d) WAC 458-20-251 (Sewerage collection ((~~business~~)) and other related activities).

(2) **Definitions.** For the purposes of this section, the following definitions apply:

(a) "Municipal corporations" means counties, cities, towns, school districts, and fire districts of the state of Washington.

(b) "Public service business" means any business subject to control by the state, or having the powers of eminent domain, or any business declared by the legislature to be of a public service nature, irrespective of whether the business has the powers of eminent domain or the state exercises its control over the business. It includes, among others and without limiting the scope hereof, water distribution, light and power, public transportation, and sewer collection.

(c) "Subject to control by the state," as used in (b) of this subsection, means control by the utilities and transportation commission or any other state department required by law to exercise control of a business of a public service nature as to rates charged or services rendered.

(d) "Enterprise activity" means an activity financed and operated in a manner similar to a private business enterprise. The term includes those activities which are generally in competition with private business enterprises and which are over fifty percent funded by user fees. The term does not include activities which are exclusively governmental.

(3) **Persons taxable under the business and occupation tax.**

(a) Sellers are subject to the B&O tax upon sales to the state of Washington, its departments and institutions, or to municipal corporations of the state.

(b) The state of Washington, its departments and institutions, as distinct from its corporate agencies or instrumentalities, are not subject to the provisions of the B&O tax. RCW 82.04.030.

(c) Municipal corporations are not subject to the B&O tax upon amounts derived from activities which are exclusively governmental. RCW 82.04.419. Thus, the B&O tax does not apply to license and permit fees, inspection fees, fees for copies of public records, reports, and studies, pet adoption and license fees, processing fees involving fingerprinting and environmental impact statements, and taxes, fines, or penalties, and interest thereon. Also exempt are fees for on-street metered parking and on-street parking permits.

Municipal corporations are also exempt from the B&O tax on grants received from the state of Washington, or the United States government. RCW 82.04.418.

(d) Municipal corporations deriving income, however designated, from any enterprise or public service business activity for which a specific charge is made are subject to the provisions of the B&O or public utility tax. Charges between departments of a particular municipal corporation are interdepartmental charges and not subject to tax. (See also WAC 458-20-201 on interdepartmental charges.)

(i) When determining whether an activity is an enterprise activity, user fees derived from the activity must be measured against total costs attributable to providing the activity, including direct and indirect overhead. This review should be performed on the fiscal or calendar year basis used by the entity in maintaining its books of account.

For example, a city operating an athletic and recreational facility determines that the facility generatedtwo hundred fifty thousand dollars in user fees for the fiscal year. The total costs for operating the facility were four hundred thousand dollars. This figure includes direct operating costs and direct and indirect overhead, including asset depreciation and interest payments for the retirement of bonds issued to fund the facility's construction. The principal payments for the retirement of the bonds are not included because these costs are a part of the asset depreciation costs. The facility's operation is an enterprise activity because it is more than fifty percent funded by user fees.

(ii) An enterprise activity which is operated as a part of a governmental or nonenterprise activity is subject to the B&O tax. For example, City operates Community Center, a large

athletic and recreational facility, and three smaller neighborhood centers. Community Center operates with its own budget, and the three neighborhood centers are lumped together and operated under a single separate budget. Community Center and the neighborhood centers are operated as a part of an overall parks and recreation system, which is not more than fifty percent funded by user fees.

Each budget must be independently reviewed to determine whether these facilities are operated as enterprise activities. The operation of Community Center would be an enterprise activity only if the user fees account for more than fifty percent of Community Center's operating budget. The total user fees generated by the three neighborhood centers would be compared to the total costs of operating the three centers to determine whether they, as a whole, were operated as enterprise activity. Had each neighborhood center operated under an individual budget, the user fees generated by each neighborhood center would have been compared to the costs of operating that center.

(4) **Business and occupation tax.**

(a) Municipal corporations engaging in public service business activities should refer to the sections of chapter 458-20 WAC mentioned in subsection (1)(a) through (d) of this section to determine their B&O tax liability. Municipal corporations engaging in enterprise activities are subject to the B&O tax as follows:

(i) **Service and other business activities tax.** Amounts derived from, but not limited to, special event admission fees for concerts and exhibits, user fees for lockers and checkrooms, charges for moorage (less than thirty days), and the granting of a license to use real property are subject to the service and other business activities tax if these activities are considered enterprise activities. (See also WAC 458-20-118 on the sale or rental of real estate.) The service tax applies to fees charged for instruction in amusement and recreation activities, such as tennis or swimming lessons.

((~~Prior to July 1, 1993, fees charged for physical fitness activities and saunas were subject to the service tax. These activities are a retail sale beginning July 1, 1993.~~)) Physical fitness activities are retail sales. These activities include weight lifting, exercise facilities, aerobic classes, etc. (See also WAC 458-20-183 on amusement and recreation activities, etc.)

(ii) **Extracting tax.** The extracting of natural products for sale or for commercial use is subject to the extracting B&O tax. The measure of tax is the value of products. (See WAC 458-20-135 on extracting.) Counties and cities are not, however, subject to the extracting tax upon the cost of labor and services performed in the mining, sorting, crushing, screening, washing, hauling, and stockpiling of sand, gravel, or rock taken from a pit or quarry owned by or leased to the county or city when these products are either stockpiled for placement or are placed on a street, road, place, or highway of the county or city by the county or city itself. Nor does the extracting tax apply to the cost of or charges for such labor and services if the sand, gravel, or rock is sold by the county or city to another county or city at actual cost for placement on a publicly owned street, road, place, or highway. RCW 82.04.415.

(iii) **Manufacturing tax.** The manufacturing of products for sale or for commercial use is subject to the manufacturing B&O tax. The measure of tax is the value of products. (See WAC 458-20-136 on manufacturing.) The manufacturing tax does not apply to the value of materials printed by counties, cities, towns, or school districts solely for their own use. RCW 82.04.397.

(iv) **Wholesaling tax.** The wholesaling tax applies to the gross proceeds derived from sales or rentals of tangible personal property to persons who resell the same without intervening use. The wholesaling tax does not, however, apply to casual sales. (See WAC 458-20-106 on casual sales.) Sellers must obtain resale certificates for sales made before January 1, 2010, or reseller permits for sales made on or after January 1, 2010, from their customers to ((~~support~~)) document the wholesale nature of any ((~~transaction. (Refer to WAC 458-20-102 on resale certificates.)~~)) sale as provided in WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits). Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by the seller for five years from the date of last use or December 31, 2014.

(v) **Retailing tax.** User fees for off-street parking and garages, and charges for the sale or rental of tangible personal property to consumers are taxable under the retailing B&O tax. The retailing tax does not, however, apply to casual sales. (See WAC 458-20-106.) Fees for amusement and recreation activities, such as golf, swimming, racquetball, and tennis, are retail sales and subject to the retailing tax if the activities are considered enterprise activities. Charges for instruction in amusement and recreation activities are subject to the service tax. (See also WAC 458-20-183 and (a)(i) of this subsection.)

((~~On and after July 1, 1993,~~)) Charges for physical fitness and sauna services are classified as retail sales and subject to the retailing tax. ((~~(See chapter 25, Laws of 1993 sp. sess.)~~)) While a retail sales tax exemption for physical fitness classes provided by local governments is available ((~~on and after July 1, 1994,~~)) (see subsection (6)(h) of this section), the retailing B&O tax continues to apply.

(b) Persons selling products which they have extracted or manufactured must report, unless exempt by law, under both the "production" (extracting and/or manufacturing) and "selling" (wholesaling or retailing) classifications of the B&O tax, and claim a tax credit under the multiple activities tax credit system. (See WAC 458-20-19301 on multiple activities tax credits.)

(5) **Retail sales tax.**

(a) The retail sales tax generally applies to all retail sales made to the state of Washington, its departments and institutions, and to municipal corporations of the state.

(b) The state of Washington, its departments and institutions, and all municipal corporations are required to collect retail sales tax on all retail sales of tangible personal property or services classified as retail services unless specific exemptions apply. Retail sales tax must be collected and remitted even though the sale may be exempt from the retailing B&O tax. For example, a city police department must collect retail sales tax on casual sales of unclaimed property to consumers, even though this activity is not subject to the B&O tax

because these sales are considered casual sales. (See also WAC 458-20-106.)

(c) Sales between a department or institution of the state and a municipal corporation, or between municipal corporations are retail sales. For example, State Agency sells office supplies to County. State Agency is making a retail sale. State Agency must collect and remit retail sales tax upon the amount charged, even though the B&O tax does not apply to this sale. The amount of retail sales tax must be separately itemized on the sales invoice. RCW 82.08.050. State Agency may claim a tax paid at source deduction for any retail sales or use tax previously paid on the acquisition of the office supplies. (((~~(See WAC 458-20-102 on purchases for dual purposes.)~~)))

(d) Departments or institutions of the state of Washington are not considered sellers when making sales to other departments or institutions of the state because the state is considered to be a single entity. RCW 82.08.010(2). Therefore, the "selling" department or institution is not required by statute to collect the retail sales tax on these sales.

All departments or institutions of the state of Washington are, however, considered "consumers." RCW 82.08.010 (3). A department or institution of the state purchasing tangible personal property from another department or institution is required to remit to the department of revenue the retail sales or use tax upon that purchase, unless it can document that the "selling" institution previously paidthe appropriate retail sales or use tax on that item.

(6) **Retail sales tax exemptions.** The retail sales tax does not apply to the following:

(a) Sales to city or county housing authorities which were created under the provisions of the Washington housing authorities law, chapter 35.82 RCW. However, prime contractors and subcontractors for city or county housing authorities should refer to WAC 458-20-17001 (Government contracting—Construction, installations, or improvements to government real property) to determine their tax liability.

(b) Charges to municipal corporations and the state of Washington for that portion of the selling price of contracts for watershed protection or flood control which is reimbursed by the United States government according to the provisions of the Watershed Protection and Flood Prevention Act, Public Law 566, as amended. RCW 82.08.0271.

(c) Sales of the entire operating property of a publicly or privately owned public utility, or of a complete operating integral section thereof, to the state or a municipal corporation thereof for use in conducting any public service business except a tugboat business. RCW 82.08.0256.

(d) Sales of or charges made for labor and services in the mining, sorting, crushing, screening, washing, hauling, and stockpiling of sand, gravel, or rock taken from a pit or quarry owned or leased to a county or city, when the materials are either stockpiled in the pit or quarry, placed on the public road by the county or city itself, or sold at cost to another county or city for use on public roads. RCW 82.08.0275.

(e) Sales to one municipal corporation by another municipal corporation directly or indirectly arising out of, or resulting from, the annexation or incorporation of any part of the territory of one municipal corporation by another. RCW 82.08.0278.

(f) Sales to the state of Washington, or a municipal corporation in the state, of ferry vessels and component parts thereof, and charges for labor and services in respect to construction or improvement of such vessels. RCW 82.08.0285.

(g) Sales to the United States. However, sales to federal employees are subject to the retail sales tax, even if the federal employee will be reimbursed for the cost by the federal government. (See WAC 458-20-190 on sales to the United States.)

(h) ((~~On and after July 1, 1994,~~)) Charges for physical fitness classes, such as aerobics classes, provided by local governments. RCW 82.08.0291. (((~~See also chapter 85, Laws of 1994.~~))) Local governments must collect retail sales tax on charges for other physical fitness activities such as weight lifting, exercise equipment, and running tracks.

This exemption does not apply if a person other than a local government provides the physical fitness class, even if the class is conducted at a local government facility.

(7) **Deferred sales or use tax.**

(a) If the seller fails to collect the appropriate retail sales tax, the state of Washington, its departments and institutions, and all municipal corporations are required to pay the deferred sales or use tax directly to the department.

(b) Purchases of cigarette stamps**,** vehicle license plates, license plate tabs, disability decals, or other items to evidence payment of a license, tax, or fee are purchases for consumption by the state or municipal corporation, and subject to the retail sales or use tax.

(c) Where tangible personal property or taxable services are purchased by the state of Washington, its departments and institutions, for the purpose of resale to any other department or institution of the state of Washington, or for the purpose of consuming the property purchased in manufacturing or producing for use or for resale to any other department or institution of the state of Washington a new article of which such property is an ingredient or component part, the transaction is deemed a purchase at retail and the retail sales tax applies.

(d) Persons producing or manufacturing products for commercial or industrial use are required to remit use tax upon the value of those products, unless a specific use tax exemption applies. RCW 82.12.020. This value must correspond as nearly as possible to the gross proceeds from retail sales of similar products. (See WAC 458-20-112 and 458-20-134 on value of products and commercial or industrial use, respectively.)

For example, a municipal corporation operating a print shop and producing forms or other documents for its own use must remit use tax upon the value of those products, even though a B&O tax exemption is provided by RCW 82.04.-397. The municipal corporation may claim a credit for retail sales tax previously paid on materials, such as paper or ink, which are incorporated into the manufactured product. The process of putting an internal communication, such as a memorandum to employees, on a blank form or document is not considered a manufacturing activity, even when multiple copies of the resulting internal communication are reproduced for wide distribution to employees.

(i) Counties and cities are not subject to use tax upon the cost of labor and services in the mining, sorting, crushing, screening, washing, hauling, and stockpiling of sand, gravel,

and rock taken from a pit or quarry owned or leased to a county or city when the materials are for use on public roads. RCW 82.12.0269.

(ii) If a department or institution of the state of Washington manufactures or produces tangible personal property for use or resale to any other department or institution of the state, use tax must be remitted upon the value of that article even though the state is not subject to the B&O tax.

For example, State Agency manufactures office furniture for resale to other departments or institutions of the state of Washington. State Agency will also on occasion use office furniture it has manufactured for its own offices. Use tax is due on the office furniture sold to the other departments or institutions of this state, and on the office furniture State Agency puts to its own use. The taxable value of the office furniture sold to the other departments or institutions of this state is the selling price. The taxable value for the office furniture State Agency puts to its own use is the selling price at which State Agency sells comparable furniture to other departments or institutions of the state. When computing and remitting use tax upon the value of manufactured furniture, State Agency may claim a credit for retail sales or use taxes previously remitted on materials incorporated into that furniture. A department or institution of this state purchasing office furniture from State Agency must remit use tax upon the value of that furniture, unless it can document that State Agency paid use tax upon the appropriate value of the furniture. (See also subsection (5)(d) of this section.)

(e) ((~~A donee is generally subject to use tax upon the use of any donated item of tangible personal property, if the appropriate retail sales or use tax was not paid by the donor. Effective May 1, 1995.~~)) A use tax exemption is available to state or local governmental entities using tangible personal property donated to them. ((~~(See chapter 201, Laws of 1995.)~~)) RCW 82.12.02595. The donor, however, remains liable for the retail sales or use tax on the donated property, even though the state or local governmental entity's use of the property is exempt of tax.

(8) **Persons subject to the public utility tax.**

(a) Persons deriving income subject to the provisions of the public utility tax may not claim a deduction for amounts received as compensation for services rendered to the state of Washington, its departments and institutions, or to municipal corporations thereof.

(b) The public utility tax does not apply to income received by the state of Washington, or its departments and institutions from providing public utility services.

(c) Municipal corporations operating public service businesses should refer to WAC 458-20-179 (Public utility tax), WAC 458-20-180 (Motor transportation, urban transportation), WAC 458-20-250 (((~~Refuse solid~~)) Solid waste collection ((~~business - Core deposits and credits, battery core charges, and tires~~)) tax) and WAC 458-20-251 (Sewerage collection ((~~business~~)) and other related activities) to determine their public utility tax liability.

(9) **Examples.** The following examples identify a number of facts and then state a conclusion. These examples should only be used as a general guide. The tax results of other situations must be determined after a review of all the facts and circumstances.

(a) City operates a community center which provides a number of activities and services. The center charges fees for court activities including tennis and racquetball, general admission to the swimming pool, swimming lessons, aerobics classes, and the use of weight equipment. The community center also provides programs targeted at youth and senior populations. These programs include arts and craft classes, dance instruction classes, and day camps providing a wide variety of activities such as picnics, nature walks, volleyball, and other games. The center provides banquet and meeting rooms to civic groups for a fee, but does not provide a meal service with the banquet facilities. The community center's operation is an enterprise activity, because it is more than fifty percent funded by user fees.

City's tax liability for the fees charged by the community center are as follows:

(i) Retailing B&O and retail sales taxes apply to all charges for the court activities**,** general admission to the swimming pool, and the use of weight equipment;

(ii) The retailing B&O tax applies to fees charged for aerobics classes. Retail sales tax does not apply because of the sales tax exemption for physical fitness classes provided by local governments;

(iii) Service and other business activities B&O tax applies to all fees for swimming lessons, the arts and crafts classes, dance instruction classes, day camps, and the rental of the banquet and meeting rooms. Retail sales tax does not apply to any part of the charge for the day camp because the portion of the day camp activities considered to be retail is minimal.

(b) City operates a swimming pool located at a high school. This swimming pool is open to the public in the evenings. City charges user fees for swimming lessons, water exercise classes, and general admission to the pool. City will occasionally "rent" the pool to a private organization for the organization's own use. In these cases, the private organization controls the overall operation and admission to the facility. City has no authority to control access and/or use when "renting" the pool to these organizations. City compares the user fees generated by the swimming pool to the total costs associated with the operation of the pool on an annual basis. The user fees never total "more than fifty percent" of the cost of pool operation, therefore the operation of the pool is not an enterprise activity.

City must collect and remit retail sales tax on all retail sales for which a retail sales tax exemption is not available, even though the B&O tax does not apply. Retail sales tax must be charged and collected on all general admission charges. Retail sales tax does not apply to the water exercise classes because of the retail sales tax exemption provided for physical fitness classes provided by local governments. City would not collect retail sales tax on the charges for the swimming lessons or the "rental" of the pool to private businesses (license to use real estate)because these charges are not retail sales.

(c) City sponsors various baseball leagues as a part of City's efforts to provide recreational activities to its citizens. Teams joining a league are charged a "league fee." Individual participants are charged a "participation fee." The league fee entitles a team to join the league, and reserve the use of

the ball fields for league games. The participation fee entitles an individual team member to participate in the baseball activity. City does not account for the operation of the ball fields under a single specific budget. The user fees generated from the baseball fields, as well as the costs of operating and maintaining these fields, are accounted for in City's overall parks and recreation system budget, which is not an enterprise activity.

The participation fees are retail sales and subject to the retail sales tax, because the team members pay these fees for the right to actually engage in an amusement and recreation activity. The league fees are not retail sales, because they simply entitle the teams to join an association of baseball teams that compete amongst themselves. (Refer also to WAC 458-20-183 on amusement and recreational activities.) The participation fees and league fees are not subject to the B&O tax, because these baseball fields are not operated as an enterprise activity. Had these fields been operated as an enterprise activity, the participation fees and league fees would also have been subject to the retailing and service and other business activities B&O tax classifications, respectively.

(d) Jane Doe enters into a contract with City to provide an aerobics class at City's community center. Jane is responsible for providing the aerobics class. City merely "rents" a room to Jane under a license to use agreement.

Jane Doe must collect and remit retail sales tax upon the charges for the aerobics classes. The charges for the aerobics classes do not qualify for the retail sales tax exemption provided by RCW 82.08.0291 merely because the classes are held at a local government facility. Jane Doe is not entitled to the retail sales tax exemption available to local governments.

AMENDATORY SECTION (Amending WSR 91-24-020, filed 11/22/91, effective 1/1/92)

WAC 458-20-193 Inbound and outbound interstate sales of tangible personal property. (1) **Introduction.** This section explains Washington's B&O tax and retail sales tax applications to interstate sales of tangible personal property. It covers the outbound sales of goods originating in this state to persons outside this state and of inbound sales of goods originating outside this state to persons in this state. This section does not include import and export transactions.

(2) **Definitions:** For purposes of this section the following terms mean:

(a) "State of origin" means the state or place where a shipment of tangible personal property (goods) originates.

(b) "State of destination" means the state or place where the purchaser/consignee or its agent receives a shipment of goods.

(c) "Delivery" means the act of transferring possession of tangible personal property. It includes among others the transfer of goods from consignor to freight forwarder or for-hire carrier, from freight forwarder to for-hire carrier, one for-hire carrier to another, or for-hire carrier to consignee.

(d) "Receipt" or "received" means the purchaser or its agent first either taking physical possession of the goods or having dominion and control over them.

(e) "Agent" means a person authorized to receive goods with the power to inspect and accept or reject them.

(f) "Nexus" means the activity carried on by the seller in Washington which is significantly associated with the seller's ability to establish or maintain a market for its products in Washington.

(3) **Outbound sales.** Washington state does not assess its taxes on sales of goods which originate in Washington if receipt of the goods occurs outside Washington.

(a) Where tangible personal property is located in Washington at the time of sale and is received by the purchaser or its agent in this state, or the purchaser or its agent exercises ownership over the goods inconsistent with the seller's continued dominion over the goods, the sale is subject to tax under the retailing or wholesaling classification. The tax applies even though the purchaser or its agent intends to and thereafter does transport or send the property out-of-state for use or resale there, or for use in conducting interstate or foreign commerce. It is immaterial that the contract of sale or contract to sell is negotiated and executed outside the state or that the purchaser resides outside the state.

(b) Where the seller delivers the goods to the purchaser who receives them at a point outside Washington neither retailing nor wholesaling business tax is applicable. This exemption applies even in cases where the shipment is arranged through a for-hire carrier or freight consolidator or freight forwarder acting on behalf of either the seller or purchaser. It also applies whether the shipment is arranged on a "freight prepaid" or a "freight collect" basis. The shipment may be made by the seller's own transportation equipment or by a carrier for-hire. For purposes of this section, a for-hire carrier's signature does not constitute receipt upon obtaining the goods for shipment unless the carrier is acting as the purchaser's agent and has express written authority from the purchaser to accept or reject the goods with the right of inspection.

(4) **Proof of exempt outbound sales.**

(a) If either a for-hire carrier or the seller itself carries the goods for receipt at a point outside Washington, the seller is required to retain in its records documentary proof of the sales and delivery transaction and that the purchaser in fact received the goods outside the state in order to prove the sale is tax exempt. Acceptable proofs, among others, will be:

(i) The contract or agreement of sale, if any, **And**

(ii) If shipped by a for-hire carrier, a waybill, bill of lading or other contract of carriage indicating the seller has delivered the goods to the for-hire carrier for transport to the purchaser or the purchaser's agent at a point outside the state with the seller shown on the contract of carriage as the consignor (or other designation of the person sending the goods) and the purchaser or its agent as consignee (or other designation of the person to whom the goods are being sent); or

(iii) If sent by the seller's own transportation equipment, a trip-sheet signed by the person making delivery for the seller and showing:

The seller's name and address,

The purchaser's name and address,

The place of delivery, if different from purchaser's address,

The time of delivery to the purchaser together with the signature of the purchaser or its agent acknowledging receipt

of the goods at the place designated outside the state of Washington.

(b) Delivery of the goods to a freight consolidator, freight forwarder or for-hire carrier merely utilized to arrange for and/or transport the goods is not receipt of the goods by the purchaser or its agent unless the consolidator, forwarder or for-hire carrier has express written authority to accept or reject the goods for the purchaser with the right of inspection. See also WAC 458-20-174, 458-20-17401, 458-20-175, 458-20-176, 458-20-177, 458-20-238 and 458-20-239 for certain statutory exemptions.

(5) **Other B&O taxes - outbound and inbound sales.**

(a) **Extracting, manufacturing.** Persons engaged in these activities in Washington and who transfer or make delivery of such produced articles for receipt at points outside the state are subject to business tax under the extracting or manufacturing classification and are not subject to tax under the retailing or wholesaling classification. See also WAC 458-20-135 and 458-20-136. The activities taxed occur entirely within the state, are inherently local, and are conducted prior to the commercial journey. The tax is measured by the value of products as determined by the selling price in the case of articles on which the seller performs no further manufacturing after transfer out of Washington. It is immaterial that the value so determined includes an additional increment of value because the sale occurs outside the state. If the seller performs additional manufacturing on the article after transferring the article out-of-state, the value should be measured under the principles contained in WAC 458-20-112.

(b) **Extracting or processing for hire, printing and publishing, repair or alteration of property for others.** These activities when performed in Washington are also inherently local and the gross income or total charge for work performed is subject to business tax, since the operating incidence of the tax is upon the business activity performed in this state. No deduction is permitted even though the articles produced, imprinted, repaired or altered are delivered to persons outside the state. It is immaterial that the customers are located outside the state, that the work was negotiated or contracted for outside the state, or that the property was shipped in from outside the state for such work.

(c) **Construction, repair.** Construction or repair of buildings or other structures, public road construction and similar contracts performed in this state are inherently local business activities subject to B&O tax in this state. This is so even though materials involved may have been delivered from outside this state or the contracts may have been negotiated outside this state. It is immaterial that the work may be performed in this state by foreign sellers who performed preliminary services outside this state.

(d) **Renting or leasing of tangible personal property.** Lessors who rent or lease tangible personal property for use in this state are subject to B&O tax upon their gross proceeds from such rentals for periods of use in this state. Proration of tax liability based on the degree of use in Washington of leased property is required.

It is immaterial that possession of the property leased may have passed to the lessee outside the state or that the lease agreement may have been consummated outside the state. Lessors will not be subject to B&O tax if all of the following conditions are present:

(i) The equipment is not located in Washington at the time the lessee first takes possession of the leased property; and

(ii) The lessor has no reason to know that the equipment will be used by the lessee in Washington; and

(iii) The lease agreement does not require the lessee to notify the lessor of subsequent movement of the property into Washington and the lessor has no reason to know that the equipment may have been moved to Washington.

(6) **Retail sales tax - outbound sales.** The retail sales tax generally applies to all retail sales made within this state. The legal incidence of the tax is upon the purchaser, but the seller is obligated to collect and remit the tax to the state. The retail sales tax applies to all sales to consumers of goods located in the state when goods are received in Washington by the purchaser or its agent, irrespective of the fact that the purchaser may use the property elsewhere. However, as indicated in subsection (4)(b), delivery of the goods to a freight consolidator, freight forwarder or for-hire carrier arranged either by the seller or the purchaser, merely utilized to arrange for and/or transport the goods out-of-state is not receipt of the goods by the purchaser or its agent in this state, unless the consolidator, forwarder or for-hire carrier has express written authority to accept or reject the goods for the purchaser with the right of inspection.

(a) The retail sales tax does not apply when the seller delivers the goods to the purchaser who receives them at a point outside the state, or delivers the same to a for-hire carrier consigned to the purchaser outside the state. This exemption applies even in cases where the shipment is arranged through a for-hire carrier or freight consolidator or freight forwarder acting on behalf of either the seller or the purchaser. It also applies regardless of whether the shipment is arranged on a "freight prepaid" or a "freight collect" basis and regardless of who bears the risk of loss. The seller must retain proof of exemption as outlined in subsection (4), above.

(b) RCW 82.08.0273 provides an exemption from the retail sales tax to certain nonresidents of Washington for purchases of tangible personal property for use outside this state when the nonresident purchaser provides proper documentation to the seller. This statutory exemption is available only to residents of states and possessions or Province of Canada other than Washington when the jurisdiction does not impose a retail sales tax of three percent or more. These sales are subject to B&O tax.

(c) A statutory exemption (RCW 82.08.0269) is allowed for sales of goods for use in states, territories and possessions of the United States which are not contiguous to any other state (Alaska, Hawaii, etc.), but only when, as a necessary incident to the contract of sale, the seller delivers the property to the purchaser or its designated agent at the usual receiving terminal of the for-hire carrier selected to transport the goods, under such circumstance that it is reasonably certain that the goods will be transported directly to a destination in such noncontiguous states, territories and possessions. As proof of exemption, the seller must retain the following as part of its sales records:

(i) A certification of the purchaser that the goods will not be used in the state of Washington and are intended for use in the specified noncontiguous state, territory or possession.

(ii) Written instructions signed by the purchaser directing delivery of the goods to a dock, depot, warehouse, airport or other receiving terminal for transportation of the goods to their place of ultimate use. Where the purchaser is also the carrier, delivery may be to a warehouse receiving terminal or other facility maintained by the purchaser when the circumstances are such that it is reasonably certain that the goods will be transported directly to their place of ultimate use.

(iii) A dock receipt, memorandum bill of lading, trip sheet, cargo manifest or other document evidencing actual delivery to such dock, depot, warehouse, freight consolidator or forwarder, or receiving terminal.

(iv) The requirements of (i) and (ii) above may be complied with through the use of a blanket exemption certificate as follows:

Exemption Certificate

We hereby certify that all of the goods which we have purchased and which we will purchase from you will not be used in the State of Washington but are for use in the state, territory or possession of. . . . . .

You are hereby directed to deliver all such goods to the following dock, depot, warehouse, freight consolidator, freight forwarder, transportation agency or other receiving terminal:

. . . . . .

. . . . . .

for the transportation of those goods to their place of ultimate use.

This certificate shall be considered a part of each order that we have given you and which we may hereafter give to you, unless otherwise specified, and shall be valid until revoked by us in writing.

DATED . . . . . .

. . . . . .
(Purchaser)

By . . . . . .
(Officer or Purchaser's Representative)

Address . . . . . .

(v) There is no business and occupation tax deduction of the gross proceeds of sales of goods for use in noncontiguous states unless the goods are received outside Washington.

(d) See WAC 458-20-173 for explanation of sales tax exemption in respect to charges for labor and materials in the repair, cleaning or altering of tangible personal property for nonresidents when the repaired property is delivered to the purchaser at an out-of-state point.

(7) **Inbound sales.** Washington does not assert B&O tax on sales of goods which originate outside this state unless the goods are received by the purchaser in this state and the seller has nexus. There must be both the receipt of the goods in Washington by the purchaser and the seller must have nexus for the B&O tax to apply to a particular sale. The B&O tax will not apply if one of these elements is missing.

(a) Delivery of the goods to a freight consolidator, freight forwarder or for-hire carrier located outside this state merely utilized to arrange for and/or transport the goods into this state is not receipt of the goods by the purchaser or its agent unless the consolidator, forwarder or for-hire carrier has express written authority to accept or reject the goods for the purchaser with the right of inspection.

(b) When the sales documents indicate the goods are to be shipped to a buyer in Washington, but the seller delivers the goods to the buyer at a location outside this state, the seller may use the proofs of exempt sales contained in subsection 4 to establish the fact of delivery outside Washington.

(c) If a seller carries on significant activity in this state and conducts no other business in the state except the business of making sales, this person has the distinct burden of establishing that the instate activities are not significantly associated in any way with the sales into this state. Once nexus has been established, it will continue throughout the statutory period of RCW 82.32.050 (up to five years), notwithstanding that the instate activity which created the nexus ceased. Persons taxable under the service B&O tax classification should refer to WAC 458-20-194. The following activities are examples of sufficient nexus in Washington for the B&O tax to apply:

(i) The goods are located in Washington at the time of sale and the goods are received by the customer or its agent in this state.

(ii) The seller has a branch office, local outlet or other place of business in this state which is utilized in any way, such as in receiving the order, franchise or credit investigation, or distribution of the goods.

(iii) The order for the goods is solicited in this state by an agent or other representative of the seller.

(iv) The delivery of the goods is made by a local outlet or from a local stock of goods of the seller in this state.

(v) The out-of-state seller, either directly or by an agent or other representative, performs significant services in relation to establishment or maintenance of sales into the state, even though the seller may not have formal sales offices in Washington or the agent or representative may not be formally characterized as a "salesperson."

(vi) The out-of-state seller, either directly or by an agent or other representative in this state, installs its products in this state as a condition of the sale.

(8) **Retail sales tax - inbound sales.** Persons engaged in selling activities in this state are required to be registered with the department of revenue. Sellers who are not required to be registered may voluntarily register for the collection and reporting of the use tax. The retail sales tax must be collected and reported in every case where the retailing B&O tax is due as outlined in subsection 7. If the seller is not required to collect retail sales tax on a particular sale because the transaction is disassociated from the instate activity, it must collect the use tax from the buyer.

(9) **Use tax - inbound sales.** The following sets forth the conditions under which out-of-state sellers are required to collect and remit the use tax on goods received by customers in this state. A seller is required to pay or collect and remit

the tax imposed by chapter 82.12 RCW if within this state it directly or by any agent or other representative:

(((~~(i)~~))) (a) Has or utilizes any office, distribution house, sales house, warehouse, service enterprise or other place of business; or

(((~~(ii)~~))) (b) Maintains any inventory or stock of goods for sale; or

(((~~(iii)~~))) (c) Regularly solicits orders whether or not such orders are accepted in this state; or

(((~~(iv)~~))) (d) Regularly engages in the delivery of property in this state other than by for-hire carrier or U.S. mail; or

(((~~(v)~~))) (e) Regularly engages in any activity in connection with the leasing or servicing of property located within this state.

(((~~(a)~~))) (i) The use tax is imposed upon the use, including storage preparatory to use in this state, of all tangible personal property acquired for any use or consumption in this state unless specifically exempt by statute. The out-of-state seller may have nexus to require the collection of use tax without personal contact with the customer if the seller has an extensive, continuous, and intentional solicitation and exploitation of Washington's consumer market. (See WAC 458-20-221).

(((~~(b)~~))) (ii) Every person who engages in this state in the business of acting as an independent selling agent for unregistered principals, and who receives compensation by reason of sales of tangible personal property of such principals for use in this state, is required to collect the use tax from purchasers, and remit the same to the department of revenue, in the manner and to the extent set forth in WAC 458-20-221.

(10) **Examples - outbound sales.** The following examples show how the provisions of this section relating to interstate sales of tangible personal property will apply when the goods originate in Washington (outbound sales). The examples presume the seller has retained the proper proof documents and that the seller did not manufacture the items being sold.

(a) Company A is located in Washington. It sells machine parts at retail and wholesale. Company B is located in California and it purchases machine parts from Company A. Company A carries the parts to California in its own vehicle to make delivery. It is immaterial whether the goods are received at either the purchaser's out-of-state location or at any other place outside Washington state. The sale is not subject to Washington's B&O tax or its retail sales tax because the buyer did not receive the goods in Washington. Washington treats the transaction as a tax exempt interstate sale. California may impose its taxing jurisdiction on this sale.

(b) Company A, above, ships the parts by a for-hire carrier to Company B in California. Company B has not previously received the parts in Washington directly or through a receiving agent. It is immaterial whether the goods are received at either Company B's out-of-state location or any other place outside Washington state. It is immaterial whether the shipment is freight prepaid or freight collect. Again, Washington treats the transaction as an exempt interstate sale.

(c) Company B, above, has its employees or agents pick up the parts at Company A's Washington plant and transports them out of Washington. The sale is fully taxable under Washington's B&O tax and, if the parts are not purchased for resale by Company B, Washington's retail sales tax also applies.

(d) Company B, above, hires a carrier to transport the parts from Washington. Company B authorizes the carrier, or another agent, to inspect and accept the parts and, if necessary, to hold them temporarily for consolidation with other goods being shipped out of Washington. This sale is taxable under Washington's B&O tax and, if the parts are not purchased for resale by Company B, Washington's retail sales tax also applies.

(e) Washington will not tax the transactions in the above examples (a) and (b) if Company A mails the parts to Company B rather than using its own vehicles or a for-hire carrier for out-of-state receipt. By contrast, Washington will tax the transactions in the above examples (c) and (d) if for some reason Company B or its agent mails the parts to an out-of-state location after receiving them in Washington. The B&O tax applies to the latter two examples and if the parts are not purchased for resale by Company B then retail sales tax will also apply.

(f) Buyer C who is located in Alaska purchases parts for its own use in Alaska from Seller D who is located in Washington. Buyer C specifies to the seller that the parts are to be delivered to the water carrier at a dock in Seattle. The buyer has entered into a written contract for the carrier to inspect the parts at the Seattle dock. The sale is subject to the B&O tax because receipt took place in Washington. The retail sales tax does not apply because of the specific exemption at RCW 82.08.0269. This transaction would have been exempt of the B&O tax if the buyer had taken no action to receive the goods in Washington.

(11) **Examples - inbound sales.** The following examples show how the provisions of this section relating to interstate sales of tangible personal property will apply when the goods originate outside Washington (inbound sales). The examples presume the seller has retained the proper proof documents.

(a) Company A is located in California. It sells machine parts at retail and wholesale. Company B is located in Washington and it purchases machine parts for its own use from Company A. Company A uses its own vehicles to deliver the machine parts to its customers in Washington for receipt in this state. The sale is subject to the retail sales and B&O tax if the seller has nexus, or use tax if nexus is not present.

(b) Company A, above, ships the parts by a for-hire carrier to Company B in Washington. The goods are not accepted by Company B until the goods arrive in Washington. The sale is subject to the retail sales or use tax and is also subject to the B&O tax if the seller has nexus in Washington. It is immaterial whether the shipment is freight prepaid or freight collect.

(c) Company B, above, has its employees or agents pick up the parts at Company A's California plant and transports them into Washington. Company A is not required to collect sales or use tax and is not liable for B&O tax on the sale of these parts. Company B is liable for payment of use tax at the time of first use of the parts in Washington.

(d) Company B, above, hires a carrier to transport the parts from California. Company B authorizes the carrier, or

an agent, to inspect and accept the parts and, if necessary, to hold them temporarily for consolidation with other goods being shipped to Washington. The seller is not required to collect retail sales or use tax and is not liable for the B&O tax on these sales. Company B is subject to use tax on the first use of the parts in Washington.

(e) Company B, above, instructs Company A to deliver the machine parts to a freight consolidator selected by Company B. The freight consolidator does not have authority to receive the goods as agent for Company B. Receipt will not occur until the parts are received by Company B in Washington. Company A is required to collect retail sales or use tax and is liable for B&O tax if Company A has nexus for this sale. The mere delivery to a consolidator or for-hire carrier who is not acting as the buyer's receiving agent is not receipt by the buyer.

(f) Transactions in examples (11)(a) and (11)(b) will also be taxable if Company A mails the parts to Company B for receipt in Washington, rather than using its own vehicles or a for-hire carrier. The tax will continue to apply even if Company B for some reason sends the parts to a location outside Washington after the parts were accepted in Washington.

(g) Company W with its main office in Ohio has one employee working from the employee's home located in Washington. The taxpayer has no offices, inventory, or other employees in Washington. The employee calls on potential customers to promote the company's products and to solicit sales. On June 30, 1990 the employee is terminated. After this date the company no longer has an employee or agent calling on customers in Washington or carries on any activities in Washington which is significantly associated with the seller's ability to establish or maintain a market for its products in Washington. Washington customers who had previously been contacted by the former employee continue to purchase the products by placing orders by mail or telephone directly with the out-of-state seller. The nexus which was established by the employee's presence in Washington will be presumed to continue through December 31, 1994 and subject to B&O tax. Nexus will cease on December 31, 1994 if the seller has not established any new nexus during this period. Company W may disassociate and exclude from B&O tax sales to new customers who had no contact with the former employee. The burden of proof to disassociate is on the seller.

(h) Company X is located in Ohio and has no office, employees, or other agents located in Washington or any other contact which would create nexus. Company X receives by mail an order from Company Y for parts which are to be shipped to a Washington location. Company X purchases the parts from Company Z who is located in Washington and requests that the parts be drop shipped to Company Y. Since Company X has no nexus in Washington, Company X is not subject to B&O tax or required to collect retail sales tax. Company X has not taken possession or dominion or control over the parts in Washington. Company Z may accept a resale certificate (WAC 458-20-102A) for sales made before January 1, 2010, or a Streamlined Sales and Use Tax Agreement Certificate of Exemption or a Multistate Tax Commission Exemption Certificate (WAC 458-20-102) for sales made on or after January 1, 2010, from Company X which will bear the registration number issued by the state of Ohio. Company Y is required to pay use tax on the value of the parts. Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by Company Z for five years from the date of last use or December 31, 2014.

(i) Company ABC is located in Washington and purchases goods from Company XYZ located in Ohio. Upon receiving the order, Company XYZ ships the goods by a for-hire carrier to a public warehouse in Washington. The goods will be considered as having been received by Company ABC at the time Company ABC is entitled to receive a warehouse receipt for the goods. Company XYZ will be subject to the B&O tax at that time if it had nexus for this sale.

(j) P&S Department Stores has retail stores located in Washington, Oregon, and in several other states. John Doe goes to a P&S store in Portland, Oregon to purchase luggage. John Doe takes physical possession of the luggage at the store and elects to finance the purchase using a credit card issued to him by P&S. John Doe is a Washington resident and the credit card billings are sent to him at his Washington address. P&S does not have any responsibility for collection of retail sales or use tax on this transaction because receipt of the luggage by the customer occurred outside Washington.

(k) JET Company is located in the state of Kansas where it manufactures specialty parts. One of JET's customers is AIR who purchases these parts as components of the product which AIR assembles in Washington. AIR has an employee at the JET manufacturing site who reviews quality control of the product during fabrication. He also inspects the product and gives his approval for shipment to Washington. JET is not subject to B&O tax on the sales to AIR. AIR receives the parts in Kansas irrespective that JET may be shown as the shipper on bills of lading or that some parts eventually may be returned after shipment to Washington because of hidden defects.

AMENDATORY SECTION (Amending WSR 94-07-050, filed 3/10/94, effective 4/10/94)

WAC 458-20-209 Farming for hire and horticultural services performed for farmers. (1) **Introduction.** This section provides tax reporting information for persons performing horticultural services for farmers. Persons providing horticultural services to persons other than farmers should refer to WAC 458-20-226 (Landscape and horticultural services). Farmers and persons making sales to farmers may also want to refer to the following sections ((~~of chapter 458-20 WAC~~)):

(a) ((~~WAC 458-20-122 (Sales of feed, seed, fertilizer, spray materials, and other tangible personal property for farm use);~~

~~(b)~~)) WAC 458-20-210 (Sales of tangible personal property for farming—Sales of agricultural products by farmers); and

(((~~c~~))) (b) WAC 458-20-239 (Sales to nonresidents of farm machinery or implements, and related services).

(2) **Definitions.** For the purposes of this section, the following definitions apply:

(a) "Farmer" means any person engaged in the business of growing ((~~or producing, upon the person's own lands or~~

~~upon the lands in which the person has a present right of possession, any agricultural product whatsoever for sale. "Farmer" does not include a person using such products as ingredients in a manufacturing process, or a person growing or producing such products for the person's own consumption. The term does not include a person selling any animal or substance obtained therefrom in connection with the person's business of operating a stockyard, slaughter or packing house. "Farmer" does not include any person in respect to the business of taking, cultivating, or raising timber~~)), raising, or producing, upon the person's own lands or upon the lands in which the person has a present right of possession, any agricultural product to be sold. "Farmer" does not include a person growing, raising, or producing such products for the person's own consumption; a person selling any animal or substance obtained therefrom in connection with the person's business of operating a stockyard or a slaughter or packing house; or a person in respect to the business of taking, cultivating, or raising timber. RCW 82.04.213.

(b) "Agricultural product" means any product of plant cultivation or animal husbandry including, but not limited to ((~~a product of horticulture, grain cultivation, vermiculture, or viticulture. "Agricultural product" includes plantation Christmas trees, animals, birds, insects, or the substances obtained from such animals. RCW 82.04.213. On and after July 1, 1993, "agricultural product" includes products of "aquaculture" and animals that are "cultured aquatic products," as those terms are defined by RCW 15.85.020. Also effective July 1, 1993, "turf" was added to the definition of "agricultural product," and "animals intended to be pets" were specifically excluded. (See chapter 25, Laws of 1993 sp.s.)~~)): A product of horticulture, grain cultivation, vermiculture, viticulture, or aquaculture as defined in RCW 15.85.020; plantation Christmas trees; short-rotation hardwoods as defined in RCW 84.33.035; turf; or any animal including, but not limited to, an animal that is a private sector cultured aquatic product as defined in RCW 15.85.020, or a bird, or insect, or the substances obtained from such an animal. "Agricultural product" does not include animals defined as pet animals under RCW 16.70.020. RCW 82.04.213.

(c) "Horticultural services" include services related to the cultivation of vegetables, fruits, grains, field crops, ornamental floriculture, and nursery products. The term "horticultural services" includes, but is not limited to, the following:

(i) Soil preparation services such as plowing or weed control before planting;

(ii) Crop cultivation services such as planting, thinning, pruning, or spraying; and

(iii) Crop harvesting services such as threshing grain, mowing and baling hay, or picking fruit.

(3) **Business and occupation (B&O) tax.** Persons performing horticultural services for farmers are generally subject to the service and other business activities B&O tax upon the gross proceeds. However, if the person providing horticultural services also sells tangible personal property for a separate and distinct charge, the charge made for the tangible personal property will be subject to either the wholesaling or retailing B&O tax, depending on the nature of the sale. Persons making sales of tangible personal property to farmers should refer to WAC ((~~458-20-122~~)) 458-20-210 to determine whether the wholesaling or retailing tax applies, and under what circumstances retail sales tax must be collected.

(a) A farmer who occasionally assists another farmer in planting or harvesting a crop is generally not considered to be engaged in the business of performing horticultural services. These activities are generally considered to be casual and incidental to the farming activity. For example, a farmer owning baling equipment which is used primarily for baling hay produced by the farmer, but who may occasionally accommodate neighboring farmers by baling small quantities of hay produced by them, is not considered to be in business with respect thereto.

(b) The extent to which horticultural services are performed for others is determinative of whether or not they are considered taxable business activities. Persons who advertise or hold themselves out to the public as being available to perform farming for hire will be considered as being engaged in business. For example, a person who regularly engages in baling hay or threshing grain for others is engaged in business and taxable upon the gross proceeds derived therefrom, irrespective of the amount of such business or that this person also does some farming of his or her own land.

(c) In cases where doubt exists in determining whether or not a person is engaged in the business of performing horticultural services, all pertinent information should be submitted to the department of revenue (department) for a specific ruling.

(4) **Deferred sales or use tax.** If the seller fails to collect the appropriate retail sales tax, the purchaser is required to pay the deferred sales or use tax directly to the department.

(a) Purchases of machinery, machinery parts and repair, tools, and cleaning materials by persons performing horticultural services are subject to retail sales tax.

(b) Persons taxable under the service and other business activities B&O tax classification are defined as consumers of anything they use in performing their services. (Refer to RCW 82.04.190.) As such, these persons are required to pay retail sales or use tax upon the purchase of all items used in performing the service, such as fertilizers, spray materials, and baling wire, which are not sold separate and apart from the service they perform.

(5) **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 tax results of other situations must be determined after a review of all of the facts and circumstances.

(a) John Doe is a wheat farmer owning threshing equipment which is generally used only for threshing his own wheat. Occasionally a neighbor's threshing equipment may break down and John will use his own equipment to assist the neighbor in completing the neighbor's wheat harvest. While John receives payment for providing the threshing assistance, this activity is considered to be a casual and isolated sale. John does not hold himself out as being in the business of performing farming (threshing) for hire. John Doe is not considered to be engaging in taxable business activities. The amounts John Doe receives for assisting in the harvest of his neighbors' wheat is not subject to tax.

(b) X Spraying applies fertilizer to orchards owned by Farmer A. The sales invoice provided to Farmer A by X

Spraying reflects a "lump sum" amount with no segregation of charges for the fertilizer and the application. When reporting its tax liability, X Spraying would report the total charge under the service B&O tax classification. X Spraying must also remit retail sales or use tax upon the purchase of the fertilizer. The entire amount charged by X Spraying is for horticultural services, and X Spraying is considered the consumer of the fertilizer.

(c) Z Flying aerial sprays pesticides on crops owned by Farmer B. The sales invoice Z Flying provides to Farmer B segregates the charge for the pesticides and the charge for the application. When reporting its tax liability, Z Flying would report the charge for the application under the service B&O tax classification. The charge for the sale of the spray materials is subject to the wholesaling B&O tax, provided Z Flying obtains a resale certificate for sales made before January 1, 2010, or a reseller permit for sales made on or after January 1, 2010, from Farmer B to document the wholesale nature of any sale as provided in WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits). ((~~(See WAC 458-20-122.)~~)) Z Flying's purchase of the pesticides is a purchase for resale and not subject to the retail sales tax. Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by Z Flying for five years from the date of last use or December 31, 2014.

AMENDATORY SECTION (Amending WSR 96-03-139, filed 1/24/96, effective 2/24/96)

WAC 458-20-211 Leases or rentals of tangible personal property, bailments. (1) **Introduction.** This section explains how persons are taxable who rent or lease tangible personal property or rent equipment with an operator. ((~~RCW 82.04.050(4) was amended by chapter 25, Laws of 1993 sp. sess. to specifically include the rental of equipment with an operator as a retail sale. However, as will be explained in more detail below,~~)) It explains that some activities performed by operated equipment may be taxable under classifications other than retail sales if the operator and equipment perform activities as a prime contractor or subcontractor and these activities are specifically classified under other tax classifications by the revenue act.

(2) **Definitions.**

(a) The terms "leasing" and "renting" are used interchangeably and refer generally to the act of granting to another the right of possession to and use of tangible personal property for a consideration. When "lease," "leasing," "lessee," or "lessor" are used in this section, these terms are intended to include rentals as well, even if not specifically stated.

Persons may not claim to be leasing or renting equipment to themselves since they are not granting to another the right of possession.

(b) The term "bailment" refers to the act of granting to another the temporary right of possession to and use of tangible personal property for a stated purpose without consideration to the grantor.

(c) The term "subcontractor" refers to a person who has entered into a contract for the performance of an act with the person who has already contracted for its performance. A subcontractor is generally responsible for performing the work to contract specification and determines how the work will be performed. In purchasing subcontract services, the customer is primarily purchasing the knowledge, skills, and expertise of the contractor to perform the task, as distinguished from the operation of the equipment.

(d) The term "rental of equipment with operator" means the provision of equipment with an operator to a lessee to perform work under the specific direction of the lessee. In such cases the lessor is generally not responsible for performing work to contract specification and does not determine how the work will be performed. Though not controlling, persons who rent equipment with an operator typically bill on the basis of the amount of time the equipment was used.

(e) The term "true object test" as it relates to this section means the analysis of a transaction involving equipment and an operator to determine if the lessee is simply purchasing the use of the equipment or purchasing the knowledge, skills, and expertise of the operator beyond those needed to operate the equipment. Even if it is determined that the customer is purchasing the knowledge, skills, and expertise of the operator, the transaction may still be a retail sale if the activity is specifically included by statute within the definition of a retail sale. This test can also be applied to rentals of tangible personal property when the seller performs some service in connection with the rental.

(f) The term "true lease" (often referred to as an "operating lease") refers to the act of leasing property to another for consideration with the property under the dominion and control of the lessee for the term of the lease with the intent that the property will revert back to the lessor at the conclusion of the lease.

(g) The term "financing lease" (often referred to as a "capital lease") typically involves the lease of property for a stated period of time with ownership transferring to the "lessee" at the conclusion of the lease for a nominal or minimal payment. The transaction is structured as a lease, but retains some elements of an installment sale. Financing leases will generally be taxed as if they are installment sales. The presence of some or all of the following factors indicates a financing lease with the transaction treated as an installment sale:

(i) The lessee is given an option to purchase the equipment, and, if so, the option price is nominal (sometimes referred to as a "bargain purchase option");

(ii) The lessee acquires equity in the equipment;

(iii) The lessee is required to bear the entire risk of loss;

(iv) The lessee pays all the charges and taxes imposed on ownership;

(v) There is a provision for acceleration of rent payments; and

(vi) The property was purchased specifically for lease to this lessee.

(3) A true lease, rental, or bailment of personal property does not arise unless the lessee or bailee, or employees or independent operators hired by the lessee or bailee actually takes possession of the property and exercises dominion and control over it. Where the owner/lessor of the equipment or the owner's/lessor's employees or agents maintain dominion and control over the personal property and actually operate it, the owner/lessor has not generally relinquished sufficient

control over the property to give rise to a true lease, rental, or bailment of the property.

(4) RCW 82.04.050 excludes from the definition "retail sale" any purchases for the purpose of resale, "as tangible personal property." Persons who use equipment in performing services either as prime contractors or as subcontractors are not purchasing the equipment for purposes of reselling the equipment as tangible personal property. These contractors must pay retail sales tax or use tax at the time the equipment is acquired. Generally persons who rent equipment with an operator are not purchasing the equipment for resale as tangible personal property and must pay retail sales or use tax at the time the equipment is acquired. Persons renting operated equipment to others may purchase the equipment without payment of retail sales tax only when the equipment is rented as tangible personal property. This can be demonstrated only when:

(a) The agreement between the parties is designated as an outright lease or rental, without reservations; and

(b) The lessee acquires the right of possession, dominion, and control of the equipment, even to the exclusion of the lessor.

This last requirement is a factual question and the burden of proof is upon the owner/operator of the equipment to establish that the degree of control has been relinquished necessary to constitute a lessor-lessee relationship. Weight will be given to such factors as who has physical, operating control of the equipment; who is responsible for its maintenance, fueling, repair, storage, insurance (risk of loss or damage), safety and security of operation, and whether the operator is a loaned employee. If control of these factors is left with the owner/operator, then as a matter of fact, there has not been a relinquishing of control of the equipment to the degree necessary to create a lessor-lessee relationship for the rental of tangible personal property. This is true, even though the customer exercises some constructive control over such matters as when and where the equipment is used in connection with the construction work being performed, i.e., the contractor controls the job site.

(5) **Business and occupation (B&O) tax.**

(a) Outright rentals of bare (unoperated) equipment or other tangible personal property as well as leases of operated equipment are generally subject to the retailing classification of the business and occupation tax.

(i) When a lessor purchases equipment for bare rental or lease, the seller of the equipment is making a wholesale sale to the lessor and is required to obtain a resale certificate for sales made before January 1, 2010, or a reseller permit for sales made on or after January 1, 2010, from the lessor to document the wholesale nature of any sale as provided in WAC ((~~458-20-102~~)) 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits). Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by the seller for five years from the date of last use or December 31, 2014.

(ii) Under unique circumstances when equipment is rented for rerent by the lessee, without intervening use, then the original rental is subject to the wholesaling classification of tax and the subsequent rental is subject to the retailing classification. The original seller is required to obtain a resale certificate (WAC 458-20-102A) for sales made before January 1, 2010, or a reseller permit (WAC 458-20-102) for sales made on or after January 1, 2010, for these wholesale sales.

(iii) Persons who purchase equipment for use as prime contractors or subcontractors are considered to be the consumers of these purchases. They are the consumers because they are not specifically reselling the tangible personal property. Persons selling equipment to these persons are retailers and subject to the retailing B&O tax.

(b) Persons who provide equipment or other tangible personal property and, in addition, operate the equipment or supply an employee to operate the same for a charge, without relinquishing substantial dominion and control to the customer, are providing a service that is classified as a retail sale unless the nature of the activity is specifically classified under another tax classification. Where a specific tax classification applies to the activity, the income is subject to the business and occupation tax (or public utility tax) according to the classification of the activities performed by the equipment and operator. In the case of building construction, it will be presumed that the rental of equipment with operator to a contractor is a retail sale unless the operator has responsibility for performing construction to contract specifications and assumes control over how the work will be performed.

(c) Under some circumstances, the leasing or renting of tangible personal property can be subject to the special "retailing of interstate transportation equipment" B&O tax classification. This classification applies if the sale is exempt from retail sales tax because of the specific tax exemptions of RCW 82.08.0261, 82.08.0262, or 82.08.0263. These exemptions apply primarily to sales to private or common carriers who are engaged in interstate or foreign commerce.

(d) The following examples show how the tax would be applied to certain situations.

(i) The charge made by a subcontractor to a prime construction contractor for use of equipment with an operator used in the paving of a parking lot as part of the construction of a building would be taxable under wholesaling—other when the subcontractor has the responsibility to perform the work to contract specification and determines how the work will be performed.

(ii) A contractor performing work to contract specification making a charge to a city for use of equipment and operator in the construction of a publicly owned road would be taxable under public road construction.

(iii) Income for loading of a vessel using equipment with an operator is taxable under the stevedoring classification.

(iv) Income from transporting persons or property for hire by motor vehicle, including leasing or renting motor carrier equipment with driver, is generally taxable under either motor transportation or urban transportation.

(v) A customer rents scaffolding and the seller is responsible for a technician to setup, move, and dismantle it. This is the rental of tangible personal property since the true object of the transaction is having the scaffolding available for use by the customer. The customer also assumes dominion or control over the scaffolding by determining who will use the scaffolding and by controlling the use of the scaffolding.

(vi) Income from transporting persons or property for hire by vessel is not a retail equipment rental with operator.

(6) **Retail sales tax.** Persons who rent or lease tangible personal property to users or consumers are required to collect from their lessees the retail sales tax measured by gross income from rentals as of the time the rental payments fall due.

(a) RCW 82.04.050 excludes from the definition of the term "retail sale," purchases for resale "as tangible personal property." Thus the retail sales tax does not apply upon sales of tangible personal property to persons who purchase the same solely for the purpose of renting or leasing such property without operators. However, the retail sales tax applies upon sales to persons who provide such property with operators for a charge, without relinquishing substantial dominion and control, or who intend to make some use of the property other than or in addition to renting or leasing.

(b) Financing leases are treated for state tax purposes as installment sales. The retail sales tax applies to the full selling price. Refer to WAC 458-20-198.

(c) The retail sales tax does not apply to lease payments made by a seller/lessee under a sale/leaseback agreement in respect to property, equipment, and components used by the seller/lessee primarily in the business of canning, preserving, freezing, or dehydrating fresh fruits, vegetables, and fish. Nor does the sales tax apply to the purchase amount paid by the lessee pursuant to an option to purchase this specific kind of processing equipment at the end of the lease term. (See RCW 82.08.0295.) In both situations the availability of this special sales tax exemption is contingent upon the seller/lessee having paid retail sales tax or use tax at the time of acquisition of such special processing property, equipment, and components. The use tax will also not apply if the sales tax does not apply.

(7) **Use tax and/or deferred retail sales tax.** Consumers who rent or lease tangible personal property from others and who have not paid the retail sales tax to their lessors are liable for the retail sales tax or use tax on the amount of the rental payments as of the time the payments fall due unless an exemption from the tax applies. However, if the rental payments do not represent a reasonable rental value for the article, the taxable value shall be determined according to the rental charges made by other sellers of similar articles of like quality and character. This can include using the rate of return as a percentage of the capitalized value that lessors of the particular type of property are generally using in rate setting.

In some cases lessors may lease articles wherein the lease payments do not include property taxes or insurance. These leases are often referred to as "net leases" with the insurance and taxes paid directly by the lessee. If the lessor is the party insured and the party legally liable for payment of the taxes, the payments made directly by the lessee must be treated as additional consideration to the lessor and subject to the retailing and retail sales tax.

(a) Bailment. The value of tangible personal property held or used under bailment is subject to use tax if the property was purchased or acquired under conditions whereby the retail sales tax was not paid by the bailor. Tax liability is that of the bailor, or of the bailee if the bailor has not paid the tax. The measure of the tax to the bailor is the fair market value of the article at the time the article was first put to use in Washington. The measure of the use tax to the bailee for articles acquired by bailment is the reasonable rental with the value to be determined as nearly as possible according to the rental price at the place of use of similar products of like quality and character. In the absence of rental prices for similar products, the reasonable rental may be computed by prorating the retail selling price over the period of possession had by a bailee and payable in monthly installments. No further use tax is due upon property acquired by bailment after tax has been paid by the bailee or any previous bailee upon the full original value of the article.

(b) Use tax does not apply to use by a bailee of any article of tangible personal property which is entirely consumed in the course of research, development, experimental, and testing activities conducted by the user, providing the acquisition or use of such articles by the bailor are exempt from sales or use tax. (RCW 82.12.0265.)

(8) **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 tax results of other situations must be determined after a review of all of the facts and circumstances. In some situations it may be difficult to determine if the transaction is a retail equipment rental with operator. If in doubt as to whether a particular rental with an operator is a retail sale, taxpayers should contact the department for a specific ruling.

(a) ABC Crane is hired to supply a crane and operator to lift air conditioning equipment from the ground and hold it in place on the roof of a six-story building while the prime construction contractor bolts the unit down. ABC Crane's operator will retain control over the crane. ABC Crane has no responsibility to attach wiring, plumbing, or otherwise make the unit operational. ABC Crane is renting equipment with an operator since it has no responsibility to perform actual construction to contract specification. The activity of renting a crane with an operator is a service included within the definition of a retail sale and is not otherwise tax classified elsewhere within the revenue act. The purchase of the crane by ABC is also a retail transaction because ABC retained control over the crane and is not renting the crane as tangible personal property.

(b) ABC Crane is hired by a prime contractor to install a neon sign on the side of a new six-story building which is being constructed. ABC is responsible for making certain that the sign is correctly fastened to the side of the building and for installation of the electrical connections and meets the proper building codes. ABC is directly involved in construction and performs work to contract specification. Since the work is being done for the prime contractor for further resale, this is a wholesale sale, provided a resale certificate (WAC 458-20-102A) is obtained for sales made before January 1, 2010, or a reseller permit (WAC 458-20-102) for sales made on or after January 1, 2010. Had ABC only been hired to hold the sign in place while the prime contractor fastened it, this would have been a retail rental of equipment with operator.

(c) XYZ Concrete Pumping is hired by a prime contractor to supply a concrete pump and operator to pump concrete from a premix concrete delivery truck to the location of the forms. XYZ has no responsibility to build forms, do the con-

crete finishing, or otherwise see that the concrete meets or is placed according to contract specifications. In short, the pump functions similarly to a wheelbarrow, but in a more efficient manner. XYZ is not a subcontractor and is making a retail rental of equipment with an operator.

(d) ABC Company purchases a crane which it rents to others as a bare rental. It periodically rents the crane to lessees on this basis for two years. Beginning in the third year of ownership of this crane, ABC decides to start providing these customers with an employee to operate the crane. The employee will operate under the direction of ABC with ABC retaining dominion and control over the crane. Does ABC owe use tax on the crane, and if so, what is the measure of the use tax?

ABC owes use tax upon the first use of the crane as a consumer. This occurred in the third year of ownership when ABC began supplying an operator. The measure of the tax is the retail market value of the crane at the time it is put to use by ABC.

(e) Farm Services, Inc. specializes in the cutting and baling of hay for farmers. The hay, after being cut and baled, is sold by the farmer. Farm Services is not making a retail rental of equipment with operator, but is engaged in a farming for hire activity which is taxable under the service and other business activities B&O tax classification. See WAC 458-20-209.

(f) Helicopter, Inc. contracts with Logs, Inc. to move logs from where they have been cut in the woods to a landing approximately one mile away where the logs will be sorted, loaded on trucks, and transported to a mill. Total control over the helicopter operation rests with Helicopter, Inc. This is not a rental of equipment with an operator, nor is it considered as an air transportation service. This activity is directly part of the timber extracting and harvesting activity and is taxable as extracting for hire.

(g) ABC Sound Productions provides lighting, amplifying equipment, and speakers as part of the services it sells to entertainment promoters. ABC also provides several operators of the equipment. This is a rental of equipment with operator. In applying the true object test, the promoter is primarily purchasing the use of the lighting and sound equipment. The performer or promoter could be expected to specify the color, location, and degree of lighting and may also request changes and modifications to the level of sound amplification during the performance.

(h) John Doe purchased a vessel which will be rented to others as a bare boat rental. The rentals will be arranged through an agent at a marina. The marina receives a commission based on any usage of the vessel, including usage by the owner. The rental of the boat is a retail sale when the boat is rented to others. The usage of the boat by John Doe is not a rental. Since John Doe will be using the boat at times for his own use, he may not purchase the boat for resale.

AMENDATORY SECTION (Amending Order ET 83-1, filed 3/30/83)

WAC 458-20-218 Advertising agencies. Advertising agencies are primarily engaged in the business of rendering professional services, but may also make sales of tangible personal property to their clients or others or make purchases of such articles as agents in behalf of their clients. Articles acquired or produced by advertising agencies may be for their own use in connection with the rendition of an advertising service or may be for resale as tangible personal property to their clients.

Business and Occupation (B&O) Tax

The gross income received for advertising services, including commissions or discounts received upon articles purchased as agents in behalf of clients, is taxable under the service and other business activities B&O tax classification. (See WAC 458-20-144 for discounts or commissions allowed by printers.) Included in this classification are amounts attributable to sales of tangible personal property, unless charges for such articles are separately stated in billings rendered to clients.

The retailing or wholesaling classification B&O tax applies to articles of tangible personal property sold to persons for whom no advertising service is rendered and also to charges to clients for such articles if separately stated from charges for advertising services in billings rendered.

The manufacturing classification applies to articles manufactured for sale or commercial or industrial use (see WAC 458-20-134), and also to interstate sales of manufactured articles separately stated from advertising services. (General principles covering sales or services to persons in other states are contained in WAC 458-20-193.)

Retail Sales Tax

The retail sales tax applies upon all sales of plates, engravings, electrotypes, etchings, mats, and other articles to advertising agencies for use by them in rendering an advertising service and not resold to clients.

The retail sales tax must be paid by advertising agencies to vendors upon retail purchases made by them as agent in behalf of clients.

Advertising agencies are required to collect the retail sales tax upon charges taxable under the retailing B&O tax classification ((~~as indicated hereinabove, and resale certificates may be given by advertising agencies in respect to purchases of such articles~~)). Advertising agencies must provide a resale certificate for purchases made before January 1, 2010, or a reseller permit for purchases made on or after January 1, 2010, to the vendor to document the wholesale nature of any sale as provided in WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits). Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by the vendor for five years from the date of last use or December 31, 2014.

Use Tax

The use tax applies upon the use of articles purchased or manufactured for use in rendering an advertising service. Articles acquired without payment of retail sales tax which are resold to clients, but not separately stated from charges for advertising service, are also subject to use tax.

AMENDATORY SECTION (Amending WSR 99-08-033, filed 3/31/99, effective 5/1/99)

WAC 458-20-222 Veterinarians. (1) **Introduction.** This ((~~rule~~)) section explains Washington's business and occupation (B&O), retail sales, and use tax applications to sales and services provided by veterinarians. It explains the tax liability resulting from the performance of professional services and the sale of medicines and supplies for use in the care of animals. This ((~~rule~~)) section also explains the tax liability of persons who provide other services for live animals including grooming, boarding, training, artificial insemination, and stud services.

(2) **Business and occupation tax.** Persons providing services for live animals are subject to the B&O tax as follows:

(a) **Service and other activities.** The service and other activities B&O tax applies to the gross income derived from veterinary services. For purposes of this ((~~rule~~)) section, "veterinary services" includes the diagnosis, cure, mitigation, treatment, or prevention of disease, deformity, defect, wounds, or injuries of animals. It also includes the administration of any drug, medicine, method or practice, or performance of any operation, or manipulation, or application of any apparatus or appliance for the diagnosis, cure, mitigation, treatment, or prevention of any animal disease, deformity, defect, wound, or injury. "Veterinary services" does not include the therapeutic use of an item of personal property opened and partly administered by the veterinarian or by an assistant under his or her direction, and taken by the customer for further administration by the customer to the animal, provided the charge for the item is separately stated on the invoice.

(i) The gross income derived from veterinary services includes the amount paid by a customer for any drug, medicine, apparatus, appliance, or supply administered by the veterinarian or by an assistant under his or her direction, even when the charge is separately stated on the invoice from charges for other veterinary services.

(ii) The service and other activities B&O tax applies to the gross income derived from grooming, boarding, training, artificial insemination, stud services, or other services provided to live animals. However, if the person providing these services also sells tangible personal property to a consumer for a separate and distinct charge, the charge made for the tangible personal property is subject to the retailing classification of B&O tax.

(b) **Retailing.** The retailing classification of B&O tax applies to the gross income from the sale of drugs, medicines, or other substances or items of personal property to consumers when the sale is not part of veterinary services. The retailing classification applies only when the veterinarian does not administer, or only administers part of the drug, medicine, or other substance or item of personal property to the animal with further administration to be completed by the customer. Adequate records must be kept by the veterinarian to distinguish drugs, medicines, or other substances or items of personal property that are administered as part of veterinary services from those that are sold at retail. The retailing classification also applies to gross income from the sale of tangible personal property for which there is a separate and distinct charge, when sold by persons providing grooming, boarding, training, artificial insemination, stud services, or other services for live animals.

(3) **Retail sales tax.** The retail sales tax applies to all the retail sales identified under subsection (2) of this ((~~rule~~)) section, unless a specific exemption applies.

(a) **Sales to veterinarians and others who provide services to live animals.** Sales of tangible personal property to veterinarians for use or consumption by them in performing veterinary services are retail sales upon which the retail sales tax must be collected. Such sales include, among others, sales of medicines, bandages, splints and other supplies primarily for use by veterinarians in performing their professional services. Sales of tangible personal property to persons who provide grooming, boarding, training, artificial insemination, stud services, or other services for live animals for use or consumption by those persons in performing their services are also retail sales upon which the retail sales tax must be collected.

Sales to veterinarians and others who purchase tangible personal property for the purpose of resale in the regular course of business without intervening use by the buyer are sales at wholesale. and not subject to the retail sales tax((~~, provided~~)). The buyer must present((~~s~~)) the seller with a resale certificate((~~. Refer to WAC 458-20-102 (Resale certificates) for more information regarding the use of resale certificates, and particularly the subsection of that rule regarding purchases for dual purposes.~~)) for purchases made before January 1, 2010, or a reseller permit for sales made on or after January 1, 2010, to document the wholesale nature of any sale as provided in WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits). Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by the seller for five years from the date of last use or December 31, 2014.

(b) **Sales to consumers.** Tangible personal property sold by a veterinarian to a consumer that is carried away by or left with the consumer is a retail sale and the retail sales tax must be collected. Items of personal property include those that the veterinarian may have opened and used for therapy but were taken by the consumer to complete the therapy. The tax applies whether the tangible personal property was sold at the time the professional services were performed or was sold subsequently, provided the charge for the item is separately stated. Sales to a consumer of tangible personal property by a person who provides other than veterinary services to live animals and who separately states the charges, are subject to retail sales tax and the retail sales tax must be collected. (See WAC ((~~458-20-122~~)) 458-20-210 for additional information regarding sales ((~~of feed~~)) to farmers.)

(c) **Exemptions.** A retail sales tax exemption is available for sales of feed for purebred livestock used for breeding purposes, provided the seller obtains a completed ((~~purebred livestock exemption~~)) Farmers' Certificate for Wholesale Purchases and Sales Tax Exemptions certificate from the buyer. Also exempt are sales of semen for use in the artificial insemination of livestock. These sales remain subject to the retailing B&O tax. (See WAC 458-20-210 for additional information regarding exemptions for farmers.)

(4) **Use tax.** The use tax complements the retail sales tax by imposing a tax of like amount upon the use within this state as a consumer of any tangible personal property purchased at retail, where the user has not paid retail sales tax with respect to the purchase of the property used. (See also WAC 458-20-178.) If the seller fails to collect the appropriate retail sales tax, the purchaser is required to pay the retail sales or use tax directly to the department unless the purchase and/or use is exempt from tax. Complementary use tax exemptions are available for the use of those items identified in subsection (3)(c) of this ((~~rule~~)) section. Veterinarians and others who provide services to live animals are required to pay use tax on any samples that they acquire or give away unless retail sales tax or use tax has been previously paid on these samples.

(5) **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 tax status of other situations must be determined after a review of all of the facts and circumstances.

(a) A dog owner brings her dog to a veterinarian for professional services. The dog has multiple wounds and a broken leg. The veterinarian sets the broken bone and uses a cast and other appropriate therapeutic medicines on the dog in the course of treatment. The veterinarian also applies some salve to the wounds and gives the remainder of the salve to the dog's owner for application over the next few days. The veterinarian segregates the charges for the veterinary services, including the cast materials, and the medicines. The charge for the salve is also separately stated on the billing invoice. The gross income for the veterinary services is subject to the service and other activities B&O tax classification. This includes the charges for the cast materials and the medicines. The charge for the salve is considered a retail sale, and subject to the retailing B&O and retail sales taxes. If the veterinarian had previously paid sales or use tax on the salve, he or she is allowed a tax paid at source deduction. (See also the discussion of tax paid at source deductions in WAC 458-20-102.)((.))

(b) AB boards other person's horses for a fee. When AB bills the customer, AB separately lists the charges for the boarding services and the feed. The gross income received by AB for boarding services is subject to B&O tax under the service classification. The charges for the feed are subject to the retailing B&O and retail sales taxes. However, a retail sales tax exemption is available for any sales of feed for purebred livestock, if the livestock is used for breeding purposes and AB obtains a completed ((~~purebred livestock exemption~~)) Farmers' Certificate for Wholesale Purchases and Sales Tax Exemptions certificate from the customer.

(c) CD trains and boards dogs for various lengths of time. CD bills the customer a lump sum amount for the training and boarding, including feed for the dogs. The gross income received by CD is subject to B&O tax under the service classification. CD must pay retail sales tax or use tax on the feed it purchases for the dogs.

(d) EF is a farrier and shoes horses for others. When EF performs this service, he lists a separate charge on the invoice for the horseshoes. The charge for the horseshoeing service is subject to B&O tax under the service classification, and the separate charge for the horseshoes is subject to the retailing B&O and retail sales taxes. EF's purchases of the horseshoes are purchases for resale and not subject to the retail sales tax.

AMENDATORY SECTION (Amending WSR 99-09-013, filed 4/13/99, effective 5/14/99)

WAC 458-20-226 Landscape and horticultural services. (1) **Introduction.** This ((~~rule~~)) section provides tax reporting instructions for persons who provide landscape and horticultural services. This ((~~rule~~)) section does not apply to silvicultural activities or to horticultural services provided to farmers. Silviculture means the commercial production of timber and includes activities such as growing seed into seedlings, planting, fertilizer and pesticide application, pruning and thinning as provided to timber growers. Silvicultural activities are generally subject to the extracting B&O tax classification or the service and other business activities B&O tax classification. (See WAC 458-20-135 and 458-20-224.)

(2) **Retail landscape and horticultural services.** Landscape and horticultural services which are retail sales include:

(a) Grading, filling, leveling, planting, seeding, sodding, removing, cutting, trimming, pruning, mulching, aerating, applying chemicals, watering, and fertilizing to establish, promote, or control the growth of trees, shrubs, flowers, grass, ground cover and other flora for ornamentation or other nonagricultural purposes.

(b) The sale or rental of landscaping materials and the construction of sprinkling systems, walks, pools, fences, trellises, rockeries, and retaining walls.

(c) Cultivating fruits, flowers, and vegetables for consumers other than farmers.

(d) All tree trimming other than for farmers or persons engaged in silviculture. This includes all trimming for size, shape, aesthetics, removal of diseased branches, and removal of limbs because they are too close to structures. It does not include tree trimming performed for public and private electric utilities or at the direction of electric utilities to keep power lines, distribution lines, or equipment free of tree branches or brush.

(3) **Nonretail landscape and horticultural services.** Landscape and horticultural services which are not retail sales include:

(a) Landscape design services performed by a landscape architect separate from a contract for landscape maintenance.

(b) Planting trees for farmers.

(c) Thinning or planting of trees for persons who are involved in the commercial production of timber. These are silvicultural activities and silvicultural activities are not considered to be horticultural or landscape maintenance activities. (See WAC 458-20-135 and 458-20-209.)

(d) Landscape services performed for municipal corporations or political subdivisions of the state on real property owned by those entities if the real property is used or held for public road purposes. (See WAC 458-20-171.)

(e) Horticultural services, including spraying and fertilizing, performed for farmers for agricultural purposes. See WAC 458-20-209 for examples of horticultural services performed for farmers.

(f) Pruning, trimming, repairing, removing, and clearing of trees and brush near electric transmission or distribution lines or equipment, if performed by or at the direction of an electric utility. The removing and clearing of trees includes the stump removal by grinding, digging, or any other means, if performed by or at the direction of an electric utility. These are retail activities when not performed by or at the direction of an electric utility.

(4) **Business and occupation tax.** The business and occupation (B&O) tax applies as follows.

(a) **Retailing.** The gross income from landscape and horticultural services which are retail sales and which are performed for consumers is taxable under the retailing classification.

(b) **Wholesaling.** The gross income from services which are retail sales and which are performed for other contractors for resale is taxable under the wholesaling classification.

(c) **Service.** The gross income from horticultural services provided to farmers is taxable under the service and other activities classification. This tax classification also applies to income received from pruning, tree trimming, removing and clearing of trees and brush near electric lines, if performed by or at the direction of an electric utility. ((~~Beginning July 1, 1998,~~)) Income from services performed by landscape architects is also subject to ((~~this~~)) the service and other activities classification. (((~~See chapter 7, Laws of 1997.) For the period July 1, 1993, through June 30, 1998, landscape architects who performed design services were taxable under the selected business service tax classification.~~)) RCW 82.04.290.

(d) **Public road construction.** Persons who perform landscape services for municipal corporations or political subdivisions of the state on real property owned by those entities are taxable under the public road construction B&O tax classification, but only if the real property is used or held for public road purposes.

(e) **Government contracting.** This classification applies to persons engaged in the business of constructing, repairing, decorating, or improving new or existing buildings or other structures for the United States, or a city or county housing authority created under chapter 35.82 RCW. This classification would include the construction or maintenance of items such as walls, fences, walks, pools and other structures. This classification does not include the planting of lawns or trees or the cutting of grass or tree trimming performed for these customers. These activities are subject to the retailing classification.

(5) **Retail sales and use tax.** Landscape gardeners and horticulturists, except horticulturists performing services for farmers, must generally collect and report the retail sales tax upon the full contract price when performing landscaping or horticultural services for consumers. For purposes of collecting the local option retail sales tax, the sale takes place where the service is performed. See WAC 458-20-145. The retail sales tax does not apply to charges to the United States for landscape services, including landscape maintenance services, and sellers may take a deduction from the retail sales tax classification in reporting those sales which are taxable under the retailing B&O tax classification.

(a) Persons performing a landscaping or horticultural service for a contractor for resale must provide a resale certificate((~~. See WAC 458-20-102.~~)) for sales made before January 1, 2010, or a reseller permit for sales made on or after January 1, 2010, to document the wholesale nature of any sale as provided by WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits). Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by a seller for five years from the date of last use or December 31, 2014.

(b) Landscape gardeners and horticulturists must pay the retail sales tax to their vendors when purchasing tools, equipment, and supplies which are not resold, either directly or as a component part of the finished work. They must pay deferred sales or use tax directly to the department upon the value of any such property that was purchased or acquired without payment of Washington retail sales tax.

(c) Plants, shrubs, trees, sod, seed, chemicals, fertilizer, peat moss, sprinkler systems, rocks, building materials and any other tangible personal property which becomes a part of the finished work may be purchased for resale, except items used in providing horticultural services for farmers and items used in performing public road construction, government contracting, or services for timber growers.

(d) Retail sales tax or use tax is due with respect to items purchased by horticulturists for use in performing services for farmers. (See also WAC 458-20-209.)

(e) Retail sales tax or use tax is due with respect to items purchased for use in performing services for timber growers or which are taxable as either public road construction or government contracting. This includes items such as sod, seed, trees, building materials, fertilizers, spray materials, etc.

(f) The retail sales tax does not apply to the charge made by persons performing tree trimming near electric transmission or distribution lines, but only if the work is performed at the direction of an electric utility. Persons performing these services must pay retail sales or use tax on all materials, supplies, tools, and equipment used in performing the service.

(6) **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 tax results of other situations must be determined after a review of all facts and circumstances.

(a) John Doe, a landscaper, was hired by a city to maintain the landscaping around the buildings at the city's municipal golf courses. He must collect and report the retail sales tax and pay retailing B&O tax on the full contract amount.

(b) John Doe purchased several plants, some fertilizer, and insect spray to use in landscaping the golf course. He also purchased some solvent and mineral oil to clean and maintain some of his landscaping tools. His purchases of the plants, fertilizer and insect spray are purchases for resale. He must pay retail sales tax to his vendors on his purchases of the solvent and mineral oil.

(c) Landscaping company provides complete landscaping services including landscape design by a licensed landscape architect, installation, and maintenance. Landscaping charged Jane Smith two hundred dollars for a landscaping plan for her new home. She planned to purchase the plants

and do the landscaping work herself. Landscaping must report B&O tax on the charge for the design service at the service and other activities classification rate.

(d) Landscaping company entered into a contract to landscape the yard for a client's new home. The company must collect and report retail sales tax and pay retailing B&O on the full contract amount, even though part of Landscaping's services included drawing a landscaping plan.

(e) Landscaping company entered into a two-phase contract with a county. Phase one required the company to plant trees and shrubs and put in a sprinkling system as part of a public road project. The sprinkler system is located in the public road right of way. The contract provided Landscaping would receive five hundred thousand dollars for phase one of the project. Phase two provided that Landscaping would maintain the trees and shrubs for a period of five years. The contract provided for payments of four thousand dollars per month plus costs for fertilizer and spray for maintaining the planted strips.

(i) Phase one is part of public road construction and Landscaping is taxable under the public road construction classification upon the five hundred thousand dollars received for phase one. The company must pay sales tax when purchasing the trees and shrubs and materials for the sprinkling system for use in phase one of the project. See WAC 458-20-171 for the tax liability for public road construction.

(ii) Phase two for the maintenance of the completed project is also public road construction. This is not a retail sale because the work is performed for a municipal corporation or political subdivision of the state on land owned by that entity and which is being used for public road purposes. See RCW 82.04.190.

Landscaping will owe B&O tax under the public road construction classification and must pay retail sales or use tax on any items used in performing this work, including purchases of fertilizers, chemicals and other materials.

(f) John Doe operates a tree trimming business and has a contract with a public utility district (PUD) to trim trees along the PUD's power lines. Some of these trees are on private property with the PUD obtaining the permission of the owners to trim the trees. Some trees are also located on land for which the PUD has an easement, including along public road right of ways. This tree trimming is not a retail sale, but taxable under the service and other activities classification. This includes trimming performed along the road right of way. The property on the road right of way is not owned by the PUD for whom the work is being performed. The easement is not for use as a public road and as such the tree trimming is not public road construction.

(g) John Doe provides a tree trimming service to his residential customers. The tree trimming is performed at the direction of the residential customer to remove diseased limbs, limbs too close to the house, limbs which are a safety hazard because of their proximity to power lines, and limbs which are objectionable to the desired shape of the tree. All of this tree trimming is a retail activity, regardless of the specific reason for cutting the limbs.

AMENDATORY SECTION (Amending WSR 06-17-007, filed 8/3/06, effective 9/3/06)

WAC 458-20-24001 Sales and use tax deferral—Manufacturing and research/development activities in rural counties—Applications filed after March 31, 2004. (1) **Introduction.** Chapter 82.60 RCW establishes a sales and use tax deferral program. The purpose of the program is to promote economic stimulation, create employment opportunities, and reduce poverty in certain areas of the state. The legislature established this program to be effective solely in those areas and under circumstances where the deferral is for investments that result in the creation of a specified minimum number of jobs or investment for a qualifying project.

(a) This deferral program applies to taxes imposed on the construction of qualified buildings or acquisition of qualified machinery and equipment and requires the recipient of the deferral to maintain the manufacturing or research and development activity for an eight-year period. This section does not address RCW 82.08.02565 and 82.12.02565, which provide a statewide sales and use tax exemption for machinery and equipment used directly in a manufacturing operation. Refer to WAC 458-20-13601 for more information regarding the statewide exemption.

(b) This program was first enacted in 1985. The legislature made major revisions to program criteria in 1993, 1994, 1995, 1996, 1999, and 2004, specifically to the definitions of "eligible area," "eligible investment project," and "qualified building." Each revision created additional criteria for prospective applicants. This section sets forth the requirements for applications made after March 31, 2004. For applications made prior to April 1, 2004, see WAC 458-20-24001A.

(c) The employment security department and the department of community, trade, and economic development administer programs for rural counties and job training and should be contacted directly for information concerning these programs.

(2) **Who is eligible for the sales and use tax deferral program?** A person engaged in manufacturing or research and development activity is eligible for this deferral program for its eligible investment project.

(a) **What does the term "person" mean for purposes of this section?** "Person" has the meaning given in RCW 82.04.030. "Person" does not include the state of Washington or its institutions. "Person" can be either a lessee or a lessor, who can apply separately for individual investment projects at the same site, if they comply with the other requirements of chapter 82.60 RCW.

(i) The lessor or owner of the qualified building is not eligible for deferral unless:

(A) The underlying ownership of the buildings, machinery, and equipment vests exclusively in the same person; or

(B) All of the following conditions are met:

(I) The lessor has by written contract agreed to pass the economic benefit of the deferral to the lessee;

(II) The lessee that receives the economic benefit of the deferral agrees in writing with the department to complete the annual survey required under RCW 82.60.070;

(III) The economic benefit of the deferral passed to the lessee is no less than the amount of tax deferred by the lessor; and

(IV) Upon request, the lessor must provide the department with written documentation to support the eligibility of the deferral, including any type of payment, credit, or other financial arrangement between the lessor or owner of the qualified building and the lessee.

For example, economic benefit of the deferral is passed through to the lessee when evidenced by written documentation that the amounts paid to the lessor for construction of tenant improvements are reduced by the amount of the sales tax deferred, or that the lessee receives more tenant improvements through a credit for tenant improvements or other mechanism in the lease equal to the amount of the sales tax deferred.

(ii) The lessor of the qualified building who receives a letter of intent from a qualifying lessee may be eligible for deferral, assuming that all other requirements of chapter 82.60 RCW are met. At the time of application, the lessor must provide to the department a letter of intent by the lessee to lease the qualified building and any other information to prove that the lessee will engage in qualified research and development or pilot scale manufacturing once the building construction is complete. After the investment project is certified as operationally complete, the lessee must actually occupy the building as a lessee and engage in qualified research and development or pilot scale manufacturing. Otherwise, deferred taxes will be immediately due to the lessor, and interest will be assessed retroactively from the date of deferral.

(b) **What is "manufacturing" for purposes of this section?** "Manufacturing" has the meaning given in RCW 82.04.120. Manufacturing, in addition, includes computer programming, the production of computer software, and other computer-related services, and the activities performed by research and development laboratories and commercial testing laboratories. Effective July 1, 2006, manufacturing also includes the conditioning of vegetable seeds.

For purposes of this section, both manufacturers and processors for hire may qualify for the deferral program as being engaged in manufacturing activities. Refer to WAC 458-20-136 (Manufacturing, processing for hire, fabricating) for more information on processors for hire.

For purposes of this section, "computer-related services" means activities such as programming for the manufactured product. It includes creating operating systems, software, and other similar goods that will be copied and sold as canned software. "Computer-related services" does not include information services, such as data or information processing. The activities performed by the manufacturer to test, correct, revise, or upgrade software or hardware before they are approved for sale to the consumer are considered computer-related services.

For purposes of this section, "vegetable seeds" includes the seeds of those crops that are grown in gardens and on truck farms and are generally known and sold under the name of vegetable or herb seeds in this state. "Vegetable seeds" includes, but is not limited to, cabbage seeds, carrot seeds, onion seeds, tomato seeds, and spinach seeds. Vegetable seeds do not include grain seeds, cereal seeds, fruit seeds, flower seeds, tree seeds, and other similar properties.

(c) **What is "research and development" for purposes of this section?** "Research and development" means the development, refinement, testing, marketing, and commercialization of a product, service, or process before commercial sales have begun. For purposes of this section, "commercial sales" excludes sales of prototypes or sales for market testing if the total gross receipts from such sales of the product, service, or process do not exceed one million dollars.

(3) **What is eligible for the sales and use tax deferral program?** This deferral program applies to an eligible investment project for sales and use taxes imposed on the construction, expansion, or renovation of qualified buildings and acquisition of qualified machinery and equipment.

(a) **What is an "eligible investment project" for purposes of this section?** "Eligible investment project" means an investment project in an eligible area. Refer to (g) of this subsection for more information on eligible area. "Eligible investment project" does not include an investment project undertaken by a light and power business as defined in RCW 82.16.010, other than that portion of a cogeneration project that is used to generate power for consumption within the manufacturing site of which the cogeneration project is an integral part. It also does not include an investment project that has already received a deferral under chapter 82.60 RCW.

(b) **What is an "investment project" for purposes of this section?** "Investment project" means an investment in qualified buildings or qualified machinery and equipment, including labor and services rendered in the planning, installation, and construction of the project.

(c) **What is "qualified buildings" for purposes of this section?** "Qualified buildings" means construction of new structures, and expansion or renovation of existing structures for the purpose of increasing floor space or production capacity, used for manufacturing or research and development activities.

(i) "Qualified buildings" is limited to structures used for manufacturing and research and development activities. "Qualified buildings" includes plant offices and warehouses if such facilities are essential to or an integral part of a factory, mill, plant, or laboratory used for manufacturing or research and development.

(A) "Office" means space used by professional, clerical, or administrative staff. For plant office space to be a qualified building its use must be essential or integral to the manufacturing or research and development operation. Office space that is used by supervisors and their staff, by technicians, by payroll staff, by the safety officer, and by the training staff are examples of qualifying office space. An office may be located in a separate building from the building used for manufacturing or research and development activities, but the office must be located at the same site as the qualified building in order to qualify. Each individual office may only qualify or disqualify in its entirety.

(B) "Warehouse" means buildings or facilities used for the storage of raw materials or finished goods. A warehouse may be located in a separate building from the building used for manufacturing or research and development activities, but the warehouse must be located at the same site as the quali-

fied building in order to qualify. Warehouse space may be apportioned based upon its qualifying use.

(C) A site is one or more immediately adjacent parcels of real property. Adjacent parcels of real property separated only by a public road comprise a single site.

(ii) "Qualified buildings" does not include construction of landscaping or most other work outside the building itself, even though the landscaping or other work outside the building may be required by the city or county government in order for the city or county to issue a permit for the construction of a building.

However, "qualified buildings" includes construction of specialized sewerage pipes connected to a qualified building that are specifically designed and used exclusively for manufacturing or research and development.

Also, "qualified buildings" includes construction of parking lots connected to or adjacent to the building if the parking lots are for the use of workers performing manufacturing or research and development in the building. Parking lots may be apportioned based upon its qualifying use.

(d) **When is apportionment of qualified buildings appropriate?** The deferral is allowable only in respect to investment in the construction of a new building or the expansion or renovation of an existing building used in manufacturing or research and development. Where a building(s) is used partly for manufacturing or research and development and partly for purposes that do not qualify for deferral under this section, apportionment is necessary.

(e) **What are the apportionment methods?** The deferral is determined by one of the following two apportionment methods. The first method of apportionment is based on square footage and does not require tracking the costs of materials for the qualifying/nonqualifying areas of a building. The second method of apportionment tracks the costs of materials used in the qualifying/nonqualifying areas, and it is primarily used by those industries with specialized building requirements.

(i) **First method.** The applicable tax deferral can be determined by apportionment according to the ratio of the square footage of that portion of the building(s) directly used for manufacturing or research and development purposes bears to the square footage of the total building(s).

Apportionment formula:

$$\frac{\text{Eligible square feet of building(s)}}{\text{Total square feet of building(s)}} = \text{Percent Eligible}$$

Percent Eligible x Total Project Costs = Eligible Costs.

"Total Project Costs" means cost of multipurpose buildings and other improvement costs associated with the deferral project. Machinery and equipment are not included in this calculation. Common areas, such as hallways, bathrooms, and conference rooms, are not included in the square feet figure for either the numerator or the denominator. The cost of the common areas is multiplied by the percent eligible to determine the portion of the common area that is eligible for deferral.

Eligible Costs x Tax Rate = Eligible Tax Deferred.

(ii) **Second method.** If the applicable tax deferral is not determined by the first method, it will be determined by tracking the cost of construction of qualifying/nonqualifying areas as follows:

(A) Tax on the cost of construction of areas devoted solely to manufacturing or research and development may be deferred.

(B) Tax on the cost of construction of areas not used at all for manufacturing or research and development may not be deferred.

(C) Tax on the cost of construction of areas used in common for manufacturing or research and development and for other purposes, such as hallways, bathrooms, and conference rooms, may be deferred by apportioning the costs of construction on a square footage basis. The apportioned costs of construction eligible for deferral are established by using the ratio, expressed as a percentage, of the square feet of the construction, expansion, or renovation devoted to manufacturing or research and development, excluding areas used in common, to the total square feet of the construction, expansion, or renovation, excluding areas used in common. That percentage is applied to the cost of construction of the common areas to determine the costs of construction eligible for tax deferral. Expressed as a formula, apportionment of the cost of the common areas is determined by:

$$\frac{\text{Square feet devoted to manufacturing or research and development, excluding square feet of common areas}}{\text{Total square feet, excluding square feet of common areas}} = \text{Percentage of total cost of construction of common areas eligible for deferral}$$

(f) **What is "qualified machinery and equipment" for purposes of this section?** "Qualified machinery and equipment" means all new industrial and research fixtures, equipment, and support facilities that are an integral and necessary part of a manufacturing or research and development operation. "Qualified machinery and equipment" includes computers, desks, filing cabinets, photocopiers, printers, software, data processing equipment, laboratory equipment; manufacturing components such as belts, pulleys, shafts and moving parts; molds, tools and dies; operating structures; and all equipment used to control or operate machinery. It also includes machinery and equipment acquired under the terms of a lease by the recipient. "New" as used in this subsection means either new to the taxing jurisdiction of the state or new to the certificate holder.

For purposes of this section, "industrial fixture" means an item attached to a building or to land. Examples of "industrial fixtures" are fuel oil lines, boilers, craneways, and improvements to land such as concrete slabs.

(i) **Are qualified machinery and equipment subject to apportionment?** Qualified machinery and equipment are not subject to apportionment.

(ii) **To what extent is leased equipment eligible for the deferral?** The amount of tax deferral allowable for leased equipment is the amount of the consideration paid by the recipient to the lessor over the initial term of the lease, excluding any period of extension or option to renew, up to the last date for repayment of the deferred taxes. After that

date, the recipient must pay the appropriate sales taxes to the lessor for the remaining term of the lease.

(g) **What is an "eligible area" for purposes of this section?** "Eligible area" means:

(i) **Rural county.** A rural county is a county with fewer than one hundred persons per square mile or a county smaller than two hundred twenty-five square miles as determined annually by the office of financial management and published by the department of revenue effective for the period July 1st through June 30th; or

(ii) **Community empowerment zone (CEZ).** A "community empowerment zone" means an area meeting the requirements of RCW 43.31C.020 and officially designated as a CEZ by the director of the department of community, trade, and economic development, or a county containing a CEZ.

(h) **What if an investment project is located in an area that qualifies both as a rural county and as a CEZ?** If an investment project is located in an area that qualifies under more than one type of eligible area, the department will automatically assign the project to the eligible area that imposes the least burden on the taxpayer and with the greatest benefit to the taxpayer. If the applicant elects to be bound by the requirements of the other potential eligible area, the applicant must make a written statement to that effect. For example, on October 1, 2004, the city of Yakima qualifies as a CEZ, and the entire county of Yakima has fewer than one hundred persons per square mile. The CEZ requirements are more restrictive than counties containing fewer than one hundred persons per square mile. The department will assign the project to the "fewer than one hundred persons per square mile designation" unless the applicant elects to be bound by the CEZ requirements. Refer to subsection (4) of this section for more information on the application process.

(i) **Are there any hiring requirements for an investment project?** There may or may not be a hiring requirement, depending on the location of the project.

(i) **Rural county.** There are no hiring requirements for qualifying projects located in rural counties.

(ii) **Community empowerment zone (CEZ).** There are hiring requirements for qualifying projects located in CEZs or in counties containing CEZs. The applicant applies for a deferral of investment that correlates to the estimated number of persons to be hired based on the following formula:

Number of qualified employment positions to be hired x $750,000 = amount of investment eligible for deferral

Applicants must make good faith estimates of anticipated hiring. Refer to subsection (4) of this section for more information on the application process. The recipient must fill the positions by persons who at the time of hire are residents of the CEZ. The department has instituted a geographic information system (GIS) to assist taxpayers in determining taxing jurisdiction boundaries, local tax rates, and a mapping and address lookup system to determine whether a specific address is within a CEZ. The system is available on the department's internet web site at http://www.dor.wa.gov. A recipient must fill the qualified employment positions by the end of the calendar year following the year in which the project is certified as operationally complete and retain the position during the entire tax year. Refer to subsection (7) of this section for more information on certification of an investment project as operationally complete. If the recipient does not fill the qualified employment positions by the end of the second calendar year following the year in which the project is certified as operationally complete, all deferred taxes are immediately due.

(A) **What is a "qualified employment position" for purposes of this section?** "Qualified employment position" means a permanent full-time employee employed in the eligible investment project during the entire tax year. The "entire tax year" means the full-time position is filled for a period of twelve consecutive months. "Full-time" means at least thirty-five hours a week, four hundred fifty-five hours a quarter, or one thousand eight hundred twenty hours a year.

(B) **Who are residents of the CEZ?** "Resident" means the person who fills the qualified employment position makes his or her home in the CEZ. A mailing address alone is insufficient to establish that a person is a resident.

(4) **What are the application and review processes?** An application for sales and use tax deferral under this program must be made prior to the initiation of construction, prior to the acquisition of machinery and equipment, and prior to the filling of qualified employment positions. Persons who apply after construction is initiated or finished or after acquisition of machinery and equipment are not eligible for the program. When an application for sales and use tax deferral is timely submitted, costs incurred before the application date are allowable, if they otherwise qualify. Applications for persons subject to hiring requirements must include information regarding the estimated total project cost and the qualified employment positions.

(a) **What is "initiation of construction" for purposes of this section?** "Initiation of construction," in regards to the construction, expansion, or renovation of buildings, means the commencement of on-site construction work. Neither planning nor land clearing prior to excavation of the building site constitutes the commencement of on-site construction work.

(b) **What is "acquisition of machinery and equipment" for purposes of this section?** "Acquisition of machinery and equipment" means the machinery and equipment is under the dominion and control of the recipient or its agent.

(c) **How may a taxpayer obtain an application form?** Application forms may be obtained at department of revenue district offices, by downloading from the department's web site (dor.wa.gov), by telephoning the telephone information center (800-647-7706), or by contacting the department's special programs division at:

Department of Revenue
Special Programs Division
Post Office Box 47477
Olympia, WA 98504-7477
Fax 360-586-2163

Applicants must mail or fax applications to the special programs division at the address or fax number given above. Applications received by the department under chapter 82.60 RCW are not confidential and are subject to disclosure. RCW 82.60.100.

For purposes of this section, "applicant" means a person applying for a tax deferral under chapter 82.60 RCW, and "department" means the department of revenue.

(d) **Will the department approve the deferral application?** In considering whether to approve or deny an application for a deferral, the department will not approve an application for a project involving construction unless:

(i) The construction will begin within one year from the date of the application; or

(ii) The applicant shows proof that, if the construction will not begin within one year of construction, there is a specific and active program to begin construction of the project within two years from the date of application. Proof may include, but is not limited to:

(A) Affirmative action by the board of directors, governing body, or other responsible authority of the applicant toward an active program of construction;

(B) Itemized reasons for the proposed construction;

(C) Clearly established plans for financing the construction; or

(D) Building permits.

Similarly, after an application has been granted, a deferral certificate is no longer valid and should not be used if construction has not begun within one year from the date of application or there is not a specific and active program to begin construction within two years from the date of application. However, the department will grant requests to extend the period for which the certificate is valid if the holder of the certificate can demonstrate that the delay in starting construction is due to circumstances beyond the certificate holder's control such as the acquisition of building permit(s). Refer to subsection (6) of this section for more information on the use of tax deferral certificate.

(e) **What is the date of application?** "Date of application" means the date of the U.S. Post Office postmark, fax, or electronic transmittal, or when the application is hand delivered to the department. The statute in effect on the "date of application" will determine the program criteria the applicant must satisfy.

(f) **When will the department notify approval or disapproval of the deferral application?** The department will verify the information contained in the application and approve or disapprove the application within sixty days. If approved, the department will issue a tax deferral certificate. If disapproved, the department will notify the applicant as to the reason(s) for disapproval.

(g) **May an applicant request a review of department disapproval of the deferral application?** The applicant may seek administrative review of the department's disapproval of an application within thirty days from the date of notice of the disallowance pursuant to the provisions of WAC 458-20-100 (Appeals). The filing of a petition for review with the department starts a review of departmental action.

(5) **What happens after the department approves the deferral application?** The department will issue a sales and use tax deferral certificate for state and local sales and use taxes due under chapters 82.08, 82.12, and 82.14 RCW for an eligible investment project. The department will state on the certificate the amount of tax deferral for which the recipient is eligible. Recipients must keep track of how much tax is deferred.

For purposes of this section, "recipient" means a person receiving a tax deferral under this program.

(6) **How should a tax deferral certificate be used?** A tax deferral certificate issued under this program is for the use of the recipient for deferral of sales and use taxes due on each eligible investment project. Deferral is limited only to investment in qualified buildings or qualified machinery and equipment as defined in this section. Thus, sales and use taxes cannot be deferred on items that do not become part of the qualified buildings, machinery, or equipment. In addition, the deferral is not to be used to defer the taxes of the persons with whom the recipient does business, persons the recipient hires, or employees of the recipient.

((~~The tax deferral certificate is to be used in a manner similar to that of a resale certificate as set forth in WAC 458-20-102 (Resale certificates).~~)) The certificate holder must provide a copy of the tax deferral certificate to the seller at the time goods or services are purchased. The seller will be relieved of the responsibility for collection of the sales or use tax upon presentation of the certificate. The seller must retain a copy of the certificate as part of its permanent records for a period of at least five years. A blanket certificate may be provided by the certificate holder and accepted by the seller covering all such purchases relative to the eligible project. The seller is liable for business and occupation tax on all tax deferral sales.

For purposes of this section, "certificate holder" means an applicant to whom a tax deferral certificate has been issued.

(7) **What are the processes of an investment project that is certified by the department as operationally complete?** An applicant must provide the department with the estimated cost of the investment project at the time the application is made. Following approval of the application and issuance of a tax deferral certificate, a certificate holder must notify the department, in writing, when the value of the investment project reaches the estimated cost as stated on the tax deferral certificate.

For purposes of this section, "operationally complete" means the project is capable of being used for its intended purpose as described in the application.

(a) **What should a certificate holder do if its investment project reaches the estimated costs but the project is not yet operationally complete?** If a certificate holder has an investment project that has reached its level of estimated costs and the project is not operationally complete, the certificate holder may request an amended certificate stating a revised amount upon which the deferral taxes are requested. Requests must be mailed or faxed to the department.

(b) **What should a certificate holder do when its investment project is operationally complete?** The certificate holder must notify the department in writing when the construction project is operationally complete. The department will certify the date on which the project is operationally complete. The certificate holder of the deferral must maintain the manufacturing or research and development activity for eight years from this date.

(8) **Is a recipient of tax deferral required to submit annual surveys?** Each recipient of a tax deferral granted under chapter 82.60 RCW after June 30, 1994, must complete an annual survey. If the economic benefits of the deferral are passed to a lessee as provided in RCW 82.60.020(4), the lessee must agree to complete the annual survey and the applicant is not required to complete the annual survey. Refer to WAC 458-20-268 (Annual surveys for certain tax adjustments) for more information on the requirements to file annual surveys.

(9) **Is a recipient of tax deferral required to repay deferred taxes?** Repayment of tax deferred under chapter 82.60 RCW is excused, except as otherwise provided in RCW 82.60.070 and this subsection.

(a) **Is repayment required for machinery and equipment exempt under RCW 82.08.02565 or 82.12.02565?** Repayment of tax deferred under chapter 82.60 RCW is not required, and interest and penalties under RCW 82.60.070 will not be imposed, on machinery and equipment that qualifies for exemption under RCW 82.08.02565 or 82.12.02565.

(b) **When is repayment required?** The following subsections describe the various circumstances under which repayment of the deferral may occur. Outstanding taxes are determined by reference to the following table. The table presumes the taxpayer maintained eligibility for the entire year.

Repayment Year	Percentage of Deferred Tax Waived
1 (Year operationally complete)	0%
2	0%
3	0%
4	10%
5	15%
6	20%
7	25%
8	30%

Any action taken by the department to disqualify a recipient for tax deferral or assess interest will be subject to administrative review pursuant to the provisions of WAC 458-20-100 (Appeals). The filing of a petition for review with the department starts a review of departmental action.

(i) **Failure of investment project to satisfy general conditions.** If, on the basis of the recipient's annual survey or other information, including that submitted by the employment security department, the department of revenue finds that an investment project is not eligible for tax deferral for reasons other than failure to create the required number of qualified employment positions, the department will declare the amount of deferred taxes outstanding to be immediately due. An example of a disqualification under this section is a facility not being used for a manufacturing or research and development operation. No penalties or interest will be assessed on the deferred sales/use tax; however, all other penalties and interest applicable to excise tax assessments may be assessed and imposed.

(ii) **Failure of investment project to satisfy required employment positions conditions.** If, on the basis of the recipient's annual survey or other information, the department finds that an investment project has been operationally complete and has failed to create the required number of qualified employment positions under subsection (3)(i) of this section, the amount of taxes deferred will be immediately due. There is no proration of the amount owed under this subsection. No penalties or interest will be assessed on the deferred sales/use tax; however, all other penalties and interest applicable to excise tax assessments may be assessed and imposed.

(10) **When will the tax deferral program expire?** No applications for deferral of taxes will be accepted after June 30, 2010.

(11) **Is debt extinguishable because of insolvency or sale?** Insolvency or other failure of the recipient does not extinguish the debt for deferred taxes nor will the sale, exchange, or other disposition of the recipient's business extinguish the debt for the deferred taxes.

(12) **Does transfer of ownership terminate tax deferral?** Transfer of ownership does not terminate the deferral. The deferral is transferred, subject to the successor meeting the eligibility requirements of chapter 82.60 RCW, for the remaining periods of the deferral. Any person who becomes a successor (see WAC 458-20-216) to such investment project is liable for the full amount of any unpaid, deferred taxes under the same terms and conditions as the original recipient of the deferral.

AMENDATORY SECTION (Amending Order 88-5, filed 8/16/88)

WAC 458-20-24002 Sales and use tax deferral—New manufacturing and research/development facilities. (1) Introduction. Chapter 82.61 RCW, as amended, establishes a sales and use tax deferral program for certain manufacturing or research and development investment projects. The deferral will be granted only to persons not currently engaged in manufacturing or research and development activities in the state of Washington on June 14, 1985, the effective date of the deferral program. Applications for the tax deferral may be accepted up through June 30, 1994; a holder of a tax deferral certificate must initiate construction of the investment project within one hundred eighty days of receiving approval from the department and issuance of the tax deferral certificate. In general, the deferral applies to the construction of new buildings and the acquisition of related machinery and equipment.

(2) In addition to the tax deferral benefits of this program, the department of employment security administers economic incentives and funding programs which encourage "first source contract" hiring of unemployed persons and state public assistance recipients. The employment security department should be contacted directly for information concerning such nontax-related programs.

(3) Definition of terms. Unless the context clearly requires otherwise, the definitions in this section apply throughout this rule.

(4) "Applicant" means a person applying for a tax deferral under this section.

(5) "Person" has the meaning given in RCW 82.04.030. It means any individual, receiver, administrator, executor, assignee, trustee in bankruptcy, trust, estate, firm, copartner-

ship, joint venture, club, company, joint stock company, business trust, municipal corporation, political subdivision of the state of Washington, corporation, association, society, or any group of individuals acting as a unit, whether mutual, cooperative, fraternal, nonprofit, or otherwise and the United States or any instrumentality thereof. For purposes of this section the relationship of landlord and tenant between separate persons, at arms length, shall not be considered as any of the types of relationships which are identified above as "persons".

(6) "Eligible investment project" means construction of new buildings and the acquisition of new related machinery and equipment when the buildings, machinery, and equipment are to be used for either manufacturing or research and development activities, which construction is commenced prior to December 31, 1994. (See subsection (37) of this section for special provisions relating to aluminum plants.)

(7) "Manufacturing" means all activities of a commercial or industrial nature wherein labor or skill is applied, by hand or machinery, to materials so that as a result thereof a new, different, or useful substance or article of tangible personal property is produced for sale or commercial or industrial use and includes the production or fabrication of specially made or custom-made articles.

(8) "Research and development" means the development, refinement, testing, marketing, and commercialization of a product, service, or process before commercial sales have begun.

(9) "Buildings" means only those new structures used for either manufacturing or research and development activities, including plant offices and warehouses or other facilities for the storage of raw materials or finished goods if such facilities are an essential or integral part of a factory, mill, plant, or laboratory used for manufacturing or research and development purposes. If a building is used partly for manufacturing or research and development purposes and partly for other purposes, the applicable tax deferral shall be determined by apportionment of the costs of construction under this section.

(10) "Machinery and equipment" means all new industrial and research fixtures, equipment, and support facilities that are an integral and necessary part of a manufacturing or research and development operation.

(11) "Qualified machinery and equipment" includes computers; software; data processing equipment; laboratory equipment; manufacturing components such as belts, pulleys, shafts, and moving parts; molds, tools, and dies; operating structures; and all equipment used to control or operate the machinery. For purposes of this definition, new machinery and equipment means either new to the taxing jurisdiction of the state or new to the certificate holder. Used machinery and equipment are eligible for deferral if the certificate holder either brings the machinery and equipment into Washington for the first time or makes a retail purchase of the machinery and equipment in Washington.

(12) "Acquisition of equipment and machinery" shall have the meaning given to the term "sale" in RCW 82.04.040. It means any transfer of the ownership of, title to, or possession of, tangible personal property for a valuable consideration. A sale takes place when the goods sold are actually or constructively delivered to the buyer in this state.

(13) "Recipient" means a person receiving a tax deferral under this section.

(14) "Certificate holder" means an applicant to whom a tax deferral certificate has been issued.

(15) "Operationally complete" means that the eligible investment project is constructed or improved to the point of being fully and functionally useable for the intended purpose as described in the application.

(16) "Initiation of construction" means that date upon which on-site construction commences.

(17) "Plant complex" shall mean land, machinery, and buildings adapted to commercial, industrial, or research and development use as a single functional or operational unit for the designing, assembling, processing or manufacturing of finished or partially finished products from raw materials or fabricated parts.

(18) "Investment project" means an investment in qualified buildings and qualified machinery and equipment, including labor and services rendered in the planning, installation, and construction of the project. A person who does not build its own building, but leases from a third party, is eligible for sales and use tax deferral provided that an investment in qualified machinery and equipment is made by such person and a new structure used to house the manufacturing activities is constructed. The lessor/owner of the structure is not eligible for deferral unless the underlying ownership of the buildings, machinery, and equipment vests in the same persons. An eligible investment project does not include any project which or person who have previously been the recipient of a tax deferral under Washington law.

(19) Application procedures. An application for sales and use tax deferral under this program must be made prior to either the initiation of construction or the acquisition of equipment or machinery, as defined above, whichever occurs first. Application forms will be supplied to the applicant by the department upon request. The completed application is to be sent in duplicate to the following address:

State of Washington
Department of Revenue
Audit Procedures & Review
Olympia, WA 98504
Mail Stop AX-02

(20) The application shall contain information regarding the location of the investment project, estimated or actual costs, time schedules for completion and operation, and other information required by the department, including information relating to employment at the investment project.

(21) The department will examine and verify the information contained in the application and either approve or disapprove the application within sixty days. If approved, a tax deferral certificate will be issued effective as of the date the application was received by the department. If disapproved, the department shall notify the applicant as to the reason(s) for disapproval. The applicant may seek administrative review of the department's refusal to issue a certificate pursuant to the provisions of WAC 458-20-100 within twenty days from the date of notice of the department's refusal, or within any extension of such time granted by the department. A certificate holder shall initiate construction of the investment

project within one hundred eighty days of receiving approval from the department and issuance of the tax deferral certificate.

(22) A tax deferral certificate shall only be issued to persons who, on June 14, 1985, are not engaged in manufacturing or research and development activities within this state. For purposes of this section, a person shall not be considered to be engaged in manufacturing or research and development activities where the only activities performed by such person in this state are sales, installation, repair, or promotional activities in respect to products manufactured outside this state. Any person who has succeeded by merger, consolidation, incorporation, or any other form or change of identity to the business of a person engaged in manufacturing or research and development activities in this state on June 14, 1985 and any person who is a subsidiary of a person engaged in manufacturing or research and development activities in this state on June 14, 1985 shall also be ineligible to receive a tax deferral certificate.

(23) No application for deferral of taxes shall be accepted after June 30, 1994. For purposes of this regulation, the time of receipt of an application shall be determined by the date shown by the post office cancellation mark stamped upon the envelope containing the application if transmitted by the United States Postal Service, the date stamped on the envelope if transmitted by another carrier, or the date of receipt if hand delivered to an office of the department.

(24) Use of the certificate. A tax deferral certificate issued under this program shall be for the use of the recipient thereof for deferral of sales and use taxes due on each eligible investment project. Deferral is limited only to investment in qualified buildings, machinery, and equipment as defined in this section. Thus, sales and use taxes cannot be deferred on items which do not become part of the qualified buildings, machinery, and equipment.

(25) ((~~The tax deferral certificate shall be used in a manner similar to that of a resale certificate as set forth in WAC 458-20-102.~~)) The certificate holder shall provide its vendors with a copy of the tax deferral certificate at the time goods or services are purchased. The seller or vendor shall be relieved of the responsibility for collection of the sales or use tax upon presentation of the certificate. The seller or vendor shall retain a copy of the certificate as part of its permanent records. A blanket certificate may be provided by the certificate holder and accepted by the seller covering all such purchases relative to the eligible project. The seller or vendor is liable for reporting business and occupation tax on all deferral sales.

(26) Audit procedures. The certificate holder shall notify the department in writing when the construction project is operationally complete. Upon receipt of such notification or other information, the department shall conduct a final audit of the investment project. The certificate holder shall open its books and records to the department and make available the final cost figures for the investment project. The department may request reasonable supporting documentation and other proof to justify the final cost of the project.

(27) Upon completion of the audit the department shall certify the amount of sales and use taxes subject to deferral and the date on which the project was operationally complete. The recipient shall be notified in writing of the total amount of deferred taxes, the date(s) upon which the deferred taxes shall be paid, and any reports required to be submitted in the subsequent years. If the department disallows all or any portion of the amount of sale and use taxes requested for deferral, the recipient may seek administrative review of the department's action pursuant to the provisions of WAC 458-20-100, within twenty days from the date of the notice of disallowance.

(28) The deferral is allowable only in respect to investment in the construction of a new plant complex used in manufacturing or research and development activities, as defined above. Where a plant complex is used partly for manufacturing or research and development purposes and partly for purposes which do not qualify for deferral under this section and it is not possible to identify the nonqualifying items through separate accounting, the applicable tax deferral shall be determined by apportionment according to the ratio which the construction cost per square foot of that portion of the plant complex directly used for manufacturing purposes bears to the construction cost per square foot of the total plant complex.

(29) The amount of tax deferral allowable for leased equipment shall be calculated upon that amount of the consideration paid by the lessee/recipient to the lessor:

(a) Over the initial term of the lease, excluding any period of extension or option to renew, where the lease term ends on or before the last date for repayment of the deferred taxes; or

(b) Over that portion of the lease term to the last date for repayment of deferred taxes as provided hereinafter, where the lease term, excluding any period of extension or option to renew extends beyond such repayment date.

(30) After that date the lessee/recipient shall pay the appropriate sales tax to the lessor for the remaining term of the lease.

(31) No taxes may be deferred under this section prior to June 14, 1985. No applications for deferral of taxes will be accepted after June 30, 1994, nor will sales or use tax deferral certificates be issued after August 29, 1994. A certificate holder must commence construction of the investment project within one hundred eighty days of receiving approval from the department and issuance of the tax deferral certificate but no later than December 31, 1994.

(32) Reporting and monitoring procedure. An applicant must provide the department with the estimated cost of the investment project at the time the application is made. The applicant shall also provide information relative to the number of jobs contemplated to be created by the project.

(33) The department and the department of trade and economic development shall jointly make two reports to the legislature about the effect of this deferral law on new manufacturing and research and development activities and projects in Washington. The report shall contain information concerning the number of deferral certificates granted, the amount of state and local sales and use taxes deferred, the number of jobs created, and other information useful in measuring such effects. The departments shall submit their joint reports to the legislature by January 1, 1986 and by January 1 of each year through 1995.

(34) Any recipient of a sales and use tax deferral may be asked to submit reports to the department or department of trade and economic development during any period of time the recipient is receiving benefits under this deferral law. The report shall be made to the department in a form and manner prescribed by the department. The recipient may be asked to report information regarding the actual average employment related to the project, the actual wages of the employees related to the project, and any other information required by the department. If the recipient fails to submit a report, the department may not impose any penalties or sanctions against the recipient.

(35) Payment procedures. The recipient of sales and use tax deferral under this program shall begin paying the deferred taxes in the third year after the date certified by the department as the date on which the construction project was operationally complete. The first payment will be due on December 31st of the third calendar year after such certified date, with subsequent annual payments due on December 31st of the following four years, with amounts of payment scheduled as follows:

Repayment Year	Percentage of Deferred Tax Repaid
1	10%
2	15%
3	20%
4	25%
5	30%

(36) The department may authorize an accelerated repayment schedule upon request of the recipient. Interest shall not be charged on any taxes deferred under this program during the period of deferral, although other penalties and interest applicable to delinquent excise taxes may be assessed and imposed for any delinquent payments during the repayment period pursuant to chapter 82.32 RCW. The debt for deferred taxes shall not be extinguished by insolvency or other failure of the recipient nor shall the debt for the deferred taxes be extinguished by the sale, exchange, or other disposition of the recipient's business. Any person who becomes a successor (see WAC 458-20-216) to such investment project shall be liable for the full amount of any unpaid, deferred taxes under the same terms and conditions as the original recipient.

(37) Special provisions affecting aluminum production facilities. Effective May 19, 1987, the law makes special provisions for sales and use tax deferrals for new or used equipment, machinery and operating property, and labor and services in connection with the startup or continued operation of aluminum smelter facilities which were in operation before 1975, but which have ceased operations (or are in imminent danger of ceasing operations). Also, such special provisions may apply to modernization projects involving the construction, acquisition, or upgrading of new or used equipment and machinery to increase the operating efficiency of aluminum smelters or aluminum rolling mills and facilities. Such special provisions entail consultation with collective bargaining units for existing employees as well as the concurrence by such bargaining units with the deferral requested. Persons who operate such facilities should contact the department of revenue to determine if the sales and use tax deferrals are available in any specific case.

(38) Disclosure of information. The law provides that information contained in applications, reports, and other information received by the department in connection with this tax deferral program shall not be confidential and shall be subject to disclosure.

AMENDATORY SECTION (Amending WSR 07-17-132, filed 8/20/07, effective 9/20/07)

WAC 458-20-274 Staffing services. (1) **Introduction.** This ((~~rule~~)) section explains the application of business and occupation (B&O) tax, public utility tax (PUT); and the retail sales tax collection responsibilities of staffing businesses providing staffing services.

(2) **To whom does this ((~~rule~~)) section apply?** This ((~~rule~~)) section applies to any person engaged in the business activity of providing staffing services. This section does not apply to persons providing professional employer services. Persons providing professional employer services should refer to RCW 82.04.540 for information on their tax-reporting responsibilities.

(3) **What is the definition of a staffing business and staffing services?** A "staffing business" is a person engaged in the business activity of providing staffing services. "Staffing services" means services consisting of a person:

• Recruiting and hiring its own employees;

• Finding other organizations that need the services of those employees;

• Assigning those employees on a temporary basis to perform work at or services for the other organizations to support or supplement the other organizations' work forces, or to provide assistance in special work situations such as, but not limited to, employee absences, skill shortages, seasonal workloads, or to perform special assignments or projects, all under the direction and supervision of the customer; and

• Customarily attempting to reassign the employees to other organizations when they finish each assignment.

(4) **Generally, what kinds of business activities are workers assigned by a staffing business?** Business activities may include, but are not limited to, services rendered with respect to:

• Construction (both custom and speculative);

• Customer software design and implementation;

• Manufacturing and light industrial activities;

• Professional services including medical and clerical; and

• Other skilled and unskilled labor.

(5) **Is the gross income received by a staffing business subject to Washington tax?** Yes, the gross income received by a staffing business is subject to B&O and/or PUT tax.

(6) **Is the tax paid by a staffing business or is the tax collected from the client to whom the workers are assigned?**

• B&O tax and/or PUT are paid by the staffing business.

• When the activity of the assigned worker is a retail sale, retail sales tax must be collected from the client unless a specific exemption or exclusion, such as the activity being a sale

for resale, applies. The collected tax is paid by the staffing business to the department.

(7) **May a staffing business deduct payroll and other business expenses from gross income?**

• Chapters 82.04 and 82.16 RCW provide limited deductions from the B&O tax and PUT.

• The requirements of each specific deduction or exemption must be met to qualify for the deduction or exemption.

• Generally, amounts paid to the worker, amounts deducted for payroll taxes, or any other expenses paid or accrued may not be deducted by a staffing business.

• But income received for work performed outside the state may be deducted from gross income for B&O tax purposes. Similarly, an interstate haul is deducted from the PUT.

• Bad debts on which tax has been paid and which may be written off for federal tax purposes may be deducted from the gross income of both B&O and PUT.

• Exemptions, deductions and special tax rates that may apply to the client do not automatically also apply to the staffing business.

• **Example 1.**

– Under the Revenue Act, certain nonprofit hospitals may qualify for a B&O tax deduction for income received through medicare.

– Also, nonprofit and public hospitals are taxable under a special B&O tax classification.

– However, because the staffing business does not meet the criteria for the B&O tax deduction for income received through medicare or, for the B&O tax special nonprofit hospital classification, the income received by a staffing business from assigning physicians, nurses, or other health care workers to the hospital is taxable under the service and other activities classification.

• **Example 2.**

– Similarly, the Revenue Act exempts from B&O tax income received by licensed adult family homes.

– However, the gross income received by a staffing business from assigning a health care worker to the adult family home is taxable under the service and other activities B&O tax classification.

(8) **What if an activity is not subject to sales tax because it is a sale for resale?**

• When a service that would otherwise be a retail sale is performed for a person that resells that service, such as construction work performed for a general contractor, sales tax is not collected when the staffing business receives a completed resale certificate (WAC 458-20-102A) for sales made before January 1, 2010, or a reseller permit (WAC 458-20-102) for sales made on or after January 1, 2010, from the client reselling the service. Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by the seller for five years from the date of last use or December 31, 2014.

• When a resale certificate for sales made before January 1, 2010, or a seller permit for sales made on or after January 1, 2010, is received, the staffing business must report such charges for the worker under the wholesaling B&O tax classification. (((~~See WAC 458-20-102 for more information about resale certificates.~~)))

(9) **What is the tax rate?**

• The B&O tax rate and/or the PUT rate is determined by the classification of the activity engaged in by the assigned worker.

• The retail sales tax rate is determined, generally, by the location of where the retail sale is performed. See WAC 458-20-145.

(10) **If the B&O tax rate is determined by the B&O tax classification, who determines or identifies the correct classification?**

• It is the responsibility of the staffing business to determine or identify the applicable B&O tax classification for the activity performed by the assigned worker.

• This determination should be made prior to dispatching the worker to the customer.

• It is important for the staffing business to know whether retail sales tax should be collected from the customer, or if a resale certificate, reseller permit, exemption certificate, or other documentation should be received from the customer as evidence of a sales tax exemption.

(11) **Is the proper B&O tax classification as reported by the staffing business always the same classification as reported by the client customer to whom the worker is assigned?**

• Regardless of the nature of the customer's business, the staffing business looks to the activity engaged in by the worker assigned.

• The staffing business should not assume that the income it receives through the activities of its workers is taxable under the same classification that the customer reports.

• It is the activity of each worker, not the reporting classification of the customer that determines the tax classification.

• **Example:**

– A person operating an insurance agency is taxable under the insurance agents B&O tax classification.

– If the staffing business assigns a receptionist for the insurance agency, the gross income received for the receptionist's services is subject to B&O tax under the service and other activities classification. The service classification applies because the receptionist is not providing services under the authority of an insurance agent's license.

– However, if the staffing business assigns a worker licensed as an insurance agent to an insurance agency, and the licensed insurance agent performs services under the authority of his/her license, the related income is taxable under the insurance agents B&O tax classification.

(12) **What are the major B&O tax classifications?** The major B&O tax classifications include:

• Retailing.
• Wholesaling.
• Manufacturing.
• Processing for hire.
• Service and other activities.
• Stevedoring.
• Travel agent activities.

(13) **Where can I get a description of the activities included in the major B&O tax classification? Where can I get a complete list of the B&O tax classifications and more information?**

• The department's *Staffing Industry Guide* provides detailed information on the staffing industry and includes a description of the activities included in the major B&O tax classifications. The *Staffing Industry Guide* is located on the department's web site http://dor.wa.gov/

• A complete list of the B&O tax classifications and more information about the B&O and PUT can be found on the department's web site http://dor.wa.gov/

(14) **What is the public utility tax (PUT)? What are the major classifications of PUT?**

• The public utility tax is a tax on gross receipts, similar to the B&O tax.

• It applies to most utility services, such as water, power, and gas distribution, and sewerage collection.

• It also applies to providing transportation of persons or property for hire within five miles of the city limits (urban transportation classification) and beyond (motor transportation classification).

– These classifications apply whether or not the person performing the work owns the vehicle with which the activity is being performed.

– Examples include taxi cab service, limousine service, and hauling goods belonging to others (hauling for hire).

(15) **How is income reported when the assigned worker is engaging in more than one activity?**

• An assigned worker provided by a staffing business to a client may engage in several different activities while on the same job.

• The different activities may be taxable under separate B&O tax and/or PUT classifications.

• If the staffing business separates the amounts it charges the client by activities, the separated charges are reported.

• If the staffing business does not separate its charge to the client the charge is reported under the classification of the predominant activity.

• "Predominant activity" for two worker activities is when more than fifty percent of the worker's time is spent working in one tax classified activity.

• "Predominant activity" for more than two worker activities is the activity the worker spends the greatest amount of time doing.

• When two or more workers, engaged in different activities, are assigned to one client, the charge for each worker is reported based on the predominant activity of each individual worker.

• **Example 1:**

– A staffing business assigns a housekeeper whose primary job is to clean an apartment (subject to the service and other activities B&O tax classification).

– The job also calls for the housekeeper to prepare one meal per day (subject to retailing B&O tax and retail sales tax).

– The majority (over half) of the time spent is associated with the housekeeping service (apartment cleaning - subject to the service and other activities B&O tax classification).

– No segregated charge is made for the preparation of the meal.

– In this case, the predominant activity is cleaning the apartment.

– Therefore, the gross income received by staffing business from the charge to the client is reportable under the service and other activities B&O tax classification. Retail sales tax will not apply.

• **Example 2:**

– A staffing business assigns a construction worker to a client that is a developer/property owner performing construction-related services (subject to retailing B&O tax and retail sales tax).

– The assigned worker has a commercial driver's license and is only occasionally required to drive the client's truck within the city to pick up a load of gravel (an activity subject to the urban transportation PUT classification).

– The worker also spends about one hour per day helping in the office.

– The predominant activity is the retailing activity of performing construction work because the greatest amount of time is spent performing retailing construction work.

– The staffing business has not segregated charge for the other lesser activities.

– In this case, the staffing business reports the gross amount charged to the client under the retailing B&O tax classification. Additionally, the staffing business must also collect from the client retail sales tax measured by the gross charge to the client.

• **Example 3:**

– Same facts as Example 2, except the staffing business also provides a receptionist to the client (developer/property owner).

– As demonstrated in Example 2, the staffing business is subject to the retailing B&O tax on the gross amount charged to the client for work done by the construction worker; and retail sales tax must be collected on this charge.

– However, the staffing business is subject to service and other activities B&O tax on the gross amount charged to the client for the receptionist's work. The service and other activities B&O tax classification is the proper classification notwithstanding the client reports under the retailing classification.

(16) **Is the staffing business required to keep documentation of the activities their assigned workers performed?**

• The staffing business must keep documentation showing what services their assigned workers performed.

• All available information should be recorded concurrently with the assignment of the worker and the charge for the service.

• It is important that the client's labor and skill requirements are detailed up front as much as possible prior to dispatch.

• This is particularly important for purposes of billing retail sales tax.

• Documentation may be in the form of a copy of a client order or other documented request by a client for a worker.

• The documentation must state the specific work to be performed, and/or the worker skills requested by the client.

• If the client's request comes in by telephone, the staffing business should ask exactly what type of services are required and write them down on an order form, or as a memo to the client's file.

• Also, the worker can provide a written explanation of the services actually performed.

• Documentation to support the B&O tax classification must be sufficiently detailed to support the classification reported.

• The classification of primary interest to the client is retailing. Only under retailing is the staffing company, as seller of the service, required to collect retail sales tax from the client.

• Any other classification which does not directly impact the client may be of less interest to the client. Nevertheless, because the rates may vary between classifications, it is in the person providing staffing service's best interest to gather enough information to classify all services correctly.

• If, subsequent to filing a return, it is later determined that income has been incorrectly classified, amended returns should be submitted to the department to make the appropriate adjustment.