

WSR 14-12-008
PERMANENT RULES
UTILITIES AND TRANSPORTATION
COMMISSION

[General Order R-575, Docket UT-131239—Filed May 22, 2014, 2:09 p.m.,
effective June 22, 2014]

In the matter of amending and adopting rules in chapter 480-123 WAC, relating to universal service.

1 STATUTORY OR OTHER AUTHORITY: The Washington utilities and transportation commission (commission) takes this action under Notice WSR No. 14-08-094, filed with the code reviser on April 2, 2014. The commission has authority to take this action pursuant to RCW 80.01.040(4), 80.36.630, 80.36.650, 80.36.660, 80.36.670, 80.36.680, 80.36.690, and 80.36.700.

2 STATEMENT OF COMPLIANCE: This proceeding complies with the Administrative Procedure Act (chapter 34.05 RCW), the State Register Act (chapter 34.08 RCW), the State Environmental Policy Act of 1971 (chapter 43.21C RCW), and the Regulatory Fairness Act (chapter 19.85 RCW).

3 DATE OF ADOPTION: The commission adopts this rule on the date this order is entered.

4 CONCISE STATEMENT OF PURPOSE AND EFFECT OF THE RULE: RCW 34.05.325(6) requires the commission to prepare and publish a concise explanatory statement about an adopted rule. The statement must identify the commission's reasons for adopting the rule, describe the differences between the version of the proposed rules published in the register and the rules adopted (other than editing changes), summarize the comments received regarding the proposed rule changes, and state the commission's responses to the comments reflecting the commission's consideration of them.

5 In 2013, the legislature directed the commission to implement a state universal telecommunications program (program). 2E2SHB 1971, § 203, authorizes the commission to adopt rules by July 1, 2014, concerning:

- Operation of the program;
- Criteria for eligibility for distributions from the account, use of distributed funds, identification of reports to be filed with the commission;
- Disbursements from the universal communications services account;
- Benchmarks and other criteria to calculate distributions from the account; and
- An advisory board to advise the commission on rules and policies governing the operation of the program.

6 The commission amends and adopts rules in chapter 480-123 WAC to implement this legislation. The commission designates the discussion in this order as the remainder of its concise explanatory statement, as that discussion provides a complete but concise explanation of the agency's actions and its reasons for taking those actions.

7 REFERENCE TO AFFECTED RULES: This order amends and adopts the following sections of the Washington Administrative Code: Amending WAC 480-123-020 Definitions; and adopting WAC 480-123-100 Prerequisites for requesting program support, 480-123-110 Petitions for eligibility to receive program support, 480-123-120 Eligibility and distributions from the program, 480-123-130 Reporting require-

ments, 480-123-140 Commission compliance review of accounts and records, 480-123-150 Advisory board, 480-123-160 Resolution of disputes, and 480-123-170 Operation of the program.

8 PREPROPOSAL STATEMENT OF INQUIRY AND ACTIONS THEREUNDER: The commission filed a Preproposal Statement of Inquiry (CR-101) on July 3, 2013, at WSR 13-14-122. The statement advised interested persons that the commission was considering entering a rule making to consider amending and adopting rules to implement provisions of 2E2SHB 1971, enacted in the 2013 2nd sp. sess. Section 204 of the bill required the commission to establish rules to implement a state universal communications service program. The commission also informed persons of this inquiry by providing notice of the subject and the CR-101 to everyone on the commission's list of persons requesting such information pursuant to RCW 34.05.320(3) and by sending notice to all registered telecommunications companies, the commission's list of telecommunications attorneys and the list for all persons interested in rule-making dockets. The commission posted the relevant rule-making information on its internet web site at <http://www.utc.wa.gov/131239>. Pursuant to the notice, the commission hosted a stakeholder workshop on July 15, 2013, and received written comments by August 2, 2014. On December 3, 2013, the commission issued draft rules to all interested persons with a December 20, 2013, deadline for filing comments.

9 WORKSHOPS: The commission held a workshop on July 15, 2013, and October 16, 2013, in the Commission's Hearing Room, Second Floor, Richard Hemstad Building, 1300 South Evergreen Park Drive S.W., Olympia, WA. Participants in the workshops included CenturyLink, the Washington Independent Telephone Association (WITA), Tenino Telephone Company, Kalama Telephone Company, Inland Telephone Company, Whidbey Telephone Company, Frontier Communications Northwest Inc. (Frontier), Western Wahkiakum County Telephone Company, Comcast, Broadband Communications of Washington, and the public counsel section of the Washington attorney general's office (public counsel).

10 NOTICE OF PROPOSED RULE MAKING: The commission filed a notice of proposed rule making (CR-102) on April 2, 2014, at WSR 14-08-094. The commission scheduled this matter for oral comment and adoption under Notice No. WSR 14-08-094 at 1:30 p.m., Thursday, May 15, 2014, in the Commission's Hearing Room, Second Floor, Richard Hemstad Building, 1300 South Evergreen Park Drive S.W., Olympia, WA. The notice provided interested persons the opportunity to submit written comments to the commission.

11 WRITTEN COMMENTS: The commission received written comments from WITA, Public Counsel, Frontier, CenturyLink, and AT&T Corp., New Cingular Wireless PCS, LLC, and Teleport Communications America, Inc. (collectively AT&T).

12 RULE-MAKING HEARING: The commission considered the proposed rules for adoption at a rule-making hearing on May 15, 2014, before Chairman David W. Danner, Commissioner Philip B. Jones, and Commissioner Jeffrey D. Goltz. The commission heard oral comments from WITA and

AT&T, both of whom emphasized aspects of their written comments.

13 SUGGESTIONS FOR CHANGE THAT ARE REJECTED/ACCEPTED: The commission received written and oral comments suggesting changes to the proposed rules. A summary of the suggested changes and the commission's reason for rejecting or accepting those suggestions are described below.

WITA

Calendar Year Distribution

14 WITA expressed concern with provisions in the proposed rules that the commission will authorize distributions from the program on a calendar year basis because the legislature provided funding for the program on a state fiscal year basis running from July 1 through June 30. WITA suggests that distributing funding on a calendar year basis runs the risk that a stakeholder may claim during the fifth year of the program that the final distributions can cover only half of calendar year 2019 and thus should be less than a full year distribution. WITA suggests that the rule language be revised to reflect program operations on a fiscal year basis.

15 The proposed rules provide for distributions on a calendar year basis to match the time period for other aspects of the program, specifically federal Connect America Fund (CAF) calculations and state and federal data reporting, all of which are based on calendar years. We find it unlikely that any stakeholder would challenge the amount of the distribution in the final year of the program as WITA fears, particularly when that amount will be calculated based [on] data from the prior years. We nevertheless will modify the rules to refer only to "annual" distributions, and we confirm that our intent is to make complete distributions to eligible companies each of the five years the program is in effect.

Cash Flow

16 WITA contends that a cash flow issue arises from the commission terminating the traditional universal service support pool as of July 1, 2014, but not making the first distribution from the program until January 2015. Companies entitled to support under both the traditional fund and the new fund will not receive their monthly distribution from the traditional fund for six months or more, potentially imperiling their ability to meet their financial obligations. WITA suggests modifying the language of proposed WAC 480-123-120 to allow a one-time payment related to the termination of the traditional universal service fund in October 2014.

17 We are sensitive to WITA's cash flow concerns. At the same time, however, we note that only eligible companies may receive program support, and we are unwilling to adopt rule language that would require a partial distribution to companies that have applied for such support before the commission has made a final eligibility determination. Accordingly, we will modify proposed WAC 480-123-120 to provide the commission with the flexibility to make a partial distribution to eligible companies before the first distribution of program funds early next year if circumstances warrant and permit such action.

Timing of Distributions

18 WITA expresses concern about proposed WAC 480-123-120 which states, "Each eligible provider will receive a single distribution for the year after January 1 of that year." WITA fears that the commission could make the distribution

as late as December 31 of that year, and WITA members need greater certainty about the timing of the distributions to structure their financial obligations accordingly. WITA proposes that the provision be revised to state, "Each eligible provider will receive a single distribution for the fiscal year between January 1 and January 15 of that year."

19 As we stated in the context of addressing WITA's cash flow issue, we will order funds from the program to be distributed only to companies that are eligible to receive those funds. We are unwilling to adopt a rule that requires distributions by a specific date when the commission, despite reasonable efforts, may not be able to make a final eligibility determination by that date. Our goal, however, is to make reasonable efforts to ensure that the annual distributions to eligible companies occur soon after January 1 of each year of the program.

Benchmark Rate Calculation

20 WITA objects to using the Federal Communications Commission's (FCC) urban rate floor as the basis for the benchmark monthly local exchange service rate the commission must establish in proposed WAC 480-123-100 (1)(d) as a threshold requirement for eligibility for program funding. WITA acknowledges that it previously had recommended using the FCC's urban rate floor in prior comments in this proceeding, but WITA now questions that accuracy and utility of the FCC's calculations after the FCC announced that it expects its urban rate floor to rise to approximately \$20.46 over the next two years. WITA offers three alternatives for setting the benchmark: (1) Use the FCC's urban rate floor in effect in 2013; (2) calculate the weighted average of the stand-alone residential rate paid by the customers of the two largest incumbent local exchange carriers in Washington; or (3) use the FCC's urban rate floor rate that is in effect as of the date of the carrier's initial filing for eligibility (currently \$14.00).

21 Eligible carriers receive the lion's share of their universal service support funding from the federal government, and that funding is tied to the carriers charging local exchange rates at or above the FCC's urban rate floor. The proposed rule appropriately bases the benchmark rate the commission establishes for state universal service fund (USF) support on the federal standard. Indeed, WITA initially advocated that the commission adopt this approach, but WITA changed its position when the FCC published its latest calculations. We find that the proposed rule properly uses a principled basis for establishing the benchmark rate in Washington that is administratively efficient and consistent with federal law. The requirement that the commission set the benchmark rate *based* on the FCC urban rate floor establishes a presumption that those two rates will be the same but allows the commission the flexibility to make an adjustment if necessary to ensure that local service rates for rural incumbent local exchange companies (ILECs) in Washington are fair, just, reasonable, and sufficient. We reject WITA's suggested changes to the proposed rules on this issue.

Benchmark Rate as Threshold Requirement

22 No company would be eligible for program funding if its local exchange rates are not at or above the benchmark the commission would establish under proposed WAC 480-123-100 (1)(d). WITA recommends that the commission modify

this requirement to allow petitioning carriers to charge rates below the benchmark as long as the company imputes the revenues the company would have received if its rates were at the benchmark. A company would then have the flexibility to set its rates at levels the market will bear as long as the company is willing to accept lower revenues from its local service rates.

23 The statute establishes three eligibility criteria for companies seeking support from the program, one of which is that "[t]he customers of the communications provider are a [at] risk of rate instability or service interruptions or cessations absent a distribution to the provider that will allow the provider to maintain rates reasonably close to the benchmark."¹ Customers of a company that voluntarily charges a local service rate below the benchmark rate the commission establishes are not at risk of rate instability. To the contrary, that company's response to competitive pressures will keep its rates in check.

¹ RCW 80.36.650 (3)(b).

24 The purpose of the program is not to subsidize a company's ability to compete with other providers in a competitive market. Rather, the legislature has provided that state funds should only be distributed to companies that otherwise would be compelled to raise their customers' local rates well above the benchmark rate. The proposed rule properly implements this statutory requirement by conditioning a company's eligibility for program support on the provider charging local service rates at or above the benchmark. The commission, therefore, rejects WITA's suggested modification.

Notification of Distribution Amounts

25 WITA states that its members need some degree of certainty concerning the amounts they will be receiving from the program in order to properly post accruals for their financial statements. WITA does not propose a modification to the draft rules but requests the commission state in its adoption order that the carriers will be notified of their approved distribution by December 1 prior to the distribution the following January.

26 As we stated above, the commission intends to make final eligibility determinations and calculations of program support for each eligible company so that funds can be distributed soon after January 1 of each year the program is in effect. The commission cannot know, much less guarantee, that this process will be completed by December 1. The commission, however, will promptly notify companies eligible for program support when the commission has made its eligibility determinations and corresponding program support calculations.

Duplicative Information

27 WITA is concerned that proposed WAC 480-123-110(1) requires duplicative reporting because subsection (e), subparts (i), (ii), and (v), and subsection (f) each ask essentially for the same information. To reduce redundant filings, WITA suggests that draft WAC 480-123-110(3) be modified to enable companies to refer to any documentation they have previously filed with the commission, not just documents filed in conjunction with a filing for certification as an eligible telecommunications carrier, so that companies need not

provide multiple copies of the same documents in response to the filing requirements in the rule.

28 WITA's suggested changes to proposed WAC 480-123-110 (1)(e) are reasonable, and we will incorporate them into the final rule.

Identification of ILECs

29 WITA states that in proposed WAC 480-123-100 (1)(b), the citation identifying which companies are ILECs should be to 47 U.S.C. section 251(h), not 253(h). In addition, WITA recommends that to include companies that became ILECs after that statute was enacted, the proposed rule should state that an ILEC can also be a company that the FCC has designated as an ILEC.

30 WITA's suggested changes to proposed WAC 480-123-100 (1)(b) are reasonable, and we will incorporate them into the final rule.

Washington Exchange Carrier Association (WECA) Administrative Costs

31 WITA observes that when the commission terminates the traditional universal service fund, WECA will need to undertake certain activities to end the pool activities. WITA points to current contracts, previously approved by the commission, related to WECA's administration of the pools that contain procedures that must be followed to true-up the activities related to the traditional USF access rate element, including the conducting of audits and other actions. In its written comments, WITA suggests that proposed WAC 480-123-120(2) be expanded to add a subsection that would enable these costs to be paid from program distributions. At the adoption hearing, however, WITA stated its support for staff's proposal to fund these costs by allowing WECA to continue to collect revenues from the traditional USF switched access charge rate element for a limited period of time after that fund terminates.

32 We, too, agree with staff that the appropriate vehicle for funding WECA's winding down of the traditional USF is a temporary continuation of the traditional USF rate element. Accordingly, we address this issue in the order we enter in Docket UT-971140 terminating the traditional USF.

Business Plans

33 WITA objects to provisions in proposed WAC 480-123-120(1) and 480-123-130 (1)(f) requiring companies that receive distributions from the program to provide reports on the company's business plan to implement operational efficiency and to transition from the provision of legacy voice service to broadband service. WITA suggests the commission should recognize that the provision of broadband service in rural areas is a capital intensive proposition, requiring constant upgrades to equipment. WITA specifically objects to the word "efficiency" if it is intended to mean operating at a lower cost because the commission would be building into the rule an unrealistic expectation. WITA notes that the commission annually will receive each company's five-year plan set out in the FCC Form 481 filing and that the five-year plan contains substantial information about deployment of broadband.

34 WITA misunderstands these rule requirements. The legislature established the program as a temporary source of funding for rural ILECs to facilitate their transition to modern communications markets. More specifically, the program

gives these companies more time to reduce their reliance on federal or state USF support, and the commission must report to the legislature on the effectiveness of the program in achieving that goal.

35 Accordingly, the proposed rules require companies who seek or obtain program support to detail what they are doing to accomplish the legislature's objective, including operational efficiencies they undertake to reduce their costs and business plans they develop and implement to modernize their networks and service options. The commission does not intend to provide state tax dollars to companies merely to enable them only to maintain the status quo. The proposed rules, therefore, appropriately provide that among the factors the commission will consider when determining eligibility for the program and how participants make use of program support is the extent to which companies are planning or implementing operational efficiencies and business plan modifications consistent with the program's goals. We reject WITA's suggested modifications to the rules on this issue.

AT&T

Calculation of Support Amount

36 AT&T expresses a single concern about the commission's flexibility under the draft rules to adopt a benchmark local exchange rate that is lower than the FCC urban rate floor. A potential unintended consequence of that flexibility, according to AT&T, is that by setting a lower benchmark, the commission might inadvertently enable an eligible carrier to receive program funding for the reduction in its federal funding resulting from the carrier charging less than the FCC urban rate floor. AT&T proposes that the commission modify WAC 480-123-020 (2)(b) to clarify that no such result is possible.

37 We appreciate AT&T's concerns, but we do not find that any clarification of the rule is necessary. Program support under proposed WAC 480-123-120(2) is limited to (a) traditional USF fund amounts received in 2012; and (b) "[t]he cumulative reduction in support from the Connect America Fund incurred by the provider." A reduction in support from the CAF does not include imputed revenues for the difference between the FCC urban rate floor and a provider's actual local rates. Even if a provider receives less federal support as a result of charging rates below the FCC urban rate floor, the rule we adopt today does not authorize that provider to receive any program funds to compensate for that lower level of federal support. The rule reflects our intent to authorize an eligible provider to receive no more than the cumulative five percent annual CAF reduction the FCC has mandated for carriers whose local service rates are at the FCC urban rate floor (to the extent program funds are available) in addition to the provider's 2012 state traditional USF distribution. We reject AT&T's suggested clarification of WAC 480-123-020 (2)(b).

Public Counsel

Benchmark Rate

38 Public counsel contends that the commission should implement a Washington-specific local rate benchmark rather than use the FCC urban rate floor. Public counsel believes that the commission should determine independently "a reasonable level customers should pay," particularly in light of the ongoing concerns at the federal level and circumstances affecting the calculations of the national aver-

age rate. Public counsel, moreover, recommends that the commission should undertake to review this issue once the FCC has issued its decision on implementation of the new urban rate floor.

39 We addressed the issue of establishing the benchmark rate in response to WITA's concerns above, and we incorporate that discussion here.² We reject public counsel's suggested changes to the proposed rule.

² See *Supra* ¶ 20.

Advisory Board

40 Public counsel notes possible confusion between proposed WAC 480-123-150(4) (initiating advisory board action) and WAC 480-123-160 (resolution of disputes). The former provision allows "any person" to petition the commission to initiate advisory board action regarding "program issues or matters." The latter provision, however, appears to limit the right to petition the commission more narrowly to "an affected provider" regarding "any disputed matter concerning the program." Public counsel seeks clarification of this apparent inconsistency.

41 No clarification to the rules is necessary on this point. The two proposed rules govern different circumstances. Proposed WAC 480-123-150(4) requires any person seeking advisory board action to petition the commission. Proposed WAC 480-123-160 establishes the process for an affected provider to resolve disputes concerning the program and provides that the commission, at its discretion, may refer any such dispute to the advisory board for initial review and consideration. These rules operate independently, and nothing in WAC 480-123-150(4) limits the ability of persons other than an affected provider to petition the commission to initiate advisory board action pursuant to WAC 480-123-160.

42 **COMMISSION ACTION:** After considering all of the information regarding this proposal, the commission finds and concludes that it should amend and adopt the rules as proposed in the CR-102 at WSR 14-08-094 with the changes described below.

43 **CHANGES FROM PROPOSAL:** The commission adopts the proposal with the following changes from the text noticed at WSR 14-08-094 based on the discussion above.

- WAC 480-123-100(b) - correct 253(h) to 251(h) and add immediately thereafter, "or has been designated as an incumbent local exchange carrier by the Federal Communications Commission" (see paragraphs 29-30 above);
- WAC 480-123-110 (1)(h) - delete the word "calendar" (see paragraphs 14-15 above);
- WAC 480-123-110(3) - delete the phrase "in conjunction with its application for certification as an eligible telecommunications carrier," (see paragraphs 27-28 above);
- WAC 480-123-120 - in the first sentence, replace "a calendar year" with "an annual"; in the second sentence, replace "that" with "each" and add the following phrase at the end of the sentence: "of eligibility, except as otherwise authorized by the commission" (see paragraphs 14-17 above); and
- WAC 480-123-150 (2)(a)(v) - replace "division" with "section" to accurately name public counsel.

44 STATEMENT OF ACTION; STATEMENT OF EFFECTIVE DATE: After reviewing the entire record, the commission determines that WAC 480-123-020 should be amended and WAC 480-123-100, 480-123-110, 480-123-120, 480-123-130, 480-123-140, 480-123-150, 480-123-160, and 480-123-170 should be adopted to read as set forth in Appendix A, as rules of the Washington utilities and transportation commission, to take effect on the thirty-first day after the date of filing with the code reviser pursuant to RCW 34.05.380(2).

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 8, Amended 1, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

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

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

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

ORDER

45 THE COMMISSION ORDERS:

46 The commission amends WAC 480-123-020, and adopts WAC 480-123-100, 480-123-110, 480-123-120, 480-123-130, 480-123-140, 480-123-150, 480-123-160, and 480-123-170 to read as set forth in Appendix A, as rules of the Washington utilities and transportation commission, to take effect on the thirty-first day after the date of filing with the code reviser pursuant to RCW 34.05.380(2).

47 This order and the rule set out below, after being recorded in the register of the Washington utilities and transportation commission, shall be forwarded to the code reviser for filing pursuant to chapters 80.01 and 34.05 RCW and 1-21 WAC.

DATED at Olympia, Washington, May 22, 2014.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

David W. Danner, Chairman
Philip B. Jones, Commissioner
Jeffrey D. Goltz, Commissioner

Appendix A (Chapter 480-123 WAC - RULES)

AMENDATORY SECTION (Amending WSR 06-14-051, filed 6/28/06, effective 7/29/06)

WAC 480-123-020 Definitions. As used in ((WAC 480-123-030 through 480-123-080)) this chapter:

"Applicant" means any person applying to an ETC for new service or reconnection of discontinued service.

"Communications provider" or "provider" means a company providing communications service that assigns a work-

ing telephone number to a final consumer for intrastate wireline or wireless communications services or interconnected voice over internet protocol service, and includes local exchange carriers.

"Communications services" includes telecommunications services and information services and any combination of these services.

"Eligible telecommunications carrier" and "ETC" mean a carrier designated by the commission as eligible to receive support from federal universal service mechanisms in exchange for providing services supported by federal universal service mechanisms.

"Facilities" means for the purpose of WAC 480-123-030 (1)(b) any physical components of the telecommunications network that are used in the transmission or routing of the services that are supported by federal universal service mechanisms.

".shp format" means the format used for creating and storing digital maps composed of shape files capable of being opened by the computer application ArcGIS™.

"Program" means the state universal communications services program created in RCW 80.36.650.

"Service outage" means a significant degradation in the ability of an end user to establish and maintain a channel of voice communications as a result of failure or degradation in the performance of a communications provider's network.

"Substantive" means sufficiently detailed and technically specific to permit the commission to evaluate whether federal universal service support has had, or will have, benefits for customers. For example, information about investments and expenses that will provide, increase, or maintain service quality, signal coverage, or network capacity, and information about the number of customers that benefit, and how they will benefit is sufficient to enable evaluation.

"Telecommunications" has the same meaning as defined in 47 U.S.C. Sec. 153(43).

NEW SECTION

WAC 480-123-100 Prerequisites for requesting program support. (1) **Wireline communications providers.** A wireline communications provider may seek support from the program if the provider satisfies all of the following requirements:

(a) The provider is a local exchange company as defined in WAC 480-120-021 that serves less than forty thousand access lines within the state;

(b) The provider is an incumbent local exchange carrier as defined in 47 U.S.C. Sec. 253(h);

(c) The provider offers basic residential and business exchange telecommunications services as set forth in WAC 480-120-021 and RCW 80.36.630;

(d) The provider's rates for residential local exchange service, plus mandatory extended area service charges, are no lower than the local urban rate floor established by the commission as the benchmark rate based on the Federal Communications Commission's most current calculation of a national local urban rate floor pursuant to 47 C.F.R. Sec. 54.318 in the year in which the provider files a petition for support; provided that, if the provider's rates exceed the benchmark, the

provider may not seek support from the program for the purpose of reducing those rates towards or to the benchmark; and

(e) The provider has been designated by the commission as an eligible telecommunications carrier for purposes of receiving federal universal service support pursuant to 47 C.F.R. Part 54 Subpart D – Universal Service Support for High Cost Areas, with respect to the service areas for which the provider is seeking program support.

(2) **Wireless communications providers.** A wireless communications provider may seek support from the program if the provider satisfies all of the following requirements:

(a) The provider is licensed by the Federal Communications Commission to offer commercial mobile radio service within the state of Washington;

(b) The provider serves fewer than the equivalent of forty thousand access lines in Washington; and

(c) The provider has been designated by the commission as an eligible telecommunications carrier for purposes of receiving federal universal service support pursuant to 47 C.F.R. Part 54 Subpart D – Universal Service Support for High Cost Areas, with respect to the service areas for which the provider is seeking program support.

(3) In calculating access lines or equivalents under this section, the access lines or equivalents of all affiliates must be counted as a single threshold, if the lines or equivalents are located in Washington; provided that only the wireline access lines of the affiliates of a provider seeking support as a wireline carrier will count toward the single threshold for that provider, and only the wireless access line equivalents of the affiliates of a provider seeking support as a wireless carrier will count toward the single threshold for that provider.

NEW SECTION

WAC 480-123-110 Petitions for eligibility to receive program support. (1) **Wireline communications providers.** A wireline communications provider that satisfies the prerequisites in WAC 480-123-100 may petition the commission to receive support from the program. The provider must petition the commission each year to be eligible to receive support from the program the following year. The petition must include the following information:

(a) The name of the legal entity that provides communications services and is seeking program support;

(b) A corporate organization chart showing the relationship between the legal entity identified in (a) of this subsection and all affiliates as defined in RCW 80.16.010 and a detailed description of any transactions between the provider and those affiliates recorded in the provider's operating accounts;

(c) A service area map or detailed reference to any maps on file with the commission showing the provider's Washington service area;

(d) A demonstration that the provider's customers are at risk of rate instability or service interruptions or cessation in the absence of support from the program;

(e) Detailed financial information and supporting documentation in a form prescribed by the commission for the provider's total Washington regulated operations for the two

calendar years prior to the year in which the provider is filing the petition including, but not limited to, the following:

(i) The provider's balance sheet and statements of income and retained earnings or margin from, or in the same format and detail required in, Rural Utilities Service (RUS) Form 479;

(ii) The provider's consolidated audited financial statements; if the provider does not have consolidated audited financial statements prepared in the normal course of its business, the provider must submit financial statements reviewed by a certified public accountant;

(iii) Information demonstrating the provider's earned rate of return on a total Washington unseparated regulated operations basis for each of the two prior years;

(iv) Information demonstrating the provider's earned return on equity on a total company (regulated and nonregulated) Washington basis for each of the two prior years;

(v) Information detailing all of the provider's revenues from the statements of income and retained earnings or margin section of RUS Form 479 for the two prior years; if the provider does not submit RUS Form 479, the provider must file with the commission the same revenue information specified in this subsection that is required to complete the applicable portion of that form;

(vi) Information detailing the amounts of any corporate operations adjustments to existing high-cost loop and interstate common line support mechanisms the Federal Communications Commission required of the provider for the two prior years or a statement under penalty of perjury from a company officer of the provider with personal knowledge and responsibility certifying that no such adjustments apply to the provider;

(vii) Any additional supporting information the commission requests to enable it to analyze the provider's financial results for program purposes; and

(viii) A statement under penalty of perjury from a company officer of the provider with personal knowledge and responsibility certifying that the provider complies with state and federal accounting, cost allocation, and cost adjustment rules pertaining to incumbent local exchange companies;

(f) A complete copy of the FCC Form 481 the provider filed with the Federal Communications Commission for the calendar year preceding the year in which the provider is filing the petition; if the provider does not submit FCC Form 481 to the Federal Communications Commission, the provider must file with the commission the same information required to complete that form;

(g) Information detailing the number of residential and business local exchange access lines the provider served as of December 31st for each of the prior two years and the monthly rate charged to each customer category; and

(h) A statement under penalty of perjury from a company officer of the provider certifying that if it receives program support the provider will continue to provide communications services pursuant to its tariffs on file with the commission throughout its service territory in Washington for which it is seeking and receives program support during the entirety of the calendar year in which the provider is applying for support from the program.

(2) **Wireless communications provider.** A wireless communications provider that meets the requirements in WAC 480-123-100 may petition the commission to receive support from the program. The provider must petition the commission each year to be eligible to receive support from the program the following year. The petition must include the same type of information for the same periods required of wireline communications providers in subsection (1) of this section. The first time a wireless communications provider seeks to file such a petition, the provider must first submit its request to file the petition to the advisory board, pursuant to any guidelines the advisory board will adopt, detailing how the provider will compile and supply the information required by this rule. The advisory board will make a recommendation to the commission, and the commission will determine the precise information the provider must file in support of its petition.

(3) **Information already on file with the commission.** To the extent that the provider has filed any of the information required under this rule in conjunction with its application for certification as an eligible telecommunications carrier, the provider need not include that same information in its petition so long as the provider identifies the docket number, documents, and location within those documents in which the provider included that information.

(4) **Timing of petitions.** A provider must file a complete petition that fully complies with this section no later than August 1st if the company seeks support from the program for the following calendar year. Program support is available annually until the expiration of the program on June 30, 2019.

(5) **Certification.** One or more company officers responsible for the provider's business and financial operations must certify in the form of a statement under penalty of perjury that the information and representations made in the petition are accurate and that the provider has not knowingly withheld any information required to be provided to the commission pursuant to the rules governing the program. The provider must file this certification with its petition.

NEW SECTION

WAC 480-123-120 Eligibility and distributions from the program. The commission will authorize distributions from the program on a calendar year basis. Each eligible provider will receive a single distribution for the year after January 1st of that year.

(1) **Eligibility.** A wireline communications provider that complies with the requirements in this chapter is eligible to receive distributions from the program if the provider demonstrates that its financial circumstances are such that its customers are at risk of rate instability or service interruptions or cessations absent a distribution to the provider that will allow the provider to maintain rates reasonably close to the benchmark the commission has established. In making that determination, the commission will consider the provider's earned rate of return on a total Washington company books and unseparated regulated operations basis, the provider's return on equity, the status of the provider's existing debt obligations, and other relevant factors including, but not limited to, the extent to which the provider is planning or implementing

operational efficiencies and business plan modifications to transition or expand from primary provision of legacy voice telephone service to broadband service or otherwise reduce its reliance on support from the program.

(2) **Calculation of support amount.** The amount that a wireline communications provider eligible to receive support from the program may receive in a calendar year shall not exceed the sum of the following:

(a) The amount the provider received in 2012 from the former traditional USF fund established in Docket U-85-23, et al., and administered by the Washington exchange carrier association; and

(b) The cumulative reduction in support from the Connect America Fund incurred by the provider up through and including the year for which program support is distributed to the provider to the extent the program contains sufficient funds.

(3) **Distribution to wireless communications providers.** The advisory board will make a recommendation to the commission on eligibility and distribution calculations for any wireless communications provider that seeks support from the program, and the commission will determine that provider's eligibility and the amount of support, if any, the provider may receive consistent with RCW 80.36.650 and commission rules.

(4) **Total requests in excess of available funds.** If the total requests for support for a calendar year exceed the program funds available for that year, the commission will distribute the available funds to eligible carriers on a pro rata basis. The commission may seek a recommendation from the advisory board on the best pro rata distribution methodology to use.

(5) **Commission determination.** The commission will consider petitions from companies seeking support from the program and will make the necessary eligibility and distribution determinations in response to those petitions prior to January 1st of the calendar year in which funds from the program will be distributed.

NEW SECTION

WAC 480-123-130 Reporting requirements. (1) Wireline communications provider reports. A wireline communications provider that receives program support must submit the following information and reports to the commission on or before July 1st of the year following each calendar year in which the provider receives that support unless a different date is specified below:

(a) The number of residential and business access lines served within the state of Washington for which the provider used program support in the provision of basic telecommunications service (broken down to reflect beginning and end of year quantities);

(b) Detailed information on how the provider used program support the provider received during the preceding year;

(c) A list with detailed information of all consumer requests for new basic telecommunications service in the area for which the provider received program support during the

preceding year that the provider denied or did not fulfill for any reason;

(d) A statement under penalty of perjury from a company officer of the provider with personal knowledge and responsibility certifying that, during the preceding year, the provider materially complied with all commission rules in chapter 480-120 WAC that are applicable to the provider and its provision of service within the area for which the provider received program support;

(e) Complete copies of the FCC Form 477 for the state of Washington that the provider filed with the Federal Communications Commission during and for the calendar year in which the provider receives support at the same time the provider submits those forms to the Federal Communications Commission; if the provider does not submit FCC Form 477 to the Federal Communications Commission, the provider must file with the commission the same information required to complete that form at the same time carriers that file FCC Form 477 are required to submit that form;

(f) A report on operational efficiencies and business plan modifications for the area for which the provider receives program support during the preceding year that the provider has undertaken to transition or expand from primary provision of legacy voice telephone service to broadband service or otherwise reduce its reliance on support from the program, and whether and how disbursements from the program were used to accomplish such outcomes;

(g) Detailed information on any other efforts the provider made to use program support to advance universal service and the public interest in Washington; and

(h) Any other information or reports the commission requires including, but not limited to, information the commission needs to provide a report to the legislature concerning the program.

(2) **Wireless communications provider reports.** The advisory board will make a recommendation to the commission on the information and reports that any wireless communications provider that receives support from the program should provide, and the commission will determine the information and reports that provider must provide consistent with RCW 80.36.650 and commission rules.

(3) **Information already on file with the commission.** To the extent that the provider has filed any of the information required under this rule in conjunction with its application for certification as an eligible telecommunications carrier, the provider need not include that same information in its report so long as the provider identifies the docket number, documents, and location within those documents in which the provider included that information.

(4) **Comments from stakeholders.** Interested persons may submit information or comments on any of the issues on which the providers must report under this rule. Persons must submit such information or comments by July 1st of the year following each calendar year in which the commission distributes program support.

NEW SECTION

WAC 480-123-140 Commission compliance review of accounts and records. Communications providers that

receive program support are subject to compliance reviews and other investigations by the commission to ensure compliance with program rules and orders. Each provider shall retain all records required to demonstrate to the commission that the support the provider received was consistent with RCW 80.36.650 and commission rules and orders. Providers shall retain all such documentation for at least five years from the distribution of program funds, and a provider shall make that documentation available to the commission upon request. Any eligible providers authorized to receive program support that fail to comply with public interest obligations under federal or Washington law or any other terms and conditions established by the commission may be subject to further action, including the commission's existing enforcement procedures and penalties, reductions in program support amounts, potential revocation of program eligibility designation, and suspension from, or disentitlement to future participation in the program.

NEW SECTION

WAC 480-123-150 Advisory board. (1) **Establishment.** The commission will establish an industry and consumer advisory board to provide recommendations to the commission on the implementation and management of the program.

(2) **Membership.** The commission secretary is authorized to solicit nominations and approve membership on the board.

(a) The board will be comprised of members representing the following interests:

(i) One from incumbent local exchange companies serving fewer than forty thousand access lines in Washington;

(ii) One from incumbent local exchange companies serving more than forty thousand access lines in Washington;

(iii) One from competitive local exchange companies serving customers in Washington;

(iv) One from wireless communications providers offering service in Washington;

(v) One from the public counsel division of the office of the attorney general of Washington; and

(vi) One from the commission staff.

(b) Commission staff and public counsel shall have permanent membership on the board. The commission will appoint industry members for a term of three years, at the expiration of which the industry members are eligible for appointment to a subsequent three-year term.

(3) **Duties.** The board shall:

(a) Have a consultative role on matters directly referred to it by the commission;

(b) Conduct meetings no less than once per year;

(c) Conduct all meetings as public meetings in accordance with the Open Public Meetings Act, chapter 42.30 RCW; and

(d) Prepare and submit to the commission a written report on matters brought to it for consideration including, where appropriate, a recommendation to the commission on potential resolution of such matters.

(4) **Initiating board action.** The commission alone may initiate board action other than the execution of administra-

tive duties, which the board may conduct on its own initiative. Any person who seeks board participation in program issues or matters must petition the commission to initiate board action.

NEW SECTION

WAC 480-123-160 Resolution of disputes. An affected provider may petition the commission to resolve any disputed matter concerning the program including, but not necessarily limited to, the provider's eligibility to receive program support, the amount or timing of any distribution of support, and calculations of the provider's revenues and earnings levels. The commission may refer such requests to the advisory board as the initial point of review and consideration of the matter for which a carrier seeks resolution. The commission will make the final determination on any petition.

NEW SECTION

WAC 480-123-170 Operation of the program. The commission will authorize and process payments from the universal communications services account for providers that the commission determines have met the requirements of WAC 480-123-100 through 480-123-140.

WSR 14-12-040

PERMANENT RULES DEPARTMENT OF

SOCIAL AND HEALTH SERVICES

(Aging and Long-Term Support Administration)

[Filed May 29, 2014, 7:19 a.m., effective June 29, 2014]

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

Purpose: The department is amending these rules to comply with changes to state law made by the 2013 legislature in SB [SSB] 5077 Gender-neutral terms and SB 5510 Vulnerable adults—Abuse.

Changes related to SB [SSB] 5077 include changing the term "ombudsman" to "ombuds" in multiple sections.

Changes related to SB 5510 include amending the definition of the term "neglect."

Citation of Existing Rules Affected by this Order: Amending WAC 388-97-0001, 388-97-0300, 388-97-0460, 388-97-0520, 388-97-1640, 388-97-1840, and 388-97-4480.

Statutory Authority for Adoption: Chapters 18.51 and 74.42 RCW.

Adopted under notice filed as WSR 13-23-098 on November 20, 2013.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 7, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

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

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

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 7, Repealed 0.

Date Adopted: May 15, 2014.

Katherine I. Vasquez
Rules Coordinator

AMENDATORY SECTION (Amending WSR 13-04-093, filed 2/6/13, effective 3/9/13)

WAC 388-97-0001 Definitions. "Abandonment" means action or inaction by an individual or entity with a duty of care for a vulnerable adult that leaves the vulnerable individual without the means or ability to obtain necessary food, clothing, shelter, or health care.

"Abuse" means the willful action or inaction that inflicts injury, unreasonable confinement, intimidation, or punishment of a vulnerable adult. In instances of abuse of a vulnerable adult who is unable to express or demonstrate physical harm, pain or mental anguish, the abuse is presumed to cause physical harm, pain, or mental anguish. Abuse includes sexual abuse, mental abuse, physical abuse, and exploitation of a vulnerable adult, which have the following meanings:

(1) **"Mental abuse"** means any willful action or inaction of mental or verbal abuse. Mental abuse includes, but is not limited to, coercion, harassment, inappropriately isolating a resident from family, friends, or regular activity, and verbal assault that includes ridiculing, intimidating, yelling, or swearing.

(2) **"Physical abuse"** means the willful action of inflicting bodily injury or physical mistreatment. Physical abuse includes, but is not limited to, striking with or without an object, slapping, pinching, choking, kicking, shoving, prodding, or restraints including chemical restraints, unless the restraint is consistent with licensing requirements.

(3) **"Sexual abuse"** means any form of nonconsensual sexual contact, including, but not limited to, unwanted or inappropriate touching, rape, sodomy, sexual coercion, sexually explicit photographing, and sexual harassment. Sexual contact may include interactions that do not involve touching, including but not limited to sending a resident sexually explicit messages, or cuing or encouraging a resident to perform sexual acts. Sexual abuse includes any sexual contact between a staff person and a resident, whether or not it is consensual.

(4) **"Exploitation"** means an act of forcing, compelling, or exerting undue influence over a resident causing the resident to act in a way that is inconsistent with relevant past behavior, or causing the resident to perform services for the benefit of another.

"Administrative hearing" is a formal hearing proceeding before a state administrative law judge that gives:

(1) A licensee an opportunity to be heard in disputes about licensing actions, including the imposition of remedies, taken by the department; or

(2) An individual an opportunity to appeal a finding of abandonment, abuse, neglect, financial exploitation of a resident, or misappropriation of a resident's funds.

"Administrative law judge (ALJ)" means an impartial decision-maker who presides over an administrative hearing. ALJs are employed by the office of administrative hearings (OAH), which is a separate state agency. ALJs are not DSHS employees or DSHS representatives.

"Administrator" means a nursing home administrator, licensed under chapter 18.52 RCW, who must be in active administrative charge of the nursing home, as that term is defined in the board of nursing home administrator's regulations.

"Advanced registered nurse practitioner (ARNP)" means an individual who is licensed to practice as an advanced registered nurse practitioner under chapter 18.79 RCW.

"Applicant" means an individual, partnership, corporation, or other legal entity seeking a license to operate a nursing home.

"ASHRAE" means the American Society of Heating, Refrigerating, and Air Conditioning Engineers, Inc.

"Attending physician" means the doctor responsible for a particular individual's total medical care.

"Berm" means a bank of earth piled against a wall.

"Chemical restraint" means a psychopharmacologic drug that is used for discipline or convenience and is not required to treat the resident's medical symptoms.

"Civil adjudication proceeding" means judicial or administrative adjudicative proceeding that results in a finding of, or upholds an agency finding of, domestic violence, abuse, sexual abuse, neglect, abandonment, violation of a professional licensing standard regarding a child or vulnerable adult, or exploitation or financial exploitation of a child or vulnerable adult under any provision of law, including but not limited to chapter 13.34, 26.44, or 74.34 RCW, or rules adopted under chapters 18.51 and 74.42 RCW. "Civil adjudication proceeding" also includes judicial or administrative findings that become final due to the failure of the alleged perpetrator to timely exercise a legal right to administratively challenge such findings.

"Civil fine" is a civil monetary penalty assessed against a nursing home as authorized by chapters 18.51 and 74.42 RCW. There are two types of civil fines, "per day" and "per instance."

(1) **"Per day fine"** means a fine imposed for each day that a nursing home is out of compliance with a specific requirement. Per day fines are assessed in accordance with WAC 388-97-4580(1); and

(2) **"Per instance fine"** means a fine imposed for the occurrence of a deficiency.

"Condition on a license" means that the department has imposed certain requirements on a license and the licensee cannot operate the nursing home unless the requirements are observed.

"Deficiency" is a nursing home's failed practice, action or inaction that violates any or all of the following:

(1) Requirements of chapters 18.51 or 74.42 RCW, or the requirements of this chapter; and

(2) In the case of a medicare and medicaid contractor, participation requirements under Title XVIII and XIX of the Social Security Act and federal medicare and medicaid regulations.

"Deficiency citation" or **"cited deficiency"** means written documentation by the department that describes a nursing home's deficiency(ies); the requirement that the deficiency(ies) violates; and the reasons for the determination of noncompliance.

"Deficient facility practice" or **"failed facility practice"** means the nursing home action(s), error(s), or lack of action(s) that provide the basis for the deficiency.

"Dementia care" means a therapeutic modality or modalities designed specifically for the care of persons with dementia.

"Denial of payment for new admissions" is an action imposed on a nursing home (facility) by the department that prohibits payment for new medicaid admissions to the nursing home after a specified date. Nursing homes certified to provide medicare and medicaid services may also be subjected to a denial of payment for new admissions by the federal Centers for Medicare and Medicaid Services.

"Department" means the state department of social and health services (DSHS).

"Department on-site monitoring" means an optional remedy of on-site visits to a nursing home by department staff according to department guidelines for the purpose of monitoring resident care or services or both.

"Dietitian" means a qualified dietitian. A qualified dietitian is one who is registered by the American Dietetic Association or certified by the state of Washington.

"Disclosure statement" means a signed statement by an individual in accordance with the requirements under RCW 43.43.834. The statement should include a disclosure of whether or not the individual has been convicted of certain crimes or has been found by any court, state licensing board, disciplinary board, or protection proceeding to have neglected, sexually abused, financially exploited, or physically abused any minor or adult individual.

"Drug" means a substance:

(1) Recognized as a drug in the official *United States Pharmacopoeia*, *Official Homeopathic Pharmacopoeia of the United States*, *Official National Formulary*, or any supplement to any of them; or

(2) Intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease.

"Drug facility" means a room or area designed and equipped for drug storage and the preparation of drugs for administration.

"Emergency closure" is an order by the department to immediately close a nursing home.

"Emergency transfer" means immediate transfer of residents from a nursing home to safe settings.

"Entity" means any type of firm, partnership, corporation, company, association, or joint stock association.

"Financial exploitation" means the illegal or improper use, control over, or withholding of the property, income, resources, or trust funds of the vulnerable adult by any person or entity for any person or entity's profit or advantage other

than the vulnerable adult's profit or advantage. Some examples of financial exploitation are given in RCW 74.34.020(6).

"Habilitative services" means the planned interventions and procedures which constitute a continuing and comprehensive effort to teach an individual previously undeveloped skills.

"Highest practicable physical, mental, and psychosocial well-being" means providing each resident with the necessary individualized care and services to assist the resident to achieve or maintain the highest possible health, functional and independence level in accordance with the resident's comprehensive assessment and plan of care. Care and services provided by the nursing home must be consistent with all requirements in this chapter, chapters 74.42 and 18.51 RCW, and the resident's informed choices. For medicaid and medicare residents, care and services must also be consistent with Title XVIII and XIX of the Social Security Act and federal medicare and medicaid regulations.

"Informal department review" is a dispute resolution process that provides an opportunity for the licensee or administrator to informally present information to a department representative about disputed, cited deficiencies. Refer to WAC 388-97-4420.

"Inspection" or **"survey"** means the process by which department staff evaluates the nursing home licensee's compliance with applicable statutes and regulations.

"Intermediate care facility for individuals with intellectual disabilities (ICF/IID)" means an institution certified under chapter 42 C.F.R., Part 483, Subpart I, and licensed under chapter 18.51 RCW.

"License revocation" is an action taken by the department to cancel a nursing home license in accordance with RCW 18.51.060 and WAC 388-97-4220.

"License suspension" is an action taken by the department to temporarily revoke a nursing home license in accordance with RCW 18.51.060 and this chapter.

"Licensee" means an individual, partnership, corporation, or other legal entity licensed to operate a nursing home.

"Licensed practical nurse" means an individual licensed to practice as a licensed practical nurse under chapter 18.79 RCW;

"Mandated reporter" as used in this chapter means any employee of a nursing home, any health care provider subject to chapter 18.130 RCW, the Uniform Disciplinary Act, and any licensee or operator of a nursing home. Under RCW 74.34.020, mandated reporters also include any employee of the department of social and health services, law enforcement officers, social workers, professional school personnel, individual providers, employees and licensees of assisted living facility, adult family homes, soldiers' homes, residential habilitation centers, or any other facility licensed by the department, employees of social service, welfare, mental health, adult day health, adult day care, home health, home care, or hospice agencies, county coroners or medical examiners, or Christian Science practitioners.

"Misappropriation of resident property" means the deliberate misplacement, exploitation, or wrongful, temporary or permanent use of a resident's belongings or money.

"NFPA" means National Fire Protection Association, Inc.

"Neglect":

(1) In a nursing home licensed under chapter 18.51 RCW, neglect means ~~((that an individual or entity with a duty of care for nursing home residents has:~~

~~(a) By a pattern of conduct or inaction, failed to provide goods and services to maintain physical or mental health or to avoid or prevent physical or mental harm or pain to a resident; or)~~

~~(b) By an act or omission, demonstrated a serious disregard of consequences of such magnitude as to constitute a clear and present danger to the resident's health, welfare, or safety;))~~

(a) A pattern of conduct or inaction by a person or entity with a duty of care that fails to provide the goods and services that maintain physical or mental health of a vulnerable adult, or that fails to avoid or prevent physical or mental harm or pain to a vulnerable adult; or

(b) An act or omission by a person or entity with a duty of care that demonstrates a serious disregard of consequences of such a magnitude as to constitute a clear and present danger to the vulnerable adult's health, welfare, or safety, including but not limited to conduct prohibited under RCW 9A.42.100.

(2) In a skilled nursing facility or nursing facility, neglect also means a failure to provide a resident with the goods and services necessary to avoid physical harm, mental anguish, or mental illness.

"Noncompliance" means a state of being out of compliance with state and/or federal requirements for nursing homes/facilities.

"Nursing assistant" means a nursing assistant as defined under RCW 18.88A.020 or successor laws.

"Nursing facility (NF)" or **"medicaid-certified nursing facility"** means a nursing home, or any portion of a hospital, veterans' home, or residential habilitation center, that is certified to provide nursing services to medicaid recipients under Section 1919(a) of the federal Social Security Act. All beds in a nursing facility are certified to provide medicaid services, even though one or more of the beds are also certified to provide medicare skilled nursing facility services.

"Nursing home" means any facility licensed to operate under chapter 18.51 RCW.

"Officer" means an individual serving as an officer of a corporation.

"Owner of five percent or more of the assets of a nursing home" means:

(1) The individual, and if applicable, the individual's spouse, who operates, or is applying to operate, the nursing home as a sole proprietorship;

(2) In the case of a corporation, the owner of at least five percent of the shares or capital stock of the corporation; or

(3) In the case of other types of business entities, the owner of a beneficial interest in at least five percent of the capital assets of an entity.

"Partner" means an individual in a partnership owning or operating a nursing home.

"Person" means any individual, firm, partnership, corporation, company, association or joint stock association.

"Pharmacist" means an individual licensed by the Washington state board of pharmacy under chapter 18.64 RCW.

"Pharmacy" means a place licensed under chapter 18.64 RCW where the practice of pharmacy is conducted.

"Physical restraint" means any manual method or physical or mechanical device, material, or equipment attached or adjacent to the resident's body that the resident cannot remove easily, and which restricts freedom of movement or access to the resident's body.

"Physician's assistant (PA)" means a physician's assistant as defined under chapter 18.57A or 18.71A RCW or successor laws.

"Plan of correction" is a nursing home's written response to cited deficiencies that explains how it will correct the deficiencies and how it will prevent their reoccurrence.

"Reasonable accommodation" and **"reasonably accommodate"** has the meaning given in federal and state antidiscrimination laws and regulations. For the purpose of this chapter:

(1) Reasonable accommodation means that the nursing home must:

(a) Not impose admission criteria that excludes individuals unless the criteria is necessary for the provision of nursing home services;

(b) Make reasonable modification to its policies, practices or procedures if the modifications are necessary to accommodate the needs of the resident;

(c) Provide additional aids and services to the resident.

(2) Reasonable accommodations are not required if:

(a) The resident or individual applying for admission presents a significant risk to the health or safety of others that cannot be eliminated by the reasonable accommodation;

(b) The reasonable accommodations would fundamentally alter the nature of the services provided by the nursing home; or

(c) The reasonable accommodations would cause an undue burden, meaning a significant financial or administrative burden.

"Receivership" is established by a court action and results in the removal of a nursing home's current licensee and the appointment of a substitute licensee to temporarily operate the nursing home.

"Recurring deficiency" means a deficiency that was cited by the department, corrected by the nursing home, and then cited again within fifteen months of the initial deficiency citation.

"Registered nurse" means an individual licensed to practice as a registered nurse under chapter 18.79 RCW.

"Rehabilitative services" means the planned interventions and procedures which constitute a continuing and comprehensive effort to restore an individual to the individual's former functional and environmental status, or alternatively, to maintain or maximize remaining function.

"Resident" generally means an individual residing in a nursing home. Except as specified elsewhere in this chapter, for decision-making purposes, the term "resident" includes the resident's surrogate decision maker acting under state law. The term resident excludes outpatients and individuals receiving adult day or night care, or respite care.

"Resident care unit" means a functionally separate unit including resident rooms, toilets, bathing facilities, and basic service facilities.

"Respiratory isolation" is a technique or techniques instituted to prevent the transmission of pathogenic organisms by means of droplets and droplet nuclei coughed, sneezed, or breathed into the environment.

"Siphon jet clinic service sink" means a plumbing fixture of adequate size and proper design for waste disposal with siphon jet or similar action sufficient to flush solid matter of at least two and one-eighth inches in diameter.

"Skilled nursing facility (SNF)" or **"medicare-certified skilled nursing facility"** means a nursing home, a portion of a nursing home, or a long-term care wing or unit of a hospital that has been certified to provide nursing services to medicare recipients under Section 1819(a) of the federal Social Security Act.

"Social/therapeutic leave" means leave which is for the resident's social, emotional, or psychological well-being; it does not include medical leave.

"Staff work station" means a location at which nursing and other staff perform charting and related activities throughout the day.

"Stop placement" or **"stop placement order"** is an action taken by the department prohibiting nursing home admissions, readmissions, and transfers of patients into the nursing home from the outside.

"Substantial compliance" means the nursing home has no deficiencies higher than severity level 1 as described in WAC 388-97-4500, or for medicaid certified facility, no deficiencies higher than a scope and severity "C."

"Surrogate decision maker" means a resident representative or representatives as outlined in WAC 388-97-0240, and as authorized by RCW 7.70.065.

"Survey" means the same as **"inspection"** as defined in this section.

"Temporary manager" means an individual or entity appointed by the department to oversee the operation of the nursing home to ensure the health and safety of its residents, pending correction of deficiencies or closure of the facility.

"Termination" means an action taken by:

(1) The department, or the nursing home, to cancel a nursing home's medicaid certification and contract; or

(2) The department of health and human services Centers for Medicare and Medicaid Services, or the nursing home, to cancel a nursing home's provider agreement to provide services to medicaid or medicare recipients, or both.

"Toilet room" means a room containing at least one toilet fixture.

"Uncorrected deficiency" is a deficiency that has been cited by the department and that is not corrected by the licensee by the time the department does a revisit.

"Violation" means the same as **"deficiency"** as defined in this section.

"Volunteer" means an individual who is a regularly scheduled individual not receiving payment for services and having unsupervised access to a nursing home resident.

"Vulnerable adult" includes a person:

(1) Sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself; or

- (2) Found incapacitated under chapter 11.88 RCW; or
- (3) Who has a developmental disability as defined under RCW 71A.10.020; or
- (4) Admitted to any facility, including any assisted living facility; or
- (5) Receiving services from home health, hospice, or home care agencies licensed or required to be licensed under chapter 70.127 RCW; or
- (6) Receiving services from an individual provider; or
- (7) With a functional disability who lives in his or her own home, who is directing and supervising a paid personal aide to perform a health care task as authorized by RCW 74.39.050.

"Whistle blower" means a resident, employee of a nursing home, or any person licensed under Title 18 RCW, who in good faith reports alleged abandonment, abuse, financial exploitation, or neglect to the department, the department of health or to a law enforcement agency.

Reviser's note: RCW 34.05.395 requires the use of underlining and deletion marks to indicate amendments to existing rules. The rule published above varies from its predecessor in certain respects not indicated by the use of these markings.

Reviser's note: The typographical error in the above section occurred in the copy filed by the agency and appears in the Register pursuant to the requirements of RCW 34.08.040.

AMENDATORY SECTION (Amending WSR 08-20-062, filed 9/24/08, effective 11/1/08)

WAC 388-97-0300 Notice of rights and services. (1) The nursing home must provide the resident, before admission, or at the time of admission in the case of an emergency, and as changes occur during the resident's stay, both orally and in writing and in language and words that the resident understands, with the following information:

- (a) All rules and regulations governing resident conduct, resident's rights and responsibilities during the stay in the nursing home;
- (b) Advanced directives, and of any nursing home policy or practice that might conflict with the resident's advance directive if made;
- (c) Advance notice of transfer requirements, consistent with RCW 70.129.110;
- (d) Advance notice of deposits and refunds, consistent with RCW 70.129.150; and
- (e) Items, services and activities available in the nursing home and of charges for those services, including any charges for services not covered under medicare or medicaid or by the home's per diem rate.

(2) The resident has the right to:

- (a) Upon an oral or written request, to access all records pertaining to the resident including clinical records within twenty-four hours; and
- (b) After receipt of his or her records for inspection, to purchase at a cost not to exceed twenty-five cents a page, photocopies of the records or any portions of them upon request and two working days advance notice to the nursing home. For the purposes of this chapter, **"working days"** means Monday through Friday, except for legal holidays.

(3) The resident has the right to:

(a) Be fully informed in words and language that he or she can understand of his or her total health status, including, but not limited to, his or her medical condition;

(b) Accept or refuse treatment; and

(c) Refuse to participate in experimental research.

(4) The nursing home must inform each resident:

(a) Who is entitled to medicaid benefits, in writing, prior to the time of admission to the nursing facility or, when the resident becomes eligible for medicaid of the items, services and activities:

(i) That are included in nursing facility services under the medicaid state plan and for which the resident may not be charged; and

(ii) That the nursing home offers and for which the resident may be charged, and the amount of charges for those services.

(b) That deposits, admission fees and prepayment of charges cannot be solicited or accepted from medicare or medicaid eligible residents; and

(c) That minimum stay requirements cannot be imposed on medicare or medicaid eligible residents.

(5) The nursing home must, except for emergencies, inform each resident in writing, thirty days in advance before changes are made to the availability or charges for items, services or activities specified in section (4)(a)(i) and (ii), or before changes to the nursing home rules.

(6) The private pay resident has the right to the following, regarding fee disclosure-deposits:

(a) Prior to admission, a nursing home that requires payment of an admission fee, deposit, or a minimum stay fee, by or on behalf of an individual seeking admission to the nursing home, must provide the individual:

(i) Full disclosure in writing in a language the potential resident or his or her representative understands:

(A) Of the nursing home's schedule of charges for items, services, and activities provided by the nursing home; and

(B) Of what portion of the deposits, admissions fees, prepaid charges or minimum stay fee will be refunded to the resident if the resident leaves the nursing home.

(ii) The amount of any admission fees, deposits, or minimum stay fees.

(iii) If the nursing home does not provide these disclosures, the nursing home must not keep deposits, admission fees, prepaid charges or minimum stay fees.

(b) If a resident dies or is hospitalized or is transferred and does not return to the nursing home, the nursing home:

(i) Must refund any deposit or charges already paid, less the home's per diem rate, for the days the resident actually resided or reserved or retained a bed in the nursing home, regardless of any minimum stay or discharge notice requirements; except that

(ii) The nursing home may retain an additional amount to cover its reasonable, actual expenses incurred as a result of a private pay resident's move, not to exceed five days per diem charges, unless the resident has given advance notice in compliance with the admission agreement.

(c) The nursing home must refund any and all refunds due the resident within thirty days from the resident's date of discharge from the nursing home; and

(d) Where the nursing home requires the execution of an admission contract by or on behalf of an individual seeking admission to the nursing home, the terms of the contract must be consistent with the requirements of this section.

(7) The nursing home must furnish a written description of legal rights which includes:

(a) A description of the manner of protecting personal funds, under WAC 388-97-0340;

(b) In the case of a nursing facility only, a description of the requirements and procedures for establishing eligibility for medicaid, including the right to request an assessment which determines the extent of a couple's nonexempt resources at the time of institutionalization and attributes to the community spouse an equitable share of resources which cannot be considered available for payment toward the cost of the institutionalized spouse's medical care in his or her process of spending down to medicaid eligibility levels;

(c) A posting of names, addresses, and telephone numbers of all relevant state client advocacy groups such as the state survey and certification agency, the state licensure office, the state ((~~ombudsman~~) ombuds) program, the protection and advocacy network, and the medicaid fraud control unit; and

(d) A statement that the resident may file a complaint with the state survey and certification agency concerning resident abandonment, abuse, neglect, financial exploitation, and misappropriation of resident property in the nursing home.

(8) The nursing home must:

(a) Inform each resident of the name, and specialty of the physician responsible for his or her care; and

(b) Provide a way for each resident to contact his or her physician.

(9) The skilled nursing facility and nursing facility must prominently display in the facility written information, and provide to residents and individuals applying for admission oral and written information, about how to apply for and use medicare and medicaid benefits, and how to receive refunds for previous payments covered by such benefits.

(10) The written information provided by the nursing home pursuant to this section, and the terms of any admission contract executed between the nursing home and an individual seeking admission to the nursing home, must be consistent with the requirements of chapters 74.42 and 18.51 RCW and, in addition, for facilities certified under medicare or medicaid, with the applicable federal requirements.

AMENDATORY SECTION (Amending WSR 08-20-062, filed 9/24/08, effective 11/1/08)

WAC 388-97-0460 Grievance rights. A resident has the right to:

(1) Voice grievances without discrimination or reprisal. Grievances include those with respect to treatment which has been furnished as well as that which has not been furnished.

(2) Prompt efforts by the nursing home to resolve voiced grievances, including those with respect to the behavior of other residents.

(3) File a complaint, contact, or provide information to the department, the long-term care ((~~ombudsman~~) ombuds),

the attorney general's office, and law enforcement agencies without interference, discrimination, or reprisal. All forms of retaliatory treatment are prohibited, including those listed in chapter 74.39A RCW.

(4) Receive information from agencies acting as client advocates, and be afforded the opportunity to contact these agencies.

AMENDATORY SECTION (Amending WSR 08-20-062, filed 9/24/08, effective 11/1/08)

WAC 388-97-0520 Access and visitation rights. (1)

The resident has the right and the nursing home must provide immediate access to any resident by the following:

(a) For medicare and medicaid residents any representative of the U.S. department of health and human services (DHHS);

(b) Any representative of the state;

(c) The resident's personal physician;

(d) Any representative of the state long term care ((~~ombudsman~~) ombuds) program (established under section 307 (a)(12) of the Older American's Act of 1965);

(e) Any representative of the Washington protection and advocacy system, or any other agency (established under part c of the Developmental Disabilities Assistance and Bill of Rights Act);

(f) Any representative of the Washington protection and advocacy system, or any agency (established under the Protection and Advocacy for Mentally Ill Individuals Act);

(g) Subject to the resident's right to deny or withdraw consent at any time, immediate family or other relatives of the resident; and

(h) Subject to reasonable restrictions and the resident's right to deny or withdraw consent at any time, others who are visiting with the consent of the resident.

(2) The nursing home must provide reasonable access to any resident by any entity or individual that provides health, social, legal, or other services to the resident, subject to the resident's right to deny or withdraw consent at any time.

(3) The nursing home must allow representatives of the state ((~~ombudsman~~) ombuds), described in subsection (1)(d) of this section, to examine a resident's clinical records with the permission of the resident or the resident's surrogate decision maker, and consistent with state law. The ((~~ombudsman~~) ombuds) may also, under federal and state law, access resident's records when the resident is incapacitated and has no surrogate decision maker, and may access records over the objection of a surrogate decision maker if access is authorized by the state ((~~ombudsman~~) ombuds) pursuant to 42 U.S.C. § 3058g(b) and RCW 43.190.065.

AMENDATORY SECTION (Amending WSR 13-04-093, filed 2/6/13, effective 3/9/13)

WAC 388-97-1640 Required notification and reporting. (1) The nursing home must immediately notify the department's aging and disability services administration of:

(a) Any allegations of resident abandonment, abuse, or neglect, including substantial injuries of an unknown source, financial exploitation and misappropriation of a resident's property;

(b) Any unusual event, having an actual or potential negative impact on residents, requiring the actual or potential implementation of the nursing home's disaster plan. These unusual events include but are not limited to those listed under WAC 388-97-1740 (1)(a) through (k), and could include the evacuation of all or part of the residents to another area of the nursing home or to another address; and

(c) Circumstances which threaten the nursing home's ability to ensure continuation of services to residents.

(2) Mandated reporters must notify the department and law enforcement as directed in WAC 388-97-0640, and according to department established nursing home guidelines.

(3) The nursing home must notify the department's aging and disability services administration of:

(a) Physical plant changes, including but not limited to:

- (i) New construction;
- (ii) Proposed resident area or room use change;
- (iii) Resident room number changes; and
- (iv) Proposed bed banking.

(b) Mechanical failure of equipment important to the everyday functioning of the nursing home, which cannot be repaired within a reasonable time frame, such as an elevator; and

(c) An actual or proposed change of ownership (CHOW).

(4) The nursing home must notify, in writing, the department's aging and disability services administration and each resident, of a loss of, or change in, the nursing home's administrator or director of nursing services at the time the loss or change occurs.

(5) The nursing home licensee must notify the department's aging and disability services administration in writing of any change in the name of the licensee, or of the nursing home, at the time the change occurs.

(6) If a licensee operates in a building it does not own, the licensee must immediately notify the department of the occurrence of any event of default under the terms of the lease, or if it receives verbal or written notice that the lease agreement will be terminated, or that the lease agreement will not be renewed.

(7) The nursing home must report any case or suspected case of a reportable disease to the appropriate department of health officer and must also notify the appropriate department(s) of other health and safety issues, according to state and local laws.

(8) In the event of a nursing home's voluntary closure, the nursing home must:

(a) Notify all residents and resident representatives, the department's designated aging and disability services administration office, the state long-term ((~~ombudsman~~)) ombuds, and, if the facility is medicare-certified, the Centers for Medicare and Medicaid Services;

(b) Send the written notification at least sixty days before closure;

(c) Ensure that the relocation of residents and any required notice to the Centers for Medicare and Medicaid Services and the public is done in accordance with WAC 388-97-4320.

(9) The nursing home licensee must provide written notice of its intention to voluntarily terminate its medicare or medicaid contract, to:

(a) The department's designated aging and disability services administration office;

(b) The Washington health care authority;

(c) The Centers for Medicare and Medicaid Services;

(d) All residents and, when appropriate, resident representatives; and

(e) The public.

(10) The written notice required in subsection (9) must be provided, at least sixty days before contract termination, except notice to Centers for Medicare and Medicaid Services and the public must be provided in accordance with the requirements of 42 C.F.R. 489.52.

(11) If a nursing home voluntarily withdraws from participation in the medicaid program, but continues to provide nursing facility services, the nursing home will be subject to 42 U.S.C. 1396r (c)(2)(F), which prohibits the discharge of medicaid residents who are residing in the facility before the effective date of the withdrawal.

AMENDATORY SECTION (Amending WSR 08-20-062, filed 9/24/08, effective 11/1/08)

WAC 388-97-1840 Retaliation or discrimination prohibited. (1) The licensee or the nursing home must not discriminate or retaliate in any manner against a resident or employee in its nursing home who has initiated or participated in any action or proceeding authorized under nursing home licensing law. Examples of such participation include, but are not limited to the following:

(a) The resident, or someone acting on behalf of the resident, or the employee:

(i) Made a complaint, including a whistle blower complaint, to the department, the department of health, the long-term care ((~~ombudsman~~)) ombuds, attorney general's office, the courts or law enforcement;

(ii) Provided information to the department, the department of health, the long-term care ((~~ombudsman~~)) ombuds, attorney general's office, the courts or law enforcement; or

(iii) Testified in a proceeding related to the nursing home or its staff.

(2) For purposes of this chapter, "**retaliation**" or "**discrimination**" against a resident means an act including, but not limited to:

(a) Verbal or physical harassment or abuse;

(b) Any attempt to expel the resident from the facility;

(c) Nonmedically indicated social, dietary, or mobility restriction(s);

(d) Lessening of the level of care when not medically appropriate;

(e) Nonvoluntary relocation within a nursing home without appropriate medical, psychosocial, or nursing justification;

(f) Neglect or negligent treatment;

(g) Withholding privileges;

(h) Monitoring resident's phone, mail or visits without resident's permission;

(i) Withholding or threatening to withhold food or treatment unless authorized by terminally ill resident or the resident's representative;

(j) Persistently delaying responses to resident's request for services of assistance; or

(k) Infringement on a resident's rights described in chapter 74.42 RCW, RCW 74.39A.060(7), WAC 388-97-0180, and also, for medicaid and medicare certified nursing facilities, in federal laws and regulations.

(3) For purposes of this chapter, "**retaliation**" or "**discrimination**" against an employee means an act including, but not limited to:

- (a) Harassment;
- (b) Unwarranted firing;
- (c) Unwarranted demotion;
- (d) Unjustified disciplinary action;
- (e) Denial of adequate staff to perform duties;
- (f) Frequent staff changes;
- (g) Frequent and undesirable office changes;
- (h) Refusal to assign meaningful work;
- (i) Unwarranted and unsubstantiated report of misconduct under Title 18 RCW;
- (j) Unsubstantiated letters of reprimand;
- (k) Unsubstantiated unsatisfactory performance evaluations;
- (l) Denial of employment;
- (m) A supervisor or superior encouraging coworkers to behave in a hostile manner toward the whistle blower; or
- (n) Workplace reprisal or retaliatory action as defined in RCW 74.34.180 (3)(b).

(4) For purposes of this chapter, a "**whistle blower**" is defined in WAC 388-97-0001.

(5) If, within one year of the complaint by or on behalf of a resident, the resident is involuntarily discharged from the nursing home, or is subjected to any type of discriminatory treatment, there will be a presumption that the action was in retaliation for the filing of the complaint. Under these circumstances, the nursing home will have the burden of establishing that the action was not retaliatory, in accordance with RCW 18.51.220 and 74.34.180(2).

AMENDATORY SECTION (Amending WSR 08-20-062, filed 9/24/08, effective 11/1/08)

WAC 388-97-4480 Criteria for imposing optional remedies. (1) The criteria set forth in this section implement the requirements under RCW 18.51.060(8). The criteria do not replace the standards for imposition of mandatory remedies under RCW 18.51.060 (3) and (5), or for the imposition of mandatory remedies in accordance with WAC 388-97-4460 (1), (2) and (3).

(2) The department must consider the imposition of one or more optional remedy(ies) when the nursing home has:

- (a) A history of being unable to sustain compliance;
- (b) One or more deficiencies on one inspection at severity level 2 or higher as described in WAC 388-97-4500;
- (c) Been unable to provide an acceptable plan of correction after receiving assistance from the department about necessary revisions;

(d) One or more deficiencies cited under general administration and/or nursing services;

(e) One or more deficiencies related to retaliation against a resident or an employee for whistle blower activity under RCW 18.51.220, 74.34.180 or 74.39A.060 and WAC 388-97-1820;

(f) One or more deficiencies related to discrimination against a medicare or medicaid client under RCW 74.42.055, and Titles XVIII and XIX of the Social Security Act and medicare and medicaid regulations; or

(g) Willfully interfered with the performance of official duties by a long-term care (~~ombudsman~~) **ombuds**.

(3) The department, in its sole discretion, may consider other relevant factors when determining what optional remedy or remedies to impose in particular circumstances.

(4) When the department imposes an optional remedy or remedies, the department will select more severe penalties for nursing homes that have deficiency(ies) that are:

- (a) Uncorrected upon revisit;
- (b) Recurring (repeated);
- (c) Pervasive; or
- (d) Present a threat to the health, safety, or welfare of the residents.

(5) The department will consider the severity and scope of cited deficiencies in accordance with WAC 388-97-4500 when selecting optional remedy(ies). Such consideration will not limit the department's discretion to impose a remedy for a deficiency at a low level severity and scope.

WSR 14-12-046

PERMANENT RULES

DEPARTMENT OF

SOCIAL AND HEALTH SERVICES

(Developmental Disabilities Administration)

[Filed May 29, 2014, 11:20 a.m., effective July 1, 2014]

Effective Date of Rule: July 1, 2014.

Purpose: The primary purposes for these changes are to clarify rules which determine whether an individual meets the requirements for developmental disabilities administration (DDA) eligibility. Overall changes in organization and language have been made to reduce confusion for DDA, applicants and DDA clients. Amendments align eligibility requirements for autism with the Diagnostic and Statistical Manual – Fifth Edition (DSM-5). Furthermore, combining the categories of "another neurological" and "other condition" eliminate confusion between the WAC and RCW language.

Amendments to this chapter may change eligibility requirements for some individuals applying for services from DDA. In addition, housekeeping changes were made such as WAC and RCW references, [changing] division of developmental disabilities to DDA, and mental retardation to intellectual disability.

Citation of Existing Rules Affected by this Order: Repealing WAC 388-823-0030, 388-823-0040, 388-823-0060, 388-823-0070, 388-823-0110, 388-823-0120, 388-823-0130, 388-823-0140, 388-823-0150, 388-823-0160,

388-823-0170, 388-823-0215, 388-823-0220, 388-823-0230, 388-823-0320, 388-823-0330, 388-823-0420, 388-823-0515, 388-823-0615, 388-823-0700, 388-823-0710, 388-823-0800, 388-823-0810, 388-823-0820, 388-823-0830, 388-823-0840, 388-823-0850, 388-823-0900, 388-823-1040 and 388-823-1050; and amending WAC 388-823-0010, 388-823-0020, 388-823-0050, 388-823-0080, 388-823-0090, 388-823-0100, 388-823-0105, 388-823-0200, 388-823-0210, 388-823-0300, 388-823-0310, 388-823-0400, 388-823-0410, 388-823-0500, 388-823-0510, 388-823-0600, 388-823-0610, 388-823-0920, 388-823-0930, 388-823-0940, 388-823-1000, 388-823-1005, 388-823-1010, 388-823-1015, 388-823-1020, 388-823-1030, 388-823-1060, 388-823-1070, 388-823-1080, 388-823-1090, 388-823-1095, and 388-823-1100.

Statutory Authority for Adoption: RCW 71A.12.030, 71A.12.120.

Other Authority: RCW 71A.12.030, 74.08.090.

Adopted under notice filed as WSR 14-05-071 on February 18, 2014.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 11, Amended 30, Repealed 32; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

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

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

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 11, Amended 30, Repealed 32.

Date Adopted: May 27, 2014.

Katherine I. Vasquez
Rules Coordinator

Chapter 388-823 WAC

DEVELOPMENTAL DISABILITIES ADMINISTRATION INTAKE AND ELIGIBILITY DETERMINATION APPLYING FOR A ~~((DETERMINATION OF A))~~ DEVELOPMENTAL ~~((DISABILITY))~~ DISABILITIES ADMINISTRATION ELIGIBILITY DETERMINATION

AMENDATORY SECTION (Amending WSR 05-12-130, filed 6/1/05, effective 7/2/05)

WAC 388-823-0010 Definitions. The following definitions apply to this chapter:

"ABAS-II" means adaptive behavior assessment system-second edition, which is a comprehensive, norm-referenced assessment of adaptive behavior and skills of individuals from birth through age 89.

"CAS" means the DAS-Naglieri cognitive assessment system, a clinical instrument for assessing intelligence based

on a battery of cognitive tasks. The test is used for children ages five through seventeen years eleven months.

"Client" means a person with a developmental disability as defined in chapter 388-823 WAC who is currently eligible and active with the ~~((division of))~~ developmental disabilities administration (DDA).

"C-TONI" means the comprehensive test of nonverbal intelligence, a battery of six subtests, designed to measure different aspects of nonverbal intellectual abilities from ages six to eighteen years eleven months.

"DAS" means differential ability scales, which is a cognitive abilities battery for children and adolescents at least age two years, six months but under age eighteen.

"DDA" means the developmental disabilities administration, an administration within department of social and health services.

~~((("DDD" means the division of developmental disabilities, a division within the aging and disability services administration, department of social and health services.))~~

"Department" means the department of social and health services.

~~((("Division" means the division of developmental disabilities.))~~

"Documentation" means written information that provides support for certain claims, such as diagnoses, test scores, or residency for the purpose of establishing DDA eligibility.

"DSM-IV-TR" means the diagnostic and statistical manual of mental disorders, fourth edition, text revision.

"DSM-5" means the diagnostic and statistical manual of mental disorders, fifth edition.

"Eligible" means that DDA has determined that you have a ~~((developmental disability that meets all of the requirements in this chapter for a specific))~~ condition that meets all of the requirements for a developmental disability as set forth in this chapter.

"ESIT" means early support for infants and toddlers, a program administered by the department of early learning.

"Expiration date" means a specific date that your eligibility as a client of ~~((DDD))~~ DDA and all services paid by ~~((DDD))~~ DDA will stop.

"FSIQ" means the full scale intelligence quotient which is a broad measure of intelligence achieved through one of the standardized intelligence tests included in these rules. Any standard error of measurement value will not be taken into consideration when making a determination for ~~((DDD))~~ DDA eligibility.

"Functional limitation" means a reduced ability or lack of ability to perform an action or activity in the manner or within the range considered to be normal.

"ICAP" means the inventory for client and agency planning. This is a standardized assessment of functional ability. The adaptive behavior section of the ICAP assesses daily living skills and the applicant awareness of when to perform these skills. The goal is to get a snapshot of his/her ability.

~~((("IMR" means an institution for the mentally retarded, per chapter 388-835 WAC or chapter 388-837 WAC.))~~

"K-ABC" means Kaufman assessment battery for children, which is a clinical instrument for assessing intellectual development. It is an individually administered test of intelli-

gence and achievement for children at least age two years, six months but under age twelve years, six months. The K-ABC comprises four global scales, each yielding standard scores. A special nonverbal scale is provided for children at least age four years but under age twelve years, six months.

"Leiter-R" means Leiter international performance scale - revised, which is an untimed, individually administered test of nonverbal cognitive ability for individuals at least age two years but under age twenty-one years.

"MPC" means medicaid personal care and is the provision of medically necessary personal care tasks as defined in chapter 388-106 WAC.

"Necessary supplemental accommodation representative" means an individual who receives copies of DDA planned action notices (PANs) and other department correspondence in order to help a client understand the documents and exercise the client's rights. A necessary supplemental accommodation representative is identified by a client of DDA when the client does not have a legal guardian and the client is requesting or receiving DDA services.

"Nonverbal" means that you do not possess sufficient verbal skills to complete a standard intellectual test.

"NSA" means necessary supplemental accommodations, which are services provided to you if you have a mental, neurological, physical, or sensory impairment or other problems that prevent you from getting program benefits in the same way that an unimpaired person would get them.

"Review" means ((DDD)) DDA must ((redetermine)) determine that ((you still have)) a current client of DDA still meets all of the requirements for a developmental disability ((according to the rules that are in place at the time of the review)) as set forth in this chapter.

"RHC" means ((one of five)) a residential habilitation ((centers)) center operated by the ((division: Lakeland Village, Yakima Valley School, Fircrest, Rainier School, and Francis Haddon Morgan Center)) DDA.

"SIB-R" means the scale of independent behavior-revised which is an adaptive behavior assessment derived from quality standardization and norming. It can be administered as a questionnaire or as a carefully structured interview, with special materials to aid the interview process.

"SOLA" means a state operated living alternative residential service for adults operated by ((the division)) DDA.

"Stanford-Binet" is a battery of fifteen subtests measuring intelligence for individuals at least age two years but under age twenty-three years.

"Termination" means an action taken by ((DDD)) DDA that stops your ((DDD)) DDA eligibility and services paid by ((DDD)) DDA. If your DDA eligibility is terminated your DDA authorized services will also be terminated. If you remain eligible for MPC and you are under the age of eighteen DDA will continue to authorize this service. If you are eighteen or older medicaid personal care will be authorized by the aging and long-term support administration.

"VABS" means Vineland adaptive behavior scales, which is an assessment to measure adaptive behavior in children from birth but under age eighteen years, nine months and in adults with low functioning in four separate domains: Communication, daily living skills, socialization, and motor skills.

"Wechsler" means the Wechsler intelligence scale, which is an individually administered ((H-subtest)) measure of an individual's capacity for intelligent behavior. ((The Wechsler has both a verbal scale and a performance scale. The Wechsler is used with individuals at least age three years but under age seventy-four years. The verbal scale can be used alone with individuals who have visual or motor impairments, and the performance scale can be used alone with individuals who cannot adequately understand or produce spoken language.)) There are three Wechsler intelligence scales, dependent upon the age of the individual:

- ((The)) Wechsler preschool and primary scale of intelligence ((-revised (WPPSI-R,)) for children at least age three years but under age seven years;

- ((The)) Wechsler intelligence scale for children ((-third edition, (WISC-III,)) for children at least age six years but under age sixteen years; and

- ((The)) Wechsler adult intelligence scale ((-revised (WAIS-R,)) for individuals at least age sixteen years but under age seventy-four years.

"WJ III(r)" means the Woodcock-Johnson(r) III, a test which is designed to provide a co-normed set of tests for measuring general intellectual ability, specific cognitive abilities, scholastic aptitude, oral language, and academic achievement. The WJ III(r) is used for ages two and up.

NEW SECTION

WAC 388-823-0015 How does the state of Washington define developmental disability? The state of Washington defines developmental disability in RCW 71A.10.020(4).

(1) To qualify for DDA you must have a diagnosed condition of intellectual disability, cerebral palsy, epilepsy, autism, or another neurological or other condition found by DDA to be closely related to intellectual disability or requiring treatment similar to that required for individuals with intellectual disability which:

- (a) Originates prior to age eighteen;
- (b) Is expected to continue indefinitely; and
- (c) Results in substantial limitations.

(2) In addition to the requirements listed in subsection (1) of this section, you must meet the other requirements contained in this chapter.

AMENDATORY SECTION (Amending WSR 05-12-130, filed 6/1/05, effective 7/2/05)

WAC 388-823-0020 How do I become a client of the ((division of)) developmental disabilities administration? You become a client of the ((division of)) developmental disabilities ((DDD)) administration (DDA) if you apply for eligibility with ((DDD)) DDA and ((DDD)) DDA determines that you ((have a "developmental disability")) meet all eligibility criteria required to establish a developmental disability as defined in this chapter.

(1) You apply to become a client of DDA by calling the regional DDA office or a local DDA office and requesting a DDA eligibility packet be sent to you. You may also download and print the eligibility packet at <http://dshs.wa.gov/ddd/eligible.shtml>.

(2) You must complete and return the required forms, along with all supporting documentation that you have, to address any disability indicated in the eligibility packet.

NEW SECTION

WAC 388-823-0025 Who can apply for DDA eligibility determination? (1) You must be a resident of the state of Washington, as described in WAC 388-823-0050, to apply for an eligibility determination.

(2) The following individuals can apply for DDA eligibility:

(a) If a court has not appointed the child as his own decision maker, a parent or legal representative must apply on behalf of a child under the age of eighteen years;

(b) If there is a legal guardian of an applicant age eighteen years or older, the legal guardian must apply on behalf of the adult applicant; or

(c) If there is no legal guardian of an adult applicant age eighteen years or older, the adult applicant can apply on his/her own behalf.

(3) A request for eligibility determination requires the signature of the applicant or their legal representative. With the consent of the applicant, any person, agency, or advocate may assist with the application process.

AMENDATORY SECTION (Amending WSR 05-12-130, filed 6/1/05, effective 7/2/05)

WAC 388-823-0050 (~~Must I be~~) For DDA eligibility, who is considered to be a resident of the state of Washington? (~~When you apply for eligibility with DDD, you must be a resident of the state of Washington. Proof of residency includes:~~

~~(1) The receipt of medicaid or other benefits from the department of social and health services that require residency as a condition of eligibility; or~~

~~(2) Documentation that shows you live in the state of Washington, or, if you are a child under the age of eighteen, documentation that shows your parent or legal guardian lives in the state of Washington))~~ (1) You must live in the state of Washington to apply or continue to be a client of DDA. If you are a child under the age of eighteen, your primary custodian or legal guardian must also live in the state of Washington. Proof that you live in the state of Washington may include documentation such as a lease agreement, school records, or mail addressed to you. Such documentation will not be considered proof of residency if you have been denied medicaid or other benefits due to failure to meet residency requirements under WAC 388-468-0005.

(2) DDA will not process your request for determination of eligibility or will terminate your eligibility if you do not live in the state of Washington.

NEW SECTION

WAC 388-823-0055 Who is responsible for obtaining the documentation needed to make my eligibility determination? You are responsible to provide all of the information required by DDA to make a determination.

(1) If you provide DDA with a signed consent form and the sources for obtaining the documentation DDA may be able to assist you in obtaining records. Evidence required to make an eligibility determination includes, but is not limited to:

(a) School psychologist and/or licensed psychologist evaluations and reports,

(b) Evidence of medical diagnoses by a licensed physician,

(c) Cognitive and adaptive skills test results and accompanying reports, and

(d) Mental health records.

(2) DDA will not pay for the purchase of diagnostic assessments, intelligence quotient (IQ) testing, or adaptive skills testing.

(3) If DDA determines that you have a qualifying condition and your records do not include an adaptive skills assessment per WAC 388-823-0710 administered within the past thirty-six months, DDA may administer the inventory of client and agency planning (ICAP) to determine your level of adaptive functioning to meet the substantial limitation requirement. DDA will administer the ICAP at no expense to you.

NEW SECTION

WAC 388-823-0075 What if I do not have written evidence that my disability began before my eighteenth birthday? (1) If there is no documentation available about your early developmental history, educational history, illnesses, or injuries, DDA may accept verbal information from your family or others who knew you prior to the age of eighteen to verify that your disability began prior to age eighteen. The information must be specific and reliable, and it cannot substitute for documentation that could be obtained with reasonable diligence.

(2) Additional evidence of your eligible condition and the resulting substantial limitations is still required.

AMENDATORY SECTION (Amending WSR 05-12-130, filed 6/1/05, effective 7/2/05)

WAC 388-823-0080 (~~Who determines that I have a developmental disability~~) How does DDA determine whether I meet eligibility criteria? (~~DDD~~) DDA determines if you (~~have a developmental disability as defined in this chapter after reviewing all documentation received by the division~~) meet eligibility criteria as defined in this chapter by reviewing all information that has been submitted.

AMENDATORY SECTION (Amending WSR 05-12-130, filed 6/1/05, effective 7/2/05)

WAC 388-823-0090 How long will it take to complete a determination of my eligibility? (~~(1) Once DDD receives sufficient documentation to determine you eligible, DDD~~) DDA has thirty days from receipt of the final piece of documentation to make the determination of eligibility.

~~((2))~~ (1) If (~~DDD~~) DDA has received all requested documentation (~~but~~) and it is (~~insufficient~~) sufficient to establish eligibility, (~~DDD~~) DDA will make a determina-

tion of ~~((ineligibility))~~ eligibility and send you written notice of ~~((denial of))~~ eligibility.

(2) If DDA has received all requested documentation but it is insufficient to establish eligibility, DDA will make a determination of ineligibility and send you written notice of denial of eligibility.

(3) If ~~((DDD))~~ DDA has insufficient information to determine you eligible ~~((but))~~ and has not received all of the requested documentation, ~~((DDD))~~ DDA may deny your eligibility after ninety days from the date of application. Rules governing reapplying for eligibility are in WAC 388-823-1080.

AMENDATORY SECTION (Amending WSR 05-12-130, filed 6/1/05, effective 7/2/05)

WAC 388-823-0100 What is the effective date ~~((that I become an eligible client of DDD))~~ of my eligibility determination? (1) If ~~((DDD))~~ DDA receives sufficient information to substantiate your ~~((DDD))~~ DDA eligibility, the effective date of your eligibility as a ~~((DDD))~~ DDA client is the date of receipt of the final piece of documentation.

(2) ~~((Paid DDD))~~ DDA services cannot begin before the effective date of your ~~((DDD))~~ DDA eligibility.

AMENDATORY SECTION (Amending WSR 05-12-130, filed 6/1/05, effective 7/2/05)

WAC 388-823-0105 How will ~~((DDD))~~ DDA notify me of the results of my eligibility determination? ~~((DDD))~~ DDA will send you written notification of the final determination of your eligibility per WAC 388-825-100.

(1) If you are not eligible, the written notice will explain why you are not eligible, explain your appeal rights to this decision, and provide you with ~~((a fair))~~ an administrative hearing request form.

(2) If you are eligible, the written notice will include:

- (a) Your eligibility condition(s);
- (b) The effective date of your eligibility;
- (c) The expiration date or review date of your eligibility, if applicable; and
- (d) The name and phone number of your ~~((assigned case manager))~~ DDA primary contact.

NEW SECTION

WAC 388-823-0115 If I am eligible to be a client of DDA, will I receive DDA services? If DDA determines that you are eligible to be a client of DDA, your access to services as a DDA client depends on your meeting eligibility requirements for the specific service. DDA paid services are described in WAC 388-825-057.

DETERMINATION OF ~~((A DEVELOPMENTAL DISABILITY))~~ ELIGIBILITY ~~((MENTAL RETARDATION))~~ INTELLECTUAL DISABILITY

AMENDATORY SECTION (Amending WSR 05-12-130, filed 6/1/05, effective 7/2/05)

WAC 388-823-0200 ~~((What evidence))~~ How do I ~~((need to substantiate "mental retardation"))~~ show that I have intellectual disability as an eligible condition? ~~((Evidence that you have an eligible condition under "mental retardation" requires a diagnosis of mental retardation by a licensed psychologist, or a finding of mental retardation by a certified school psychologist or a diagnosis of Down syndrome by a licensed physician.~~

(1) ~~This diagnosis is based on documentation of a life-long condition originating before age eighteen.~~

(2) ~~The condition results in significantly below average intellectual and adaptive skills functioning that will not improve with treatment, instruction or skill acquisition.~~

(3) ~~A diagnosis or finding of mental retardation by the examining psychologist must include an evaluation of adaptive functioning that includes the use of a standardized adaptive behavior scale indicating adaptive functioning that is more than two standard deviations below the mean, in at least two of the following areas: Communication, self care, home living, social/interpersonal skills, use of community resources, self direction, functional academic skills, work, leisure, health, and safety.)~~ In order to be considered for eligibility under the condition of intellectual disability you must be age four or older and have a diagnosis of mental retardation as specified in the DSM-IV-TR or intellectual disability as specified in the DSM-5. This diagnosis must meet the following criteria:

(1) The diagnosis must be made by a licensed psychologist, or be a finding of intellectual disability by a Washington certified school psychologist or other school psychologist certified by the National Association of School Psychologists.

(2) An acceptable diagnostic report includes documentation of all three diagnostic criteria specified in the DSM-IV-TR or DSM-5.

AMENDATORY SECTION (Amending WSR 05-12-130, filed 6/1/05, effective 7/2/05)

WAC 388-823-0210 If I have ~~((mental retardation))~~ intellectual disability, how do I meet the definition of substantial limitations ~~((in adaptive functioning))~~? ~~((If you meet the definition of mental retardation in WAC 388-823-0200, you must have substantial limitations in adaptive functioning of two standard deviations below the mean and a full-scale intelligence quotient (FSIQ) of more than two standard deviations below the mean.~~

(2) ~~The substantial limitation in adaptive functioning must reflect your current condition.)~~ If you have an eligible condition of intellectual disability, in order to meet the definition of substantial limitations you must have:

(1) Documentation of a full-scale intelligence quotient (FSIQ) score of more than two standard deviations below the

mean per WAC 388-823-0720, and subject to all of WAC 388-823-0720 and 388-823-0730, and

(2) Documentation of an adaptive skills test score of more than two standard deviations below the mean as described in WAC 388-823-0710 and subject to all of WAC 388-823-0740 and 388-823-0750.

AMENDATORY SECTION (Amending WSR 05-12-130, filed 6/1/05, effective 7/2/05)

WAC 388-823-0300 ~~((What evidence))~~ **How do I ((need to substantiate "cerebral palsy")) show that I have cerebral palsy as an eligible condition?** ~~((Evidence that you have an eligible))~~ In order to be considered for eligibility under the condition ((under "cerebral palsy" requires a diagnosis by a licensed physician of cerebral palsy, quadriplegia, hemiplegia, or diplegia with symptoms that:

(1) Existed prior to age three; and

(2) Impair control of movement)) of cerebral palsy you must be age four or older and have a diagnosis by a licensed physician of cerebral palsy or similar brain damage which causes, quadriplegia, hemiplegia, or diplegia, with evidence of onset prior to age three.

AMENDATORY SECTION (Amending WSR 05-12-130, filed 6/1/05, effective 7/2/05)

WAC 388-823-0310 **If I have cerebral palsy, how do I meet the definition of substantial limitations ((to adaptive functioning))?** If you have an eligible condition of cerebral palsy, in order to meet the definition of substantial limitations ((of adaptive functioning is)), you must demonstrate the need for direct physical assistance ((on a daily basis)), per WAC 388-823-0760, with two or more of the following activities as a result of your condition:

- (1) Toileting;
- (2) Bathing;
- (3) Eating;
- (4) Dressing;
- (5) Mobility; or
- (6) Communication.

AMENDATORY SECTION (Amending WSR 05-12-130, filed 6/1/05, effective 7/2/05)

WAC 388-823-0400 ~~((What evidence))~~ **How do I ((need to substantiate "epilepsy")) show that I have epilepsy as an eligible condition?** ~~((Evidence of an eligible condition under "epilepsy" requires a diagnosis of a neurological condition that produces brief disturbances in the normal electrical functions of the brain resulting in))~~ In order to be considered for eligibility under the condition of epilepsy you must be age four or older and have a diagnosis of epilepsy or a neurological condition that produces seizures.

(1) ~~((This condition requires a diagnosis of))~~ You must show evidence that your epilepsy or seizure disorder ((that)) originated prior to age eighteen and is expected to continue indefinitely.

(2) The diagnosis must be made by a board certified neurologist and be ~~((based on))~~ supported with documentation of medical history ~~((and))~~ with neurological testing.

(3) You must provide confirmation from your physician or neurologist that your seizures are currently uncontrolled and ongoing or recurring and cannot be controlled by medication.

~~((4)) DDD will not consider your seizures uncontrolled or ongoing if it is documented or reported that you refuse to take medications.~~

~~(5) Your seizures must make you physically incapacitated, requiring direct physical assistance for one or more activities as defined in WAC 388-823-0310 and 388-823-0320 during or following seizures.)~~

AMENDATORY SECTION (Amending WSR 05-12-130, filed 6/1/05, effective 7/2/05)

WAC 388-823-0410 **If I have epilepsy, how do I meet the definition of substantial limitations ((to adaptive functioning))?** ~~((A))~~ If you have an eligible condition of epilepsy, in order to meet the definition of substantial ((limitation to)) limitations, you must have documentation of an adaptive skills test score that reflects your daily functioning ((under epilepsy is a functional assessment score)) of more than two standard deviations below the mean ((on a Vineland adaptive behavior scales (VABS), scale of independent behavior-revised (SIB-R) or inventory for client and agency planning (ICAP) assessment instrument as described in WAC 388-823-0420)) as described in WAC 388-823-0740 and subject to all of WAC 388-823-0740 and 388-823-0750.

AMENDATORY SECTION (Amending WSR 05-12-130, filed 6/1/05, effective 7/2/05)

WAC 388-823-0500 ~~((What evidence))~~ **How do I ((need to substantiate "autism")) show that I have autism as an eligible condition?** ~~((Evidence of an eligible))~~ In order to be considered for eligibility under the condition ((under "autism" requires)) of autism you must be age four or older and have a diagnosis by a qualified professional ((of autism or autistic disorder per 299.00 in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR) that is expected to continue indefinitely, and evidence of onset before age three.)) which meets the conditions in subsection (1) or (2) of this section, as well as subsections (3), (4), and (5) of this section:

(1) ~~((The))~~ Autistic disorder 299.00 per the diagnostic and statistical manual of mental disorders, fourth edition, text revision (DSM-IV-TR), or

(2) Autism spectrum disorder 299.00 per the diagnostic and statistical manual of mental disorders, fifth edition (DSM-5), with a severity level of 2 or 3 in both columns of the severity level scale.

(3) The condition is expected to continue indefinitely with evidence of onset before age three.

(4) An acceptable diagnostic report includes documentation of all diagnostic criteria specified in the DSM-IV-TR or DSM-5.

(5) DDA will accept a diagnosis from any of the following professionals ((are qualified to give this diagnosis)):

- (a) Board ~~((eligible))~~ certified neurologist;
- (b) Board ~~((eligible))~~ certified psychiatrist;
- (c) Licensed psychologist; ~~((or))~~

(d) Advanced registered nurse practitioner (ARNP) associated with an autism center or developmental center; or

(e) Board certified developmental and behavioral pediatrician.

~~((2) The evidence provided by a diagnosing professional in subsection (1) above exhibits a total of six or more of the following diagnostic criteria listed in the current DSM-IV-TR for Autistic Disorder 299.00:~~

~~(a) Two or more qualitative impairments in social interactions;~~

~~(b) One or more qualitative impairments in communication; and~~

~~(c) One or more impairments in restricted repetitive and stereotypical patterns or behavior, interests, and activities.~~

~~(3) A checklist of diagnostic criteria follows:~~

| DSM-IV-TR Diagnostic Criteria required for Autism | Check if present |
|--|------------------|
| 1. Qualitative impairment in social interaction | |
| a. Marked impairment in the use of multiple non-verbal behaviors | |
| b. Failure to develop peer relationships appropriate to developmental level | |
| c. A lack of spontaneous seeking to share enjoyment, interests, or achievements with other people | |
| d. Lack of social or emotional reciprocity | |
| 2. Qualitative impairment in communication | |
| a. Delay in the development of spoken language without nonverbal compensation | |
| b. In individuals with adequate speech, marked impairment in the ability to initiate or sustain a conversation with others | |
| c. Stereotyped and repetitive use of language or idiosyncratic use of language | |
| d. Lack of varied, spontaneous, make-believe play or social imitative play appropriate to developmental level | |
| 3. Restricted repetitive and stereotyped patterns of behavior, interests, and activities | |
| a. Encompassing preoccupation with stereotyped and restricted patterns of interest that is abnormal in either intensity or focus | |
| b. Apparently inflexible adherence to specific, nonfunctional routines or rituals | |
| c. Stereotyped and repetitive motor mannerisms (e.g., hand or finger flapping or twisting, or complex whole-body movements) | |
| d. Persistent occupation with parts of objects | |
| TOTAL)) | |

AMENDATORY SECTION (Amending WSR 05-12-130, filed 6/1/05, effective 7/2/05)

WAC 388-823-0510 If I have autism, how do I meet the definition of substantial limitations ((~~to adaptive functioning~~)?) ((A) If you have an eligible condition of autism, in order to meet the definition of substantial ((~~limitation of adaptive functioning for the condition of autism is the presence of adaptive functioning impairment as described in~~

WAC 388-823-0515)) limitations you must meet the criteria in subsections (1) and (2) in this section:

(1) Documentation of an adaptive skills test score of more than two standard deviations below the mean as described in WAC 388-823-0740 and subject to all of WAC 388-823-0740 and 388-823-0750, and

(2) If your diagnosis is autism spectrum disorder per the DSM-5, documentation of a FSQI of more than one standard deviation below the mean as described in WAC 388-823-0720 and subject to all of WAC 388-823-0720 and 388-823-0730.

(a) If you have a FSQI score of one standard deviation below the mean or higher as described in WAC 388-823-0720, you may present additional documentation described in subitem (i) or (ii) in this subsection, signed by the diagnosing professional, which shows that you meet the criteria for autistic disorder 299.00 per the DSM-IV-TR:

(i) A completed autistic disorder confirmation form (available from DDA), or

(ii) Other documentation that provides the same information as required on the autistic disorder confirmation form.

(b) If you are unable to complete a FSQI test, you may provide a statement by the diagnosing professional that your condition is so severe that you are unable to demonstrate the minimal skills required to complete testing.

ANOTHER NEUROLOGICAL OR OTHER CONDITION SIMILAR TO INTELLECTUAL DISABILITY

Reviser's note: The spelling error in the above section occurred in the copy filed by the agency and appears in the Register pursuant to the requirements of RCW 34.08.040.

AMENDATORY SECTION (Amending WSR 05-12-130, filed 6/1/05, effective 7/2/05)

WAC 388-823-0600 ~~((What evidence))~~ How do I ((~~need to substantiate "another neurological condition" as an eligible condition~~)) show that I have another neurological or other condition similar to intellectual disability? ((Evidence of an eligible condition under "another neurological condition" requires a diagnosis by a licensed physician of an impairment of the central nervous system involving the brain and/or spinal cord that meets all of the following:

(1) Originated before age eighteen;

(2) Results in both physical disability and intellectual impairment;

(3) Is expected to continue indefinitely; and

(4) Is not attributable to a mental illness or psychiatric disorder.)) In order to be considered for eligibility under the category of another neurological or other condition similar to intellectual disability you must meet one of the three criteria below:

(1) You are age four or older and have a diagnosis by a licensed physician of a neurological or chromosomal disorder that is known by reputable authorities to cause intellectual and adaptive skills deficits. Your condition meets all of the following:

(a) Originated before age eighteen;

(b) Is expected to continue indefinitely without improvement;

(c) Is other than intellectual disability, autism, cerebral palsy, or epilepsy;

(d) Is not attributable to nor is itself a mental illness, or emotional, social, or behavior disorder; and

(e) Has resulted in substantial functional limitations.

(2) You are under the age of eighteen and are eligible for DSHS-paid in-home nursing through the medically intensive children program defined in WAC 182-551-3000.

(3) You are under the age of ten and have one or more developmental delays.

AMENDATORY SECTION (Amending WSR 05-12-130, filed 6/1/05, effective 7/2/05)

WAC 388-823-0610 If I have another neurological or other condition similar to intellectual disability, how do I meet the definition of substantial limitations ((to adaptive functioning))? ~~((Substantial limitations to adaptive functioning for the condition of another neurological condition require both intellectual impairment and the need for direct physical assistance with activities of daily living per WAC 388-823-0615 (1) and (2) below.))~~ If you have an eligible condition of another neurological or other condition similar to intellectual disability, in order to meet the definition of substantial limitations you must have impairments in both intellectual abilities and adaptive skills which are separate from any impairment due to an unrelated mental illness, or emotional, social or behavioral disorder.

(1) For WAC 388-823-0600(1) evidence of substantial functional limitations requires documentation of (a) and (b) below:

(a) For impairment in intellectual abilities, either subitem (i) or (ii) or (iii) below:

(i) A FSIQ score of more than 1.5 standard deviations below the mean as described in WAC 388-823-0720 and subject to all of WAC 388-823-0720 and WAC 388-823-0730; or

(ii) If you are under the age of twenty, significant academic delays defined as delays of more than two standard deviations below the mean at the time of testing in both broad reading and broad mathematics; or

(iii) A statement by a licensed physician, a licensed psychologist, or a school psychologist that your condition is so severe that you are unable to demonstrate the minimal skills required to complete testing for a FSIQ.

(b) For impairment in adaptive skills, a score of more than two standard deviations below the mean per WAC 388-823-0740 and subject to all of WAC 388-823-0740 and WAC 388-823-0750.

(2) For WAC 388-823-0600(2) you do not need additional evidence of your substantial functional limitations if your eligible condition is solely due to your eligibility and participation in the medically intensive children program offered through DDA and defined in WAC 182-551-3000.

(3) For WAC 388-823-0600(3) evidence of substantial functional limitations requires documentation of (a) or (b) or (c) below:

(a) You are under the age of three and have one or more developmental delays per WAC 388-823-0770, or

(b) You are under the age of three and meet the ESIT eligibility requirements, or

(c) You are under the age of ten and have three or more developmental delays per WAC 388-823-0770.

EVIDENCE VERIFICATION REQUIREMENTS

NEW SECTION

WAC 388-823-0720 What evidence do I need of my FSIQ? Evidence of a qualifying FSIQ is derived from one of the tests listed in the table below.

| Assessment | Qualifying score at more than 2 standard deviations | Qualifying score at more than 1.5 standard deviations | Qualifying score at more than 1 standard deviation |
|--|---|---|--|
| Stanford-Binet 4th edition or earlier editions | 67 or less | 75 or less | 83 or less |
| Stanford-Binet 5th edition | 69 or less | 77 or less | 84 or less |
| Wechsler intelligence scales (Wechsler) | 69 or less | 77 or less | 84 or less |
| Differential abilities scale (DAS) | 69 or less | 77 or less | 84 or less |
| Kaufman assessment battery for children (K-ABC) | 69 or less | 77 or less | 84 or less |
| Das-Naglieri cognitive assessment system (CAS) | 69 or less | 77 or less | 84 or less |
| Woodcock-Johnson-III test of cognitive abilities (WJ III(r)) | 69 or less | 77 or less | 84 or less |

(1) The test must be administered by a licensed psychologist or Washington certified school psychologist or other school psychologist certified by the National Association of School Psychologists.

(2) The FSIQ score cannot be attributable to mental illness or other psychiatric condition occurring at any age; or other illness or injury occurring after age eighteen:

(a) If you are dually diagnosed with a qualifying condition and mental illness, other psychiatric condition, or other illness or injury, you must provide acceptable documentation that your intellectual impairment, measured by a FSIQ test, would meet the requirements for DDA eligibility without the influence of the mental illness, other psychiatric condition, or other illness or injury.

(b) "Acceptable documentation" means written reports or statements that are directly related to the subject at issue, reasonable in light of all the evidence, and from a source of appropriate authority. The determination of whether a document is acceptable is made by DDA.

(c) If no documentation is provided or DDA determines that the documentation is not acceptable DDA will deny eligibility. The determination may be challenged through an administrative appeal.

(3) If you have a vision impairment that prevents completion of the performance portion of the IQ test, the administering professional may estimate an FSIQ using only the verbal IQ score of the appropriate Wechsler.

(4) If you have a significant hearing impairment, English is not your primary language, or you are nonverbal your FSIQ may be estimated using one of the tests shown in the table below.

| Assessment | Qualifying score at more than 2 standard deviations | Qualifying score at 1.5 or more standard deviations | Qualifying score more than 1 standard deviation |
|---|--|--|--|
| Wechsler intelligence scales (WISC, WAIS) | 69 or less on the performance scale, or, on both the perceptual reasoning index and processing speed index | 77 or less on the performance scale, or, on both the perceptual reasoning index and the processing speed index | 84 or less on the performance scale, or, on both the perceptual reasoning Index and the processing speed index |
| Leiter international performance scale-revised (Leiter-R) | 69 or less | 77 or less | 84 or less |
| Comprehensive test of nonverbal intelligence (C-TONI) | 69 or less on full scale (NVIQ) | 77 or less on full scale (NVIQ) | 84 or less on full scale (NVIQ) |
| Kaufman assessment battery for children (K-ABC) | Nonverbal scale index of 69 or less | Nonverbal scale index of 77 or less | Nonverbal scale index of 84 or less |

(5) If you are over the age of nineteen at the time of your determination you must have a valid FSIQ obtained at age thirteen or older.

Reviser's note: The spelling error in the above section occurred in the copy filed by the agency and appears in the Register pursuant to the requirements of RCW 34.08.040.

NEW SECTION

WAC 388-823-0730 If I have more than one FSIQ score, what criteria will DDA use to select the FSIQ for determining eligibility? (1) If you have more than one FSIQ, DDA will review the pattern of FSIQ scores.

(a) If the variation among these scores is no more than five points, DDA will accept the score obtained closest to but below age eighteen.

(b) If there are differences among the FSIQ scores of more than five points, DDA will review the pattern and attempt to determine reasons for the fluctuations to ensure that the most reliable and accurate FSIQ score is used. DDA will use the most current FSIQ obtained below age eighteen, provided the FSIQ is a result of your developmental disability.

(2) DDA will exclude any FSIQ score attributable to a condition or impairment that began on or after your eighteenth birthday.

NEW SECTION

WAC 388-823-0740 What evidence do I need of my adaptive skills limitations? (1) Evidence of substantial limitations of adaptive functioning requires a qualifying score completed in the past thirty-six months on one of the tests shown in the table below:

| Assessment | Qualifying Score |
|---|--|
| Vineland adaptive behavior scales (VABS) | An adaptive behavior composite score of 69 or less |
| Scales of independent behavior - revised (SIB-R) | A broad independence standard score of 69 or less |
| Adaptive behavior assessment system- second edition (ABAD-II) | An adaptive behavior composite score of 69 or less |
| Inventory for client and agency planning (ICAP) | A broad independence standard score of 69 or less |

(a) Tests must be administered and scored by professionals who have a background in individual assessment, human development and behavior, and tests and measurements, as well as an understanding of individuals with disabilities.

(b) Tests must be administered following the instructions for the specific test used.

(c) Department staff or designee contracted with DDA must administer the ICAP.

(d) DDA will administer or arrange for the administration of the ICAP only if results from one of the other acceptable tests are not available.

(2) The adaptive test score cannot be a result of an unrelated mental illness or other psychiatric condition occurring

at any age; or other illness or injury occurring after age eighteen.

(a) If you are dually diagnosed with a qualifying condition and mental illness, other psychiatric condition, or other illness or injury, you must provide acceptable documentation that your adaptive functioning impairment, measured by an adaptive skills test, would meet the requirements for DDA eligibility without the influence of the mental illness, other psychiatric condition, or other illness or injury.

(b) "Acceptable documentation" means written reports or statements that are directly related to the subject at issue, reasonable in light of all the evidence, and from a source of appropriate authority. The determination of whether a document is acceptable is made by DDA.

(c) If no documentation is provided or DDA determines that the documentation is not acceptable DDA will deny eligibility. The determination may be challenged through an administrative appeal.

NEW SECTION

WAC 388-823-0750 If I have more than one adaptive test score, what criteria will DDA use to select the adaptive test for determining eligibility? If you have more than one adaptive test score during the thirty-six months prior to your determination, DDA will accept the test score obtained closest to the date of review or application providing it is a valid score and reflects adaptive functioning due to your developmental disability.

NEW SECTION

WAC 388-823-0760 What evidence do I need to show my need for direct physical assistance? (1) The need for direct physical assistance with activities of daily living is due to your impaired motor control and means:

(a) You need the presence and physical assistance of another person on a daily basis to be able to communicate and be understood by any other person.

(i) If you are able to communicate through a communication device you will be considered independent in communication.

(ii) You must require more than "setting up" of the communication device.

(b) You need direct physical assistance from another person on a daily basis with toileting, bathing, eating, dressing, or mobility.

(i) You require more than "setting up" the task to enable you to perform the task independently.

(ii) You must require direct physical assistance for more than transferring in and out of wheelchair, in and out of the bath or shower, and/or on and off of the toilet.

(iii) Your ability to be mobile is your ability to move yourself from place to place, not your ability to walk. For instance, if you can transfer in and out of a wheelchair and are independently mobile in a wheelchair, you do not meet the requirement for direct physical assistance with mobility.

(2) Any of the following can be used as documentation of your direct physical assistance needs:

(a) The comprehensive assessment reporting evaluation (CARE) tool or other department assessments that measure direct assistance needs in the areas specified above;

(b) Assessments and reports from educational or health-care professionals that are current and consistent with your current functioning;

(c) In the absence of professional reports or assessments, DDA may document its own observation of your direct assistance needs along with reported information by family and others familiar with you.

NEW SECTION

WAC 388-823-0770 What evidence do I need of developmental delays? (1) Evidence of substantial functional limitations requires developmental delays of at least 1.5 standard deviations or twenty-five percent or more of the chronological age in one or more of the following developmental areas based on an assessment current within the past 12 months:

(a) Physical skills (fine or gross motor);

(b) Self help/adaptive skills;

(c) Expressive or receptive communication, including American sign language;

(d) Social/emotional skills; and

(e) Cognitive, academic, or problem solving skills.

(2) The number of areas in which you are required to have delays to meet the evidence is specific to your age.

(3) Tools used to determine developmental delays must be diagnostic assessments that are designed to measure the developmental areas in subsection (1) of this section and are appropriate to the age of the child being tested.

(4) The assessment must be administered by one of the following professionals qualified to administer the assessment of developmental areas:

(a) Licensed physician;

(b) Licensed psychologist or certified school psychologist;

(c) Speech language pathologist;

(d) Audiologist;

(e) Registered occupational therapist;

(f) Licensed physical therapist;

(g) Registered nurse;

(h) Certified teacher;

(i) Masters level social worker; or

(j) Orientation and mobility specialist.

AMENDATORY SECTION (Amending WSR 05-12-130, filed 6/1/05, effective 7/2/05)

WAC 388-823-0920 What sections of the ICAP does ~~((DDD))~~ DDA or a designee contracted with ~~((DDD))~~ DDA complete and score? (1) ~~((DDD))~~ DDA or a designee contracted with ~~((DDD))~~ DDA completes the adaptive behavior portion of the ICAP.

(2) There is a computer generated broad independence score of your motor skills, personal living skills, social and communication skills, and community living skills, based on your age.

AMENDATORY SECTION (Amending WSR 05-12-130, filed 6/1/05, effective 7/2/05)

WAC 388-823-0930 How does ~~((DDD))~~ DDA or a designee contracted with ~~((DDD))~~ DDA administer the ICAP? (1) ~~((DDD))~~ DDA or a designee contracted with ~~((DDD))~~ DDA completes the adaptive section of the ICAP by interviewing a qualified respondent who has known you for at least three months and who sees you on a day-to-day basis. You cannot be the respondent for your own ICAP.

(2) ~~((DDD))~~ DDA or a designee contracted with ~~((DDD))~~ DDA will choose the respondent and may interview more than one respondent to ensure that information is complete and accurate.

(3) ~~((DDD))~~ DDA or a designee contracted with ~~((DDD))~~ DDA will ask you to demonstrate some of the skills in order to evaluate what skills you are able to perform. ~~((DDD))~~ DDA or a designee contracted with ~~((DDD))~~ DDA cannot administer the ICAP if no respondent is identified and available.

AMENDATORY SECTION (Amending WSR 05-12-130, filed 6/1/05, effective 7/2/05)

WAC 388-823-0940 What happens if ~~((DDD))~~ DDA or a designee contracted with ~~((DDD))~~ DDA cannot identify a qualified respondent? If you and ~~((DDD))~~ DDA or a designee contracted with ~~((DDD))~~ DDA cannot identify a qualified respondent for the ICAP, ~~((DDD))~~ DDA or a designee contracted with ~~((DDD))~~ DDA will not be able to administer the ICAP or determine you eligible under any conditions that require an ICAP.

AMENDATORY SECTION (Amending WSR 05-12-130, filed 6/1/05, effective 7/2/05)

WAC 388-823-1000 Once I become an eligible ~~((DDD))~~ DDA client, is there a time limit to my eligibility? While ~~((DDD))~~ DDA has the authority to review your eligibility at any time, your eligibility as a ~~((DDD))~~ DDA client will expire or have required reviews as indicated in WAC 388-823-1005 and 388-823-1010.

AMENDATORY SECTION (Amending WSR 05-12-130, filed 6/1/05, effective 7/2/05)

WAC 388-823-1005 When does my eligibility as a ~~((DDD))~~ DDA client expire? (1) If you are determined eligible prior to age ~~((four))~~ three, your eligibility expires on your fourth birthday.

~~((a))~~ DDD will notify you at least ninety days before your eligibility expiration date.

~~((b))~~ You must reapply for eligibility with DDD.)

(2) If you are determined ~~((or redetermined))~~ eligible at age three but under age ten ~~((per WAC 388-823-0810 through 388-823-0850.))~~ under developmental delays or Down syndrome your eligibility expires on your tenth birthday.

~~((a))~~ DDD will notify you at least ninety days before your eligibility expiration date.

~~((b))~~ You must reapply for eligibility with DDD.

~~((3))~~ If your eligibility determination was prior to July 2005 under developmental delays, Down syndrome, or medically intensive program and you are age four or older as of June 30, 2005, your eligibility expires on your tenth birthday.

~~((a))~~ DDD will notify you at least ninety days before of your eligibility expiration date.

~~((b))~~ You must reapply for eligibility with DDD.) (3) If you are determined eligible under another neurological or other condition similar to intellectual disability and have used academic delays as evidence of your substantial limitations, your eligibility expires on your twentieth birthday.

(4) If your eligibility determination ~~((was made after July 2005 and))~~ is based solely ~~((due to))~~ on your need for nursing through the medically intensive children program, your eligibility expires when you are no longer eligible for the program ~~((but no later than))~~ or your eighteenth birthday, whichever comes first.

~~((a))~~ DDD) (5) DDA will notify you at least ~~((ninety days))~~ six months before your ~~((eighteenth birthday))~~ eligibility expiration date.

~~((b))~~ You) (6) If your eligibility expires you must reapply ~~((for))~~ in order to maintain eligibility with ~~((DDD))~~ DDA.

(7) If you fail to reapply before your expiration date or if DDA receives your reapplication less than sixty days prior to your expiration date and DDA does not have sufficient time to make an eligibility determination by the date of expiration, DDA eligibility will expire and your DDA paid services will stop.

(a) If DDA determines you eligible after your eligibility expires, your eligibility will be reinstated on the date that DDA determines you eligible pursuant to WAC 388-823-0100.

(b) If DDA determines you eligible after your eligibility expires, your eligibility will not be retroactive to the expiration date.

(8) This expiration of eligibility takes effect even if DDA is unable to locate you to provide written notification that eligibility is expiring.

(9) There is no appeal right to eligibility expiration.

AMENDATORY SECTION (Amending WSR 05-12-130 [14-07-028], filed 6/1/05 [3/10/14], effective 7/2/05 [4/10/14])

WAC 388-823-1010 When will ~~((DDD))~~ DDA review my eligibility to determine if I continue to ~~((have a developmental disability))~~ meet the eligibility requirements for DDA? (1) ~~((Your eligibility can be reviewed at any time if your eligibility effective date is prior to July 2005 and you are age ten or older and were eligible under a condition of developmental delay or Down syndrome.~~

(2) ~~((Your))~~ DDA will review your eligibility ~~((will be reviewed))~~ at age ~~((seventeen))~~ nineteen with termination occurring no sooner than your ~~((eighteenth))~~ twentieth birthday if your most current eligibility determination was at sixteen or younger under ~~((mental retardation))~~ intellectual disability, cerebral palsy, epilepsy, autism, or another neurological ~~((condition.))~~ or other condition similar to ~~((mental retardation))~~ intellectual disability.

~~((3-DDD))~~ (2) DDA will review your eligibility prior to the initial authorization of any paid service from ~~((DDD))~~ DDA when you are not currently receiving paid services and~~(:~~

~~(a) You))~~ you are age ~~((eighteen))~~ nineteen or older and your most current eligibility determination ~~((is more than twenty-four months old; or~~

~~(b) You are age four but under age eighteen and your eligibility was established under the eligible conditions of developmental delay or Down syndrome and your eligibility effective date is))~~ was made prior to ~~((July))~~ June 1, 2005.

~~((4-DDD))~~ (3) DDA will review your eligibility if ~~((DDD))~~ DDA discovers:

~~(a) Your eligibility determination was made in error; or~~

~~(b) The evidence used to make your most recent eligibility determination ((completed in 1992 or later)) appears to be insufficient, in error, or fraudulent; or~~

~~((b))~~ (c) New diagnostic information becomes available that does not support your current eligibility ((and you are under the age of eighteen)) determination.

(4) If DDA requires additional information to make a determination of eligibility during a review and you do not respond to the request for additional information, DDA will terminate your eligibility and any DDA services you are receiving either:

(a) On your twentieth birthday if the review is because you will be turning twenty; or

(b) Ninety days after DDA requests the information if the review is because you have requested a paid service.

Reviser's note: The bracketed material preceding the section above was supplied by the code reviser's office.

Reviser's note: RCW 34.05.395 requires the use of underlining and deletion marks to indicate amendments to existing rules. The rule published above varies from its predecessor in certain respects not indicated by the use of these markings.

AMENDATORY SECTION (Amending WSR 05-12-130, filed 6/1/05, effective 7/2/05)

WAC 388-823-1015 What is the definition of "~~((DDD))~~ DDA paid services" in WAC ~~((388-823-1010(3)))~~ 388-823-1010(2)? ~~((DDD paid services are defined by one or more of the following:~~

~~(1))~~ Authorization of a paid service within the last ninety days as evidenced by a social services ~~((payment system (SSPS)))~~ authorization in the DSHS payment system, a county authorization for day program services, a ~~((waiver plan of care approving a DDD paid service, or))~~ DDA individual service plan approving a DDA service or program, residence in a SOLA, RHC, or ((HMR (authorization of a state supplementary payment through SSPS does not meet the definition of a DDD paid service);

~~(2) Authorization of family support services within the last twelve months.~~

~~(3-Documentation))~~ ICF/ID, or documentation of ~~((DDD))~~ DDA approval of your absence from ~~((DDD))~~ DDA paid services for more than ninety days with available funding for your planned return to services.

Reviser's note: RCW 34.05.395 requires the use of underlining and deletion marks to indicate amendments to existing rules. The rule published

above varies from its predecessor in certain respects not indicated by the use of these markings.

AMENDATORY SECTION (Amending WSR 05-12-130, filed 6/1/05, effective 7/2/05)

WAC 388-823-1020 Can ~~((DDD))~~ DDA terminate my eligibility if I no longer am a resident of the state of Washington? ~~((DDD))~~ DDA will terminate your eligibility if you lose residency in the state of Washington as defined in WAC 388-823-0050.

AMENDATORY SECTION (Amending WSR 05-12-130, filed 6/1/05, effective 7/2/05)

WAC 388-823-1030 How will I know that my eligibility is expiring or is due for review? If your eligibility has a required expiration or review date, ~~((DDD))~~ DDA will send you prior written notification with reapplication or review information.

AMENDATORY SECTION (Amending WSR 05-12-130, filed 6/1/05, effective 7/2/05)

WAC 388-823-1060 How will ~~((DDD))~~ DDA notify me of its decision? ~~((DDD))~~ DDA will notify you and your legal representative or one other responsible party in writing of its determination of eligibility, ineligibility, or expiration of eligibility per WAC 388-825-100.

AMENDATORY SECTION (Amending WSR 05-12-130, filed 6/1/05, effective 7/2/05)

WAC 388-823-1070 What are my appeal rights to a department decision that I ~~((do not have a developmental disability))~~ am not eligible to be a client of DDA? Your appeal rights to a department decision that you are not eligible to be a ~~((DDD))~~ DDA client because you do not ~~((have))~~ meet the requirements for a developmental disability as outlined in this WAC chapter are limited to those described in WAC 388-825-120 through 388-825-165.

AMENDATORY SECTION (Amending WSR 05-12-130, filed 6/1/05, effective 7/2/05)

WAC 388-823-1080 If ~~((DDD))~~ DDA decides that I do not ~~((have a developmental disability, how soon))~~ meet the requirements for eligibility, can I reapply for another decision? If ~~((DDD))~~ DDA decides that you do not ~~((have a developmental disability))~~ meet the requirements for eligibility, as defined in this chapter, ((you may reapply)) DDA will only accept a new application if:

~~(1) Your eligibility was terminated because ~~((DDD))~~ DDA could not locate you and you have subsequently contacted ~~((DDD))~~ DDA;~~

~~(2) Your eligibility was terminated because you lost residency in the state of Washington and you have reestablished residency;~~

~~(3) You have additional or new information relevant to the determination that ~~((DDD))~~ DDA did not review for the previous determination of eligibility~~((:~~~~

~~(4) DDD denied or terminated your eligibility based solely on your ICAP score and it has been more than twenty-four months since your last ICAP).~~

(a) The only acceptable new information considered is diagnostic information, FSIQ tests, or adaptive skills tests.

(b) DDA will only accept adaptive skills tests as new information if you provide evidence that your prior scores were invalid or if you provide evidence of a loss of functioning related to your qualifying condition.

(c) DDA will not administer an ICAP if you have a previous, valid ICAP or adaptive skills test score that is current within the past thirty-six months.

AMENDATORY SECTION (Amending WSR 05-12-130, filed 6/1/05, effective 7/2/05)

WAC 388-823-1090 If I am already eligible, how do these new rules affect me? If you are an eligible ~~((DDD))~~ DDA client on the effective date of these rules, you continue to be an eligible ~~((DDD))~~ DDA client but you are subject to the expiration and required eligibility reviews per WAC 388-823-1000 through ~~((388-823-1050))~~ 388-823-1030.

AMENDATORY SECTION (Amending WSR 05-12-130, filed 6/1/05, effective 7/2/05)

WAC 388-823-1095 What are my rights as a ~~((DDD))~~ DDA client? As a ~~((DDD))~~ DDA client, you have the following rights:

(1) The right to be free from any kind of abuse or punishment (verbal, mental, physical, and/or sexual); or being sent to a place by yourself, if you do not choose to be alone;

(2) The right to appeal any decision by ~~((DDD))~~ DDA that denies, reduces, or terminates your eligibility, your services or your choice of provider;

(3) The right to receive only those services you agree to;

(4) The right to meet with and talk privately with your friends and family;

(5) The right to personal privacy and confidentiality of your personal and other records;

(6) The right to choose activities, schedules, and health care that meet your needs;

(7) The right to be free from discrimination because of your race, color, creed, national origin, religion, sex, age, disability, marital status, gender identity, or sexual orientation;

(8) The right to set your own rules in your home and to know what rules your providers have when you are living in their house or working in their facility;

(9) The right to request information regarding services that may be available from ~~((DDD))~~ DDA;

(10) The right to know what your doctor wants you to do or take and to help plan how that will happen;

(11) The right to be free from unnecessary medication, restraints and restrictions;

(12) The right to vote and help people get elected to office;

(13) The right to complain and not to have someone "get even";

(14) The right to have your provider listen to your concerns including those about the behavior of other people where you live;

(15) The right to receive help from an advocate;

(16) The right to manage your money or choose other persons to assist you;

(17) The right to be part of the community;

(18) The right to make choices about your life;

(19) The right to wear your clothes and hair the way you want;

(20) The right to work and be paid for the work you do; and

(21) The right to decide whether or not to participate in research after the research has been explained to you, and after you or your guardian gives written consent for you to participate in the research~~((;))~~.

AMENDATORY SECTION (Amending WSR 05-12-130, filed 6/1/05, effective 7/2/05)

WAC 388-823-1100 How do I complain to ~~((DDD))~~ DDA about my services or treatment? If you have a complaint or grievance about your services or treatment, follow these steps in this order:

(1) First, contact your case resource manager or social worker by phone, in writing, e-mail, or in person and explain your problem.

(2) If you are not happy with the results from speaking with your case resource manager or social worker, you may ask to speak with their supervisor.

(3) If steps (1) and (2) do not solve your problem, you submit your complaint in writing to the regional office.

(4) If you do not reach a solution with the regional office, you can request that your complaint be forwarded to the ~~((DDD))~~ DDA headquarters in Olympia.

REPEALER

The following sections of the Washington Administrative Code are repealed:

WAC 388-823-0030 Will I receive paid services if DDD decides that I have a developmental disability?

WAC 388-823-0040 What is a developmental disability?

WAC 388-823-0060 How do I apply to become a client of DDD?

WAC 388-823-0070 Who can apply for an eligibility determination?

WAC 388-823-0110 Who is responsible for obtaining the documentation needed to make this eligibility determination?

WAC 388-823-0120 Will my diagnosis of a developmental disability qualify me for DDD eligibility?

WAC 388-823-0130 Can I be eligible for DDD if my disability occurs on or after my eighteenth birthday?

- WAC 388-823-0140 What if I do not have written evidence that my disability began before my eighteenth birthday?
- WAC 388-823-0150 Which rules define a developmental disability if I am a child under the age of six?
- WAC 388-823-0160 Which rules define a developmental disability if I am age six through nine?
- WAC 388-823-0170 Which rules define a developmental disability if I am age ten or older?
- WAC 388-823-0215 What evidence do I need of my FSIQ?
- WAC 388-823-0220 If I am too intellectually impaired to complete a standardized IQ test, how do I meet the criteria under mental retardation?
- WAC 388-823-0230 If I have more than one FSIQ score, what criteria will DDD use to select the FSIQ score for determining eligibility?
- WAC 388-823-0320 What evidence do I need of my need for direct physical assistance with activities of daily living?
- WAC 388-823-0330 How can I document my need for direct physical assistance?
- WAC 388-823-0420 What evidence do I need to substitute adaptive functioning limitations for the eligible conditions of epilepsy, autism and other conditions similar to mental retardation?
- WAC 388-823-0515 What evidence do I need to substantiate adaptive functioning limitations for the condition of autism?
- WAC 388-823-0615 What evidence do I need to substantiate adaptive functioning limitations for another neurological condition?
- WAC 388-823-0700 How do I meet the definition for an "other condition" similar to mental retardation?
- WAC 388-823-0710 What evidence do I need to meet the definition of substantial limitations for an "other condition" similar to mental retardation?
- WAC 388-823-0800 Which eligible developmental disability conditions apply at what age?
- WAC 388-823-0810 If I am a child under age ten, what evidence do I need to meet the definition for an "other condition" similar to mental retardation?
- WAC 388-823-0820 If I am a child under age ten with an eligible condition under the medically intensive program, Down syndrome, or a diagnosed condition that is too severe for developmental testing, how do I meet the definition of substantial limitations to adaptive functioning?
- WAC 388-823-0830 If I am a child under age ten with an eligible condition based on developmental delays, how do I meet the definition of substantial limitations to adaptive functioning?
- WAC 388-823-0840 If I am a child under age ten, how many areas of developmental delays meet the definition of substantial limitations to adaptive functioning?
- WAC 388-823-0850 What developmental evaluations or assessments will be acceptable for determining developmental delay?
- WAC 388-823-0900 What are the qualifying scores for inventory of client and agency planning broad independence for each age?
- WAC 388-823-1040 What happens if I do not reapply for eligibility before my eligibility expiration date?
- WAC 388-823-1050 What happens if I do not respond to a request for information to review my eligibility?

WSR 14-13-002
PERMANENT RULES
DEPARTMENT OF
EARLY LEARNING

[Filed June 4, 2014, 2:40 p.m., effective July 5, 2014]

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

Purpose: To align the department of early learning's director's list of crimes that permanently disqualify an individual from authorization to care for or have unsupervised access to children with department of social and health services' secretary's list of crimes and negative actions for which a person is denied unsupervised access to vulnerable adults, juveniles, and children by removing "carnal knowledge" from the director's list.

Citation of Existing Rules Affected by this Order:
Amending WAC 170-06-0120.

Statutory Authority for Adoption: RCW 43.215.060 and 43.215.070; chapter 43.215 RCW.

Adopted under notice filed as WSR 14-09-011 on April 4, 2014.

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

Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

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

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

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

Date Adopted: June 4, 2014.

Elizabeth M. Hyde
Director

AMENDATORY SECTION (Amending WSR 12-12-040, filed 5/30/12, effective 7/1/12)

WAC 170-06-0120 Director's list. (1) A subject individual's conviction for any crimes listed in column (a) in the table below will permanently disqualify him or her from authorization to care for or have unsupervised access to children in child care.

(2) A subject individual's conviction for any crime listed in column (b) in the table below will disqualify him or her from authorization to care for or have unsupervised access to children in child care for a period of five years from the date of conviction.

| (a) Crimes that permanently disqualify a subject individual | (b) Crimes that disqualify a subject individual for five years from date of conviction |
|---|--|
| Abandonment of a child | Abandonment of a dependent person not against child |
| Arson | Assault 3 not domestic violence |
| Assault 1 | Assault 4/simple assault |
| Assault 2 | Burglary |
| Assault 3 domestic violence | Coercion |
| Assault of a child | Custodial assault |
| Bail jumping | Custodial sexual misconduct |
| ((Carnal knowledge)) | Extortion 2 |
| Child buying or selling | Forgery |
| Child molestation | Harassment |
| Commercial sexual abuse of a minor | |
| Communication with a minor for immoral purposes | Identity theft |
| Controlled substance homicide | Leading organized crime |

| (a) Crimes that permanently disqualify a subject individual | (b) Crimes that disqualify a subject individual for five years from date of conviction |
|---|--|
| Criminal mistreatment | Malicious explosion 3 |
| Custodial interference | Malicious mischief |
| Dealing in depictions of minor engaged in sexually explicit conduct | Malicious placement of an explosive 2 |
| Domestic violence (felonies only) | Malicious placement of an explosive 3 |
| Drive-by shooting | Malicious placement of imitation device 1 |
| Extortion 1 | Patronizing a prostitute |
| Harassment domestic violence | Possess explosive device |
| Homicide by abuse | Promoting pornography |
| Homicide by watercraft | Promoting prostitution 1 |
| Incendiary devices (possess, manufacture, dispose) | Promoting prostitution 2 |
| Incest | Promoting suicide attempt |
| Indecent exposure/public indecency (felonies only) | Prostitution |
| Indecent liberties | Reckless endangerment |
| Kidnapping | Residential burglary |
| Luring | Stalking |
| Malicious explosion 1 | Theft |
| Malicious explosion 2 | Theft-welfare |
| Malicious harassment | Unlawful imprisonment |
| Malicious mischief domestic violence | Unlawful use of a building for drug purposes |
| Malicious placement of an explosive 1 | Violation of the Imitation Controlled Substances Act (manufacture/deliver/intent) |
| Manslaughter | Violation of the Uniform Controlled Substances Act (manufacture/deliver/intent) |
| Murder/aggravated murder | Violation of the Uniform Legend Drug Act (manufacture/deliver/intent) |
| | Violation of the Uniform Precursor Drug Act (manufacture/deliver/intent) |
| Possess depictions minor engaged in sexual conduct | |
| Rape | |
| Rape of child | |
| Robbery | |

| (a) Crimes that permanently disqualify a subject individual | (b) Crimes that disqualify a subject individual for five years from date of conviction |
|--|---|
| Selling or distributing erotic material to a minor | |
| Sending or bringing into the state depictions of a minor | |
| Sexual exploitation of minors | |
| Sexual misconduct with a minor | |
| Sexually violating human remains | |
| Use of machine gun in felony | |
| Vehicular assault | |
| Vehicular homicide (negligent homicide) | |
| Violation of child abuse restraining order | |
| Violation of civil anti-harassment protection order | |
| Violation of protection/contact/restraining order | |
| Voyeurism | |

Citation of Existing Rules Affected by this Order:
Amending WAC 460-10A-160.

Statutory Authority for Adoption: RCW 21.20.450, 21.20.320(2).

Adopted under notice filed as WSR 14-07-062 on March 17, 2014.

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

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

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

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

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

Date Adopted: June 5, 2014.

Scott Jarvis
Director

AMENDATORY SECTION (Amending WSR 98-17-013, filed 8/10/98, effective 9/10/98)

WAC 460-10A-160 Nationally recognized securities manual. For the purpose of WAC 460-44A-100, "Nationally recognized securities manual" shall mean: *Fitch Investors Service, ((Moody's)) Mergent's Investor((s)) Service, and Standard and Poor's Corporation Records.*

WSR 14-13-005
PERMANENT RULES
DEPARTMENT OF
FINANCIAL INSTITUTIONS
(Securities Division)

[Filed June 5, 2014, 9:05 a.m., effective July 6, 2014]

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

Purpose: The securities division is hereby amending WAC 460-10A-160 to update a reference to securities manuals that are no longer in existence. Several years ago, the credit rating agency and securities manual publisher known as "Moody's Investor Service" (Moody's) sold to a company named Mergent's, Inc. (Mergent's). The services and functions provided by Moody's continue to operate under the Mergent's title. WAC 460-10A-160 defines "nationally recognized securities manual" as securities manuals published by "Fitch Investors Service, Moodys Investors Service, and Standard and Poor's Corporation Records." Because Moody's is no longer in existence, we have removed the reference in WAC 460-10A-160 to "Moody's Investor Service" and have replaced it with a reference to "Mergent's Investor Service."

WSR 14-13-006
PERMANENT RULES
PROFESSIONAL EDUCATOR
STANDARDS BOARD

[Filed June 5, 2014, 9:54 a.m., effective July 6, 2014]

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

Purpose: Amends WAC 181-79A-257 to comply with statute requirements for expedited applications for out-of-state candidate[s] for teacher certification that are military spouses per RCW 18.340.020.

Citation of Existing Rules Affected by this Order:
Amending WAC 181-79A-257.

Statutory Authority for Adoption: RCW 28A.410.210.

Adopted under notice filed as WSR 14-08-043 on March 27, 2014.

A final cost-benefit analysis is available by contacting David Brenna, 600 Washington Street South, Room 252, Olympia, WA 98504-7236, phone (360) 725-6238, fax (360) 586-4548, e-mail david.brenna@k12.wa.us.

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

Recently Enacted State Statutes: New 0, Amended 1, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

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

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

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

Date Adopted: June 5, 2014.

David Brenna
Senior Policy Analyst

AMENDATORY SECTION (Amending WSR 11-15-038, filed 7/13/11, effective 8/13/11)

WAC 181-79A-257 Out-of-state candidates. Candidates for certification from other states who meet the general certificate requirements described in WAC 181-79A-150 (1) and (2) shall be eligible for Washington certificates as follows:

(1) Residency certificates. The residency certificate shall be issued by the superintendent of public instruction to any candidate who meets requirements for the residency certificate including testing requirements as described in RCW 28A.410.220, and who meets one of the following:

(a) Holds the appropriate degree and, if applicable, credit hours and/or licensing as set forth in this chapter has completed a state approved preparation program in the professional field for which the certificate is to be issued and such additional professional fields as required by WAC 181-79A-150(4). Such programs shall include a defined course of study and a supervised internship.

(b) Provided, That if a candidate for teacher, administrator or educational staff associate certification does not meet the qualifications described in (a) of this subsection, a residency certificate shall be issued to a candidate who:

(i) Holds an appropriate degree from a regionally accredited college or university.

(ii) Holds or has held a certificate in the role, comparable to a residency certificate, issued by another state and has practiced at the P-12 level in the role outside the state of Washington for at least three years within the last seven years.

(c) Holds an appropriate degree from a regionally accredited college or university and has practiced three years as an educational staff associate in that role in a state where such certificate was not required.

(d) Holds a valid Nationally Certified School Psychologist (NCSP) certificate issued by the National School Psychology Certification Board (NSPCB) after December 31, 1991, and applies for an initial/residency educational staff associated school psychologist certificate.

(2) Professional certificate. After August 31, 2000, the professional certificate shall be issued to out-of-state candidates if the candidate meets requirements for the residency

certificate including testing requirements as described in RCW 28A.410.220, meets the child abuse course work requirement as described in WAC 181-79A-206 (3)(b), and if one of the following conditions is met:

(a) The candidate has completed an advanced level certification procedure approved by the professional educator standards board as equivalent to the approved program procedure required in Washington; or

(b) The candidate holds a valid teaching certificate issued by the National Board for Professional Teaching Standards; or

(c) The candidate holds a valid school counselor certificate issued by the National Board for Professional Teaching Standards; or

(d) A Washington state college or university with an approved professional certificate program verifies that the candidate has met all the requirements of that institution's approved program. The college/university shall evaluate the candidate's background to determine whether or not course work or certification activities are equivalent to that college/university's approved program.

(3) As per RCW 18.340.020 out-of-state candidates who are military spouses shall receive expedited issuance of the appropriate certificate in accordance with this section.

WSR 14-13-016

PERMANENT RULES

DEPARTMENT OF HEALTH

(Veterinary Board of Governors)

[Filed June 6, 2014, 4:23 p.m., effective July 7, 2014]

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

Purpose: WAC 246-933-530 Purchase and use of legend drugs and controlled substances, 246-933-550 Investigation, and 246-935-410 Definitions. The rules change references from the board of pharmacy to the pharmacy quality assurance commission. HB 1609 (chapter 19, Laws of 2013), effective July 28, 2013, changed the title and reference of the board of pharmacy to the pharmacy quality assurance commission. The rules do not create any additional requirements.

Citation of Existing Rules Affected by this Order: Amending WAC 246-933-530, 246-933-550, and 246-935-410.

Statutory Authority for Adoption: RCW 18.92.030(2).

Adopted under notice filed as WSR 14-02-059 on December 26, 2013.

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

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

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

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

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

Date Adopted: June 6, 2014.

Ethan C. Nelson, DVM, Chair
Veterinary Board of Governors

AMENDATORY SECTION (Amending WSR 03-14-035, filed 6/23/03, effective 7/24/03)

WAC 246-933-530 Purchase and use of legend drugs and controlled substances. (1) For purposes of this section, "drugs" includes both legend drugs and controlled substances.

(a) "Legend drugs" means any drugs that are required by state law or regulation of the ((state board of)) pharmacy quality assurance commission to be dispensed on prescription only or are restricted to use by practitioners only.

(b) "Controlled substances" means a drug, substance, or immediate precursor in Schedule I through V of Article II of chapter 69.50 RCW.

(2) A licensed veterinarian shall be responsible for the policies and procedures regarding the ordering, purchasing, safe storage, dispensing and administration of all drugs used at an entity registered under RCW 18.92.260 in connection with surgical sterilization or emergency care. Entities are responsible for the ordering, purchasing, and safe storage of all drugs.

(a) The veterinarian shall comply with the ((state board of)) pharmacy quality assurance commission requirements for controlled substances in chapter 69.50 RCW, and legend drugs in chapter 69.41 RCW.

(b) All drugs shall be stored in accordance with WAC 246-933-320.

(c) All controlled substances shall be stored, maintained, administered, dispensed and prescribed in compliance with federal and Washington state laws.

(d) All legend drugs shall be dispensed in accordance with RCW 18.92.012, 18.92.013, and WAC 246-933-340(5).

(e) A record of all drugs administered and/or dispensed shall be kept in the individual animal's record.

AMENDATORY SECTION (Amending WSR 03-14-035, filed 6/23/03, effective 7/24/03)

WAC 246-933-550 Investigation. Treatment records to include drug use shall be made available to representatives of the veterinary board of governors and the ((board of)) pharmacy quality assurance commission.

AMENDATORY SECTION (Amending WSR 10-06-086, filed 3/1/10, effective 4/1/10)

WAC 246-935-410 Definitions. The definitions in this section apply throughout WAC 246-935-400 through 246-935-440 unless the context clearly requires otherwise.

"Administer" means the direct application of a drug whether by injection, inhalation, ingestion, or any other means, to the body of a patient.

"Controlled substance" means a drug, substance, or immediate precursor included in Schedules I through V as set forth in federal or state laws, or federal or ((board of)) pharmacy quality assurance commission rules.

"Deliver" or "delivery" means the actual, constructive, or attempted transfer from one person to another of a legend drug or controlled substance, whether or not there is an agency relationship.

"Legend drugs" means any drugs which are required by state law or regulation of the ((state board of)) pharmacy quality assurance commission to be dispensed on prescription only or are restricted to use by practitioners only.

"Preparing" includes the proper selection, measuring, labeling, or packaging necessary to prepare a prescription or order from a licensed veterinarian for delivery.

WSR 14-13-051

PERMANENT RULES

DEPARTMENT OF

SOCIAL AND HEALTH SERVICES

(Children's Administration)

[Filed June 12, 2014, 8:11 a.m., effective July 13, 2014]

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

Purpose: The WAC supports E2SSB 5405 - Extended foster care services. E2SSB 5405 authorized children's administration to additionally provide extended foster care services to youth eighteen up to twenty-one years old who are eligible to receive foster care services authorized under RCW 74.13.031 and participating in a program or activity designed to promote employment or remove barriers to employment secondary vocational program. Youth whose dependency has been dismissed may enter a voluntary placement agreement (VPA) one time. A youth must agree to the entry of a dependency order within one hundred eighty days of the date the youth was placed in foster care through the VPA to continue to receive services. CR-102 was filed on November 20, 2013, as WSR 13-23-102 and hearing was held on January 7, 2014.

Citation of Existing Rules Affected by this Order: Repealing WAC 388-25-0518, 388-25-0520, 388-25-0522, 388-25-0524, 388-25-0526 and 388-25-0538; and amending WAC 388-25-0110; 388-25-0502, 388-25-0504, 388-25-0506, 388-25-0508, 388-25-0510, 388-25-0515, 388-25-0516, 388-25-0528, 388-25-0530, 388-25-0532, 388-25-0534, 388-25-0536, 388-25-0540, 388-25-0544, 388-25-0546, 388-25-0548, and 388-148-0010.

Statutory Authority for Adoption: RCW 13.34.145, 13.34.267, 74.13.020, 74.13.031, 43.88C.010, 74.13.107, 43.131.416, 13.34.030.

Adopted under notice filed as WSR 13-23-102 on November 20, 2013.

Changes Other than Editing from Proposed to Adopted Version: Change was made to:

- WAC 388-25-0508(2), removed the time frame for youth who are expected to return to care in order to be considered in foster care.
- WAC 388-25-0510(4), removed the reference to youth who are absent from placement.

- WAC 388-25-0534(2), changed the WAC being referenced from WAC 388-148-2506 to 388-25-2506.
- WAC 388-148-0010, definition of VPA to reflect "eligible youth" instead of "nonminor dependents."

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 17, Repealed 6; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

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

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

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 17, Repealed 6.

Date Adopted: June 11, 2014.

Katherine I. Vasquez
Rules Coordinator

Reviser's note: The material contained in this filing exceeded the page-count limitations of WAC 1-21-040 for appearance in this issue of the Register. It will appear in the 14-14 issue of the Register.

WSR 14-13-056
PERMANENT RULES
DEPARTMENT OF
EARLY LEARNING

[Filed June 12, 2014, 10:51 a.m., effective July 13, 2014]

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

Purpose: To revise family home child care licensing minimum standards rules to include children age six in the definition of "preschool age child."

Citation of Existing Rules Affected by this Order: Amending WAC 170-296A-0010.

Statutory Authority for Adoption: RCW 43.215.060 and 43.215.070; chapter 43.215 RCW.

Adopted under notice filed as WSR 14-09-033 on April 10, 2014.

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

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

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

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

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

New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 1, Repealed 0.

Date Adopted: June 12, 2014.

Elizabeth M. Hyde
Director

AMENDATORY SECTION (Amending WSR 12-21-050, filed 10/12/12, effective 11/12/12)

WAC 170-296A-0010 Definitions. The following definitions apply throughout this chapter unless the context clearly indicates otherwise. Certain definitions appear in the section the term is used if the definition applies only to a specific section or sections:

"Accessible to children" means areas of the facility and materials that the children can easily get to on their own.

"Agency" as used in this chapter, has the same meaning as in RCW 43.215.010 (1)(c).

"Available" means accessible and ready for use or service.

"Bathroom" means any room containing a built-in flush-type toilet.

"Capacity" means the maximum number of children the licensee is authorized by the department to have in care at any given time.

"Child" means an individual who is younger than age thirteen, including any infant, toddler, preschool-age child, or school-age child as defined in this chapter.

"Child abuse or neglect" has the same meaning as "abuse or neglect" under RCW 26.44.020 and chapter 388-15 WAC.

"Child care" means the developmentally appropriate care, protection, and supervision of children that is designed to promote positive growth and educational experiences for children outside the child's home for periods of less than twenty-four hours a day.

"Clean" or **"cleaning"** means to remove dirt and debris (such as soil, food, blood, urine, or feces) by scrubbing and washing with a soap or detergent solution and rinsing with water. Cleaning is the first step in the process of sanitizing or disinfecting a surface or item.

"Confidential" means the protection of personal information, such as the child's records, from persons who are not authorized to see or hear it.

"Denial of a license" means an action by the department to not issue a child care license to an applicant for an initial license, or to a licensee operating under an initial license seeking a nonexpiring full license, based on the applicant's or initial licensee's inability or failure to meet the requirements of chapter 43.215 RCW or requirements adopted by the department pursuant to chapter 43.215 RCW.

"Department" or **"DEL"** means the Washington state department of early learning.

"Developmentally appropriate" means curriculum, materials or activities provided at a level that is consistent with the abilities or learning skills of the child.

"Discipline" means a method used to redirect a child in order to achieve a desired behavior.

"Disinfect" or **"disinfecting"** means to eliminate virtually all germs on a surface by the process of cleaning and rinsing, followed by:

(a) A chlorine bleach and water solution of one tablespoon of chlorine bleach to one quart of cool water, allowed to stand wet for at least two minutes; or

(b) Other disinfectant product if used strictly according to the manufacturer's label instructions including, but not limited to, quantity used, time the product must be left in place, adequate time to allow the product to dry or rinsing if applicable, and appropriateness for use on the surface to be disinfected. Any disinfectant used on food contact surfaces or toys must be labeled safe for food contact surfaces.

"DOH" means the Washington state department of health.

"DSHS" means the Washington state department of social and health services.

"Enforcement action" means a department issued:

(a) Denial, suspension, revocation or modification of a license;

(b) Probationary license;

(c) Civil monetary penalty (fine); or

(d) Disqualification from having unsupervised access to children in care.

"Family home child care" means a facility licensed by the department where child care is provided for twelve or fewer children in the family living quarters where the licensee resides as provided in RCW 43.215.010 (1)(c).

"Family living quarters" means a licensee's or license applicant's residence and other spaces or buildings on the premises that meet the facility requirements of this chapter and are approved by the department for child care.

"Fine" has the same meaning as "civil monetary penalty," "civil fines," or "monetary penalty" under chapter 43.215 RCW.

"Inaccessible to children" means an effective method or barrier that reasonably prevents a child's ability to reach, enter, or use items or areas.

"Infant" means a child age birth through eleven months of age.

"Licensed space" means the indoor and outdoor space on the premises approved by the department for the purpose of providing licensed child care.

"Licensee" for the purposes of this chapter, means the individual listed on a family home child care license issued by the department of early learning authorizing that individual to provide child care under the requirements of this chapter and chapter 43.215 RCW.

"Licensor" means an individual employed by the department and designated by the director to inspect and monitor an agency or other child care facility for compliance with the requirements of this chapter and chapter 43.215 RCW.

"MERIT" means the managed education registry information tool used to track professional development for early learning professionals. See also "STARS."

"Modification of a license" means department action to change the conditions identified on a current license.

"Nonexpiring full license" or **"nonexpiring license"** means a full license that is issued to a licensee following the initial licensing period as provided in WAC 170-296A-1450.

"Nonprescription medication" means any of the following:

(a) Nonaspirin fever reducers or pain relievers;

(b) Nonnarcotic cough suppressants;

(c) Cold or flu medications;

(d) Antihistamines or decongestants;

(e) Vitamins;

(f) Ointments or lotions specially intended to relieve itching;

(g) Diaper ointments and talc free powders specially used in the diaper area of children;

(h) Sun screen;

(i) Hand sanitizer gels; or

(j) Hand wipes with alcohol.

"One year of experience" means at least twelve months of early learning experience as demonstrated by a resume and references:

(a) In a supervisory role in a child care setting where the individual was responsible for supervising staff and complying with licensing standards; or

(b) As a Washington state:

(i) Child care center or school age center director, program supervisor, or lead teacher as defined in chapters 170-151 and 170-295 WAC; or

(ii) Family home child care licensee or qualified primary staff person.

"Overnight care" means child care provided for a child anytime between the hours of eight o'clock at night and six o'clock in the morning that includes a sleep period for the child.

"Personal needs" means an individual's hygiene, toileting, medication, cleansing, eating or clothing needs. "Personal needs" does not mean smoking or use of tobacco products, illegal drug use or misuse of prescription drugs, conducting business or related activities, sleeping or napping, screen time, or leaving children in care unattended.

"Physical restraint" means the practice of rendering a child helpless or keeping a child in captivity.

"Poison" for the purposes of this chapter includes, but is not limited to, substances, chemicals, chemical compounds (other than naturally occurring compounds such as water or salt), or similar items, that even in small quantities are likely to cause injury or illness if it is swallowed or comes into contact with a child's skin, eyes, mouth, or mucus membranes.

"Premises" means the licensed or unlicensed space at the licensed address including, but not limited to, buildings, land and residences.

"Preschool age child" means a child age thirty months through ~~(five)~~ six years of age who is not attending kindergarten or elementary school.

"Primary staff person" means a staff person other than the licensee who has been authorized by the department to care for and have unsupervised access to children in care.

"RCW" means Revised Code of Washington.

"Revocation" or **"revoke"** means the formal action by the department to close a child care business and take the license due to the licensee's failure to comply with chapter

43.215 RCW or requirements adopted pursuant to chapter 43.215 RCW.

"Sanitize" means to reduce the number of microorganisms on a surface by the process of:

(a) Cleaning and rinsing, followed by using:

(i) A chlorine bleach and water solution of three-quarters teaspoon of chlorine bleach to one quart of cool water, allowed to stand wet for at least two minutes; or

(ii) Another sanitizer product if used strictly according to manufacturer's label instructions including, but not limited to, quantity used, time the product must be left in place, and adequate time to allow the product to dry, and appropriateness for use on the surface to be sanitized. If used on food contact surfaces or toys, a sanitizer product must be labeled as safe for food contact surfaces; or

(b) For laundry and dishwasher use only, "sanitize" means use of a bleach and water solution or temperature control.

"School age child" means a child not less than five years of age through twelve years of age who is attending kindergarten or school.

"Screen time" means watching, using or playing television, computers, video games, video or DVD players, mobile communication devices, and similar devices.

"Sleeping equipment" includes a bed, cot, mattress, mat, crib, bassinet, play yard or "pack and play." "Sleeping equipment" does not include any car seat or infant swing.

"Staff" unless referring specifically to a "primary staff person," means any primary staff person, assistant, or volunteer helping to provide child care, or a household member acting in the capacity of a primary staff person, assistant or volunteer, whether compensated or not compensated.

"STARS" means the state training and registry system.

"Suspension of a license" means a formal department action to stop a license pending a department decision regarding further enforcement action.

"Toddler" means a child age twelve months through twenty-nine months of age.

"Unlicensed space" means the indoor and outdoor areas of the premises, not approved as licensed space by DEL, that the licensee must make inaccessible to the children during child care hours.

"Unsupervised access" has the same meaning as "unsupervised access" in WAC 170-06-0020.

"WAC" means the Washington Administrative Code.

"Weapons" means an instrument or device of any kind that is used or designed to be used to inflict harm including, but not limited to, rifles, handguns, shotguns, antique firearms, knives, swords, bows and arrows, BB guns, pellet guns, air rifles, electronic or other stun devices, or fighting implements.

WSR 14-13-057
PERMANENT RULES
DEPARTMENT OF
EARLY LEARNING

[Filed June 12, 2014, 11:04 a.m., effective July 13, 2014]

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

Purpose: To revise child care center licensing minimum standards rules to include children age six in the definition of "preschool age child" and to allow mixed age groups to include infants walking independently, and to reorganize certain affected sections for greater clarity.

Citation of Existing Rules Affected by this Order: Amending WAC 170-295-0010, 170-295-2090, 170-295-2100, and 170-295-5100.

Statutory Authority for Adoption: RCW 43.215.060 and 43.215.070; chapter 43.215 RCW.

Adopted under notice filed as WSR 14-09-035 on April 10, 2014.

Changes Other than Editing from Proposed to Adopted Version: Based on comments received, the term "ambulatory" as used in WAC 170-295-2100 was replaced with the phrase "walking independently." A definition of "walking independently" was inserted in the section. Also based on comments received, language was inserted in the section stating that mixed groups including infants walking independently as described in subsections (1) and (3) must not include school-age children.

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

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 0, Amended 4, Repealed 0.

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

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 4, Repealed 0.

Date Adopted: June 12, 2014.

Elizabeth M. Hyde
 Director

AMENDATORY SECTION (Amending WSR 13-21-109, filed 10/22/13, effective 11/22/13)

WAC 170-295-0010 What definitions under this chapter apply to licensed child care providers? "American Indian child" means any unmarried person under the age of eighteen who is:

(1) A member or eligible for membership in a federally recognized Indian tribe, or who is Eskimo, Aleut, or other Alaska native and a member of an Alaskan native regional corporation or Alaska native village;

(2) Determined or eligible to be found Indian by the Secretary of the Interior, including through issuance of a certifi-

cate of degree of Indian blood, or by the Indian health service;

(3) Considered to be Indian by a federally recognized or nonfederally recognized Indian tribe; or

(4) A member or entitled to be a member of a Canadian tribe or band, Metis community, or nonstatus Indian community from Canada.

"Anti-bias" is an approach that works against biases and recognizes when others are treated unfairly or oppressively based on race, color, national origin, marital status, gender, sexual orientation, class, religion, creed, disability, or age.

"CACFP" means child and adult care food program established by congress and funded by the United States Department of Agriculture (USDA).

"Capacity" means the maximum number of children that a licensee is authorized to have on the premises of the child care at any one time.

"Center" means the same as **"child care center."**

"Certification" means department approval of a person, home, or facility that does not legally need to be licensed, but wants evidence that they meet the minimum licensing requirements (also see **"Tribal certification"**).

"Child abuse or neglect" means the physical abuse, sexual abuse, sexual exploitation, abandonment or negligent treatment or maltreatment of a child by any person indicating the child's health, welfare, and safety is harmed.

"Child-accessible" means areas where children regularly have access such as: Entrances and exits to and from the center, classrooms or child care areas, playground area including equipment and fencing, parking areas, walkways, decks, platforms, stairs and any items available for children to use in these areas.

"Child care center" means the same as a **"child day care center"** or a facility providing regularly scheduled care for a group of children one month of age through twelve years of age for periods less than twenty-four hours.

"Clean" means to remove dirt and debris from a surface by scrubbing and washing with a detergent solution and rinsing with water. This process must be accomplished before sanitizing a surface.

"Commercial kitchen equipment" means equipment designed for business purposes such as restaurants.

"Contagious disease" means as provided in WAC 246-110-010.

"Cultural relevancy" creates an environment that reflects home cultures, communities and lives of children enrolled in the program.

"Department," "we," "us," or "our" refers to and means the state department of early learning (DEL) and its predecessor agency the department of social and health services (DSHS).

"Developmentally appropriate practice":

(1) Means that the provider should interact with each child in a way that recognizes and respects the child's chronological and developmental age;

(2) Is based on knowledge about how children grow and learn; and

(3) Reflects the developmental level of the individual child, and interactions and activities must be planned with the needs of the individual child in mind.

"Director" means the person responsible for the overall management of the center's facility and operation, except that **"DEL director"** means the director of the department of early learning.

"Disinfect" means to eliminate virtually all germs from inanimate surfaces through the use of chemicals or physical agents.

"Domestic kitchen" means a kitchen equipped with residential appliances.

"External medication" means a medication that is not intended to be swallowed or injected but is to be applied to the external parts of the body, such as medicated ointments, lotions, or liquids applied to the skin or hair.

"I," "you," and "your" refer to and mean the licensee or applicant for a child care license.

"Inaccessible to children" means stored or maintained in a manner preventing children from reaching, entering, or using potentially hazardous items or areas. Examples include but are not limited to: Quantities of water, sharp objects, medications, chemicals, electricity, fire, mechanical equipment, entrapment or fall areas.

"Individual plan of care" means that the center's health policies and procedures do not cover the needs of the individual child so an individual plan is needed. Examples may include children with allergies, asthma, Down syndrome, tube feeding, diabetes care such as blood glucose monitoring, or nebulizer treatments.

"Infant" means a child one-month through eleven months of age.

"Lead teacher" means the person who is the lead child care staff person in charge of a child or group of children and implementing the activity program.

"License" means a permit issued by the department authorizing a licensee by law to operate a child care center and certifying that the licensee meets the minimum requirements under licensure.

"Licensee" or **"you"** means the person, organization, or legal entity responsible for operating the center.

"Maximum potential capacity based on square footage" is the maximum number of children a licensee can be licensed for based on the amount of usable space (square footage) in the licensee's center. The licensee may be licensed for less than the maximum potential capacity. A licensee may not be licensed for more than the maximum potential capacity.

"Moisture impervious" or **"moisture resistant"** means a surface incapable of being penetrated by water or liquids.

"Nonexpiring license" or **"nonexpiring full license"** means a full license that is issued to a licensee following the initial licensing period as provided in WAC 170-295-0095.

"Parent" means birth parent, custodial parent, foster parent, legal guardian, those authorized by the parent or other entity legally responsible for the welfare of the child.

"Pesticides" means chemicals that are used to kill weeds, pests, particularly insects.

"Potable water" means water suitable for drinking by the public as determined by the state department of health or local health jurisdiction.

"Potentially hazardous food" means any food or ingredient that requires temperature control because it supports rapid growth of infectious or toxin forming microorganisms.

~~("Potable water" means water suitable for drinking by the public as determined by the state department of health or local health jurisdiction.)~~

"Premises" means the building where the center is located and the adjoining grounds over which the licensee has control.

"Preschool age child" means a child thirty months through ~~(five)~~ six years of age not attending kindergarten or elementary school.

"Program supervisor" means the person responsible for planning and supervising the center's learning and activity program.

"Sanitize" means a surface must be clean and the number of germs reduced to a level that disease transmissions by that surface are unlikely. This procedure is less vigorous than disinfection.

"Satellite kitchen" means a food service establishment approved by a local health jurisdiction where food is stored, prepared, portioned or packaged for service elsewhere.

"School-age child" means a child not less than five years through twelve years of age who has begun attending kindergarten or elementary school.

"Staff" means a child care giver or group of child care givers employed by the licensee to supervise children served at the center who are authorized by DEL to care for or have unsupervised access to children under chapter 170-06 WAC.

"Supervised access" refers to those individuals at a child care center who have no responsibility for the operation of the center and do not have unsupervised access to children. These individuals are not required to submit a background check form. This includes those persons on the premises for "time limited" activities whose presence is supervised by a center employee and does not affect provider/child ratios or the normal activities or routine of the center. Examples include:

- (1) A person hired to present an activity to the children in care such as a puppet show, cooking activity, and story telling;
- (2) Parent participation as part of a special theme; or
- (3) A relative visiting a child on the premises.

"Terminal room cleaning" means thorough cleaning of walls, ceiling, floor and all equipment, and disinfecting as necessary, in a room which has been used by a person having a contagious disease before it is occupied by another person.

"The Washington state training and registry system (STARS)" means the entity approved by the department to determine the classes, courses, and workshops licensees and staff may take to satisfy training requirement.

"Toddler" means a child twelve months through twenty-nine months of age.

"Tribal certification" means that the department has certified the tribe to receive state payment for children eligible to receive child care subsidies.

"Unsupervised access" refers to those individuals at a child care center who can be left alone with children in the child care center. These individuals must have received a full background authorization clearance under chapter 170-06 WAC.

"Usable space" means the areas that are available at all times for use by the children that do not cause a health or safety hazard.

AMENDATORY SECTION (Amending WSR 06-15-075, filed 7/13/06, effective 7/13/06)

WAC 170-295-2090 What are the required staff to child ratios and maximum group sizes for my center? The following requirements apply to centers licensed for any number of children:

(1) You must ensure the required staff to child ratios are met at all times when children are in your care. ~~((In centers licensed for thirteen or more children,))~~ The licensee must conduct group activities within the group size and staff to child ratio requirements, according to the age of the children:

| If the age of the children is: | Then the staff to child ratio is: | And the maximum group size is: |
|---|-----------------------------------|--------------------------------|
| (a) One month, through 11 months (infant) | 1:4 | 8 |
| (b) Twelve months through 29 months (toddler) | 1:7 | 14 |
| (c) Thirty months through (5 years (preschooler)) <u>six years not attending kindergarten or elementary school (preschool age child)</u> | 1:10 | 20 |
| (d) Five years through 12 years <u>attending kindergarten or elementary school</u> (school-age child) | 1:15 | 30 |

~~(2) ((In centers licensed for twelve or fewer children, you may combine children of different age groups, provided you: (a) Maintain the staff to child ratio designated for the youngest child in the mixed group; and (b) Provide a separate care area when four or more infants are in care. In such case the maximum group size is eight infants.~~

~~(3))~~ You must conduct activities for each group in a specific room or other defined space within a larger area.

~~((4))~~ (3) You must ensure each group is under the direct supervision of a qualified staff person or team of staff involved in directing the child's activities.

~~((5) We may approve reasonable variations to group size limitations if you maintain required staff to child ratios, dependent on:~~

- ~~(a) Staff qualifications;~~
- ~~(b) Program structure; and~~
- ~~(c) Usable square footage.~~

~~(6) After consulting with the child's parent, you may place the individual child in a different age group and serve the child within the different age group's required staff-to-child ratio based on the child's:~~

~~(a) Developmental level; and~~

~~(b) Individual needs.~~

~~(7) You may combine children of different age groups for no more than one hour, provided you maintain the staff-to-child ratio and group size designated for the youngest child in the mixed group.~~

~~(8) In centers licensed for thirteen or more children, you may group ambulatory children between one year and two years of age with older children, provided:~~

~~(a) The total number of children in the group does not exceed twelve; and~~

~~(b) Two staff are assigned to the group.~~

~~(9)) (4) You must ensure the staff person providing direct care and supervision of the child is free of other duties at the time of care.~~

~~((10)) (5) You must maintain required staff-to-child ratios indoors, outdoors, on field trips, and during rest periods. During rest periods, staff may be involved in other activities if:~~

~~(a) Staff remain on the premises; and~~

~~(b) Each child is within continuous visual and auditory range of a staff person.~~

~~((11)) (6) You must ensure staff:~~

~~(a) Attend to the group of children at all times; and~~

~~(b) Keep each child (including school age children) within continuous visual and auditory range of center staff. Toilet trained children using the toilet must be within auditory range of a center staff member.~~

~~((12)) (7) When only one staff person is present, you must ensure a second staff person is readily available in case of emergency.~~

~~((13)) (8) When only one caregiver is required to meet the staff to child ratio, you must be sure there is coverage for emergencies to meet both ratios and worker qualifications by either:~~

~~(a) Posting the name, address, and telephone number of a person who meets the qualifications of at least a lead teacher, who has agreed in writing to be available to provide emergency relief and who can respond immediately; or~~

~~(b) Having a second person that meets the qualifications of at least a lead teacher on the premises who is not needed for the staff to child ratio, but is available to provide emergency relief.~~

~~((14)) (9) Service staff, such as cooks, janitors, or bus drivers, may be counted in the required staff to child ratio if they meet all child care worker qualifications.~~

AMENDATORY SECTION (Amending WSR 06-15-075, filed 7/13/06, effective 7/13/06)

WAC 170-295-2100 What are the exceptions to group sizes and staff to child ratios? (1) If the center is licensed for twelve or fewer children, you may combine children (excluding infants not walking independently) of different age groups if you:

(a) Maintain the staff to child ratio for the youngest child in the mixed group; and

(b) Provide a separate area when infants not walking independently are in care.

(2) ~~((You must conduct activities for each group in a specific room or other specifically defined space within a larger area;))~~ In centers licensed for thirteen or more children, you may group children between one year and two years of age who are walking independently with older children, provided:

(a) The total number of children in the group does not exceed twelve; and

(b) Two staff are assigned to the group.

(3) Excluding infants not walking independently, you may place an individual child in a different age group and serve the child within the different age group's required staff to child ratio ~~((, based on the child's individual needs and developmental level)).~~ Prior to making the change, you must:

(a) Consult with the child's parent ((prior to making the change)); and

(b) Document that the change is appropriate to the child's individual needs and developmental level.

(4) Mixed groups including infants walking independently under subsections (1) and (3) of this section must not include school-age children.

(5) You may combine children of different age groups for periods of no more than one hour at the beginning and end of the day provided you maintain the staff to child ratio and group size designated for the youngest child in the mixed group;

~~((5)) (6) You may have nine infants in a classroom with appropriate square footage if you maintain a ratio of one staff to three infants; and~~

~~((6)) (7) You can request a waiver to group size limitations. If we approve variations to group size limitations, you must maintain the required staff-to-child ratios. Our approval will depend on factors including, but ((is)) not limited to:~~

~~(a) Staff qualifications;~~

~~(b) Program structure;~~

~~(c) Square footage; and~~

~~(d) Lower staff to child ratios.~~

(8) As used in this section, "walking independently" means being able to stand and move about easily without the aid or assistance of or holding on to an object, wall, equipment, or other person.

AMENDATORY SECTION (Amending WSR 06-15-075, filed 7/13/06, effective 7/13/06)

WAC 170-295-5100 What are the requirements for toilets, handwashing sinks and bathing facilities? (1) You must provide:

(a) A toilet room that is vented to the outdoors;

(b) A room with flooring that is moisture resistant and washable;

(c) One flush-type toilet and one adjacent sink for handwashing within auditory (hearing) range of the child care classrooms for every fifteen children and staff;

(d) Toileting privacy for children of opposite genders who are six years of age and older, or when a younger child demonstrates a need for privacy; and

(e) A mounted toilet paper dispenser within arms reach of the user with a constant supply of toilet paper for each toilet.

(2) Children eighteen months of age or younger are not included when determining the number of required flush-type toilets.

(3) If urinals are provided, the number of urinals must not replace more than one-third of the total required toilets.

(4) Toilet fixture heights must be as follows:

| If the age group is: | The toilet fixture height must be: |
|---|---|
| (a) Toddler: Eighteen months through 29 months | (i) Ten - 12 inches (child size); or (ii) Fourteen - 16 inches (adult size) with a safe, easily cleanable platform that is moisture impervious and slip resistant. |
| (b) Preschool or older: Thirty months of age through (five) <u>six</u> years of age not enrolled in kindergarten or elementary school | (i) Ten - 12 inches (child size); or (ii) Fourteen - 16 inches (adult size) with a safe, easily cleanable platform that is moisture impervious and slip resistant. |

(5) Handwashing sink heights must be as follows:

| If the age group is: | The sink height must be: |
|---|--|
| (a) Toddler: Twelve months through 29 months | (i) Eighteen - 22 inches; or (ii) Provide a moisture and slip resistant platform for children to safely reach and use the sink. |
| (b) Preschool or older: Thirty months of age through (five) <u>six</u> years of age not enrolled in kindergarten or elementary school | (i) Twenty-two - 26 inches; or (ii) Provide a moisture and slip resistant platform for children to safely reach and use the sink. |
| (c) School age: Over five years of age or enrolled in kindergarten or elementary school | (i) Twenty-six - 30 inches; or (ii) Provide a moisture and slip resistant platform for children to safely reach and use the sink. |

(6) Infants are not included when determining the number of sinks required for handwashing.

(7) The sink for handwashing must:

(a) Be located in or immediately outside of each toilet room;

(b) Have water controls that are accessible by the intended user; and

(c) Not be used for food preparation, as a drinking water source or a storage area.

(8) You must have:

(a) Single-use paper towels and dispensers; or

(b) Heated air-drying devices.

(9) You must use soap from some type of dispenser to prevent the spread of bacteria from the soap.

(10) If the center is equipped with a bathing facility, you must:

(a) Have parent permission to bathe children;

(b) Equip the bathing facility with a conveniently located grab bar and a nonskid pad or surface; and

(c) Provide constant supervision for the child five years of age and younger and older children who require supervision.

(11) You must make the bathing facility inaccessible to children when not in use.

WSR 14-13-060

PERMANENT RULES

DEPARTMENT OF

SOCIAL AND HEALTH SERVICES

(Aging and Long-Term Support Administration)

[Filed June 12, 2014, 2:24 p.m., effective July 13, 2014]

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

Purpose: The department is repealing the chronic care management (CCM) program as the CCM state plan service ended on October 31, 2013. Washington has received approval from the Centers for Medicare and Medicaid Services to offer health home services under its medicaid program. Health home services are comparable to CCM services. The state's new health home service contracted through the health care authority will replace the CCM program.

Citation of Existing Rules Affected by this Order: Repealing 388-106-1500, 388-106-1505, 388-106-1510, 388-106-1515, 388-106-1520, 388-106-1525, 388-106-1530 and 388-106-1535; and amending WAC 388-106-0010.

Statutory Authority for Adoption: RCW 74.08.090, 74.09.520.

Adopted under notice filed as WSR 14-09-122 on April 23, 2014.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 1, Repealed 8; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

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

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

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 1, Repealed 8.

Date Adopted: June 5, 2014.

Katherine I. Vasquez
Rules Coordinator

AMENDATORY SECTION (Amending WSR 14-04-097, filed 2/4/14, effective 3/7/14)

WAC 388-106-0010 What definitions apply to this chapter? "Ability to make self understood" means how you make yourself understood to those closest to you; express or communicate requests, needs, opinions, urgent problems and social conversations, whether in speech, writing, sign language, symbols, or a combination of these including use of a communication board or keyboard:

- (a) Understood: You express ideas clearly;
- (b) Usually understood: You have difficulty finding the right words or finishing thoughts, resulting in delayed responses, or you require some prompting to make self understood;
- (c) Sometimes understood: You have limited ability, but are able to express concrete requests regarding at least basic needs (e.g. food, drink, sleep, toilet);
- (d) Rarely/never understood: At best, understanding is limited to caregiver's interpretation of client specific sounds or body language (e.g. indicated presence of pain or need to toilet);
- (e) Child under three: Proficiency is not expected of a child under three and a child under three would require assistance with communication with or without a functional disability. Refer to the developmental milestones table in WAC 388-106-0130.

"Activities of daily living (ADL)" means the following:

- (a) Bathing: How you take a full-body bath/shower, sponge bath, and transfer in/out of tub/shower.
- (b) Bed mobility: How you move to and from a lying position, turn side to side, and position your body while in bed, in a recliner, or other type of furniture.
- (c) Body care: How you perform with passive range of motion, applications of dressings and ointments or lotions to the body and pedicure to trim toenails and apply lotion to feet. In adult family homes, contracted assisted living, enhanced adult residential care, and enhanced adult residential care-specialized dementia care facilities, dressing changes using clean technique and topical ointments must be performed by a licensed nurse or through nurse delegation in accordance with chapter 246-840 WAC. Body care excludes:
 - (i) Foot care if you are diabetic or have poor circulation; or
 - (ii) Changing bandages or dressings when sterile procedures are required.
- (d) Dressing: How you put on, fasten, and take off all items of clothing, including donning/removing prosthesis.
- (e) Eating: How you eat and drink, regardless of skill. Eating includes any method of receiving nutrition, e.g., by mouth, tube or through a vein.
- (f) Locomotion in room and immediate living environment: How you move between locations in your room and immediate living environment. If you are in a wheelchair, locomotion includes how self-sufficient you are once in your wheelchair.
- (g) Locomotion outside of immediate living environment including outdoors: How you move to and return from more distant areas. If you are living in a contracted assisted living, adult residential care, enhanced adult residential care,

enhanced adult residential care-specialized dementia care facility or nursing facility (NF), this includes areas set aside for dining, activities, etc. If you are living in your own home or in an adult family home, locomotion outside immediate living environment including outdoors, includes how you move to and return from a patio or porch, backyard, to the mailbox, to see the next-door neighbor, etc.

(h) Walk in room, hallway and rest of immediate living environment: How you walk between locations in your room and immediate living environment.

(i) Medication management: Describes the amount of assistance, if any, required to receive medications, over the counter preparations or herbal supplements.

(j) Toilet use: How you use the toilet room, commode, bedpan, or urinal, transfer on/off toilet, cleanse, change pad, manage ostomy or catheter, and adjust clothes.

(k) Transfer: How you move between surfaces, i.e., to/from bed, chair, wheelchair, standing position. Transfer does not include how you move to/from the bath, toilet, or get in/out of a vehicle.

(l) Personal hygiene: How you maintain personal hygiene, including combing hair, brushing teeth, shaving, applying makeup, washing/drying face, hands (including nail care), and perineum (menses care). Personal hygiene does not include hygiene in baths and showers.

"Age appropriate" proficiency in the identified task is not expected of a child that age and a child that age would require assistance with the task with or without a functional disability. Refer to the developmental milestones table in WAC 388-106-0130 for the specific ages.

"Aged person" means a person sixty-five years of age or older.

"Agency provider" means a licensed home care agency or a licensed home health agency having a contract to provide long-term care personal care services to you in your own home.

"Application" means a written request for medical assistance or long-term care services submitted to the department by the applicant, the applicant's authorized representative, or, if the applicant is incompetent or incapacitated, someone acting responsibly for the applicant. The applicant must submit the request on a form prescribed by the department.

"Assessment details" means a summary of information that the department entered into the CARE assessment describing your needs.

"Assessment or reassessment" means an inventory and evaluation of abilities and needs based on an in-person interview in your own home or your place of residence, using CARE.

"Assistance available" means the amount of assistance available for a task if status is coded:

- (a) Partially met due to availability of other support; or
- (b) Shared benefit. The department determines the amount of the assistance available using one of four categories:
 - (i) Less than one-fourth of the time;
 - (ii) One-fourth to one-half of the time;
 - (iii) Over one-half of the time to three-fourths of the time; or

(iv) Over three-fourths but not all of the time.

"Assistance with body care" means you need assistance with:

- (a) Application of ointment or lotions;
- (b) Trimming of toenails;
- (c) Dry bandage changes; or
- (d) Passive range of motion treatment.

"Assistance with medication management" means you need assistance managing your medications. You are scored as:

(a) Independent if you remember to take medications as prescribed and manage your medications without assistance.

(b) Assistance required if you need assistance from a nonlicensed provider to facilitate your self-administration of a prescribed, over the counter, or herbal medication, as defined in chapter 246-888 WAC. Assistance required includes reminding or coaching you, handing you the medication container, opening the container, using an enabler to assist you in getting the medication into your mouth, alteration of a medication for self-administration, and placing the medication in your hand. This does not include assistance with intravenous or injectable medications. You must be aware that you are taking medications.

(c) Self-directed medication assistance/administration if you are an adult with a functional disability who is capable of and who chooses to self-direct your medication assistance/administration.

(d) Must be administered if you must have medications placed in your mouth or applied or instilled to your skin or mucus membrane. Administration must either be performed by a licensed professional or delegated by a registered nurse to a qualified caregiver (per chapter 246-840 WAC). Administration may also be performed by a family member or unpaid caregiver in in-home settings or in residential settings if facility licensing regulations allow. Intravenous or injectable medications may never be delegated except for insulin injections.

"Authorization" means an official approval of a departmental action, for example, a determination of client eligibility for service or payment for a client's long-term care services.

"Blind person" means a person determined blind as described under WAC 182-500-0015 by the division of disability determination services of the medical assistance administration.

"Categorically needy" means the status of a person who is eligible for medical care under Title XIX of the Social Security Act. See WAC 182-512-0010 and chapter 182-513 WAC.

"Child" means an individual less than eighteen years of age.

~~(**"Chronic care management"** means programs that provide care management and coordination activities for medical assistance clients receiving long-term care services and supports determined to be at risk for high medical costs.)~~

"Health action plan" means an individual plan which identifies health-related problems, interventions and goals.

"Client" means an applicant for service or a person currently receiving services from the department.

"Current" means a behavior occurred within seven days of the CARE assessment date, including the day of the assessment. Behaviors that the department designates as current must include information about:

- (a) Whether the behavior is easily altered or not easily altered; and
- (b) The frequency of the behavior.

"Decision making" means your ability and actual performance in making everyday decisions about tasks or activities of daily living. The department determines whether you are:

(a) Independent: Decisions about your daily routine are consistent and organized; reflecting your lifestyle, choices, culture, and values.

(b) Modified independence/difficulty in new situations: You have an organized daily routine, are able to make decisions in familiar situations, but experience some difficulty in decision making when faced with new tasks or situations.

(c) Moderately impaired/poor decisions; unaware of consequences: Your decisions are poor and you require reminders, cues and supervision in planning, organizing and correcting daily routines. You attempt to make decisions, although poorly.

(d) Severely impaired/no or few decisions: Decision making is severely impaired; you never/rarely make decisions.

(e) Child under twelve: Proficiency in decision making is not expected of a child under twelve and a child under twelve would require assistance with decision making with or without a functional disability. Refer to the developmental milestones table in WAC 388-106-0130.

"Department" means the state department of social and health services, aging and disability administration or its designee.

"Designee" means area agency on aging.

"Developmental milestones table" is a chart showing the age range for which proficiency in the identified task is not expected of a child and assistance with the task would be required whether or not the child has a functional disability.

"Difficulty" means how difficult it is or would be for you to perform an instrumental activity of daily living (IADL). This is assessed as:

- (a) No difficulty in performing the activity;
- (b) Some difficulty in performing the activity (e.g., you need some help, are very slow, or fatigue easily); or
- (c) Great difficulty in performing the activity (e.g., little or no involvement in the activity is possible).

"Disability" is described under WAC 182-500-0025.

"Disabling condition" means you have a medical condition which prevents you from self-performance of personal care tasks without assistance.

"Estate recovery" means the department's process of recouping the cost of medicaid and long-term care benefit payments from the estate of the deceased client. See chapter 182-527 WAC.

"Home health agency" means a licensed:

- (a) Agency or organization certified under medicare to provide comprehensive health care on a part-time or intermittent basis to a patient in the patient's place of residence and

reimbursed through the use of the client's medical identification card; or

(b) Home health agency, certified or not certified under medicare, contracted and authorized to provide:

(i) Private duty nursing; or

(ii) Skilled nursing services under an approved medicaid waiver program.

"Income" means income as defined under WAC 182-509-0001.

"Individual provider" means a person employed by you to provide personal care services in your own home. See WAC 388-71-0500 through 388-71-05909.

"Informal support" means a person or resource that is available to provide assistance without home and community program funding. The person or resource providing the informal support must be age 18 or older. Examples of informal supports include but are not limited to: family members, friends, housemates/roommates, neighbors, school, child-care, after school activities, adult day health, church or community programs.

"Institution" means medical facilities, nursing facilities, and institutions for the intellectually disabled. It does not include correctional institutions. See medical institutions in WAC 182-500-0050.

"Instrumental activities of daily living (IADL)" means routine activities performed around the home or in the community and includes the following:

(a) Meal preparation: How meals are prepared (e.g., planning meals, cooking, assembling ingredients, setting out food, utensils, and cleaning up after meals). NOTE: The department will not authorize this IADL to plan meals or clean up after meals. You must need assistance with actual meal preparation.

(b) Ordinary housework: How ordinary work around the house is performed (e.g., doing dishes, dusting, making bed, tidying up, laundry).

(c) Essential shopping: How shopping is completed to meet your health and nutritional needs (e.g., selecting items). Shopping is limited to brief, occasional trips in the local area to shop for food, medical necessities and household items required specifically for your health, maintenance or well-being. This includes shopping with or for you.

(d) Wood supply: How wood is supplied (e.g., splitting, stacking, or carrying wood) when you use wood as the sole source of fuel for heating and/or cooking.

(e) Travel to medical services: How you travel by vehicle to a physician's office or clinic in the local area to obtain medical diagnosis or treatment-includes driving vehicle yourself, traveling as a passenger in a car, bus, or taxi.

(f) Managing finances: How bills are paid, checkbook is balanced, household expenses are managed. The department cannot pay for any assistance with managing finances.

(g) Telephone use: How telephone calls are made or received (with assistive devices such as large numbers on telephone, amplification as needed).

"Long-term care services" means the services administered directly or through contract by the aging and disability services and identified in WAC 388-106-0015.

"Medicaid" is defined under WAC 182-500-0070.

"Medically necessary" is defined under WAC 182-500-0070.

"Medically needy (MN)" means the status of a person who is eligible for a federally matched medical program under Title XIX of the Social Security Act, who, but for income above the categorically needy level, would be eligible as categorically needy. Effective January 1, 1996, an AFDC-related adult is not eligible for MN.

"New Freedom consumer directed services (NFCDS)" means a mix of services and supports to meet needs identified in your assessment and identified in a New Freedom spending plan, within the limits of the individual budget, that provide you with flexibility to plan, select, and direct the purchase of goods and services to meet identified needs. Participants have a meaningful leadership role in:

(a) The design, delivery and evaluation of services and supports;

(b) Exercising control of decisions and resources, making their own decisions about health and well being;

(c) Determining how to meet their own needs;

(d) Determining how and by whom these needs should be met; and

(e) Monitoring the quality of services received.

"New Freedom consumer directed services (NFCDS) participant" means a participant who is an applicant for or currently receiving services under the NFCDS waiver.

"New Freedom spending plan (NFSP)" means the plan developed by you, as a New Freedom participant, within the limits of an individual budget, that details your choices to purchase specific NFCDS and provides required federal medicaid documentation.

"Own home" means your present or intended place of residence:

(a) In a building that you rent and the rental is not contingent upon the purchase of personal care services as defined in this section;

(b) In a building that you own;

(c) In a relative's established residence; or

(d) In the home of another where rent is not charged and residence is not contingent upon the purchase of personal care services as defined in this section.

"Past" means the behavior occurred from eight days to five years of the assessment date. For behaviors indicated as past, the department determines whether the behavior is addressed with current interventions or whether no interventions are in place.

"Personal aide" is defined in RCW 74.39.007.

"Personal care services" means physical or verbal assistance with activities of daily living (ADL) and instrumental activities of daily living (IADL) due to your functional limitations. Assistance is evaluated with the use of assistive devices.

"Physician" is defined under WAC 182-500-0085.

"Plan of care" means assessment details and service summary generated by CARE.

"Provider or provider of service" means an institution, agency, or person:

(a) Having a signed department contract to provide long-term care client services; and

(b) Qualified and eligible to receive department payment.

"Reasonable cost" means a cost for a service or item that is consistent with the market standards for comparable services or items.

"Representative" means a person who you have chosen, or has been appointed by a court, whose primary duty is to act on your behalf to direct your service budget to meet your identified health, safety, and welfare needs.

"Residential facility" means a licensed adult family home under department contract or licensed assisted living facility under department contract to provide assisted living, adult residential care or enhanced adult residential care.

"Self performance for ADLs" means what you actually did in the last seven days before the assessment, not what you might be capable of doing. Coding is based on the level of performance that occurred three or more times in the seven-day period and does not include support provided as defined in WAC 388-106-0010. Your self performance level is scored as:

(a) Independent if you received no help or oversight, or if you needed help or oversight only once or twice;

(b) Supervision if you received oversight (monitoring or standby), encouragement, or cueing three or more times;

(c) Limited assistance if you were highly involved in the activity and given physical help in guided maneuvering of limbs or other nonweight bearing assistance on three or more occasions. For bathing, limited assistance means physical help is limited to transfer only;

(d) Extensive assistance if you performed part of the activity, but on three or more occasions, you needed weight bearing support or you received full performance of the activity during part, but not all, of the activity. For bathing, extensive assistance means you needed physical help with part of the activity (other than transfer);

(e) Total dependence if you received full caregiver performance of the activity and all subtasks during the entire seven-day period from others. Total dependence means complete nonparticipation by you in all aspects of the ADL; or

(f) Activity did not occur if you or others did not perform an ADL over the last seven days before your assessment. The activity may not have occurred because:

(i) You were not able (e.g., walking, if paralyzed);

(ii) No provider was available to assist; or

(iii) You declined assistance with the task.

"Self performance for IADLs" means what you actually did in the last thirty days before the assessment, not what you might be capable of doing. Coding is based on the level of performance that occurred three or more times in the thirty-day period. Your self performance is scored as:

(a) Independent if you received no help, set-up help, or supervision;

(b) Set-up help/arrangements only if on some occasions you did your own set-up/arrangement and at other times you received help from another person;

(c) Limited assistance if on some occasions you did not need any assistance but at other times in the last thirty days you required some assistance;

(d) Extensive assistance if you were involved in performing the activity, but required cueing/supervision or partial assistance at all times;

(e) Total dependence if you needed the activity fully performed by others; or

(f) Activity did not occur if you or others did not perform the activity in the last thirty days before the assessment.

"Service summary" is CARE information which includes: Contacts (e.g. emergency contact), services the client is eligible for, number of hours or residential rates, personal care needs, the list of formal and informal providers and what tasks they will provide, a provider schedule, referral needs/information, and dates and agreement to the services.

"Shared benefit" means:

(a) A client and their paid caregiver both share in the benefit of an IADL task being performed; or

(b) Two or more clients in a multi-client household benefit from the same IADL task(s) being performed.

"SSI-related" is defined under WAC 182-512-0050.

"Status" means the level of assistance available for a task from informal supports; the shared benefit that a care provider may derive from doing a task for a client or that two or more clients derive from the same IADL being performed and the determination of whether a child's need for assistance is due primarily to his or her age. The department determines the status of each ADL or IADL and codes the status as follows:

(a) Met, which means the ADL or IADL will be fully provided by an informal support;

(b) Unmet, which means an informal support will not be available to provide assistance with the identified ADL or IADL;

(c) Partially met, which means an informal support will be available to provide some assistance, but not all, with the identified ADL or IADL;

(d) Shared benefit, which means:

(i) A client and their paid caregiver both share in the benefit of an IADL task being performed; or

(ii) Two or more clients in a multi-client household benefit from the same IADL task(s) being performed.

(e) Age appropriate or child under (age), means proficiency in the identified task is not expected of a child that age and a child that age would require assistance with the task with or without a functional disability. The department presumes children have a responsible adult(s) in their life to provide assistance with personal care tasks. Refer to the developmental milestones table in WAC 388-106-0130; or

(f) Client declines, which means you do not want assistance with the task.

"Supplemental security income (SSI)" means the federal program as described under WAC 182-500-0100.

"Support provided" means the highest level of support provided (to you) by others in the last seven days before the assessment, even if that level of support occurred only once.

(a) No set-up or physical help provided by others;

(b) Set-up help only provided, which is the type of help characterized by providing you with articles, devices, or preparation necessary for greater self performance of the activity. (For example, set-up help includes but is not limited to giving or holding out an item or cutting food);

- (c) One-person physical assist provided;
 - (d) Two- or more person physical assist provided; or
 - (e) Activity did not occur during entire seven-day period.
- "You/your"** means the client.

REPEALER

The following sections of the Washington Administrative Code are repealed:

- WAC 388-106-1500 What is the department's chronic care management program?
- WAC 388-106-1505 What services may I receive under the chronic care management program?
- WAC 388-106-1510 Who provides chronic care management services to medical assistance clients receiving long-term care services and supports?
- WAC 388-106-1515 Am I eligible to enroll in the chronic care management program?
- WAC 388-106-1520 How do I enroll in the chronic care management program?
- WAC 388-106-1525 How long can I participate in the chronic care management program?
- WAC 388-106-1530 Is there a cost to me for participating in the chronic care management program?
- WAC 388-106-1535 Do I have a right to a fair hearing while receiving chronic care management services?

WSR 14-13-062

PERMANENT RULES

DEPARTMENT OF

SOCIAL AND HEALTH SERVICES

(Aging and Long-Term Support Administration)

[Filed June 12, 2014, 2:29 p.m., effective July 13, 2014]

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

Purpose: The department is amending chapter 388-71 WAC, specifically the home care referral registry (HCRR), in order to make program revisions by bringing the HCRR WAC into alignment with the individual provider WAC. Rules pertaining to the HCRR's individual providers must reflect changes to the individual provider WAC that went into effect January 2013.

Citation of Existing Rules Affected by this Order: Repealing WAC 388-71-06100, 388-71-06120, 388-71-06130, 388-71-06135, 388-71-06140, 388-71-06160, 388-71-06180, 388-71-06200, 388-71-06220, 388-71-06240, 388-71-06260, 388-71-06280, 388-71-06300, 388-71-06340, 388-71-06360, 388-71-06380, 388-71-06400 and 388-71-06420; and amending WAC 388-71-06020, 388-71-06040, 388-71-06060, and 388-71-06080.

Statutory Authority for Adoption: RCW 74.08.090, 74.09.520.

Adopted under notice filed as WSR 14-06-070 on March 3, 2014.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 5, Amended 4, Repealed 18; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

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

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

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 5, Amended 4, Repealed 18.

Date Adopted: June 12, 2014.

Katherine I. Vasquez
Rules Coordinator

AMENDATORY SECTION (Amending WSR 11-13-009, filed 6/3/11, effective 7/4/11)

WAC 388-71-06020 What is the purpose of WAC 388-71-06020 through ~~((388-71-06420)) 388-71-06165?~~
The purpose of this chapter is to describe the operation of the home care referral registry.

AMENDATORY SECTION (Amending WSR 11-13-009, filed 6/3/11, effective 7/4/11)

WAC 388-71-06040 What definitions apply to WAC 388-71-06020 through ~~((388-71-06420)) 388-71-06165?~~
The following definitions apply to WAC 388-71-06020 through ~~((388-71-06420)) 388-71-06165:~~

~~("AAA" means the local area agency on aging.~~

~~"ALJ" means administrative law judge.)~~

"Applicant" is a person who is applying to be placed on the referral registry as an individual provider of personal care or respite care services.

"Consumer(~~(employer)~~)" means an adult or child with a functional or developmental ~~((disabilities)) disability~~ who qualifies for ~~((and uses))~~ personal care or respite care paid for through medicaid or state-only funds and chooses to use the referral registry to find and employ an individual provider. Consumer also includes an individual who is acting as a representative on behalf of the consumer.

~~("Consumer representative" means an individual who is acting on behalf of the consumer/employer.)~~

"Department" or **"DSHS"** means the department of social and health services, including but not limited to the department's developmental disabilities administration and aging and long-term support administration.

~~("Emergency provider" means an individual provider who is employed as a back-up for a provider who did not show up or who was unable to work due to unexpected circumstances.~~

"Employer" means the consumer.)

"HCRR" means the home care referral registry.

"Home care referral registry operations" or "referral registry operations" means the activities carried out at the local level to recruit and register individual providers or prospective individual providers for the referral registry and assist consumers to utilize the referral registry to find qualified individual providers.)

"Individual provider" or "IP" means a person, ~~((regardless of relationship,))~~ including a personal aide ~~((working for a consumer under self-directed care, who has a contract with the department of social and health services to provide personal care or respite care services to adults or children with functional or developmental disabilities and is reimbursed for those services through medicaid or state-only funding)),~~ who is employed by a consumer and who has a contract with the department to provide personal care services or respite care services under chapter 388-71 or 388-825 WAC.

~~((**"IP"** means an individual provider.~~

"Malfeasance" means any unlawful act committed by the provider, whether in the course of employment or otherwise.

"Mandatory reporter" is an employee of DSHS; law enforcement officer; social worker; professional school personnel; individual provider; an employee of a facility; an operator of a facility; an employee of a social service, welfare, mental health, adult day health, adult day care, home health, home care, or hospice agency; county coroner or medical examiner; Christian science practitioner; or health care provider subject to chapter 18.130 RCW.

"Misfeasance" means performance of a workplace duty in an improper manner; including events which jeopardize the health and safety of persons, unresolved pattern of performance, issues related to truth or dishonesty, including failure to report a criminal conviction.

"OAH" means the office of administrative hearings.)

"Prospective ((individual provider) IP" means one who has met the initial requirements for employment under chapter 74.39A RCW, is placed on the referral registry, and is seeking employment but has not been matched with a consumer(~~/employer~~).

~~((**"Provider"** means an individual provider.~~

~~**"Referral registry"** is a data base that is designed to assist consumers with finding individual providers and to assist individual providers to find employment.~~

"Respite provider" means an individual provider who is employed on a prearranged short-term basis to fill in for a routine caregiver.

"Routine provider" means an individual provider who is employed on a regularly scheduled basis.)

Reviser's note: RCW 34.05.395 requires the use of underlining and deletion marks to indicate amendments to existing rules. The rule published above varies from its predecessor in certain respects not indicated by the use of these markings.

Reviser's note: The spelling error in the above section occurred in the copy filed by the agency and appears in the Register pursuant to the requirements of RCW 34.08.040.

AMENDATORY SECTION (Amending WSR 11-13-009, filed 6/3/11, effective 7/4/11)

WAC 388-71-06060 What is the purpose of the referral registry? ~~((To increase consumer/employer choice while providing assistance in finding individual providers and prospective individual providers. In addition, the referral registry))~~ The purpose of the referral registry is to help consumers find individual providers of personal care or respite care by maintaining a list of pre-screened providers. The referral registry:

(1) Takes into account the ~~((consumer/employer))~~ consumer's needs and preferences when identifying potential individual providers;

(2) ~~((Provides for reasonable standards of accountability for providers and prospective individual providers listed on the registry;~~

~~((3))~~ Is voluntary for ((individual)) providers and ((prospective individual providers and consumers/employers)) consumers;

~~((4))~~ (3) Promotes job opportunities for ((individual)) providers ((and prospective individual providers));

~~((5))~~ (4) Provides access to the data base for ((consumer/employers)) consumers who want to ((query)) search for a ((referral independently)) provider; and

~~((6))~~ (5) Increases a ((consumer/employer's)) consumer's choice ((of individual providers and prospective individual providers via)) through an established pool of available ((individual providers and prospective individual)) providers on the registry.

AMENDATORY SECTION (Amending WSR 11-13-009, filed 6/3/11, effective 7/4/11)

WAC 388-71-06080 Who is eligible to request a ((referral) list of providers from the referral registry? The following ~~((categories of))~~ persons are eligible to request a ~~((referral) list of providers~~ from the referral registry:

(1) ~~((Consumer/employers who are adults or children with functional or developmental disabilities))~~ Consumers who qualify for ~~((and use or will use))~~ personal care or respite care paid for ~~((through))~~ with medicaid or state-only funds.

(2) Persons who are authorized to ~~((request a referral on behalf of a consumer including family members, area agency on aging case managers, department social workers and/or a consumer representative))))~~ act on behalf of consumers who qualify for personal care or respite care.

(3) Case management staff within the department or an area agency on aging.

Reviser's note: The typographical error in the above section occurred in the copy filed by the agency and appears in the Register pursuant to the requirements of RCW 34.08.040.

NEW SECTION

WAC 388-71-06125 Who hires an IP or prospective IP? The consumer or consumer's designated representative is responsible for interviewing, screening, hiring, supervising, and terminating an IP or prospective IP as required under WAC 388-71-0505 or 388-825-315.

NEW SECTION

WAC 388-71-06145 What requirements must an applicant satisfy to be placed on the referral registry as a provider? The applicant must satisfy the following requirements to be placed on the referral registry as a provider:

- (1) Be eighteen years of age or older;
- (2) Provide:
 - (a) A social security card;
 - (b) A current driver's license issued by the state of Washington or another state in which the applicant resides or has recently resided; or
 - (c) A current identification card, which includes the applicant's photograph, issued by the state of Washington or another state in which the applicant resides or has recently resided;
- (3) Complete an application and pre-screening with the registry coordinator;
- (4) Satisfactorily complete a Washington state patrol name and date of birth background screening as required by WAC 388-71-0510 and 388-825-320;
- (5) Review "Becoming an IP" booklet unless the applicant has already worked as an individual provider for more than three months;
- (6) Complete orientation and safety training as required by WAC 388-71-0860;
- (7) Have a current provider contract(s) with DSHS or initiate the process for obtaining a provider contract(s); and
- (8) Satisfactorily complete a national fingerprint-based background screening if the applicant has lived in the state of Washington for less than three years.

Applicants who do not meet the provider requirements under this section will not be placed on the referral registry.

NEW SECTION

WAC 388-71-06150 What requirements does an IP or prospective IP have to meet in order to continue to be listed on the referral registry? In order to continue to be listed on the referral registry, an IP or prospective IP must:

- (1) Satisfactorily complete the background screening process every two years or as required by the department;
- (2) After being matched with a consumer:
 - (a) Satisfactorily complete a national fingerprint-based background screening, as required by RCW 74.39A.056, unless determined exempt or fingerprints are already on file with the department;
 - (b) Complete required training under WAC 388-71-0523 or 388-825-355; and
 - (c) Meet certification requirements, unless exempt, under WAC 388-71-0523 or 388-825-355.
- (3) The department may require an IP or prospective IP to have a Washington state name and date of birth background screening or a Washington state and national fingerprint-based background screening, or both, at any time.

Failure to comply with any of the requirements under this section may result in removal from the referral registry.

NEW SECTION

WAC 388-71-06155 When will an IP or prospective IP be removed from the referral registry? An IP or prospective IP will be removed from the referral registry when he or she:

- (1) Fails to meet the ongoing requirements set forth in WAC 388-71-06150;
- (2) In the performance of his or her duties as an IP, has committed any unlawful act or provided care in an improper manner, including but not limited to:
 - (a) An act that jeopardized the health and safety of any persons; or
 - (b) Has demonstrated a pattern of poor performance.
- (3) Requests that his or her name be removed from the referral registry;
- (4) Has had his or her individual provider contract terminated under WAC 388-71-0551 or 388-825-385.

NEW SECTION

WAC 388-71-06165 Can the removal of an IP or prospective IP from the referral registry be contested? An IP, prospective IP, or the consumer to whom the individual provider is providing services may request a fair hearing to contest removal from the referral registry by using the procedures described in this section.

(1) All fair hearing requests to contest removal from the referral registry must be in writing and mailed, delivered, or faxed to the office of administrative hearings (OAH). OAH must receive the written request within 28 calendar days of the date the department's notice is mailed to or personally served upon the IP or the prospective IP, whichever occurs first.

(2) The IP, prospective IP, or consumer should keep a copy of his or her request for a fair hearing.

(3) The appeal process will be governed by chapter 34.05 RCW, chapter 388-02 WAC, and this chapter. If there is a conflict between chapter 388-02 WAC and this chapter, this chapter will govern.

A consumer's right to appeal the department's denial, termination, or suspension of an individual provider's contact is described in WAC 388-71-0560.

REPEALER

The following sections of the Washington Administrative Code are repealed:

WAC 388-71-06100 What is the difference between an individual provider and a prospective individual provider?

WAC 388-71-06120 What qualifies an individual provider or prospective individual provider to be listed on the referral registry?

WAC 388-71-06130 When will an individual provider or prospective individual provider be denied placement on the referral registry?

- WAC 388-71-06135 When may an individual provider or prospective individual provider be denied placement on the referral registry?
- WAC 388-71-06140 How does an individual provider or prospective individual provider apply to be placed on the referral registry?
- WAC 388-71-06160 Does an individual provider or prospective individual provider have any ongoing responsibilities in order to continue to be listed on the referral registry?
- WAC 388-71-06180 Are there training requirements for being placed on the referral registry?
- WAC 388-71-06200 When will an individual provider or prospective individual provider be removed from the referral registry?
- WAC 388-71-06220 What is the procedure for removing an individual provider or prospective individual provider from the referral registry?
- WAC 388-71-06240 By what procedures will the department deny an individual provider or prospective individual provider's application to be placed on the referral registry?
- WAC 388-71-06260 Who must be notified if a complaint is received about an individual provider?
- WAC 388-71-06280 Are referral registry staff considered mandatory reporters?
- WAC 388-71-06300 What is reasonable cause for mandatory reporting?
- WAC 388-71-06340 How does a consumer/employer apply to use the referral registry services?
- WAC 388-71-06360 How does a consumer/employer obtain a list of names from the referral registry?
- WAC 388-71-06380 Who hires an individual provider or prospective individual provider?
- WAC 388-71-06400 Does a consumer/employer who is eligible to have his or her individual provider paid through medicaid or state-only funds from DSHS need to gain approval from his/her case manager, social worker or nurse?
- WAC 388-71-06420 How can a consumer/employer use the referral registry to get an individual provider in an emergency or as a critical personal care back-up?

WSR 14-13-068
PERMANENT RULES
DEPARTMENT OF
FINANCIAL INSTITUTIONS
 (Securities Division)

[Filed June 12, 2014, 4:42 p.m., effective July 13, 2014]

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

Purpose: The securities division hereby amends the investment adviser rules set forth in chapter 460-24A WAC. The amendments update various provisions of the investment adviser rules, including the rules regarding examination and registration requirements, financial reporting requirements, custody, performance compensation arrangements, books and records requirements, and unethical business practices. The amendments add new rule sections addressing compliance policies and procedures, proxy voting, and advisory contracts. In addition, the amendments create exemptions from registration for certain private fund and venture capital fund advisers. The amendments repeal WAC 460-24A-058, which defines when an application is considered filed; and make additional updates, clarifications, and changes to the rules.

Citation of Existing Rules Affected by this Order: Repealing WAC 460-24A-058; and amending WAC 460-24A-005, 460-24A-010, 460-24A-020, 460-24A-030, 460-24A-040, 460-24A-045, 460-24A-047, 460-24A-050, 460-24A-057, 460-24A-060, 460-24A-070, 460-24A-080, 460-24A-100, 460-24A-105, 460-24A-106, 460-24A-107, 460-24A-108, 460-24A-109, 460-24A-110, 460-24A-140, 460-24A-145, 460-24A-150, 460-24A-160, 460-24A-170, 460-24A-200, 460-24A-205, 460-24A-210, and 460-24A-220.

Statutory Authority for Adoption: RCW 21.20.005, 21.20.020, 21.20.030, 21.20.040, 21.20.050, 21.20.060, 21.20.070, 21.20.080, 21.20.090, 21.20.100, 21.20.330, 21.20.340, 21.20.450, and 21.20.702.

Adopted under notice filed as WSR 14-08-097 on April 2, 2014.

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

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 7, Amended 28, Repealed 1.

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

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

Date Adopted: June 12, 2014.

Scott Jarvis
Director

AMENDATORY SECTION (Amending WSR 08-18-033, filed 8/27/08, effective 9/27/08)

WAC 460-24A-005 Definitions. For purposes of this chapter:

(1) **"Custody"** means holding, directly or indirectly, client funds or securities, or having any authority to obtain possession of them or the ability to appropriate them.

(a) "Custody" includes:

(i) Possession of client funds or securities unless received inadvertently and returned to the sender promptly, but in any case within three business days of receiving them;

(ii) Any arrangement (including a general power of attorney) under which an investment adviser is authorized or permitted to withdraw client funds or securities maintained with a custodian upon an investment adviser's instruction to the custodian; and

(iii) Any capacity (such as general partner of a limited partnership, managing member of a limited liability company or a comparable position for another type of pooled investment vehicle, or trustee of a trust) that gives an investment adviser or its supervised person legal ownership of or access to client funds or securities.

(b) Receipt of checks drawn by clients and made payable to unrelated third parties will not meet the definition of custody if forwarded to the third party within (~~twenty-four hours~~) three business days of receipt and the adviser maintains a ledger or other listing of all securities or funds held or obtained inadvertently (~~including the following information:~~

~~(i) Issuer;~~

~~(ii) Type of security and series;~~

~~(iii) Date of issue;~~

~~(iv) For debt instruments, the denomination, interest rate, and maturity date;~~

~~(v) Certificate number, including alphabetical prefix or suffix;~~

~~(vi) Name in which registered;~~

~~(vii) Date given to the adviser;~~

~~(viii) Date sent to client or sender;~~

~~(ix) Form of delivery to client or sender, or copy of the form of delivery to client or sender; and~~

~~(x) Mail confirmation number, if applicable, or confirmation by client or sender of the fund's or security's return)) as set forth in WAC 460-24A-200.~~

(2) **"Independent party"** means a person who:

(a) Is engaged by an investment adviser to act as a gatekeeper for the payment of fees, expenses, and capital withdrawals from a pooled investment;

(b) Does not control and is not controlled by and is not under common control with the investment adviser; (~~and~~)

(c) Does not have, and has not had within the past two years, a material business relationship, including acting as an independent representative on behalf of a client of the investment adviser, with the investment adviser;

(d) Shall not negotiate or agree to have material business relations with an investment adviser, or relationships with entities under common control with an investment adviser, for a period of two years after serving as the person engaged in an independent party agreement; and

(e) Is required to act in the best interest of the limited partners, members, or other beneficial owners.

(3) **"Independent representative"** means a person who:

(a) Acts as an agent for an advisory client, including in the case of a pooled investment vehicle, for limited partners of a limited partnership, members of a limited liability company, or other beneficial owners of another type of pooled investment vehicle and by law or contract is obliged to act in the best interest of the advisory client or the limited partners or members, or other beneficial owners;

(b) Does not control, is not controlled by, and is not under common control with the investment adviser;

(c) Does not have, and has not had within the past two years, a material business relationship, including acting as an independent party, with the investment adviser.

(4) **"Qualified custodian"** means the following independent institutions or entities:

(a) A bank as defined in section 202 (a)(2) of the Advisers Act, 15 U.S.C. 80b-2 (a)(2), or a savings association as defined in section 3 (b)(1) of the Federal Deposit Insurance Act, 12 U.S.C. 1813 (b)(1), that has deposits insured by the Federal Deposit Insurance Corporation under the Federal Deposit Insurance Act, 12 U.S.C. 1811;

(b) A broker-dealer registered in this state and under section 15 (b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78o (b)(1), holding the client assets in customer accounts;

(c) A futures commission merchant registered under section 4f(a) of the Commodity Exchange Act, 7 U.S.C. 6f(a), holding the client assets in customer accounts, but only with respect to clients' funds and security futures, or other securities incidental to transactions in contracts for the purchase or sale of a commodity for future delivery and options thereon;

(d) A foreign financial institution that customarily holds financial assets for its customers, provided that the foreign financial institution keeps the advisory clients' assets in customer accounts segregated from its proprietary assets; and

(e) The transfer agent for an open-end company as defined in section 5 (a)(1) of the Investment Company Act of 1940, 15 U.S.C. 80a-5 (a)(1), only with respect to shares of the open-end company.

(5) **"Independent certified public accountant"** means a certified public accountant that meets the standards of independence described in rule 2-01 (b) and (c) of Regulation S-X, 17 C.F.R. 210.2-01 (b) and (c).

(6) **"Related person"** means any person, directly or indirectly, controlling or controlled by the investment adviser, and any person that is under common control with the investment adviser.

(7) **"Control"** means the power, directly or indirectly, to direct the management or policies of a person whether through ownership of securities, by contract, or otherwise. The following persons are presumed to have control:

(a) Each of the investment adviser's officers, partners, or directors exercising executive responsibility (or persons having similar status or functions); and

(b) A person who:

(i) Directly or indirectly has the right to vote twenty-five percent or more of a class of the voting securities of a corporation or limited liability company;

(ii) Has the power to sell or direct the sale of twenty-five percent or more of a class of the voting securities of a corporation or limited liability company;

(iii) Has the right to receive, upon dissolution, or that has contributed, twenty-five percent or more of the capital of a partnership or limited liability company; or

(iv) Is the manager of a limited liability company or the trustee or managing agent of a trust.

(8) "Private fund adviser" means an investment adviser who provides advice solely to one or more qualifying private funds.

(9) "Qualifying private fund" means a private fund that meets the definition of a qualifying private fund in Securities and Exchange Commission Rule 203 (m)-1, 17 C.F.R. 275.203 (m)-1, other than a private fund that qualifies for the exclusion from the definition of "investment company" provided in section 3 (c)(1) of the Investment Company Act of 1940, 15 U.S.C. 80a-3 (c)(1).

(10) "Discretionary authority" means the authority, directly or indirectly, to:

(a) Determine what securities or other property shall be purchased or sold by or on behalf of a client;

(b) Make decisions as to what securities or other property shall be purchased or sold by or for the benefit of a client even though some other person may have responsibility for such investment decisions; or

(c) Make decisions as to what investment advisers to retain on behalf of a client.

(11) "FINRA" means the Financial Industry Regulatory Authority, Inc., the self-regulatory organization for broker-dealers and broker-dealer representatives that is registered as a national securities association with the Securities and Exchange Commission under Section 15A of the Securities Exchange Act of 1934, 15 U.S.C. § 78o.

(12) "Central Registration Depository" or "CRD" means the electronic filing system operated by FINRA for the registration of broker-dealers and broker-dealer representatives.

(13) "Investment Adviser Registration Depository" or "IARD" means the electronic filing system operated by FINRA for the registration of investment advisers and investment adviser representatives and submission of filings by exempt reporting advisers.

AMENDATORY SECTION (Amending Order 304, filed 2/28/75, effective 4/1/75)

WAC 460-24A-010 ((Investment advisers—Where rules apply.)) Application of rules to out-of-state investment advisers. If you are an investment adviser or investment adviser representative with your principal office and place of business outside the state of Washington, these rules apply only to that part of ((the investment advisers')) your business within the state of Washington.

AMENDATORY SECTION (Amending WSR 12-10-051, filed 4/30/12, effective 5/31/12)

WAC 460-24A-020 Investment adviser representatives employed by federal covered advisers. If you are an individual employed by or associated with a federal covered adviser ((is)) you are an "investment adviser representative," ((pursuant to)) as defined under RCW 21.20.005, if ((the representative has)) you have a "place of business" in this state, as that term is defined under section 203A of the Investment Advisers Act of 1940, and:

(1) ((Is)) You are an "investment adviser representative" ((pursuant to)) as that term is defined in rules or regulations promulgated under the Investment Advisers Act of 1940 by the U.S. Securities and Exchange Commission; or

(2) You solicit((s)), offer((s)), or negotiate((s)) for the sale of or sell((s)) investment advisory services on behalf of a federal covered adviser, but ((is)) are not a "supervised person" as that term is defined under the Investment Advisers Act of 1940.

AMENDATORY SECTION (Amending Order 304, filed 2/28/75, effective 4/1/75)

WAC 460-24A-030 Use of the term "investment counsel(=)" is prohibited. ((No)) If you are an investment adviser or investment adviser representative, you shall not use the title "investment counsel" in the conduct of ((his or its)) your business nor represent that ((he or it is)) you are an "investment counsel" nor use the term "investment counsel" as descriptive of ((his or its)) your business where such use is prohibited under the provisions of the Federal Investment Advisers Act of 1940, as amended.

NEW SECTION

WAC 460-24A-035 Definition of "client" of an investment adviser. (1) **General.** You may deem the following to be a single client for purposes of RCW 21.20.040(3):

(a) A natural person; and

(i) Any minor child of the natural person;

(ii) Any relative, spouse, or relative of the spouse of the natural person who has the same principal residence;

(iii) All accounts of which the natural person and/or the persons referred to in (a) of this subsection are the only primary beneficiaries; and

(iv) All trusts of which the natural person and/or the persons referred to in (a) of this subsection are the only primary beneficiaries;

(b)(i) A corporation, general partnership, limited partnership, limited liability company, trust (other than a trust referred to in subsection (1)(a)(iv) of this section), or other legal organization (any of which are referred to hereinafter as a "legal organization") to which you provide investment advice based on its investment objectives rather than the individual investment objectives of its shareholders, partners, limited partners, members, or beneficiaries (any of which are referred to hereinafter as an "owner"); and

(ii) Two or more legal organizations referred to in subsection (1)(b)(i) of this section that have identical owners.

(2) **Special rules.** For purposes of this section:

(a) You must count an owner as a client if you provide investment advisory services to the owner separate and apart from the investment advisory services you provide to the legal organization; provided, however, that the determination that an owner is a client will not affect the applicability of this section with regard to any other owner;

(b) You are not required to count an owner as a client solely because you, on behalf of the legal organization, offer, promote, or sell interests in the legal organization to the owner, or report periodically to the owners as a group solely with respect to the performance of or plans for the legal organization's assets or similar matters;

(c) A limited partnership or limited liability company is a client of any general partner, managing member or other person acting as investment adviser to the partnership or limited liability company;

(d) You are not required to count as a client any person for whom you provide investment advisory services without compensation;

(e) If you have your principal office and place of business outside the United States, you are not required to count clients that are not United States residents, but if your principal office and place of business is in the United States, you must count all clients;

(f) You may not rely on subsection (1)(b)(i) of this section with respect to any company that would be an investment company under section 3(a) of the Investment Company Act of 1940, 15 U.S.C. 80a-3(a), but for the exception from that definition by either section 3 (c)(1) or 3 (c)(7) of such act, 15 U.S.C. 80a-3 (c)(1) or (7); and

(g) For purposes of (e) of this subsection, a client who is an owner of a private fund is a resident of the place at which the client resides at the time of the client's investment in the fund.

AMENDATORY SECTION (Amending WSR 00-01-001, filed 12/1/99, effective 1/1/00)

WAC 460-24A-040 Use of certain terms deemed similar to "financial planner" or "investment counselor." (1) For the purposes of RCW 21.20.040(~~(3)~~) (4), use of any term, or abbreviation for a term, including the word "financial planner" or the word "investment counselor" is considered the same as the use of either of those terms alone.

(2) For the purposes of RCW 21.20.040(~~(3)~~) (4), terms that are deemed similar to "financial planner" and "investment counselor" include, but are not limited to, the following:

- (a) Financial consultant;
- (b) Investment consultant;
- (c) Money manager;
- (d) Investment manager;
- (e) Investment planner;
- (f) Chartered financial consultant or its abbreviation ChFC; or
- (g) The abbreviation CFP®.

AMENDATORY SECTION (Amending WSR 12-10-051, filed 4/30/12, effective 5/31/12)

WAC 460-24A-045 Holding out as a financial planner. (~~A person using~~) If you use a term deemed similar to "financial planner" or "investment counselor" under WAC 460-24A-040(2), you will not be considered to be holding (~~himself~~) yourself out as a financial planner for purposes of RCW 21.20.005 and 21.20.040 under the following circumstances:

(1) (~~The person is~~) You are not in the business of providing advice relating to the purchase or sale of securities, and would not, but for (~~his~~) your use of such a term, be an investment adviser required to register pursuant to RCW 21.20.040; and

(2) (~~The person does~~) You do not directly or indirectly receive a fee for providing investment advice. Receipt of any portion of a "wrap fee," that is, a fee for some combination of brokerage and investment advisory services, constitutes receipt of a fee for providing investment advice for the purpose of this section; and

(3) (~~The person~~) You deliver(~~s~~) to every customer, at least forty-eight hours before accepting any compensation, including commissions from the sale of any investment product, a written disclosure including the following information:

(a) (~~The person is~~) You are not registered as an investment adviser or investment adviser (~~salesperson~~) representative in the state of Washington;

(b) (~~The person is~~) You are not authorized to provide financial planning or investment advisory services and (~~does~~) do not provide such services; and

(c) A brief description (~~the person's~~) of your business which description (~~should~~) shall include a statement of the kind of products offered or services provided (e.g., (~~the person is~~) you are in the business of selling securities and insurance products) and of the basis on which (~~the person is~~) you are compensated for the products sold or services provided; and

(4) (~~The person has~~) You have each customer to whom a disclosure described in subsection (3) of this section is given sign a written dated acknowledgment of receipt of the disclosure; and

(5) (~~The person shall~~) You retain the executed acknowledgments of receipt required by subsection (4) of this section and of the disclosure given for so long as (~~the person~~) you continue(~~s~~) to receive compensation from such customers, but in no case for less than three years from date of execution of the acknowledgment; and

(6) If (~~the person~~) you received compensation from the customer on more than one occasion, (~~the person~~) you need give the customer the disclosure described in subsection (3) of this section only on the first occasion unless the information in the disclosure becomes inaccurate, in which case (~~the person~~) you must give the customer updated disclosure before receiving further compensation from the customer.

AMENDATORY SECTION (Amending WSR 01-16-125, filed 7/31/01, effective 10/24/01)

WAC 460-24A-047 Electronic filing with designated entity. (1) Designation. Pursuant to RCW 21.20.050, the

director designates the Investment Adviser Registration Depository (IARD) operated by ~~((the National Association of Securities Dealers (IARD)))~~ FINRA to receive and store filings and collect related fees from investment advisers, federal covered advisers, and investment adviser representatives on behalf of the director.

(2) Use of IARD. Unless otherwise provided, all investment adviser, federal covered adviser, and investment adviser representative applications, amendments, reports, notices, related filings, and fees required to be filed with the director pursuant to the rules promulgated under this chapter, shall be filed electronically with and transmitted to IARD. The following additional conditions relate to such electronic filings:

(a) Electronic signature. When a signature or signatures are required by the particular instructions of any filing to be made through IARD, a duly authorized officer of the applicant or the applicant him or herself, as required, shall affix his or her electronic signature to the filing by typing his or her name in the appropriate fields and submitting the filing to ~~((Web))~~ IARD. Submission of a filing in this manner shall constitute irrefutable evidence of legal signature by any individuals whose names are typed on the filing.

(b) When filed. Solely for purposes of a filing made through IARD, a document is considered filed with the director when all fees are received and the filing is accepted by IARD on behalf of the state.

(3) Electronic filing. Notwithstanding subsection (2) of this section, the electronic filing of any particular document and the collection of related processing fees shall not be required until such time as IARD provides for receipt of such filings and fees and thirty days' notice is provided by the director. Any documents required to be filed with the director that are not permitted to be filed with or cannot be accepted electronically by IARD shall be filed ~~((in paper))~~ directly with the director.

(4) Hardship exemptions. Notwithstanding subsection (2) of this section, electronic filing is not required under the following circumstances:

(a) Temporary hardship exemption.

(i) Investment advisers registered or required to be registered under RCW 21.20.040, who experience unanticipated technical difficulties that prevent submission of an electronic filing to IARD, may request a temporary hardship exemption from the requirements to file electronically.

(ii) To request a temporary hardship exemption, the investment adviser must:

(A) File Form ADV-H in paper format with the appropriate regulatory authority in the state where the investment adviser's principal place of business is located, no later than one business day after the filing, that is the subject of the Form ADV-H, was due. If the state where the investment adviser's principal place of business is located has not mandated the use of IARD, the investment adviser should file the Form ADV-H with the appropriate regulatory authority in the first state that mandates the use of IARD by the investment adviser; and

(B) Submit the filing that is the subject of the Form ADV-H in electronic format to IARD no later than seven business days after the filing was due.

(ii) Effective date~~((—))~~ Upon filing. The temporary hardship exemption will be deemed effective by the director upon receipt of the complete Form ADV-H by appropriate regulatory authority noted in (a)(ii)(A) of this subsection. Multiple temporary hardship exemption requests within the same calendar year may be disallowed by the director.

(b) Continuing hardship exemption.

(i) Criteria for exemption. A continuing hardship exemption will be granted only if the investment adviser is able to demonstrate that the electronic filing requirements of this section are prohibitively burdensome.

(ii) To apply for a continuing hardship exemption, the investment adviser must:

(A) File Form ADV-H in paper format with the director at least twenty business days before a filing is due; and

(B) If a filing is due to more than one state, the Form ADV-H must be filed with the appropriate regulatory authority in the state where the investment adviser's principal place of business is located. If the state where the investment adviser's principal place of business is located has not mandated the use of IARD, the investment adviser should file the Form ADV-H with the appropriate regulatory authority in the first state that mandates the use of IARD by the investment adviser. Any applications received by the director will be granted or denied within ten business days after the filing of Form ADV-H.

(iii) Effective date~~((—))~~ Upon approval. The exemption is effective upon approval by the director. The time period of the exemption may be no longer than one year after the date on which the Form ADV-H is filed. If the director approves the application, the investment adviser must, no later than five business days after the exemption approval date, submit filings in paper format (along with the appropriate processing fees) for the period of time for which the exemption is granted.

(c) Recognition of exemption. The decision to grant or deny a request for a hardship exemption will be made by the appropriate regulatory authority in the state where the investment adviser's principal place of business is located. If the state where the investment adviser's principal place of business is located has not mandated the use of IARD, the decision to grant or deny a request for a hardship exemption will be made by appropriate regulatory authority in the first state that mandates the use of IARD by the investment adviser. The decision will be followed by the director if the investment adviser is registered in this state.

AMENDATORY SECTION (Amending WSR 01-16-125, filed 7/31/01, effective 10/24/01)

WAC 460-24A-050 ~~((Investment adviser and investment adviser representative))~~ Registration and examination~~((s))~~ requirements. (1) **Examination requirements.** ~~((A person))~~ If you are applying to be registered as an investment adviser or investment adviser representative under RCW 21.20.040, you shall provide the director with proof that ~~((he or she has))~~ you have obtained a passing score on ~~((one of the following examinations))~~:

(a) The Uniform Investment Adviser Law Examination (Series 65 examination); or

(b) The General Securities Representative Examination (Series 7 examination) and the Uniform Combined State Law Examination (Series 66 examination).

(2) ~~((Grandfathering))~~ Exceptions from examination requirements.

(a) ~~((Any individual who is))~~ If you were registered as an investment adviser or investment adviser representative in any jurisdiction in the United States on ~~((the effective date of this amended rule))~~ January 1, 2000, and there has been no period longer than two years since that date in which you were not registered as an investment adviser or investment adviser representative, you shall not be required to satisfy the examination requirements for initial or continued registration, provided that the director may require additional examinations ~~((for any individual))~~ if you are found to have violated the Securities Act of Washington, Chapter 21.20 RCW, or the Uniform Securities Act.

(b) ~~((An individual who has not been registered in any jurisdiction for a period of two years shall be required to comply with the examination requirements of subsection (1).))~~ Any person who has been registered as an investment adviser or investment adviser representative in any state requiring the licensing, registration, or qualification of investment advisers or investment adviser representatives within the two-year period immediately preceding the date of filing of an application shall not be required to comply with the examination requirement set forth in subsection (1) of this section provided that the person previously met the examination requirement in subsection (1) of this section.

(c) An applicant who has taken and passed the Uniform Investment Adviser State Law Examination (Series 65 examination) within two years prior to the date the application is filed with the director shall not be required to take and pass the Uniform Investment Adviser State Law Examination again.

(d) An applicant who is an agent for a broker-dealer/investment adviser and who is not required by the agent's home jurisdiction to make a separate filing on CRD as an investment adviser representative but who has previously met the examination requirement in subsection (1) of this section necessary to provide advisory services on behalf of the broker-dealer/investment adviser, shall not be required to take and pass the Uniform Investment Adviser State Law Examination (Series 65 examination) or the Uniform Combined State Law Examination (Series 66 examination) again.

(3) Examination waivers. ~~((The examination requirements shall not apply to an individual who currently))~~ You are not required to take the examinations set forth in subsection (1) of this section if you currently hold~~((s))~~ one of the following professional designations:

(a) Certified Financial Planner (CFP®) issued by the Certified Financial Planner Board of Standards, Inc.;

(b) Chartered Financial Consultant (ChFC) awarded by The American College, Bryn Mawr, Pennsylvania;

(c) Personal Financial Specialist (PFS) administered by the American Institute of Certified Public Accountants;

(d) Chartered Financial Analyst (CFA) granted by the ~~((Association for Investment Management and Research))~~ CFA Institute;

(e) Chartered Investment Counselor (CIC) granted by the Investment ~~((Counsel))~~ Adviser Association ~~((of America))~~; or

(f) Such other professional designation as the director may by order recognize.

(4) ~~((the person))~~ you are applying for registration as an investment adviser ~~((is))~~ and you are any entity other than a sole proprietor, an officer, general partner, managing member, or other equivalent person of authority in the entity may take the examination on behalf of the entity. If the person ~~((taking))~~ that took the examination ceases to be a person of authority in the entity, then ~~((the investment adviser))~~ you must notify the director of a substitute person of authority who has ~~((passed the examinations required in subsection (1) of this section within two months in order to maintain the investment adviser license))~~ registered with the director as an investment adviser representative.

(5) Registration requirements.

(a) ~~((A person applying))~~ To apply for initial registration as an investment adviser ~~((shall))~~, you must file a completed Form ADV with IARD along with the following:

(i) Proof of complying with the examination or waiver requirements specified in subsections (1) through (4) above;

(ii) ~~((A financial statement demonstrating compliance with the requirements of WAC 460-24A-170))~~ Such financial statements as are set forth in WAC 460-24A-060, including a copy of the balance sheet for the last fiscal year, and if such balance sheet is as of a date more than ninety days from the date of filing the application, an unaudited balance sheet prepared as set forth in WAC 460-24A-060, if necessary;

(iii) A copy of the surety bond required by WAC 460-24A-170, if applicable;

~~((iv))~~ (iv) The application fee specified in RCW 21.20.340; and

~~((iv))~~ (v) Such other documents as the director may require.

(b) ~~((A person applying))~~ To apply for initial registration as an investment adviser representative, you shall file a completed Form ~~((U-4))~~ U4 with IARD along with the following:

(i) Proof of complying with the examination or waiver requirements specified in subsections (1) through (4) above;

(ii) The application fee specified in RCW 21.20.340; and

(iii) Such other documents as the director may require.

(c) If you advise one or more pooled investment vehicles, then you must also submit to the division as part of your application, copies of the following documents:

(i) Account agreement with each qualified custodian for each pooled investment vehicle pursuant to WAC 460-24A-105;

(ii) Engagement letter with an independent certified public accountant or agreement with an independent party for each pooled investment vehicle pursuant to WAC 460-24A-107;

(iii) Private placement memorandum or other offering circular used to solicit investors to purchase interests in each pooled investment vehicle;

(iv) Subscription agreement for each pooled investment vehicle;

(v) Operating agreement for each pooled investment vehicle; and

(vi) Such other documents as the director may require in order to complete the application.

AMENDATORY SECTION (Amending WSR 01-16-125, filed 7/31/01, effective 10/24/01)

WAC 460-24A-057 Renewal of investment adviser and investment adviser representative registration—Delinquency fees. (1) Application for renewal. You may renew your registration as an investment adviser or investment adviser representative (~~(may be renewed)~~) by filing the following with IARD:

- (a) Any renewal application required by IARD;
- (b) The renewal fee required by RCW 21.20.340; and
- (c) An electronically submitted Form ~~((U-4))~~ U4, unless:
 - (i) The Form ~~((U-4))~~ U4 has been previously submitted to IARD electronically; or
 - (ii) The investment adviser, filing on behalf of the investment adviser representative, has been granted a hardship exemption under WAC 460-24A-047(4).

(2) **Delinquency fees.** For any renewal application received by IARD after the expiration date set forth in WAC 460-24A-055, but on or before March 1 of the following year, the licensee shall pay a delinquency fee in addition to the renewal fee. The delinquency fee for investment advisers shall be one hundred dollars. The delinquency fee for investment adviser representatives shall be fifty dollars.

~~((3))~~ No renewal applications will be accepted after March 1. An investment adviser or investment adviser representative may apply for reregistration by complying with WAC 460-24A-050.

NEW SECTION

WAC 460-24A-059 Pending application—Notice of termination—Application for continuation. The director may at his or her discretion send notice to an applicant for investment adviser or investment adviser representative registration with respect to any pending application in which no action has been taken for nine months immediately prior to the sending of such notice, advising such applicant that the pending registration will be terminated thirty days from the date of sending such notice unless on or before the termination date the applicant responds in writing to the director showing good cause why the application should be continued as a pending application. If the applicant does not request in writing that the application be continued or show good cause why it should be continued, the director may terminate the pending application.

AMENDATORY SECTION (Amending WSR 01-16-125, filed 7/31/01, effective 10/24/01)

WAC 460-24A-060 Financial ~~((statements required or))~~ reporting requirements for investment advisers. ~~((Every))~~ (1) If you are an investment adviser ~~((shall))~~ registered or required to be registered under RCW 21.20.040 who has custody of client funds or securities or you require payment of advisory fees six months or more in advance and in excess of five hundred dollars per client, you must file with the director ~~((&))~~ an audited balance sheet as of the end of

~~((the investment adviser's))~~ your fiscal year. ~~((The))~~ Each balance sheet ~~((shall be prepared in accordance with))~~ filed pursuant to this subsection must be:

(a) Prepared in conformity with generally accepted accounting principles (GAAP) ~~((unless the director, on a case-by-case basis, allows another basis of presentation. The balance sheet shall be filed annually with the director not more than ninety days after the end of the investment adviser's fiscal year end (unless extension of time is granted by the director))~~ and audited in accordance with generally accepted auditing standards by an independent certified public accountant; and

(b) Accompanied by an audit opinion of the accountant on the audit of the balance sheet.

(2) If you are an investment adviser registered or required to be registered under RCW 21.20.040 that has custody as defined in WAC 460-24A-005 (1)(a)(iii) and you have notified the director on Form ADV that you will comply with the safekeeping requirements in WAC 460-24A-107 (1)(b), you must file with the director a copy of the audited financial statements of each pooled investment vehicle for which you are a general partner (or managing member or other comparable position).

(3) If you are an investment adviser registered or required to be registered under RCW 21.20.040 and are not subject to the financial statement reporting requirements in subsection (1) or (2) of this section, you must file with the director a balance sheet, which need not be audited, but which must be prepared in accordance with generally accepted accounting principles and represented by you or the person who prepared the statement as true and accurate, as of the end of your fiscal year.

(4) The financial statements required by this section must be filed with the director within one hundred twenty days following the end of your fiscal year, except for the audited financial statements of pooled investment vehicles you obtain and distribute pursuant to WAC 460-24A-107(1), which must be filed with the director within one hundred twenty days following the end of each pooled investment vehicle's fiscal year.

(5) If you are an investment adviser that has its principal place of business in a state other than this state, you must file only such reports as required by the state in which you maintain your principal place of business, provided that you are licensed in such state and are in compliance with such state's financial reporting requirements.

AMENDATORY SECTION (Amending WSR 01-16-125, filed 7/31/01, effective 10/24/01)

WAC 460-24A-070 Notice filing~~((s))~~ requirements for federal covered advisers. (1) **Notice filing.** If you are a federal covered adviser, you must file the notice filing required ~~((of a federal covered adviser))~~ pursuant to RCW 21.20.050 ~~((shall be filed))~~ with IARD on a completed Form ADV. ~~((A))~~ The notice filing ~~((of a federal covered adviser))~~ shall be deemed filed when the fee required by RCW 21.20-340 and the Form ADV are filed with and accepted by IARD on behalf of the state.

~~(2) ((Portions of Form ADV not yet accepted by IARD. Until IARD provides for the filing of Part 2 of Form ADV, Part 2 will be deemed filed if it is provided to the director within five days of the director's request. The federal covered adviser is not required to submit Part 2 of the Form ADV to the director unless requested.)) **Form ADV Part 2.** The director will accept a copy of Part 2 of Form ADV as filed electronically with IARD.~~

(3) **Renewal.** If you are a federal covered adviser, you must file the annual renewal of ~~((the)) your~~ notice filing ~~((for a federal covered adviser shall be filed))~~ with IARD. The renewal ~~((of the notice filing for a federal covered adviser))~~ shall be deemed filed when the fee required by RCW 21.20.-340 is filed with and accepted by IARD on behalf of the state.

(4) **Updates and amendments.** If you are a federal covered adviser, you must file any amendments to ~~((its)) your~~ Form ADV with IARD in accordance with the instructions in the Form ADV.

(5) **Hardship exemption.** If you are a federal covered adviser that, because ~~((it has)) you have~~ received a hardship exemption from the Securities and Exchange Commission (SEC), ~~((is)) are~~ not required to file ~~((its)) your~~ Form ADV with the SEC through IARD you shall, in lieu of filing electronically, file the documents and fees required by this section directly with the director.

NEW SECTION

WAC 460-24A-071 Registration exemption for investment advisers to private funds. (1) **Exemption for private fund advisers.** You are exempt from the registration requirements for investment advisers in RCW 21.20.040 if you are a private fund adviser as defined in WAC 460-24A-005 and you satisfy each of the following conditions:

(a) Neither you nor any of your advisory affiliates are subject to a disqualification as described in WAC 460-44A-505 (2)(d); and

(b) You file with the division each report and amendment thereto that an exempt reporting adviser is required to file with the Securities and Exchange Commission pursuant to Securities and Exchange Commission Rule 204-4, 17 C.F.R. 275.204-4.

(2) **Federal covered investment advisers.** If you are a private fund adviser that is registered with the Securities and Exchange Commission, you are not eligible for the exemption provided in subsection (1) of this section and you must comply with the state notice filing requirements applicable to federal covered investment advisers in WAC 460-24A-070.

(3) **Investment adviser representatives.** You are exempt from the registration requirements for investment adviser representatives set forth in RCW 21.20.040 if you are employed by or associated with an investment adviser that is exempt from registration in this state pursuant to subsection (1) of this section and you do not otherwise act as an investment adviser representative.

(4) **Electronic filing.** You must make the report filings described in subsection (1)(b) of this section electronically through IARD. A report shall be deemed filed when the report is filed and accepted by the IARD on the state's behalf.

(5) **Transition.** If you become ineligible for the exemption provided in subsection (1) of this section, you must comply with all applicable laws and rules requiring registration or notice filing within ninety days from the date your eligibility for this exemption ceases.

(6) **Waiver authority with respect to statutory disqualification.** Subsection (1)(a) of this section shall not apply upon a showing of good cause and without prejudice to any other action of the securities division, if the securities administrator determines that it is not necessary under the circumstances that an exemption be denied.

NEW SECTION

WAC 460-24A-072 Registration exemption for investment advisers to venture capital funds. (1) **Exemption for venture capital fund advisers.** You are exempt from the registration requirements for investment advisers in RCW 21.20.040 if you are exempt from registration under Section 203(l) of the Investment Advisers Act of 1940, 15 U.S.C. 80b-3(l), and Rule 203 (l)-1 adopted thereunder, 17 C.F.R. 275.203 (l)-1, provided you satisfy each of the following conditions:

(a) Neither you nor any of your advisory affiliates are subject to a disqualification as described in WAC 460-44A-505 (2)(d); and

(b) You file with the division each report and amendment thereto that an exempt reporting adviser is required to file with the Securities and Exchange Commission pursuant to Securities and Exchange Commission Rule 204-4, 17 C.F.R. 275.204-4.

(2) **Federal covered investment advisers.** If you are a venture capital fund adviser that is registered with the Securities and Exchange Commission, you are not eligible for the exemption provided in subsection (1) of this section and you must comply with the state notice filing requirements applicable to federal covered investment advisers in WAC 460-24A-070.

(3) **Investment adviser representatives.** You are exempt from the registration requirements for investment adviser representatives set forth in RCW 21.20.040 if you are employed by or associated with an investment adviser that is exempt from registration in this state pursuant to subsection (1) of this section and you do not otherwise act as an investment adviser representative.

(4) **Electronic filing.** You must make the report filings described in subsection (1)(b) of this section electronically through IARD. A report shall be deemed filed when the report is filed and accepted by the IARD on the state's behalf.

(5) **Transition.** If you become ineligible for the exemption provided in subsection (1) of this section, you must comply with all applicable laws and rules requiring registration or notice filing within ninety days from the date your eligibility for this exemption ceases.

(6) **Waiver authority with respect to statutory disqualification.** Subsection (1)(a) of this section shall not apply upon a showing of good cause and without prejudice to any other action of the securities division, if the securities administrator determines that it is not necessary under the circumstances that an exemption be denied.

AMENDATORY SECTION (Amending WSR 01-16-125, filed 7/31/01, effective 10/24/01)

WAC 460-24A-080 Termination of investment adviser and investment adviser representative registration and federal covered adviser notice filing status. (1) Investment advisers and federal covered advisers. If you are an investment adviser or federal covered adviser ((may)) and you want to terminate ((its)) your registration or notice filing ((status)), you must do so by complying with the instructions to Form ADV-W and filing a completed Form ADV-W with IARD.

(2) Investment adviser representative. ((The termination of)) If you are an investment adviser and you terminate an investment adviser representative, you must terminate the registration ((as an)) of the investment adviser representative pursuant to RCW 21.20.080 ((shall be reported)) by complying with the instructions to Form ((U-5)) U5 and filing a completed Form ((U-5)) U5 with IARD within thirty days of termination.

AMENDATORY SECTION (Amending Order 304, filed 2/28/75, effective 4/1/75)

WAC 460-24A-100 Advertisements by investment advisers. (1) ((It shall constitute)) If you are an investment adviser, federal covered adviser, or investment adviser representative, it is an "act, practice, or course of business" which operates or would operate as a fraud within the meaning of RCW 21.20.020 for ((an investment adviser)) you, directly or indirectly, to publish, circulate or distribute any advertisement:

(a) Which refers, directly or indirectly, to any testimonial of any kind concerning ((the investment adviser)) you or concerning any advice, analysis, report or other service rendered by ((such investment adviser)) you; or

(b) Which refers, directly or indirectly, to any past specific recommendations ((of such investment adviser)) you made which were or would have been profitable to any person: Provided, however, That this clause (b) does not prohibit ((an advertisement which sets)) you from setting out or ((offers)) offering to furnish a list of all recommendations you made ((by such investment adviser)) within the immediately preceding period of not less than one year if such advertisement, and such list if it is furnished separately:

(i) States the name of each such security recommended, the date and nature of each such recommendation (e.g., whether to buy, sell or hold), the market price at that time, the price at which the recommendation was to be acted upon, and the market price of each such security as of the most recent practicable date((-)); and

(ii) Contains the following cautionary legend on the first page thereof in print or type as large as the largest print or type used in the body or text thereof: "It should not be assumed that recommendations made in the future will be profitable or will equal the performance of the securities in this list"; or

(c) Which represents, directly or indirectly, that any graph, chart, formula or other device being offered can in and of itself be used to determine which securities to buy or sell, or when to buy or sell them; or which represents, directly or

indirectly, that any graph, chart, formula or other device being offered will assist any person in making his own decisions as to which securities to buy or sell, or when to buy or sell them, without prominently disclosing in such advertisement the limitations thereof and the difficulties with respect to its use; or

(d) Which contains any statement to the effect that any report, analysis, or other service will be furnished free or without charge, unless such report, analysis or other service actually is or will be furnished entirely free and without any condition or obligation, directly or indirectly; or

(e) Which contains any untrue statement of a material fact, or which is otherwise false or misleading.

(2) For the purposes of this section, the term "advertisement" includes any notice, circular, letter or other written communication addressed to more than one person, or any notice or other announcement in any publication or by electronic means, including online, or by radio or television, which offers:

(a) Any analysis, report, or publication concerning securities, or which is to be used in making any determination as to when to buy or sell any security, or which security to buy or sell((-);) or

(b) Any graph, chart, formula or other device to be used in making any determination as to when to buy or sell any security, or which security to buy or sell((-);) or

(c) Any other investment advisory service with regard to ((security)) securities.

AMENDATORY SECTION (Amending WSR 08-18-033, filed 8/27/08, effective 9/27/08)

WAC 460-24A-105 Requirements for an investment adviser that has custody or possession of client funds or securities. If you are an investment adviser registered or required to be registered under RCW 21.20.040, it shall constitute an "act, practice, or course of business" which operates or would operate as a fraud within the meaning of RCW 21.20.020 for you to have custody of client funds or securities unless:

(1) **You notify the director.** You notify the director promptly on Form ADV that you have or may have custody;

(2) **A qualified custodian maintains your clients' funds and securities.**

(a) A qualified custodian maintains your clients' funds and securities:

(i) In a separate account for each client under that client's name; or

(ii) In accounts that contain only your clients' funds and securities, under either your name as agent or trustee for the clients or, in the case of a pooled investment vehicle that you manage, in the name of the pooled investment vehicle; and

(b) You maintain a separate record for each such account which shows the name and address of the qualified custodian where such account is maintained, the dates and amounts of deposits in and withdrawals from such account, and the exact amount of each client's beneficial interest in such account;

(3) **You notify clients of the identity of the qualified custodian.** If you open an account with a qualified custodian on your client's behalf, either under the client's name, under

your name as agent, or under the name of a pooled investment vehicle, you notify the client in writing of the qualified custodian's name, address, and the manner in which the funds or securities are maintained, promptly when the account is opened and following any changes to this information. If both you and the qualified custodian send account statements to a client to which you are required to provide this notice, you must include in the notification provided to that client and in any subsequent account statement you send that client a statement urging the client to compare the account statements from the custodian with those from you;

(4) Either you or a qualified custodian sends account statements to your clients. You or a qualified custodian sends your clients account statements subject to the following requirements:

(a) Requirements if qualified custodian sends account statements. If you do not send account statements to your clients, you have a reasonable basis for believing, after due inquiry, that the qualified custodian sends an account statement, at least quarterly, to each of your clients for which the qualified custodian maintains funds or securities, within a reasonable period of time after the end of the statement period, identifying the amount of funds and of each security in the account at the end of the period and setting forth all transactions in the account during that period;

(b) Requirements if you send account statements. If the qualified custodian does not send account statements to your clients:

(i) You send account statements, at least quarterly, to each of your clients for whom you have custody of funds or securities, within a reasonable period of time after the end of the statement period, identifying the amount of funds and of each security of which you have custody at the end of the period and setting forth all transactions during that period;

(ii) An independent certified public accountant verifies all client funds and securities by actual examination at least once during each calendar year, pursuant to a written agreement between you and the accountant, at a time that is chosen by the accountant without prior notice or announcement to you and that is irregular from year to year (~~and~~). The written agreement must provide for the first examination to occur within six months of becoming subject to this subsection, except that, if the investment adviser maintains client funds or securities pursuant to this rule as a qualified custodian, the agreement must provide for the first examination to occur no later than six months after obtaining the internal control report. The written agreement must require the accountant to:

(A) File(s) a ((copy of the special examination report)) certificate on Form ADV-E with the director within ((thirty)) one hundred twenty days ((after the completion of the examination)) of the time chosen by the independent certified public accountant to conduct the examination, stating that it has examined the funds and securities and describing the nature and extent of the examination; and

((iii) The independent certified public accountant, upon finding any material discrepancies during the course of the examination, notifies)) (B) Notify the director within one business day of the finding of any material discrepancies during the course of the examination, by means of a facsimile

transmission or electronic mail, followed by first class mail, directed to the attention of the director; and

~~(((e) Account statements are sent to limited partners and members of limited liability companies that you advise. If you are a general partner of a limited partnership (or managing member of a limited liability company, or hold a comparable position for another type of pooled investment vehicle), the account statements required under this subsection are sent to each limited partner (or member or other beneficial owner); and)) (C) File within four business days of the resignation or dismissal from, or other termination of, the engagement, or removing itself or being removed from consideration for being reappointed, Form ADV-E accompanied by a statement that includes:~~

(I) The date of such resignation, dismissal, removal, or other termination, and the name, address, and contact information of the independent certified public accountant; and

(II) An explanation of any problems relating to examination scope or procedure that contributed to such resignation, dismissal, removal, or other termination;

(5) A client may designate an independent representative to receive account statements. A client may designate an independent representative to receive, on his or her behalf, notices and account statements as required under subsections (3) and (4) of this section;

(6) Investment advisers acting as qualified custodians. If you are an investment adviser that maintains, or if you have custody because a related person maintains, client funds or securities pursuant to this rule as a qualified custodian in connection with the advisory services you provide to clients:

(a) You must enter into an agreement with an independent certified public accountant to conduct an examination to verify client funds and securities as otherwise provided in subsection (4)(b)(ii) of this section. The independent certified public accountant you retain must be registered with, and subject to regular inspection as of the commencement of the professional engagement period, and as of each calendar year-end, by, the Public Company Accounting Oversight Board in accordance with its rules; and

(b) You must obtain, or receive from your related person, within six months of becoming subject to this subsection (6) and thereafter no less frequently than once each calendar year a written internal control report prepared by an independent certified public accountant subject to the following:

(i) The internal control report must include an opinion of an independent certified public accountant as to whether controls have been placed in operation as of a specific date, and are suitably designed and are operating effectively to meet control objectives relating to custodial services, including safeguarding of funds and securities held by either you or a related person on behalf of your clients;

(ii) The independent certified public accountant must verify that the funds and securities are reconciled to a custodian other than you or your related person; and

(iii) The independent certified public accountant must be registered with, and subject to regular inspection as of the commencement of the professional engagement period, and as of each calendar year-end, by, the Public Company Accounting Oversight Board in accordance with its rules.

AMENDATORY SECTION (Amending WSR 08-18-033, filed 8/27/08, effective 9/27/08)

WAC 460-24A-106 Additional custody requirements for an investment adviser that directly deducts fees from client accounts. (1) If you are an investment adviser registered or required to be registered under RCW 21.20.040 who has custody as defined in WAC 460-24A-005(1) (~~solely~~) because you have the authority to directly deduct fees from client accounts, you must comply with the safekeeping requirements in WAC 460-24A-105 and the following additional safeguards:

(a) **You must have your client's written authorization.** You must have written authorization from your client to deduct advisory fees from the account held with the qualified custodian.

(b) **You must provide notice to the qualified custodian and an itemized invoice to your client.** Each time a fee is directly deducted from your client's account, you must concurrently:

(i) Send the qualified custodian notice of the amount of the fee to be deducted from your client's account; and

(ii) Send your client an invoice itemizing the fee. Itemization includes the formula used to calculate the fee, the amount of assets under management the fee is based on, and the time period covered by the fee.

(c) **You must notify the director that you will comply with these safekeeping requirements.** You must notify the director on Form ADV that you will comply with the safekeeping requirements set forth in this section.

(2) **Waiver of net worth and bonding requirements.** If you have custody as defined in WAC 460-24A-005(1) solely because you have the authority to have fees directly deducted from client accounts and you comply with the safekeeping requirements set forth in this section, you are not required to comply with the net worth and bonding requirements for an investment adviser that has custody set forth in WAC 460-24A-170.

(3) **Waiver of audited balance sheet requirement.** If you have custody as defined in WAC 460-24A-005(1) solely because you have the authority to directly deduct fees from client accounts, you are not required to comply with the requirement to file an audited balance sheet as set forth in WAC 460-24A-060(1) if you comply with WAC 460-24A-060(3), the safekeeping requirements in WAC 460-24A-105, and subsection (1) of this section.

AMENDATORY SECTION (Amending WSR 08-18-033, filed 8/27/08, effective 9/27/08)

WAC 460-24A-107 Additional custody requirements for an investment adviser that manages a pooled investment vehicle or trust. (1) If you are an investment adviser registered or required to be registered under RCW 21.20.040 that has custody as defined in WAC 460-24A-005 (1)(a)(iii), you must, in addition to complying with the safekeeping requirements set forth in WAC 460-24A-105, either:

(a) ~~(Comply with additional safekeeping requirements.~~ In addition to the safekeeping requirements set forth in WAC 460-24A-105, you must comply with the following

~~safekeeping requirements:)~~ **Engage an independent party to authorize withdrawals from the pooled account.**

(i) ~~((You must engage an independent party to authorize withdrawals from the pooled account.))~~ You must ~~((hire))~~ enter into a written agreement with an independent party to review all fees, expenses, and capital withdrawals from the pooled accounts;

(ii) ~~((You must send detailed invoices or receipts to the independent party.))~~ You must send all invoices or receipts to the independent party, detailing the amount of the fee, expenses, or capital withdrawal and the method of calculation such that the independent party can:

(A) Determine that the payment is in accordance with the pooled investment vehicle standards (generally the partnership agreement or membership agreement); and

(B) Forward, to the qualified custodian, approval for payment of the invoice with a copy to the investment adviser; and

(iii) ~~((You must notify the director that you will comply with these additional safekeeping requirements.))~~ You must notify the director on Form ADV that you will comply with the safekeeping requirements in (a) of this subsection; or

(b) ~~((You must))~~ **Provide audited financial statements of the pooled investment vehicle to all limited partners or members.** ~~((If you do not comply with the safekeeping requirements set forth in WAC 460-24A-105 and (a) of this subsection, you must comply with the following alternative safekeeping requirements:))~~

(i) ~~((The pooled investment vehicle must be subject to annual audits.))~~ You must cause the financial statements of the limited partnership (or limited liability company, or another type of pooled investment vehicle) for which you are a general partner (or managing member or other comparable position) to be subject to audit, at least annually, by an independent certified public accountant to be conducted in accordance with generally accepted auditing standards;

(ii) ~~((You must distribute audited financial statements of the pooled investment vehicle to all beneficial owners.))~~ You must distribute the audited financial statements ~~((prepared in accordance with generally accepted accounting principles for the limited partnership (or limited liability company, or another type of pooled investment vehicle) for which you are a general partner (or managing member or other comparable position)))~~ to all limited partners (or members or other beneficial owners), or the independent representative where one has been designated, within one hundred twenty days of the end of ~~((its))~~ the pooled investment vehicle's fiscal year. If the limited partners (or members or other beneficial owners) are themselves limited partnerships (or limited liability companies, or another type of pooled investment vehicle) that are related persons to you, you must distribute the audited financial statements to each beneficial owner that is unrelated to you; ~~((and))~~

(iii) ~~((You must notify the director that you will distribute audited financial statements of the pooled investment vehicle to all beneficial owners.))~~ You must distribute, upon liquidation, the fund's final audited financial statements prepared in accordance with generally accepted accounting principles to all limited partners (or members or other beneficial owners), or the independent representative

where one has been designated, and the director promptly after the completion of such audit:

(iv) You must enter into a written agreement with the independent certified public accountant who will audit the financial statements of the pooled investment vehicle. The written agreement with the independent certified public accountant must require the independent certified public accountant to, upon resignation or dismissal from, or other termination of, the engagement, or upon removing itself or being removed from consideration for being reappointed, notify the director within four business days accompanied by a statement that includes:

(A) The date of such resignation, dismissal, removal, or other termination, and the name, address, and contact information of the independent certified public accountant; and

(B) An explanation of any problems relating to audit scope or procedure that contributed to such resignation, dismissal, removal, or other termination; and

(v) You must notify the director on Form ADV that you will comply with the safekeeping requirements in (b)(i) and (ii) of this subsection(-);

(2) **You must deliver account statements to each limited partner (or member or other beneficial owner).** If you are an investment adviser registered or required to be registered under RCW 21.20.040 and you are an investment adviser to a limited partnership (or managing member of a limited liability company, or hold a comparable position for another type of pooled investment vehicle), you must:

(a) Send the account statements required under WAC 460-24A-105 to each limited partner (or member or other beneficial owner). If the limited partners (or members or other beneficial owners) are themselves limited partnerships (or limited liability companies, or another type of pooled investment vehicle) that are your related persons, you must send the account statements required under WAC 460-24A-105 to each beneficial owner of the fund that is unrelated to you; and

(b) Include the following information in the account statements, which will satisfy the requirements under WAC 460-24A-105 (4)(a) and (b)(i):

(i) The total amount of all additions to and withdrawals from the fund as a whole as well as the opening and closing net asset value of the fund at the end of the quarter based on the fund's governing documents;

(ii) A listing of the fund's long and short positions on the closing date of the statement in a form and to the extent required by FASB Rule ASC 946-210-50; and

(iii) The total amount of additions to and withdrawals from the fund by the investor as well as the total value of the investor's interest in the fund at the end of the quarter.

(3) **If you ~~((comply with the additional safekeeping requirements))~~ engage an independent party, you are not required to comply with the net worth and bonding requirements for an investment adviser that has custody.** If you have custody solely as defined in WAC ~~((460-24A-105))~~ 460-24A-005 (1)(a)(iii) and you comply with the safekeeping requirements in WAC 460-24A-105 and subsection (1)(a) of this section, you are not required to comply with the net worth and bonding requirements for an investment adviser that has custody set forth in WAC 460-24A-170.

~~((3))~~ (4) **If you distribute audited financial statements of the pooled investment vehicle to all beneficial owners, you are not required to comply with the surprise examination requirements.** You are not required to comply with the surprise examination requirements set forth in WAC 460-24A-105 (4)(b)(ii) ~~((and (iii)))~~ with respect to the account of a limited partnership (or limited liability company, or another type of pooled investment vehicle) that is subject to audit if you otherwise comply with the safekeeping requirements in WAC 460-24A-105 and subsection (1)(b) of this section.

(5) **If you distribute audited financial statements of the pooled investment vehicle to all beneficial owners, you are not required to file an audited balance sheet.** If you have custody solely as defined in WAC 460-24A-005 (1)(a)(iii), you are not required to comply with the requirement to file an audited balance sheet as set forth in WAC 460-24A-060(1) if you comply with WAC 460-24A-060(3), the safekeeping requirements in WAC 460-24A-105, and subsections (1)(b) and (2) of this section.

AMENDATORY SECTION (Amending WSR 08-18-033, filed 8/27/08, effective 9/27/08)

WAC 460-24A-108 Additional custody requirements for an investment adviser that acts as trustee and investment adviser to a trust. If you are an investment adviser registered or required to be registered under RCW 21.20.040 that acts as an investment adviser to a trust and the trust has retained you or one of your representatives, employees, directors, or owners as trustee, you must comply with the following requirements:

(1) **You must send invoices to the qualified custodian and a person connected to the trust at the same time.** You must send to the grantor of the trust, the attorney for the trust if it is a testamentary trust, the co-trustee (other than you or one of your representatives, employees, directors, or owners); or a defined beneficiary of the trust, at the same time that you send any invoice to the qualified custodian, an invoice showing the amount of the trustees' fee or investment management or advisory fee, the value of the assets on which the fees were based, and the specific manner in which the fees were calculated.

(2) **You must have an agreement with a qualified custodian that contains certain terms.** You must enter into a written agreement with a qualified custodian that complies with the following requirements:

(a) **The agreement must restrict payments to you or persons related to you.** The agreement must specify that the qualified custodian will neither deliver trust securities nor transmit any funds to you or one of your representatives, employees, directors, or owners, except that the qualified custodian may pay trustees' fees to the trustee and investment management or advisory fees to you, provided that:

(i) The grantor of the trust or attorneys for the trust, if it is a testamentary trust, the co-trustee (other than you or one of your representatives, employees, directors, or owners), or a defined beneficiary of the trust has authorized the qualified custodian in writing to pay those fees;

(ii) The statements for those fees show the amount of the fees for the trustee and, in the case of statements for investment management or advisory fees, show the value of the trust assets on which the fee is based and the manner in which the fee was calculated; and

(iii) The qualified custodian agrees to send to the grantor of the trust, the attorneys for a testamentary trust, the co-trustee (other than you or one of your representatives, employees, directors, or owners); or a defined beneficiary of the trust, at least quarterly, a statement of all disbursements from the account of the trust, including the amount of investment management fees paid to you and the amount of trustees' fees paid to the trustee.

(b) The agreement must restrict the transfer of funds or securities. Except as otherwise set forth in subsection (1)(b)(i) of this section, the agreement must specify that the qualified custodian may transfer funds or securities, or both, of the trust only upon the direction of the trustee (who may be you or one of your representatives, employees, directors, or owners), who you have duly accepted as an authorized signatory. The grantor of the trust or attorneys for the trust, if it is a testamentary trust, the co-trustee (other than you or one of your representatives, employees, directors, or owners), or a defined beneficiary of the trust, must designate the authorized signatory for management of the trust. The agreement must further specify that the direction to transfer funds or securities, or both, can only be made to the following:

(i) To a trust company, bank trust department or brokerage firm independent from you for the account of the trust to which the assets relate;

(ii) To the named grantors or to the named beneficiaries of the trust;

(iii) To a third person independent from you in payment of the fees or charges of the third person including, but not limited to:

(A) Attorney's, accountant's, or qualified custodian's fees for the trust; and

(B) Taxes, interest, maintenance, or other expenses, if there is property other than securities or cash owned by the trust;

(iv) To third persons independent from you for any other purpose legitimately associated with the management of the trust; or

(v) To a broker-dealer in the normal course of portfolio purchases and sales, provided that the transfer is made on payment against delivery basis or payment against trust receipt.

(3) You must notify the director that you will comply with these safekeeping requirements. You must notify the director on Form ADV that you will comply with the safekeeping requirements set forth in this section.

(4) You are not required to comply with the net worth and bonding requirements for an investment adviser that has custody if you comply with these safekeeping requirements. If you have custody solely as defined in WAC 460-24A-005 (1)(a)(iii) because you are the trustee of a trust and you comply with the safekeeping requirements in WAC 460-24A-105 and this section, you are not required to comply with the net worth and bonding requirements for an invest-

ment adviser that has custody set forth in WAC 460-24A-170.

AMENDATORY SECTION (Amending WSR 08-18-033, filed 8/27/08, effective 9/27/08)

WAC 460-24A-109 Exceptions from custody requirements. Exceptions from the custody requirements for investment advisers that are registered or required to be registered under RCW 21.20.040 are available in the following circumstances:

(1)(a) You are not required to ~~((comply with the custody requirements for))~~ engage a qualified custodian to hold certain privately offered securities. You are not required to comply with WAC 460-24A-105(2) ~~((through 460-24A-108))~~ with respect to securities that are:

(i) Acquired from the issuer in a transaction or chain of transactions not involving any public offering;

(ii) Uncertificated, and ownership thereof is recorded only on books of the issuer or its transfer agent in the name of the client; and

(iii) Transferable only with prior consent of the issuer or holders of the outstanding securities of the issuer.

(b) Notwithstanding (a) of this subsection, the provisions of this subsection (1) are available with respect to securities held for the account of a limited partnership (or limited liability company, or other type of pooled investment vehicle) only if you comply with the requirements in WAC 460-24A-107 (1)(b).

(2) You are not required to comply with the custody requirements with respect to the account of a registered investment company. You are not required to comply with WAC 460-24A-105 through 460-24A-108 with respect to the account of an investment company registered under the Investment Company Act of 1940, 15 U.S.C. 80a-1 to 80a-64.

(3) You are not required to comply with the custody requirements with respect to a trust for the benefit of your relative. You are not required to comply with the safekeeping requirements of WAC 460-24A-105 through 460-24A-108 or the net worth and bonding requirements for an investment adviser that has custody set forth in WAC 460-24A-170 if you have custody solely because you or one of your representatives, employees, directors, or owners is a trustee for a beneficial trust, if all of the following conditions are met for each trust:

(a) The beneficial owner of the trust is your parent, a grandparent, a spouse, a sibling, a child, or a grandchild. These relationships shall include "step" relationships.

(b) For each account under (a) of this subsection, you comply with the following:

(i) You provide a written statement to each beneficial owner of the account setting forth a description of the requirements of WAC 460-24A-105 through 460-24A-108 and WAC 460-24A-170 and the reasons why you will not be complying with those requirements;

(ii) You obtain from each beneficial owner a signed and dated statement acknowledging the receipt of the written statement required under (b)(i) of this subsection; and

(iii) You maintain a copy of both documents described in (b)(i) and (ii) of this subsection until the account is closed or you are no longer trustee.

AMENDATORY SECTION (Amending WSR 00-01-001, filed 12/1/99, effective 1/1/00)

WAC 460-24A-110 Agency cross transactions. ~~((A))~~

(1) For purposes of this rule, "agency cross transaction for an advisory client" means a transaction in which a person acts as an investment adviser in relation to a transaction in which the investment adviser, or any person controlling, controlled by, or under common control with such investment adviser, including an investment adviser representative, acts as a broker-dealer for both the advisory client and another person on the other side of the transaction. When acting in such capacity such person is required to be registered as a broker-dealer in this state unless excluded from the definition.

~~((B))~~ (2) If you are an investment ~~(effecting)~~ adviser or investment adviser representative, it shall be unlawful for you to effect an agency cross transaction for an advisory client ~~(shall be in compliance with)~~ under RCW 21.20.020~~((3))~~(2) ~~(if the following)~~ unless you satisfy these conditions ~~(are met)~~:

~~((4))~~ (a) You obtain the written consent of the advisory client ~~(executes a written consent)~~ prospectively authorizing ~~(the investment adviser)~~ you to effect agency cross transactions for such client;

~~((2))~~ (b) Before obtaining such written consent from the client, ~~(the investment adviser)~~ you make~~(s)~~ full written disclosure to the client that, with respect to agency cross transactions, ~~(the investment adviser)~~ you will act as broker-dealer for, receive commissions from and have a potentially conflicting division of loyalties and responsibilities regarding both parties to the transactions;

~~((3))~~ (c) At or before the completion of each agency cross transaction, ~~(the investment adviser)~~ you or any other person relying on this rule sends the client a written confirmation. You must include the following in the written confirmation ~~(shall include (A))~~:

(i) A statement of the nature of the transaction~~(, (B))~~;

(ii) The date the transaction took place ~~((C))~~;

(iii) An offer to furnish, upon request, the time when the transaction took place; and

~~((D))~~ (iv) The source and amount of any other remuneration the investment adviser received or will receive in connection with the transaction. In the case of a purchase, if the investment adviser was not participating in a distribution, or, in the case of a sale, if the investment adviser was not participating in a tender offer, the written confirmation may state whether the investment adviser has been receiving or will receive any other remuneration and that the investment adviser will furnish the source and amount of such remuneration to the client upon the client's written request;

~~((4))~~ (3) At least annually, and with or as part of any written statement or summary of the account from the investment adviser, the investment adviser or any other person relying on this rule sends each client a written disclosure statement identifying ~~((A))~~;

(a) The total number of agency cross transactions during the period for the client since the date of the last such statement or summary; and

~~((B))~~ (b) The total amount of all commissions or other remuneration the investment adviser received or will receive in connection with agency cross transactions for the client during the period~~((C))~~;

~~((5))~~ (4) Each written disclosure and confirmation required by this rule must include a conspicuous statement that the client may revoke the written consent required under subsection ~~((B)(1))~~ (2)(a) of this ~~(rule)~~ section at any time by providing written notice to the investment adviser~~((C))~~;

~~((6))~~ (5) No agency cross transaction may be effected in which the same investment adviser recommended the transaction to both any seller and any purchaser.

~~((E))~~ (6) Nothing in this rule shall be construed to relieve an investment adviser or investment adviser representative from acting in the best interest of the client, including fulfilling his duty with respect to the best price and execution for the particular transaction for the client nor shall it relieve any investment adviser or investment adviser representative of any other disclosure obligations imposed by the Securities Act of Washington, chapter 21.20 RCW, and the rules and regulations thereunder.

NEW SECTION

WAC 460-24A-120 Compliance procedures and practices. If you are an investment adviser registered or required to be registered under RCW 21.20.040, or a federal covered adviser, and have more than one employee, it is unlawful under RCW 21.20.020 for you to provide investment advice to clients unless you:

(1) **Policies and procedures.** Adopt and implement written policies and procedures reasonably designed to prevent violation, by you and your supervised persons, of the Securities Act of Washington, chapter 21.20 RCW, and the rules adopted thereunder, and the federal securities laws;

(2) **Annual review of policies and procedures.** Review, no less frequently than annually, the adequacy of the policies and procedures established pursuant to this section and the effectiveness of their implementation; and

(3) **Chief compliance officer.** Designate an individual responsible for administering the policies and procedures that you adopt under subsection (1) of this section.

NEW SECTION

WAC 460-24A-125 Proxy voting. If you are an investment adviser registered or required to be registered under RCW 21.20.040, or a federal covered adviser, it is unlawful under RCW 21.20.020 for you to exercise voting authority with respect to client securities, unless you:

(1) Adopt and implement written policies and procedures that are reasonably designed to ensure that you vote client securities in the best interest of clients, which procedures must include how you address material conflicts that may arise between your interests and those of your clients;

(2) Disclose to clients how they may obtain information from you about how you voted with respect to their securities; and

(3) Describe to clients your proxy voting policies and procedures and, upon request, furnish a copy of the policies and procedures to the requesting client.

NEW SECTION

WAC 460-24A-130 Contents of investment advisory contract. If you are an investment adviser registered or required to be registered under RCW 21.20.040, it is unlawful under RCW 21.20.020 and 21.20.030 for you to enter into, extend, or renew any investment advisory contract unless it provides in writing:

(1) The services to be provided, the term of the contract, the investment advisory fee, the formula for computing the fee, the amount of prepaid fee to be returned in the event of termination or nonperformance of the contract, and whether and the extent to which the contract grants discretionary authority to you and any limits on such authority;

(2) That no direct or indirect assignment or transfer of the contract may be made by you without the written consent of the client or other party to the contract;

(3) That you shall not be compensated on the basis of a share of capital gains upon or capital appreciation of the funds or any portion of the funds of the client except as permitted under WAC 460-24A-150;

(4) That if you are a partnership, you shall notify the client or other party to the investment contract of any change in the membership of the partnership within a reasonable time after the change;

(5) That if you are an investment adviser who has custody as a consequence of your authority to make withdrawals from client accounts to pay your advisory fee, that the contract gives you the authority to deduct your advisory fees from the account held with the qualified custodian;

(6) The nature and extent to which you are granted proxy voting authority with respect to client securities;

(7) The terms for termination of the contract;

(8) The nature and extent to which you may deliver electronically the documents specified in WAC 460-24A-145, account statements, fee invoices, and other documents and the extent and manner in which a client may opt out of receiving documents electronically; and

(9) For clients residing in Washington, the advisory contract shall not waive or limit compliance with, or require indemnification for any violations of, any provision of the Securities Act of Washington, chapter 21.20 RCW.

AMENDATORY SECTION (Amending Order 304, filed 2/28/75, effective 4/1/75)

WAC 460-24A-140 Guarantees of success are prohibited. ~~((No representation or statement, whether direct or by implication, should be made guaranteeing the success of investments made pursuant to recommendations of the advisory service concerned.))~~ It is an unlawful act, practice, or course of business which operates or would operate as a fraud or deceit under RCW 21.20.020 (1)(b) to make any representation or statement, whether directly or by implication, guaranteeing the success of investments made pursuant to the recommendations of an investment adviser or investment adviser representative.

AMENDATORY SECTION (Amending WSR 02-19-093, filed 9/17/02, effective 10/18/02)

WAC 460-24A-145 Investment adviser brochure rule. (1) **General requirements.** Unless otherwise provided in this rule, if you are an investment adviser((-)) registered or required to be registered pursuant to RCW 21.20.040, you shall, in accordance with the provisions of this section, ((offer and)) deliver to each advisory client and prospective advisory client ((written disclosure materials containing at least the information then so required by Part II of Form ADV and such other information as the director may require. If a federal covered adviser may utilize a copy of Part II of its Form ADV to provide the disclosures required pursuant to 17 CFR 275.204-3, then an investment adviser may use a copy of Part II of its ADV to provide the disclosures required by this section)).

(a) A brochure which may be a copy of Part 2A of your Form ADV or written documents containing the information required by Part 2A of Form ADV. The brochure must comply with the language, organizational format and filing requirements specified in the Instructions to Form ADV Part 2;

(b) A copy of your Part 2B brochure supplement for each individual:

(i) Providing investment advice and having direct contact with clients in this state; or

(ii) Exercising discretion over assets of clients in this state, even if no direct contact is involved;

(c) A copy of your Part 2A Appendix 1 wrap fee brochure if you sponsor or participate in a wrap fee account;

(d) A summary of material changes, which may be included in Form ADV Part 2 or given as a separate document; and

(e) Such other information as the director may require.

(2) **Delivery.**

(a) ((An investment adviser.)) **Initial delivery.** Except as provided in ((b)) (c) of this subsection, you shall deliver the materials required by this section to an advisory client or prospective advisory client (i) not less than forty-eight hours prior to entering into any investment advisory contract with such client or prospective client, or (ii) at the time of entering into any such contract, if the advisory client has a right to terminate the contract without penalty within five business days after entering into the contract.

(b) ((Delivery of the)) **Annual delivery.** Except as provided in (c) of this subsection, if there have been any material changes that have taken place since the last summary and brochure delivery to your clients, you must:

(i) Deliver within one hundred twenty days of the end of your fiscal year a free, updated brochure and related brochure supplements which include or are accompanied by a summary of the material changes; or

(ii) Deliver a summary of material changes that includes an offer to provide a copy of the updated brochure and supplements and information on how the client may obtain a copy of the brochure and supplements. You must mail or deliver any materials requested by the client pursuant to such an offer within seven days of the receipt of the request.

(c) **Exception for certain clients.** You are not required to deliver the materials ((required by (a))) set forth in (1) of

this ((subsection need not be made in connection with entering into a contract for impersonal advisory services.

(3) Offer to deliver.

(a) An investment adviser, except as provided in (b) of this subsection, annually shall, without charge, deliver or offer in writing to deliver upon written request to each of its advisory clients the materials required by this section.

(b) The delivery or offer required by (a) of this subsection need not be made to advisory clients receiving advisory services solely pursuant to a contract for impersonal advisory services requiring a payment of less than \$200.00.

(c) With respect to an advisory client entering into a contract or receiving advisory services pursuant to a contract for impersonal advisory services which requires a payment of \$200.00 or more, an offer of the type specified in (a) of this subsection shall also be made at the time of entering into an advisory contract.

(d) Any materials requested in writing by an advisory client pursuant to an offer required by this subsection must be mailed or delivered within seven days of the receipt of the request.)) section to:

(i) Clients receiving advisory services solely pursuant to a contract for impersonal advisory services requiring a payment of less than two hundred dollars;

(ii) An investment company registered under the Investment Company Act of 1940; or

(iii) A business development company as defined in the Investment Company Act of 1940 and whose advisory contract meets the requirements of section 15c of that act.

(3) **Electronic delivery.** You may deliver the materials required by this section electronically if you:

(a) In the case of an initial delivery to a potential client, obtain a verification that readable copies of the materials were received by the client;

(b) In the case of deliveries other than initial deliveries, obtain each client's prior consent to provide the materials electronically;

(c) Prepare the electronically delivered materials in the format prescribed in (a) of this subsection and the instructions to Form ADV Part 2;

(d) Deliver the materials in a format that can be retained by the client in either electronic or paper form; and

(e) Establish procedures to supervise personnel transmitting the materials and prevent violations of this rule.

(4) **Delivery to limited partners.** If ((the investment adviser is)) you are the ((general partner of)) adviser to a limited partnership, ((the manager of)) a limited liability company, or ((the trustee of)) a trust, then((, for purposes of this section, the investment adviser)) you must treat each of the partnership's limited partners, the company's members, or the trust's beneficial owners, as a client. For purposes of this section, a limited liability partnership or limited liability limited partnership is a "limited partnership."

(5) ((Wrap fee program brochures.

(a) If the investment adviser is a sponsor of a wrap fee program, then the materials required to be delivered, by subsection (2) of this section, to a client or prospective client of the wrap fee program, must contain all information required by Form ADV. Any additional information must be limited to

information applicable to wrap fee programs that the investment adviser sponsors.

(b) The investment adviser does not have to offer or deliver wrap fee information if another sponsor of the wrap fee program offers or delivers to the client or prospective client of the wrap fee program wrap fee program information containing all the information the investment adviser's wrap fee program brochure must contain.

(6) **Delivery of updates and amendments.** When the disclosure materials required to be delivered pursuant to subsection (2) of this section become materially inaccurate, the investment adviser must amend and promptly deliver to its clients amendments to such disclosure materials. The instructions to Part 2 of Form ADV contain updating and delivery instructions that the investment adviser must follow. An amendment will be considered to be delivered promptly if the amendment is delivered within thirty days of the event that requires the filing of the amendment.

(7)) Omission of inapplicable information. If ((an investment adviser)) you render((s)) substantially different types of investment advisory services to different advisory clients, ((the investment adviser)) you may provide them with different disclosure materials, provided that each client receives all applicable information about services and fees. The disclosure delivered to a client may omit any information required by Part ((H)) 2 of Form ADV if such information is applicable only to a type of investment advisory service or fee which is not rendered or charged, or proposed to be rendered or charged, to that client or prospective client.

((8)) (6) **Other disclosure obligations.** Nothing in this section shall relieve ((any investment adviser)) you from any obligation to disclose any information to ((its)) your advisory clients or prospective advisory clients not specifically required by this rule under chapter 21.20 RCW, the rules and regulations thereunder, or any other federal or state law.

((9)) (7) **Definitions.** For the purposes of this rule:

(a) "Contract for impersonal advisory services" means any contract relating solely to the provision of investment advisory services;

(i) By means of written material or oral statements which do not purport to meet the objectives or needs of specific individuals or accounts;

(ii) Through the issuance of statistical information containing no expression of opinion as to the investment merits of a particular security; or

(iii) Any combination of the foregoing services.

(b) "Entering into," in reference to an investment advisory contract, does not include an extension or renewal without material change of any such contract which is in effect immediately prior to such extension or renewal.

((c)) "Sponsor" of a wrap fee program means an investment adviser that is compensated under a wrap fee program for sponsoring, organizing, or administering the program, or for selecting, or providing advice to clients regarding the selection of other investment advisers in the program.

(d) "Wrap fee program" means an advisory program under which a specified fee or fees, not based directly upon transactions in a client's account, is charged for investment advisory services (which may include portfolio management

or advice concerning the selection of other investment advisers) and the execution of client transactions.))

AMENDATORY SECTION (Amending WSR 00-01-001, filed 12/1/99, effective 1/1/00)

WAC 460-24A-150 Performance compensation arrangements. (1) **General.** If you are an investment adviser you may, without violating RCW 21.20.030(1), enter into ((a performance compensation arrangement with a customer that complies with Securities and Exchange Commission Rule 205-3, as made effective in Release No. IA-996 and as amended in Release No. IA-1731, under the Investment Advisers Act of 1940. Rule 205-3 is found in the CCH Federal Securities Law Reports published by Commerce Clearing House. Copies of the rule are also available at the office of the securities administrator.)), extend, or renew an investment advisory contract which provides for compensation to you on the basis of a share of capital gains upon or capital appreciation of the funds, or any portion of the funds, of the client if:

(a) You are an investment adviser who is not registered and is not required to be registered under RCW 21.20.040; or

(b) The client is a "qualified client" as defined in subsection (2) of this section and the conditions of subsections (3) through (8) of this section are met.

(2) **Definitions.** For the purposes of this section:

(a) The term "qualified client" means:

(i) A natural person who, or a company that, immediately after entering into the contract has at least one million dollars under the management of the investment adviser;

(ii) A natural person who, or a company that, the investment adviser entering into the contract (and any person acting on his or her behalf) reasonably believes, immediately prior to entering into the contract, either:

(A) Has a net worth (together, in the case of a natural person, with assets held jointly with a spouse) of more than two million dollars. For purposes of calculating a natural person's net worth:

(I) The person's primary residence must not be included as an asset;

(II) Indebtedness secured by the person's primary residence, up to the estimated fair market value of the primary residence at the time the investment advisory contract is entered into may not be included as a liability (except that if the amount of such indebtedness outstanding at the time of calculation exceeds the amount outstanding sixty days before such time, other than as a result of the acquisition of the primary residence, the amount of such excess must be included as a liability); and

(III) Indebtedness that is secured by the person's primary residence in excess of the estimated fair market value of the residence must be included as a liability; or

(B) Is a qualified purchaser as defined in section 2 (a)(51)(A) of the Investment Company Act of 1940 (15 U.S.C. 80a-2 (a)(51)(A)) at the time the contract is entered into; or

(iii) A natural person who immediately prior to entering into the contract is:

(A) An executive officer, director, trustee, general partner, or person serving in a similar capacity, of the investment adviser; or

(B) An employee of the investment adviser (other than an employee performing solely clerical, secretarial, or administrative functions with regard to the investment adviser) who, in connection with his or her regular functions or duties, participates in the investment activities of such investment adviser, provided that such employee has been performing such functions and duties for or on behalf of the investment adviser, or substantially similar functions or duties for or on behalf of another company for at least twelve months.

(b) The term "company" has the same meaning as in section 202 (a)(5) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2 (a)(5)), but does not include a company that is required to be registered under the Investment Company Act of 1940 but is not registered.

(c) The term "private investment company" means a company that would be defined as an investment company under section 3(a) of the Investment Company Act of 1940 (15 U.S.C. 80a-3(a)) but for the exception provided from that definition by section 3 (c)(1) of such Act (15 U.S.C. 80a-3 (c)(1)).

(d) The term "executive officer" means the president, any vice-president in charge of a principal business unit, division or function (such as sales, administration, or finance), any other officer who performs a policy-making function, or any other person who performs similar policy-making functions, for the investment adviser.

(3) **Compensation formula.** The compensation paid to you with respect to the performance of any securities over a given period must be based on a formula with the following characteristics:

(a) In the case of securities for which market quotations are readily available within the meaning of Rule 2a-4(a)(1) under the Investment Company Act of 1940 (Definition of "Current Net Asset Value" for Use in Computing Periodically the Current Price of Redeemable Security), 17 C.F.R. 270.2a-4 (a)(1), the formula must include the realized capital losses and unrealized capital depreciation of the securities over the period:

(b) In the case of securities for which market quotations are not readily available within the meaning of Rule 2a-4 (a)(1) under the Investment Company Act of 1940, 17 C.F.R. 270.2a-4 (a)(1), the formula must include:

(i) The realized capital losses of securities over the period;

(ii) If the unrealized capital appreciation of the securities over the period is included, the unrealized capital depreciation of the securities over the period; and

(c) The formula must provide that any compensation paid to you under this section is based on the gains less the losses (computed in accordance with (a) and (b) of this subsection) in the client's account for a period of not less than one year.

(4) **Client disclosure.** To the extent not otherwise disclosed on Form ADV Part 2, you must disclose in writing to the client all material information concerning the proposed advisory arrangement, including the following:

(a) That the fee arrangement may create an incentive for the investment adviser to make investments that are riskier or more speculative than would be the case in the absence of a performance fee;

(b) Where relevant, that the investment adviser may receive increased compensation with regard to unrealized appreciation as well as realized gains in the client's account;

(c) The period which will be used to measure investment performance throughout the contract and their significance in the computation of the fee;

(d) The nature of any index which will be used as a comparative measure of investment performance, the significance of the index, and the reason the investment adviser believes that the index is appropriate; and

(e) Where your compensation is based in part on the unrealized appreciation of securities for which market quotations are not readily available within the meaning of Rule 2a-4 (a)(1) under the Investment Company Act of 1940, 17 C.F.R. 270.2a-4 (a)(1), how the securities will be valued and the extent to which the valuation will be independently determined.

(5) **Equity owners.** In the case of a private investment company, as defined in subsection (2)(c) of this rule, an investment company registered under the Investment Company Act of 1940, or a business development company, as defined in section 202 (a)(22) of the Investment Advisers Act of 1940, each equity owner of any such company (except for the investment adviser entering into the contract and any other equity owners not charged a fee on the basis of a share of capital gains or capital appreciation) will be considered a client for the purposes of subsection (1) of this rule.

(6) **Informed consent.** You or any of your investment adviser representatives that enter into a contract under this rule, must reasonably believe, immediately before entering into the contract that the contract represents an arm's length arrangement between the parties and that the client, alone or together with the client's independent agent, understands the proposed method of compensation and its risks.

(7) **Nonexclusive.** Any person entering into or performing an investment advisory contract under this section is not relieved of any obligations under RCW 21.20.020 or any other applicable provision of the Securities Act of Washington, chapter 21.20 RCW, or any rule or order thereunder.

(8) **Obligations of independent representative.** Nothing in this section shall relieve a client's independent representative from any obligation to the client under applicable law.

(9) **Transition rules.**

(a) **Registered investment advisers.** If you are a registered investment adviser that entered into a contract and satisfied the conditions of this section that were in effect when the contract was entered into, you will be considered to satisfy the conditions of this section. If a natural person or company who was not a party to the contract becomes a party (including an equity owner of a private investment company advised by the adviser), however, the conditions of this section in effect at that time will apply with regard to that person or company.

(b) **Registered investment advisers that were previously not registered.** This section shall not apply to an advisory

contract entered into when you were not required to register and were not registered. If a natural person or a company who was not a party to the contract becomes a party (including an equity owner of a private investment company advised by the adviser) when you are registered or required to register, however, the conditions of this section in effect at that time will apply with regard to that person or company.

(c) **Certain transfers of interest.** Solely for purposes of (a) and (b) of this subsection, a transfer of an equity ownership interest in a private investment company by gift or bequest, or pursuant to an agreement related to a legal separation or divorce, will not cause the transferee to "become a party" to the contract and will not cause this section to apply to such transferee.

AMENDATORY SECTION (Amending Order 304, filed 2/28/75, effective 4/1/75)

WAC 460-24A-160 Restrictions on advertising refunds. ((Advisory services should not)) If you are in an investment adviser or investment adviser representative, it is unlawful under RCW 21.20.020 to advertise or represent to subscribers or customers for advisory services that subscriptions, fees or other payments will be refunded if they are not satisfied unless:

(1) Such undertaking to refund is clear and unequivocal and is concerned not with the merit or success of the service, but with the customer's satisfaction therewith; and

(2) ((the investment adviser's)) Your financial ((responsibility)) situation is adequate to ((insure its)) ensure your ability to meet all such refund demands.

AMENDATORY SECTION (Amending WSR 08-18-033, filed 8/27/08, effective 9/27/08)

WAC 460-24A-170 Minimum financial requirements for investment advisers. (1) If you are an investment adviser registered or required to be registered under RCW 21.20.040, who has custody of client funds or securities, you shall maintain at all times a minimum net worth of \$35,000 unless provided otherwise in this chapter. If you are an investment adviser registered or required to be registered under RCW 21.20.040, who has discretionary authority over client funds or securities, you shall maintain at all times a minimum net worth of \$10,000.

(2) If you are an investment adviser registered or required to be registered under RCW 21.20.040 who has custody or ((discretion of)) discretionary authority over client funds or securities, but does not meet the minimum net worth requirements in subsection (1) of this section you shall ((be bonded)) maintain a bond in the amount of the net worth deficiency rounded up to the nearest \$5,000. Any bond required by this section shall be in the form determined by the director, issued by a company qualified to do business in this state, and shall be subject to the claims of all clients of the investment adviser regardless of the ((client's)) clients' states of residence.

(3) If you are an investment adviser registered or required to be registered under RCW 21.20.040, ((who accepts prepayment of more than \$500 per client and six or

~~more months in advance,))~~ you shall maintain at all times a positive net worth.

(4) Unless otherwise exempted, as a condition of the right to transact business in this state, ~~((every))~~ if you are an investment adviser registered or required to be registered under RCW 21.20.040 you shall, by the close of business on the next business day, notify the director if ~~((the investment adviser's))~~ your net worth is less than the minimum required. After transmitting such notice, ~~((each investment adviser))~~ you shall file, by the close of business on the next business day, a report with the director of its financial condition, including the following:

- (a) A trial balance of all ledger accounts;
- (b) A statement of all client funds or securities which are not segregated;
- (c) A computation of the aggregate amount of client ledger debit balances; and
- (d) A statement as to the number of client accounts.

(5) For purposes of this section, the term "net worth" shall mean an excess of assets over liabilities, as determined by generally accepted accounting principles, but shall not include as assets: Prepaid expenses (except as to items properly classified as assets under generally accepted accounting principles), deferred charges, goodwill, franchise rights, organizational expenses, patents, copyrights, marketing rights, unamortized debt discount and expense, all other assets of intangible nature; primary residence, home furnishings, automobile(s), and any other personal items not readily marketable in the case of an individual; advances or loans to stockholders and officers in the case of a corporation; and advances or loans to partners in the case of a partnership.

(6) For purposes of this section, if you are an investment adviser you shall not be deemed to be exercising discretion when you place trade orders with a broker-dealer pursuant to a third-party trading agreement if:

(a) You have executed an investment adviser contract exclusively with your client which acknowledges that a third-party trading agreement will be executed to allow you to effect securities transactions for your client in your client's broker-dealer account;

(b) Your contract specifically states that your client does not grant discretionary authority to you and you in fact do not exercise discretion with respect to the account; and

(c) A third-party trading agreement is executed between your client and a broker-dealer which specifically limits your authority in your client's broker-dealer account to the placement of trade orders and deduction of investment adviser fees.

(7) The director may require that a current appraisal be submitted in order to establish the worth of any asset for the purposes of meeting the minimum net worth requirements in subsection (1) of this section or the positive net worth requirement in subsection (3) of this section.

~~((7) Every))~~ (8) If you are an investment adviser that has its principal place of business in a state other than this state, you shall maintain only such minimum net worth as required by the state in which ~~((the investment adviser))~~ you maintain ~~((s-its))~~ your principal place of business, provided ~~((the investment adviser is))~~ you are licensed in that state and ~~((is))~~

are in compliance with that state's minimum capital requirements.

AMENDATORY SECTION (Amending WSR 01-16-125, filed 7/31/01, effective 10/24/01)

WAC 460-24A-200 Books and records to be maintained by investment advisers. (1) ~~((Every))~~ If you are an investment adviser registered or required to be registered pursuant to RCW 21.20.040, you shall make and keep true, accurate, and current the following books, ledgers, and records:

(a) A journal or journals, including cash receipts and disbursement~~((s))~~ records, and any other records of original entry forming the basis of entries in any ledger.

(b) General and auxiliary ledgers (or other comparable records) reflecting asset, liability, reserve, capital, income and expense accounts.

(c) A memorandum of each order given by ~~((the investment adviser))~~ you for the purchase or sale of any security, of any instruction received by ~~((the investment adviser))~~ you from a client concerning the purchase, sale, receipt or delivery of a particular security, and of any modification or cancellation of any such order or instruction. The memoranda shall show the terms and conditions of the order, instruction, modification or cancellation; shall identify the person connected with ~~((the investment adviser))~~ you who recommended the transaction to the client and the person who placed the order; and shall show the account for which entered, the date of entry, and the bank or broker-dealer by or through whom executed where appropriate. Orders entered pursuant to the exercise of a power of attorney shall be so designated.

(d) All check books, bank statements, canceled checks and cash reconciliations of the investment adviser.

(e) All bills or statements (or copies thereof), paid or unpaid, relating to ~~((the))~~ your business ~~((of the investment adviser)).~~

(f) All trial balances, financial statements, and internal audit working papers or other supporting financial records relating to ~~((the investment adviser's))~~ your business as an investment adviser. For purposes of this subsection, "financial statements" shall mean a balance sheet prepared in accordance with generally accepted accounting principles, ~~((and))~~ an income statement, a cash flow statement, and a net worth computation, if applicable, as required by WAC 460-24A-170.

(g) Originals of all written communications received and copies of all written communications sent by ~~((the investment adviser))~~ you relating to your investment advisory business including, but not limited to:

(i) Any recommendation made or proposed to be made and any advice given or proposed to be given~~((:));~~

(ii) Any receipt, disbursement or delivery of funds or securities~~((-or));~~ and

(iii) The placing or execution of any order to purchase or sell any security: Provided, however, That ~~((the investment adviser))~~ you shall not be required to keep any unsolicited market letters and other similar communications of general public distribution not prepared by or for ~~((the investment adviser))~~ you. And provided, That if ~~((the investment~~

adviser) you send((s)) any notice, circular or other advertisement offering any report, analysis, publication or other investment advisory service to more than ten persons, ((the investment adviser) you shall not be required to keep a record of the names and addresses of the persons to whom it was sent, except that if such notice, circular or advertisement is distributed to persons named on any list, ((the investment adviser) you shall retain with the copy of such notice, circular or advertisement a memorandum describing the list and the source thereof.

(h) A list or other record of all accounts in which ((the investment adviser is)) you are vested with any discretionary ((power with respect to)) authority over the funds, securities or transactions of any client.

(i) A copy of all powers of attorney and other evidences of the granting of any discretionary authority by any client to ((the investment adviser)) you.

(j) A written copy of each signed agreement entered into by ((the investment adviser)) you with any client and all other written agreements otherwise relating to ((the investment adviser's)) your business as an investment adviser.

(k) A file containing a copy of each notice, circular, advertisement, newspaper article, investment letter, bulletin or other communication, including by electronic media, and all amendments thereto, that ((the investment advisers)) you circulate((s)) or distribute((s)), directly or indirectly, to two or more persons (other than persons connected with ((the investment adviser)) you), and if such communication recommends the purchase or sale of a specific security and does not state the reasons for the recommendation, a memorandum ((of the investment adviser) by you indicating the reasons for the recommendation.

(l)(i) A record of every transaction in a security in which ((the investment adviser) you or any ((advisory representative (as hereinafter defined) of the investment adviser)) of your advisory representatives has, or by reason of such transaction acquires, any direct or indirect beneficial ownership, except:

(A) Transactions effected in any account over which neither ((the investment adviser) you nor any of your advisory representatives ((of the investment adviser)) has any direct or indirect influence or control; and

(B) Transactions in securities which are direct obligations of the United States.

The record shall state the title and amount of the security involved; the date and nature of the transaction (i.e., purchase, sale or other acquisition or disposition); the price at which it was effected; and the name of the broker-dealer or bank with or through whom the transaction was effected. The record may also contain a statement declaring that the reporting or recording of any such transaction shall not be construed as an admission that ((the investment adviser) you or your advisory representative has any direct or indirect beneficial ownership in the security. ((A)) You shall record each transaction ((shall be recorded)) not later than ten days after the end of the calendar quarter in which the transaction was effected.

(ii) For the purposes of this subsection (1)(l), the following definitions will apply:

(A) "Advisory representative" shall mean any of your partners, officers or directors ((of the investment adviser)); any employee who participates in any way in the determination of which recommendations shall be made, or whose functions or duties relate to the determination of which recommendation shall be made; any employee who, in connection with his or her duties, obtains any information concerning which securities are being recommended prior to the effective dissemination of the recommendations; and any of the following persons who obtain information concerning securities recommendations being made by ((the investment adviser) you prior to the effective dissemination of the recommendations:

(I) Any person in a control relationship to ((the investment adviser) you;

(II) Any affiliated person of a controlling person; and

(III) Any affiliated person of an affiliated person.

(B) "Control" shall mean the power to exercise a controlling influence over the management or policies of a company, unless such power is solely the result of an official position with such company. Any person who owns beneficially, either directly or through one or more controlled companies, more than twenty-five percent of the voting securities of a company shall be presumed to control such company.

(iii) ((An investment adviser) You shall not be deemed to have violated the provisions of this subsection (1) because of the failure to record securities transactions of any advisory representative if ((the investment adviser establishes)) you establish that ((#)) you instituted adequate procedures, and used reasonable diligence to obtain promptly, reports of all transactions required to be recorded.

(m)(i) Notwithstanding the provisions of (l) of this subsection, ((where the investment adviser is)) if you are primarily engaged in a business or businesses other than advising investment advisory clients, you must maintain a record ((must be maintained)) of every transaction in a security in which ((the investment adviser) you or any of your advisory representatives (as hereinafter defined) ((of the investment adviser)) has, or by reason of any transaction acquires, any direct or indirect beneficial ownership, except:

(A) Transactions effected in any account over which neither ((the investment adviser) you nor any of your advisory representatives ((of the investment adviser)) has any direct or indirect influence or control; and

(B) Transactions in securities which are direct obligations of the United States.

The record shall state the title and amount of the security involved; the date and nature of the transaction (i.e., purchase, sale, or other acquisition or disposition); the price at which it was effected; and the name of the broker-dealer or bank with or through whom the transaction was effected. The record may also contain a statement declaring that the reporting or recording of any transaction shall not be construed as an admission that ((the investment adviser) you or any of your advisory representatives has any direct or indirect beneficial ownership in the security. You shall record a transaction ((shall be recorded)) not later than ten days after the end of the calendar quarter in which the transaction was effected.

(ii) ((An investment adviser is)) You are "primarily engaged in a business or businesses other than advising

investment advisory clients" ~~((when))~~ if, for each of ~~((its))~~ your most recent three fiscal years or for the period of time since organization, whichever is lesser, ~~((the investment adviser))~~ you derived, on an unconsolidated basis, more than fifty percent of:

(A) ~~((Its))~~ Your total sales and revenues; and

(B) ~~((Its))~~ Your income (or loss) before income taxes and extraordinary items, from such other business or businesses.

(iii) For purposes of this subsection (1)(m) of this section the following definitions will apply:

(A) "Advisory representative," when used in connection with a company primarily engaged in a business or businesses other than advising investment advisory clients, shall mean any partner, officer, director, or employee of the investment adviser who participates in any way in the determination of which recommendation shall be made, or whose functions or duties relate to the determination of which securities are being recommended prior to the effective dissemination of the recommendations; and any of the following persons who obtain information concerning securities recommendations being made by the investment adviser prior to the effective dissemination of the recommendations or of the information concerning the recommendations:

(I) Any person in a control relationship to the investment adviser;

(II) Any affiliated person of a controlling person; and

(III) Any affiliated person of an affiliated person.

(B) "Control" shall mean the power to exercise a controlling influence over the management or policies of a company, unless such power is solely the result of an official position with such company. Any person who owns beneficially, either directly or through one or more controlled companies, more than twenty-five percent of the voting securities of a company shall be presumed to control such company.

(iv) ~~((An investment adviser))~~ You shall not be deemed to have violated the provisions of this subsection (1)(m) because of ~~((the))~~ your failure to record securities transactions of any advisory representative if ~~((the investment adviser establishes))~~ you establish that ~~((it))~~ you instituted adequate procedures, and used reasonable diligence to obtain promptly, reports of all transactions required to be recorded.

(n) The following items related to WAC 460-24A-145 and Part ~~((H))~~ 2 of Form ADV:

(i) A copy of each written statement, and each amendment or revision, given or sent to any of your clients or prospective clients ~~((of the investment adviser))~~ as required by WAC 460-24A-145;

(ii) Any summary of material changes that is required by Part ~~((H))~~ 2 of Form ADV that is not included in the written statement; and

(iii) A record of the dates that each written statement, each amendment or revision thereto, and each summary of material changes was given or offered to any client or prospective client who subsequently becomes a client.

(o) For each client that ~~((was))~~ you obtained ~~((by the adviser))~~ by means of a solicitor to whom you paid a cash fee ~~((was paid by the adviser))~~:

(i) Evidence of a written agreement to which ~~((the adviser is))~~ you are a party related to the payment of such fee;

(ii) A signed and dated acknowledgment of receipt from the client evidencing the client's receipt of ~~((the investment adviser's))~~ your disclosure statement and a written disclosure statement of the solicitor; and

(iii) A copy of the solicitor's written disclosure statement. The written agreement, acknowledgment, and solicitor disclosure statement will be considered to be in compliance if such documents are in compliance with Rule 275.206 (4)-3 of the Investment Advisers Act of 1940.

For purposes of this subsection, the term "solicitor" shall mean any person or entity who, for compensation, acts as an agent of an investment adviser in referring potential clients.

(p) All accounts, books, internal working papers, and any other records or documents that are necessary to form the basis for or demonstrate the calculation of the performance or rate of return of all managed accounts or securities recommendations in any notice, circular, advertisement, newspaper article, investment letter, bulletin, or other communication including, but not limited to, electronic media that ~~((the investment adviser))~~ you circulate~~((s))~~ or distribute~~((s))~~, directly or indirectly, to two or more persons (other than persons connected with ~~((the investment adviser))~~ you); provided however, that, with respect to the performance of managed accounts, the retention of all account statements, if they reflect all debits, credits, and other transactions in a client's account for the period of the statement, and all worksheets necessary to demonstrate the calculation of the performance or rate of return of all managed accounts shall be deemed to satisfy the requirements of this subsection.

(q) A file containing a copy of all written communications received or sent regarding any litigation involving ~~((the investment adviser))~~ you or any investment adviser representative or employee, and regarding any written customer or client complaint.

(r) Written information about each investment advisory client that is the basis for making any recommendation or providing any investment advice to such client.

(s) Written information about each security that you recommended a client buy or sell that is the basis for making any recommendation or providing any investment advice to such client.

(t) Written procedures to supervise the activities of employees and investment adviser representatives that are reasonably designed to achieve compliance with applicable securities laws and regulations.

~~((t))~~ (u) A file containing a copy of each document (other than any notices of general dissemination) that was filed with or received from any state or federal agency or self regulatory organization and that pertains to ~~((the registrant))~~ you or ~~((its))~~ your advisory representatives as that term is defined in (m)(iii)(A) of this subsection, which file should contain, but is not limited to, all applications, amendments, renewal filings, and correspondence.

~~((t))~~ (v) If you inadvertently held or obtained a client's securities or funds and returned them to the client within three business days or forwarded third-party checks within three business days, you shall keep the following records relating to the inadvertent custody:

(i) Issuer;

(ii) Type of security and series;

(iii) Date of issue;

(iv) For debt instruments, the denomination, interest rate and maturity date;

(v) Certificate number, including alphabetical prefix or suffix;

(vi) Name in which registered;

(vii) Date given to the adviser;

(viii) Date sent to client or sender;

(ix) Form of delivery to client or sender, or copy of the form of delivery to client or sender; and

(x) Mail confirmation number, if applicable, or confirmation by client or sender of the fund's or security's return.

(w) Copies, with original signatures of ~~((the investment adviser's))~~ you appropriate signatory and the investment adviser representative, of each initial Form ~~((U-4))~~ U4 and each amendment to Disclosure Reporting Pages (DRPs ~~((U-4))~~) must be retained by ~~((the investment adviser))~~ you (filing on behalf of the investment adviser representative) and must be made available for inspection upon regulatory request.

~~((2))~~ (x) If you obtain possession of securities that are acquired from the issuer in a transaction or chain of transactions not involving any public offering that comply with the exception from custody under WAC 460-24A-109(1), you shall keep the following records:

(i) A record showing the issuer or current transfer agent's name, address, phone number, and other applicable contact information pertaining to the party responsible for recording client interests in the securities; and

(ii) A copy of any legend, shareholder agreement or other agreement showing that those securities are transferable only with prior consent of the issuer or holders of the outstanding securities of the issuer.

(y) A copy of a current written business continuity plan which identifies procedures to be followed in the event of an emergency or significant business disruption and which is reasonably designed to enable you to meet your fiduciary obligations to your clients.

(2)(a) If ~~((an investment adviser))~~ you are subject to subsection (1) of this section ~~((has))~~ and have custody or possession of securities or funds of any client, the records required to be made and kept under subsection (1) of this section shall include:

~~((a))~~ (i) A copy of any and all documents executed by the client (including a limited power of attorney) under which the adviser is authorized or permitted to withdraw a client's funds or securities maintained with a custodian upon the adviser's instruction to the custodian.

(ii) A journal or other record showing all purchases, sales, receipts and deliveries of securities (including certificate numbers) for all accounts and all other debits and credits to the accounts.

~~((b))~~ (iii) A separate ledger account for each such client showing all purchases, sales, receipts and deliveries of securities, the date and price of each purchase or sale, and all debits and credits.

~~((c))~~ (iv) Copies of confirmations of all transactions effected by or for the account of any client.

~~((d))~~ (v) A record for each security in which any client has a position, which record shall show the name of each cli-

ent having any interest in each security, the amount of interest of each client, and the location of each security.

~~((3) Every investment adviser))~~ (vi) A copy of each of the client's quarterly account statements, as generated and delivered by the qualified custodian. If you also generate a statement that is delivered to the client, you shall also maintain copies of such statements along with the date such statements were sent to the clients.

(vii) If applicable to your situation, a copy of the special examination report verifying the completion of the examination by an independent certified public accountant and describing the nature and extent of the examination.

(viii) A record of any finding by the independent certified public accountant of any material discrepancies found during the examination.

(ix) If applicable, evidence of the client's designation of an independent representative.

(b) If you have custody because you advise a pooled investment vehicle, as defined in WAC 460-24A-005 (1)(a)(iii), you shall also keep the following records:

(i) True, accurate and current account statements;

(ii) Where you comply with WAC 460-24A-107 (1)(b) the records required to be made and kept shall include:

(A) The date of the audit;

(B) A copy of the audited financial statements; and

(C) Evidence of the mailing of the audited financial statements to all limited partners, members or other beneficial owners within one hundred twenty days of the end of its fiscal year.

(iii) Where you comply with WAC 460-24A-107 (1)(a) the records required to be made and kept shall include:

(A) A copy of the written agreement with the independent party reviewing all fees and expenses, indicating the responsibilities of the independent party; and

(B) Copies of all invoices and receipts showing the approval by the independent party for payment through the qualified custodian.

(c) If you have custody because you are acting as the trustee for a beneficial trust as it is described in WAC 460-24A-109(3), you shall also keep the following records until the account is closed or the adviser is no longer acting as trustee:

(i) A copy of the written statement given to each beneficial owner setting forth a description of the requirements of WAC 460-24A-105 and the reason why you will not be complying with those requirements; and

(ii) A written acknowledgment signed and dated by each beneficial owner, and evidencing receipt of the statement required under WAC 460-24A-109 (3)(b).

(3) If you are subject to subsection (1) of this section ~~((who))~~ and you render~~((s))~~ any investment supervisory or management service to any client, you shall, with respect to the portfolio being supervised or managed and to the extent that the information is reasonably available to or obtainable by ~~((the investment adviser))~~ you, make and keep true, accurate and current:

(a) Records showing separately for each client the securities purchased and sold, and the date, amount and price of each purchase or sale.

(b) For each security in which any client has a current position, information from which ~~((the investment adviser))~~ you can promptly furnish the name of each client, and the current amount ~~((of))~~ or the interest of the client.

(4) Any books or records required by this section may be maintained by ~~((the investment adviser))~~ you in such manner that the identity of any client to whom ~~((such investment adviser))~~ you render ~~((s))~~ investment supervisory services is indicated by numerical or alphabetical code or some similar designation.

(5) ~~((Every investment adviser))~~ If you are subject to subsection (1) of this section, you shall preserve the following records in the manner prescribed:

(a) All books and records required to be made under the provisions of subsections (1) to (3)~~((a))~~, inclusive, of this section except for books and records required to be made pursuant to subsection (1)(k) and (p) of this section shall be maintained and preserved in an easily accessible place for a period of not less than five years from the end of the fiscal year during which the last entry was made on the record, the first two years in ~~((the))~~ your principal office ~~((of the investment adviser))~~.

(b) Your partnership articles and any amendments, articles of incorporation, charter documents, minute books and stock certificate books of ~~((the investment adviser))~~ you and ~~((of))~~ any of your predecessors, shall be maintained in ~~((the))~~ your principal office ~~((of the investment adviser))~~ and preserved until at least three years after termination of the enterprise.

(c) Books and records required to be made pursuant to subsection (1)(k) and (p) of this section shall be maintained and preserved in an easily accessible place for a period of not less than five years, the first two years in ~~((the))~~ your principal office ~~((of the investment adviser))~~, from the end of the fiscal year during which ~~((the investment adviser))~~ you last published or otherwise disseminated, directly or indirectly, including by electronic media, the notice, circular, advertisement, newspaper article, investment letter, bulletin, or other communication.

(d) Notwithstanding other record preservation requirements of this section, you shall maintain the following records or copies ~~((shall be maintained))~~ at ~~((the))~~ your business location ~~((of the investment adviser))~~ from which the customer or client is being provided or has been provided with investment advisory services:

(i) Records required to be preserved under subsections (1)(c), (g) through (j), (n), (o), and (q) through (s), (2), and (3) of this section shall be maintained for the period prescribed in (a) of this subsection; and

(ii) Records or copies required pursuant to subsection (1)(k) and (p) of this section which records or related records identify the name of the investment adviser representative providing investment advice from that business location, or which identify the business locations' physical address, mailing address, electronic mailing address, or telephone number shall be maintained for the period prescribed in (c) of this subsection.

(6) If you are an investment adviser subject to subsection (1) of this section, you shall before ceasing to conduct or discontinuing business as an investment adviser, ~~((shall))~~

arrange for and be responsible for the preservation of the books and records required to be maintained and preserved under this section for the remainder of the period specified in this section, and shall notify the director in writing of the exact address where the books and records will be maintained during the period.

~~((7)(a) ((The records required to be maintained and preserved pursuant to this section may be immediately produced or reproduced by photograph on film or, as provided in (b) of this subsection, on magnetic disk, tape, or other computer storage medium, and be maintained and preserved for the required time in that form. If records are produced or reproduced by photographic film or computer storage medium, the investment adviser shall:~~

~~((i) Arrange the records and index the films or computer storage medium so as to permit the immediate location of any particular record;~~

~~((ii) Be ready at all times to promptly provide any facsimile enlargement of film or computer printout or copy of the computer storage medium that the director, by its examiners or other representatives, may request;~~

~~((iii) Store, separately from the original, one copy of the film or computer storage medium for the time required;~~

~~((iv) With respect to records stored on computer storage medium, maintain procedures for maintenance and preservation of, and access to, records so as to reasonably safeguard records from loss, alteration, or destruction; and~~

~~((v) With respect to records stored on photographic film, at all times have available for the director's examination of its records pursuant to RCW 21.20.100, facilities for immediate, easily readable projection of the film and for producing easily readable facsimile enlargements.~~

~~((b) Pursuant to (a) of this subsection, an investment adviser may maintain and preserve on computer tape, disk, or other computer storage medium records which, in the ordinary course of the adviser's business, are created by the adviser on electronic media or received by the adviser solely on electronic media or by electronic data transmission.)) The records required to be maintained and preserved pursuant to this section may be immediately produced or reproduced, and maintained and preserved for the required time, by an investment adviser on:~~

~~((i) Paper or hard copy form, as those records are kept in their original form;~~

~~((ii) Micrographic media, including microfilm, microfiche, or any similar medium; or~~

~~((iii) Electronic storage media, including any digital storage medium or system that meets the terms of this section.~~

~~((b) If you are an investment adviser required to maintain and preserve records pursuant to this section, you must:~~

~~((i) Arrange and index the records in a way that permits easy location, access, and retrieval of any particular record;~~

~~((ii) Provide promptly any of the following that the director may request:~~

~~((A) A legible, true, and complete copy of the record in the medium and format in which it is stored;~~

~~((B) A legible, true, and complete printout of the record; and~~

~~((C) Means to access, view, and print the records; and~~

(iii) Separately store, for the time required for preservation of the original record, a duplicate copy of the record on any medium allowed by this section.

(c) If the records that the investment adviser is required to maintain and preserve pursuant to this section are created or maintained on electronic storage media, the investment adviser must establish and maintain procedures:

(i) To maintain and preserve the records, so as to reasonably safeguard them from loss, alteration, or destruction;

(ii) To limit access to the records to properly authorized personnel and the director; and

(iii) To reasonably ensure that any reproduction of a non-electronic original record on electronic storage media is complete, true, and legible when retrieved.

(8) As used in this section, "investment supervisory services" means the giving of continuous advice as to the investment of funds on the basis of the individual needs of each client; and "discretionary authority" shall not include discretion as to the price at which, or the time when, a transaction is or is to be effected, if, before the order is given by the investment adviser, the client has directed or approved the purchase or sale of a definite amount of the particular security.

(9) Any book or other record made, kept, maintained, and preserved in compliance with Rules 17a-3 and 17a-4 under the Securities Exchange Act of 1934, which is substantially the same as the book or other record required to be made, kept, maintained, and preserved under this section, shall be deemed to be made, kept, maintained, and preserved in compliance with this section.

(10) ~~(Every)~~ If you are an investment adviser registered or required to be registered in this state and ~~(that has its)~~ have your principal place of business in a state other than this state ~~(shall be)~~, you are exempt from the requirements of this section, provided ~~(the investment adviser is)~~ you are licensed in the state where ~~(it has its)~~ you have your principal place of business and ~~(is)~~ are in compliance with that state's recordkeeping requirements.

AMENDATORY SECTION (Amending WSR 01-16-125, filed 7/31/01, effective 10/24/01)

WAC 460-24A-205 Notice of changes by investment advisers and investment adviser representatives. (1) ~~(Each licensed investment adviser must)~~ If you are an investment adviser registered or required to be registered pursuant to RCW 21.20.040, you must:

(a) Promptly file with IARD, in accordance with the instructions to Form ADV, any amendments to ~~(its)~~ your Form ADV. An amendment will be considered promptly filed if it is filed within thirty days of the event that requires the filing of the amendment; ~~(and)~~

(b) File an ~~(updated)~~ annual updating amendment to the Form ADV with IARD within ninety days ~~(of)~~ after the end of ~~(the investment adviser's)~~ your fiscal year; and

(c) File thirty days prior to use any amendments to your advisory contracts or offering materials for any pooled investment vehicles that you advise.

(2) ~~(Each)~~ If you are an investment adviser representative ~~(has)~~ registered or required to be registered pursuant to RCW 21.20.040, you have a continuing obligation to update

the information required by Form ~~(U-4)~~ U4 as changes occur and you must promptly file with IARD any amendments to ~~(the representative's)~~ your Form ~~(U-4)~~ U4. An amendment will be considered promptly filed if it is filed within thirty days of the event that requires the filing of the amendment.

AMENDATORY SECTION (Amending WSR 01-16-125, filed 7/31/01, effective 10/24/01)

WAC 460-24A-210 Notice of complaint must be filed with director. ~~(Each licensed)~~ If you are an investment adviser registered or required to be registered pursuant to RCW 21.20.040 who has filed a complaint against any of ~~(its)~~ your partners, officers, directors, agents licensed in Washington or associated persons with any law enforcement agency, any other regulatory agency having jurisdiction over the securities industry, or with any bonding company regarding any loss arising from alleged acts of such person, you shall send a copy of such complaint to the director, within ten days following its filing with such other agency or bonding company.

AMENDATORY SECTION (Amending WSR 08-14-006, filed 6/19/08, effective 7/20/08)

WAC 460-24A-220 Unethical business practices—Investment advisers and federal covered advisers. ~~(A person who is)~~ If you are an investment adviser, investment adviser representative, or a federal covered adviser ~~(is)~~, you are a fiduciary and ~~(has)~~ have a duty to act primarily for the benefit of ~~(its)~~ your clients. If you are a federal covered adviser, the provisions of this subsection apply ~~(to federal covered advisers)~~ to the extent that the conduct alleged is fraudulent, deceptive, or as otherwise permitted by the National Securities Markets Improvement Act of 1996 (Pub. L. No. 104-290). While the extent and nature of this duty varies according to the nature of the relationship with the client and the circumstances of each case, in accordance with RCW 21.20.020 (1)(c) and 21.20.110 (1)(g) ~~(an investment adviser or a federal covered adviser)~~ you shall not engage in dishonest or unethical business practices~~(s)~~ including, but not limited to, the following:

(1) Recommending to a client to whom investment supervisory, management or consulting services are provided the purchase, sale or exchange of any security without reasonable grounds to believe that the recommendation is suitable for the client on the basis of information furnished by the client after reasonable inquiry concerning the client's investment objectives, financial situation and needs, and any other information known by the investment adviser, investment adviser representative, or federal covered investment adviser.

(2) Exercising any ~~(discretionary power)~~ discretion in placing an order for the purchase or sale of securities for a client without obtaining written discretionary authority from the client within ten business days after the date of the first transaction placed pursuant to oral discretionary authority, unless the ~~(discretionary power)~~ discretion relates solely to the price at which, or the time when, an order involving a definite amount of a specified security shall be executed, or both.

(3) Inducing trading in a client's account that is excessive in size or frequency in view of the financial resources, investment objectives and character of the account in light of the fact that an investment adviser, investment adviser representative, or federal covered adviser in such situations can directly benefit from the number of securities transactions effected in a client's account. The rule appropriately forbids an excessive number of transaction orders to be induced by an adviser for a "customer's account."

(4) Placing an order to purchase or sell a security for the account of a client without authority to do so.

(5) Placing an order to purchase or sell a security for the account of a client upon instruction of a third party without first having obtained a written third-party trading authorization from the client.

(6) Borrowing money or securities from a client unless the client is a broker-dealer, an affiliate of the investment adviser, or a financial institution engaged in the business of loaning funds.

(7) Loaning money or securities to a client unless ~~((the investment adviser is))~~ you are a financial institution engaged in the business of loaning funds or the client is an affiliate of the investment adviser.

(8) ~~((To misrepresent))~~ Misrepresenting to any advisory client, or prospective advisory client, the qualifications of the investment adviser, investment adviser representative, federal covered adviser, or any employee~~((s of the investment adviser))~~, or person affiliated with the investment adviser, or ~~((to misrepresent))~~ misrepresenting the nature of the advisory services being offered or fees to be charged for such service, or to omit to state a material fact necessary to make the statements made regarding qualifications, services or fees, in light of the circumstances under which they are made, not misleading.

(9) Providing a report or recommendation to any advisory client prepared by someone other than ~~((the adviser))~~ you without disclosing that fact. (This prohibition does not apply to a situation where ~~((the adviser))~~ you use~~((s))~~ published research reports or statistical analyses to render advice or where ~~((an adviser))~~ you order~~((s))~~ such a report in the normal course of providing service.)

(10) Charging a client an unreasonable advisory fee.

(11) Failing to disclose to clients in writing before any advice is rendered any material conflict of interest relating to the investment adviser, investment adviser representative, federal covered adviser, or any ~~((of its))~~ employees or affiliated persons thereof which could reasonably be expected to impair the rendering of unbiased and objective advice including:

(a) Compensation arrangements connected with advisory services to clients which are in addition to compensation from such clients for such services; and

(b) Charging a client an advisory fee for rendering advice when ~~((a commission))~~ compensation for ~~((executing))~~ effecting securities transactions pursuant to such advice will be received by the investment adviser, investment adviser representative, federal covered investment adviser, or ~~((its))~~ employees or affiliated persons thereof.

(12) Guaranteeing a client that a specific result will be achieved (gain or no loss) with advice which will be rendered.

(13) Publishing, circulating or distributing any advertisement which does not comply with Rule 206(4)-1 under the Investment Advisers Act of 1940.

(14) Disclosing the identity, ~~((affairs, or))~~ investments, or other financial information of any client or former client unless required by law to do so, or unless consented to by the client.

(15) Taking any action, directly or indirectly, with respect to those securities or funds in which any client has any beneficial interest, where ~~((the investment adviser has))~~ you have custody or possession of such securities or funds when the ~~((adviser's))~~ action of the investment adviser, federal covered adviser, or investment adviser representative or employee is subject to and does not comply with ~~((the))~~ applicable custody requirements ~~((of Reg. 206(4)-2 under the Investment Advisers Act of 1940)).~~

(16) Entering into, extending or renewing any investment advisory contract ~~((unless such contract is in writing and discloses, in substance, the services to be provided, the term of the contract, the advisory fee, the formula for computing the fee, the amount of prepaid fee to be returned in the event of contract termination or nonperformance, whether the contract grants discretionary power to the adviser and that no assignment of such contract shall be made by the investment adviser without the consent of the other party to the contract))~~ that does not comply with the requirements set forth in WAC 460-24A-130.

(17) Failing to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the misuse of material nonpublic information contrary to the provisions of Section 204A of the Investment Advisers Act of 1940.

(18) Entering into, extending, or renewing any advisory contract contrary to the provisions of section 205 of the Investment Advisers Act of 1940. This provision shall apply to all advisers and investment adviser representatives registered or required to be registered under the Securities Act of Washington, chapter 21.20 RCW, notwithstanding whether ~~((such adviser))~~ you would be exempt from federal registration pursuant to section 203(b) of the Investment Advisers Act of 1940.

(19) To indicate, in an advisory contract, any condition, stipulation, or provisions binding any person to waive or limit compliance with, or require indemnification for any violations of, any provision of the Securities Act of Washington, chapter 21.20 RCW, or of the Investment Advisers Act of 1940, or any other practice contrary to the provisions of section 215 of the Investment Advisers Act of 1940.

(20) Engaging in any act, practice, or course of business which is fraudulent, deceptive, ~~((or))~~ manipulative ~~((contrary to the provisions of section 206(4) of the Investment Advisers Act of 1940, notwithstanding the fact that such investment adviser is not registered or required to be registered under section 203 of the Investment Advisers Act of 1940))~~ or unethical.

(21) Engaging in conduct or any act, indirectly or through or by any other person, which would be unlawful for

such person to do directly under the provisions of the Securities Act of Washington, chapter 21.20 RCW, or any rule or regulation thereunder.

(22) Using any term or abbreviation thereof in a manner that misleadingly states or implies that a person has special expertise, certification, or training in financial planning, including, but not limited to, the misleading use of a senior-specific certification or designation as set forth in WAC 460-25A-020.

(23) Making, in the solicitation of clients, any untrue statement of fact, or omitting to state a material fact necessary in order to make the statement made, in light of the circumstances under which they are made, not misleading.

The conduct set forth above is not inclusive. Engaging in other conduct such as nondisclosure, incomplete disclosure, or deceptive practices shall be deemed an unethical business practice. The federal statutory and regulatory provisions referenced herein shall apply to investment advisers, investment adviser representatives, and federal covered advisers, to the extent permitted by the National Securities Markets Improvement Act of 1996 (Pub. L. No. 104-290).

REPEALER

The following section of the Washington Administrative Code is repealed:

WAC 460-24A-058 Completion of filing.

WSR 14-13-071
PERMANENT RULES
RECREATION AND CONSERVATION
OFFICE

(Salmon Recovery Funding Board)

[Filed June 13, 2014, 12:07 p.m., effective July 14, 2014]

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

Purpose: Change the agency's name from the inter-agency committee for outdoor recreation to the recreation and conservation office and update statutory references.

Citation of Existing Rules Affected by this Order: Amending WAC 420-04-010 through 420-04-030, 420-04-060, 420-04-100, and 420-12-040.

Statutory Authority for Adoption: RCW 77.85.120 (1)(d).

Adopted under notice filed as WSR 14-08-087 on April 1, 2014.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 7, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 0, Amended 7, Repealed 0.

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

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

Date Adopted: June 4, 2014.

Leslie Connelly
Natural Resource
Policy Specialist
Rules Coordinator

AMENDATORY SECTION (Amending WSR 01-04-052, filed 2/2/01, effective 3/5/01)

WAC 420-04-010 Definitions. For purposes of Title 420 WAC, the definitions in RCW 77.85.010 apply. In addition, unless the context clearly indicates otherwise, the following definitions also apply:

"Acquisition" means the gaining of rights of public ownership by purchase, negotiation, or other means, of fee or less than fee interests in real property, and related interests such as water or mineral claims and use rights.

"Applicant" means any agency, person or organization that meets qualifying standards, including deadlines, for submission of an application soliciting a grant of funds from the board. Generally, eligible applicants for ~~((SRFB))~~ board funds include a state, local, tribal or special purpose government, a nonprofit organization, a combination of such governments, or a landowner for projects on its land.

"Application" means the form(s) developed and implemented for use by applicants in soliciting project funds administered by the board.

"Board" means the ~~salmon recovery funding board~~ ~~((SRFB))~~ created by chapter 13, Laws of 1999 1st sp. sess. (2E2SSB 5595), now codified as ~~((chapter 77.85))~~ RCW 77.85.110.

"Chair" means the chair of the board.

"Development" means the construction or alteration of facilities, the placement or removal of materials, or other physical activity to restore or enhance salmon habitat resources.

"Director" means the director of the ~~((IAC))~~ office or that person's designee, as described in RCW 79A.25.150, responsible for implementation of board activities under chapter ~~((s 79A.25 and))~~ 77.85 RCW.

~~("IAC" means the interagency committee for outdoor recreation (IAC), an executive state agency established under chapter 79A.25 RCW.)~~

"Lead entity" means the local organization or group designated under RCW 77.85.050.

"Manual(s)" means a compilation of state and federal policies, procedures, rules, forms, and instructions that have been assembled in manual form and which have been approved by the ~~((board))~~ office for dissemination by paper, electronic or other formats to all who may wish to participate in the board's grant program(s).

"Office" means the recreation and conservation office or the office of recreation and conservation as described in RCW 79A.25.010.

"Preliminary expense" means project costs incurred prior to board approval, other than site preparation/develop-

ment costs, necessary for the preparation of a development project.

"Project" means the undertaking which is, or may be, funded in whole or in part with funds administered by the ((IAC)) office on behalf of the board.

"Project agreement" means a project agreement, supplemental agreement, intergovernmental agreement, or project contract between the ((IAC)) office acting on behalf of the board, and a project sponsor.

"Project sponsor" means an applicant under RCW 77.85.010(6) who has been awarded a grant of funds, and has a signed project agreement.

AMENDATORY SECTION (Amending WSR 01-04-052, filed 2/2/01, effective 3/5/01)

WAC 420-04-015 Address. All communications with the board shall be directed to the ((IAC offices)) recreation and conservation office at the Natural Resources Building, 1111 Washington Street S.E., P.O. Box 40917, Olympia, Washington 98504-0917. Telephone ((360) 902-3000. Web site: www.wa.gov/iaac/salmonmain) 360-902-3000.

AMENDATORY SECTION (Amending WSR 01-04-052, filed 2/2/01, effective 3/5/01)

WAC 420-04-020 Organization and operations. The board:

(1) Is an unsalaried body of ten members. Five members are citizens appointed by the governor from the public-at-large, with the consent of the senate, for a term of three years each. The other members are the:

- (a) Commissioner of public lands;
- (b) Director of the department of fish and wildlife;
- (c) Director of the state conservation commission;
- (d) Director of the department of ecology; and
- (e) Secretary of transportation (or the designees of these individuals).

The five citizen members, including the chair, are voting members. The chair of the board is appointed by the governor from among the five citizen members.

(2) Is authorized and obligated to administer grant programs for salmon recovery, and related programs and policies.

(3) Performs and accomplishes work by a staff under the supervision of the ((IAC)) director appointed by the governor.

(4)(a) Conducts regular meetings, pursuant to RCW 42.30.075, according to a schedule it adopts in an open public meeting.

(b) May conduct special meetings at any time, pursuant to RCW 42.30.080, if called by the chair.

(c) Maintains an official record of its meetings in a recorded audio format, unless written minutes are otherwise indicated for logistical reasons.

(5) Defines a quorum as three of its voting members, with a preference that at least two of the agency members shall also be present.

(6) Adopts parliamentary meeting procedure generally as described in *Robert's Rules of Order*. Only voting members may make motions or formal amendments, but agency

members may request the chair for leave to present a proposal for board consideration.

AMENDATORY SECTION (Amending WSR 01-04-052, filed 2/2/01, effective 3/5/01)

WAC 420-04-030 Manuals and waivers—Guidance.

(1) The board shall adopt one or more manuals that describe its general administrative policies, for use by grant applicants, potential applicants, project sponsors, and others. The board shall inform all applicants in any given grant cycle of the specific project application process and methods of review, including current evaluation tests and instruments, by explaining these items in the manuals or other publicly available formats. Manuals may be adopted for each grant cycle, or for a topical issue, and shall contain a clear statement of the applicability of the policies outlined. The board also instructs the director to use applicable ((IAC)) office administrative manuals for general guidance in the implementation of ((SRFB)) board grant contracts. These include ((IAC)) manuals regarding land acquisition, conservation easements, funded projects, and reimbursement procedures.

(2) Board policies, including those referenced in the manuals, shall be considered and approved by the board in an open public meeting. Notice of such considerations will be given by distribution of the agenda for the meeting, press releases, meeting notice in the *Washington State Register*, or other means.

(3) Project applicants, project sponsors, or other interested parties may petition the director for a waiver or waivers of those items within the manuals dealing with general administrative matters and procedures. Determinations on petitions for such waivers made by the director are subject to review by the board at the request of the petitioner.

(4) Petitions for waivers of subjects regarding board policy, and those petitions that in the judgment of the director require board review, shall be referred to the board for deliberation. Policy waivers may be granted after consideration by the board at an open public meeting.

AMENDATORY SECTION (Amending WSR 01-04-052, filed 2/2/01, effective 3/5/01)

WAC 420-04-060 Delegated authority. Consistent with RCW 79A.25.240 and other applicable laws, the director is delegated the authority and responsibility to carry out policies and administrative functions of the board. This includes, but is not limited to, the authority to:

(1) Administer board programs ((at the offices of the IAC));

(2) Administer all applicable rules, regulations and requirements established by the board or reflected in the laws of the state;

(3) Implement board decisions; and

(4) Approve certain waiver requests or other administrative matters.

AMENDATORY SECTION (Amending WSR 01-04-052, filed 2/2/01, effective 3/5/01)

WAC 420-04-100 Public records access. (1) The board is committed to public access to its public records. All public records of the board, as defined in RCW ((~~42.17.260~~) 42.56.070) as now or hereafter amended, are available for public inspection and copying pursuant to this regulation, except as otherwise provided by law, including, but not limited to, RCW ((~~42.17.310 and 42.17.255 (Exemptions)~~) 42.56.050 and 42.56.210).

(2) The board's public records shall be available through the public records officer designated by the director. All records access for board records shall be conducted in the same manner as records access for ((~~IAC~~) office) records, including office location, hours, copy fee and request forms. The board adopts by reference the records access procedures of the ((~~IAC~~) office) and charges the director to administer for access purposes the board's records in the same manner as records of the ((~~IAC~~) office) are administered, pursuant to chapter 286-06 WAC.

(3) Any person who objects to the denial of a request for a public record of the board may petition the director for review by submitting a written request. The request shall specifically refer to the written statement which constituted or accompanied the denial.

(4) After receiving a written request for review of a decision denying inspection of a public record, the director, or designee, will either affirm or reverse the denial by the end of the second business day following receipt according to RCW ((~~42.17.320~~) 42.56.520). This shall constitute final board action. Whenever possible in such matters, the director or designee shall consult with the board's chair and members.

AMENDATORY SECTION (Amending WSR 01-04-052, filed 2/2/01, effective 3/5/01)

WAC 420-12-040 Eligible matching resources. (1) Applicant resources used to match board funds may include: Cash, certain federal funds, the value of privately owned donated real estate, equipment, equipment use, materials, labor, or any combination thereof. The specific eligible matches for any given grant cycle shall be detailed in the published manual. The director shall require documentation of values.

(2) Agencies and organizations may match board funds with other state funds, including ((~~IAC~~) recreation and conservation funding board) funds, so long as the other state funds are not administered by the board and if otherwise allowed by state law. For the purposes of this subsection, grants issued by other agencies under the Jobs for Environment program and the Forests & Fish program are not considered to be administered by the board.

(3) Private donated real property, or the value of that property, must consist of real property (land and facilities) that would otherwise qualify for board grant funding.

(4) The eligibility of federal funds to be used as a match is governed by federal requirements and thus may vary with individual proposals and grant cycles.

WSR 14-13-074

PERMANENT RULES

HORSE RACING COMMISSION

[Filed June 13, 2014, 3:08 p.m., effective July 14, 2014]

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

Purpose: To update and add threshold levels for accepted therapeutic mediations [medications] allowed in racing.

Citation of Existing Rules Affected by this Order: Amending WAC 260-70-630.

Statutory Authority for Adoption: RCW 67.16.020.

Adopted under notice filed as WSR 14-10-049 on May 1, 2014.

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

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 1, Repealed 0.

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

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

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

Date Adopted: June 13, 2014.

Douglas L. Moore
Executive Secretary

AMENDATORY SECTION (Amending WSR 13-07-045, filed 3/15/13, effective 4/15/13)

WAC 260-70-630 Threshold levels. (1) Permitted medications.

(a) The following quantitative medications and/or metabolites are permissible in test samples up to the stated concentrations in urine:

((~~Acepromazine—25 ng/ml urine~~
~~Albuterol—1 ng/ml urine~~
~~Benzocaine—50 ng/ml urine~~
~~Bupivacaine—5 ng/ml urine~~
~~Betamethasone—60 ng/ml urine~~
~~Clenbuterol—25 pg/ml serum or plasma~~
~~Dexamethasone—1.5 ng/ml serum or plasma~~
~~Diclofenac—5 ng/ml serum or plasma~~
~~DMSO—10 mc/ml serum or plasma~~
~~Firocoxib—40 ng/ml serum or plasma~~
~~Glycopyrrolate—3.5 pg/ml serum or plasma~~
~~Lidocaine—50 ng/ml urine~~
~~Mepivacaine—10 ng/ml urine~~
~~Methocarbamol—1 ng/ml serum or plasma~~
~~Methylprednisolone—1.3 ng/ml serum or plasma~~
~~Prednisolone—2 ng/ml serum or plasma~~
~~Procaine—25 ng/ml urine~~
~~Promazine—25 ng/ml urine~~
~~Pyrimilamine—50 ng/ml urine~~

Salicylates - 750,000 ng/ml urine
Theobromine - 2000 ng/ml urine
Triamcinolone acetonide - 1 ng/ml serum or plasma))
Acepromazine - 25 ng/ml
Albuterol - 1 ng/ml
Bupivacaine - 5 ng/ml
Detomidine - 1 ng/ml
Mepivacaine - 10 ng/ml
Omeprazole - 1 ng/ml
Promazine - 25 ng/ml
Pyrimilamine - 25 ng/ml

(b) The following quantitative medications and/or metabolites are permissible in test samples up to the stated concentrations in serum or plasma:

Betamethasone - 10 pg/ml
Butorphanol - 2 ng/ml
Clenbuterol - 25 pg/ml
Dantrolene - 100 pg/ml
Dexamethasone - 1 ng/ml
Diclofenac - 5 ng/ml
DMSO - 10 mc/ml
Firocoxib - 40 ng/ml
Glycopyrrrolate - 3 pg/ml
Isoflupredone - 100 pg/ml
Lidocaine - 20 pg/ml
Methocarbamol - 1 ng/ml
Methylprednisolone - 1.3 ng/ml
Prednisolone - 1 ng/ml
*Procaine penicillin - 25 ng/ml
Triamcinolone - 100 pg/ml
Xylazine - 0.01 ng/ml

*Administration of procaine penicillin to those horses entered must be reported to the commission and may require surveillance up to six hours prior to post time.

(c) The official urine or blood test sample may not contain more than one of the above substances, including their metabolites or analogs, and may not exceed the concentrations established in this rule.

(2) Environmental substances.

(a) Certain substances can be considered "environmental" in that they are endogenous to the horse or that they can arise from plants traditionally grazed or harvested as equine feed or are present in equine feed because of contamination or exposure during the cultivation, processing, treatment, storage, or transportation phases. Certain drugs are recognized as substances of human use and could therefore be found in a horse. The following substances are permissible in test samples up to the stated concentrations:

Arsenic - 0.3 mc/ml urine
Caffeine - 100 ng/ml serum or plasma
Benzoylcegonine - 50 ng/ml urine
Estranediol - 0.045 mc/ml free + conjugated (5a-oes-trane-3 β ,17a-diol), in male horses, other than geldings
Hydrocortisone - 1 mc/ml urine
Methoxytyramine - 4 mc/ml, free + conjugated urine
Morphine Glucuronides - 50 ng/ml urine
Salicylate salicylic acid - 750 mc/ml serum or plasma
Theobromine - 2 mc/ml urine

(b) If a preponderance of evidence presented shows that a positive test is the result of environmental substance or inadvertent exposure due to human drug use, that evidence should be considered as a mitigating factor in any disciplinary action taken against the trainer.

(3) Androgenic-anabolic steroids.

(a) The following androgenic-anabolic steroids are permissible in test samples up to the stated concentrations:

~~((Stanozolol (Winstrol) - 1 ng/ml urine in all horses regardless of sex-))~~

Boldenone (Equipose) - 15 ng/ml urine in intact males. No level is permitted in geldings, fillies or mares.

Nandrolone (Durabolin) - 1 ng/ml urine in geldings, fillies, and mares, and for nandrolone metabolite (5a-oestrane-3 β ,17a-diol) - 45 ng/ml urine in intact males.

Testosterone - 20 ng/ml urine in geldings. 55 ng/ml urine in fillies and mares. Samples from intact males will not be tested for the presence of testosterone.

(b) All other androgenic-anabolic steroids are prohibited in race horses.

WSR 14-13-079

PERMANENT RULES

UNIVERSITY OF WASHINGTON

[Filed June 16, 2014, 10:23 a.m., effective July 17, 2014]

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

Purpose: Because of recent changes in the state liquor control board's rules for the special occasion license, the University of Washington is making administrative changes to its alcoholic beverage policy for all University of Washington campuses and facilities in WAC 478-136-041, and for shared facilities on the collocated University of Washington, Bothell and Cascadia Community College campus in WAC 478-137-050. These rules also clarify the availability of third-party vendors, modify restrictions at athletic venues, and update the time frame for obtaining an alcohol license or permit from the state.

Citation of Existing Rules Affected by this Order: Amending WAC 478-136-041 and 478-137-050.

Statutory Authority for Adoption: RCW 28B.20.130.

Other Authority: RCW 66.24.380.

Adopted under notice filed as WSR 14-08-096 on April 2, 2014.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 2, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 0, Amended 2, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 2, Repealed 0.

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

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

Date Adopted: June 12, 2014.

Rebecca Goodwin Deardorff
Director of Rules Coordination

AMENDATORY SECTION (Amending WSR 13-15-062, filed 7/15/13, effective 8/15/13)

WAC 478-136-041 Alcoholic beverage policy. Alcoholic beverages may be possessed, sold, served, and consumed at university facilities only if the procedures set forth in this section are followed.

(1) The appropriate permits/licenses for possession, sale, service, and consumption of alcohol must be obtained from the Washington state liquor control board.

(2) Permits/licenses must be displayed during the event and all other guidelines and restrictions established by the Washington state liquor control board must be followed.

(3) Alcoholic beverages may be possessed, sold, served, and consumed at the University of Washington club, as so designated by the university board of regents to the Washington state liquor control board, pursuant to a spirits, beer, and wine private club license issued by the Washington state liquor control board.

(4) Alcoholic beverages may be possessed, sold, served, and consumed at university facilities leased to a commercial tenant under a lease that includes authorization for the tenant to apply and hold a license issued by the Washington state liquor control board.

(5) Except as provided in subsections (3) and (4) of this section, alcoholic beverages may be possessed, sold, served, and consumed at university facilities only under permits/licenses issued by the Washington state liquor control board (including third-party vendors with a caterer's business license with liquor endorsement) and only as follows:

(a) Events at which alcohol is to be possessed, sold, served, or consumed must be approved by the appropriate committee chair for the committee on the use of university facilities and an application to the chair must be accompanied by a request for written authorization under subsection (6) of this section or proof that the seller holds an appropriate license; and

(b) Events at athletic venues at which alcohol is to be possessed, sold, served, or consumed must:

(i) ~~((Not))~~ Be within ~~((the spectator viewing))~~ designated areas and must have restricted attendance; or

(ii) Operate under a sport entertainment facility license issued by the Washington state liquor control board; and

(c) A university unit, or an individual or organization applying for a permit/license must have obtained approval under subsection (6) of this section; and

(d) Sale, service, and consumption of alcohol is to be confined to the specified room~~((s))~~ or area~~((s))~~ identified on the license or permit. ~~((Unopened containers may not be sold or served. No alcohol is permitted to be taken off premises.))~~

(6) Written authorization to apply for a special occasion license ~~((to sell alcoholic beverages))~~ or a banquet permit ~~((to serve and consume alcoholic beverages at university facili-~~

~~ties))~~ must be obtained from the appropriate committee chair for the committee on the use of university facilities prior to applying for a special occasion license or banquet permit from the Washington state liquor control board. Authorization should be requested sufficiently in advance of the program to allow timely consideration. (Note: Some license applications must be filed with the Washington state liquor control board at least ~~((thirty))~~ forty-five days or more before the event.) Written authorization to apply for such a permit/license shall accompany the application filed with the Washington state liquor control board.

(7) Consumption, possession, dispensation, or sale of alcohol is prohibited except for persons of legal age.

AMENDATORY SECTION (Amending WSR 06-13-022, filed 6/13/06, effective 8/1/06)

WAC 478-137-050 Limitations on use. (1) Freedom of expression is a highly valued and indispensable quality of university and college life. However, joint facilities may not be used in ways that obstruct or disrupt the institutions' operations, the freedom of movement, or any other lawful activities. Additionally, use of joint facilities may be subject to reasonable time, place and manner restrictions.

(2) Joint facilities may be used for events and forums regarding ballot propositions and/or candidates who have filed for public office providing the event has received preliminary approval by an administrative or academic unit of one of the institutions and final approval by the appropriate facility designee. There are, however, certain limitations on the use of joint facilities for these political activities.

(a) First priority for the use of joint facilities shall be given to regularly scheduled university and college activities.

(b) Joint facilities may be used for political purposes such as events and forums regarding ballot propositions and/or candidates who have filed for public office only when the full rental cost of the facility is paid. Use of state funds for payment of facility rental costs is prohibited.

(c) Forums or debates may be scheduled at full facility rental rates if all parties to a ballot proposition election or all candidates who have filed for office for a given position, regardless of party affiliation, are given equal access to the use of facilities within a reasonable time.

(d) No person shall solicit contributions on joint property for political uses, except in instances where this limitation conflicts with applicable federal law regarding interference with the mails.

(e) Public areas outside joint facility buildings may be used for political purposes such as events and forums regarding ballot propositions and/or candidates who have filed for public office, excluding solicitation of funds, provided the other normal business of the institutions is not disrupted and entrances to and exits from buildings are not blocked.

(f) Joint facilities or services may not be used to establish or maintain offices or headquarters for political candidates or partisan political causes.

(3) Joint facilities may not be used for private or commercial purposes such as sales, advertising, or promotional activities unless such activities are consistent with the institution's mission, as determined by the appropriate designee.

(4) Nothing in these rules is intended to alter or affect the regular advertising, promotional, or underwriting activities carried on, by, or in the regular media or publications of the institutions. Policies concerning advertising, promotional or underwriting activities included in these media or publications are under the jurisdiction of and must be approved by their respective management or, where applicable, advisory committees, in accordance with applicable state and federal laws.

(5) In accordance with WAC 478-137-010 the institutions will make their joint facilities available only for purposes related to their educational missions, including but not limited to instruction, research, public assembly, community programs, and student activities. When permission is granted to use joint facilities for approved instructional or related purposes, as a condition of approval, the user of joint facilities agrees to include in all materials nonendorsement statements in the form approved by the appropriate designee. "Materials" includes all communications, advertisement, and any other printed, electronic, or broadcast/telecast information related to the user's activities offered in joint facilities. The designee will determine the content, size of print and placement of the nonendorsement language. The institutions will not make their joint facilities available for instructional or related purposes that compete with courses or programs offered by the university or college.

(6) Solicitation, or distribution of handbills, pamphlets and similar materials by anyone, whether a member of the university and college community or of the general public, is not permitted in those areas of campus to which access by the public is restricted or where such solicitation or distribution would significantly impinge upon the primary business being conducted.

(7) Electronic amplification on the grounds of the campus shall not be permitted unless approved by the joint committee on facility use.

(8) No person may use joint facilities to camp. "Camp" means to remain overnight, to erect a tent or other shelter, or to use sleeping equipment, a vehicle, or a trailer camper, for the purpose of or in such ways as will permit remaining overnight. Violators are subject to arrest and criminal prosecution under applicable state, county and city laws. This provision does not prohibit use of joint facilities where a university or college employee remains overnight to fulfill the responsibilities of his or her position.

(9) The institutions are committed to maintaining a safe and healthful work and educational environment for all faculty, staff, students, and visitors. In accordance with the Washington Clean Indoor Air Act (chapter 70.160 RCW), the Use of University of Washington facilities (chapter 478-136 WAC) and Cascadia Community College facility use (chapter 132Z-140 WAC), the following smoking policy is intended to protect nonsmokers from exposure to smoke in their campus-associated environments and to protect life and property against fire hazards:

(a) Smoking is prohibited inside all university or college vehicles, inside buildings and parking structures owned or occupied by the university or college and/or used by university or college faculty, staff or students and at any outside

areas or locations that may directly or indirectly affect the air supply of buildings or carry smoke into buildings.

(b) The institutions may designate specific outdoor locations as smoking areas. Signage will be placed to indicate the designated locations.

(c) Any student, staff, or faculty member who violates the smoking policy may be subject to disciplinary action. In addition, violations of the smoking policy may be subject to appropriate enforcement.

(10) Alcoholic beverages may be possessed, sold, served, and consumed at joint facilities only if the procedures set forth in this section are followed.

(a) The appropriate permits/licenses for possession, sale, service, and consumption of alcohol must be obtained from the Washington state liquor control board.

(b) Permits/licenses must be displayed during the event and all other guidelines and restrictions established by the Washington state liquor control board must be followed.

(c) Alcoholic beverages may be possessed, sold, served, and consumed at joint facilities leased to a commercial tenant under a lease that includes authorization for the tenant to apply and hold a license issued by the Washington state liquor control board.

(d) Except as provided in (c) of this subsection, alcoholic beverages may be possessed, sold, served, and consumed at joint facilities only under permits/licenses issued by the Washington state liquor control board and only as follows:

(i) Events at which alcohol is to be sold must be approved by the joint committee on facility use and an application to the committee must be accompanied by a request for written authorization under (e) or (f) of this subsection or proof that the seller holds an appropriate license; and

(ii) A university or college unit or an individual or organization applying for a permit/license must have obtained approval under (e) or (f) of this subsection; and

(iii) Sale, service, and consumption of alcohol is to be confined to ~~the~~ specified room~~((s))~~ or area~~((s) specified)~~ identified on the license or permit. ~~((Unopened containers may not be sold or served. No alcohol is permitted to be taken off premises.))~~

(e) Written authorization to apply for a special occasion license to sell alcoholic beverages at joint facilities must be obtained from the joint committee on facility use prior to applying for a special occasion license from the Washington state liquor control board. Authorization should be requested through the facilities use coordinator for the joint committee on facility use sufficiently in advance of the program to allow timely consideration. (Note: Some license applications must be filed with the Washington state liquor control board at least ~~((thirty))~~ forty-five days or more before the event.) Written authorization to apply for such license shall accompany the license application filed with the Washington state liquor control board.

(f) Written authorization to apply for a banquet permit to serve and consume alcoholic beverages at joint facilities must be obtained from the university chancellor or college president prior to applying for the permit from the Washington state liquor control board. Authorization should be requested sufficiently in advance of the program to allow timely consideration. Written authorization to apply for such permit

shall accompany the permit application filed with the Washington state liquor control board.

(g) Consumption, possession, dispensation, or sale of alcohol is prohibited except for persons of legal age.

Board of Boiler Rules

WSR 14-13-087
PERMANENT RULES
DEPARTMENT OF
LABOR AND INDUSTRIES

[Filed June 17, 2014, 6:19 a.m., effective August 1, 2014]

Effective Date of Rule: August 1, 2014.

Purpose: The board of boiler [rules] is adopting amendments to chapter 296-104 WAC, Board of boiler rules—Substantive, for new safety code requirements and a housekeeping change. The boiler rules are reviewed on a regular basis to ensure the rules are consistent with national boiler and unfired pressure vessel safety standards and industry practice. Rule making is needed to update existing requirements to ensure the most current standards are in place for proper construction, installation, inspection, operation, maintenance, alterations, and repairs of boilers and unfired pressure vessels that improve public safety.

This rule making will:

- Adopt the 2013 (current edition) National Board Inspection Code (NBIC) requirements for boilers and unfired pressure vessels in the state of Washington;
- Adopt the current revision of the National Board NB-263 standards, rules for national board in-service and new construction inspectors; and
- Remove an obsolete reference to provide rule clarity and consistency in the rules.

Citation of Existing Rules Affected by this Order: Amending WAC 296-104-050, 296-104-102, 296-104-271, and 296-104-502.

Statutory Authority for Adoption: Chapter 70.79 RCW.

Adopted under notice filed as WSR 14-09-093 on April 22, 2014.

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

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 0, Amended 4, Repealed 0.

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

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 4, Repealed 0.

Date Adopted: June 17, 2014.

Robert Olson, Chair

AMENDATORY SECTION (Amending WSR 08-12-015, filed 5/27/08, effective 6/30/08)

WAC 296-104-050 Administration—What are the requirements for a boiler inspector? Application for examination for a Washington state certificate of competency shall be in writing upon a form to be furnished by the chief inspector stating the school and education of the applicant, a list of employers, period of employment and position held with each employer. Applications containing willful falsification or untruthful statements shall be rejected.

In order to qualify as a prospective inspector, an applicant shall meet the minimum requirements as set forth in the national board's "Rules for Commissioned Inspectors," NB263, Revision ((+7)) § (02/07) or API-510 (ninth edition), as appropriate.

If the applicant's history and experience meet with the approval of the chief inspector based on the board of boiler rules approved criteria, the candidate shall be given the Washington state examination. If the applicant is accepted on the merits of these examinations or as provided for in WAC 296-104-065, and the applicant is in possession of a national board commission or API-510 certification, as appropriate, a Washington state certificate of competency will be issued by the chief inspector.

For those applicants sitting for the national board examination in conjunction with the Washington state examination, a certificate of competency will be issued by the chief inspector upon receipt of a valid national board commission.

Examinations shall be held at locations and times when considered necessary by the chief inspector. The examinations may be offered four times each year, namely, the first Wednesday and following Thursday of the months of March, June, September and December. Special examinations may be held when considered necessary by the chief inspector.

AMENDATORY SECTION (Amending WSR 08-24-072, filed 12/1/08, effective 1/1/09)

WAC 296-104-102 Inspection—What are the standards for in-service inspection? Where a conflict exists between the requirements of the standards listed below and this chapter, this chapter shall prevail. The duties of the in-service inspector do not include the installation's compliance with other standards and requirements (environmental, construction, electrical, undefined industrial standards, etc.), for which other regulatory agencies have authority and responsibility to oversee.

(1) The standard for inspection of nonnuclear boilers, unfired pressure vessels, and safety devices ((is)) in the National Board Inspection Code (NBIC), ((2007)) 2013 edition Part 2, ((with addenda,)) excluding Section 6, Supplements 1, 2, 5, 6, and 7 which may be used as nonmandatory guidelines. ((This code may be used on or after the date of issue and becomes mandatory twelve months after adoption by the board as specified in RCW 70.79.050(2).))

(2) The standard for inspection of historical steam boilers of riveted construction preserved, restored, or maintained for hobby or demonstration use, shall be Appendix "C" of the

National Board Inspection Code (NBIC) 2004 edition with 2006 addenda.

(3) The standard for inspection of nuclear items is ASME section XI. The applicable ASME Code edition and addenda shall be as specified in the owner in-service inspection program plan.

(4) Where a petroleum or chemical process industry owner/user inspection agency so chooses, the standard for inspection of unfired pressure vessels used by the owner shall be the API-510 Pressure Vessel Inspection Code, ninth edition, with addenda. This code may be used on or after the date of issue.

(5) TAPPI TIP 0402-16, dated 2006 may be used for both pulp dryers and paper machine dryers when requested by the owner. When requested by the owner, this document becomes a requirement and not a guideline.

AMENDATORY SECTION (Amending WSR 02-23-036, filed 11/13/02, effective 12/14/02)

WAC 296-104-271 Installation—How does an owner, user, or installer obtain a variance from clearances? Variances from WAC 296-104-255, (~~296-104-256~~) 296-104-260, and 296-104-265 may be requested. The variance request shall be in writing on an appropriate form approved by the chief inspector, and shall specify how equivalent safety is to be maintained. The chief inspector may grant the variance provided that safety and accessibility for inspections are acceptable.

AMENDATORY SECTION (Amending WSR 08-24-072, filed 12/1/08, effective 1/1/09)

WAC 296-104-502 Repairs—What is the standard for nonnuclear repairs and alterations? The standard for repairs/alterations is:

(1) National Board Inspection Code (NBIC), (~~2007~~) 2013 edition Part 3, (~~with addenda~~) excluding Section 6, Supplements 1, 2, 5, 6, and (7) 10 which may be used as nonmandatory guidelines.

(2) The standard for repair of historical boilers or riveted construction preserved, restored, or maintained for hobby or demonstration use, shall be Appendix C of the National Board Inspection Code (NBIC) 2004 edition with 2006 addenda.

WSR 14-13-092

PERMANENT RULES

DEPARTMENT OF REVENUE

[Filed June 17, 2014, 9:53 a.m., effective July 18, 2014]

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

Purpose: The department proposes to amend WAC 458-20-15503 to recognize the provisions of ESSB 5882, Part VII (chapter 13, Laws of 2013 2nd sp. sess.). This legislation established an exemption from retail sales tax and use tax for purchases of standard financial information by qualifying international investment management companies.

Citation of Existing Rules Affected by this Order:
Amending WAC 458-20-15503 Digital products.

Statutory Authority for Adoption: RCW 82.01.060.

Other Authority: ESSB 5882, Part VII (chapter 13, Laws of 2013 2nd sp. sess.).

Adopted under notice filed as WSR 14-05-053 on February 14, 2014.

Changes Other than Editing from Proposed to Adopted Version: We clarified in Example 11 that service and other activities B&O may not apply to educational institutions if an exclusion, deduction or exemption otherwise applies.

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

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

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

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

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AMENDATORY SECTION (Amending WSR 13-06-015, filed 2/25/13, effective 3/28/13)

WAC 458-20-15503 Digital products. This rule provides a structured approach for determining tax liability for digital products and digital codes. For purposes of this rule, a digital product includes digital goods or digital automated services, which are described in detail below. The sale or use of digital products and digital codes is generally subject to retail sales or use tax unless purchased for resale or some other exemption applies.

This rule is organized into six parts. Each part addresses a question or topic relevant to the determination of whether a person is selling or purchasing a digital product or digital code and, if so, what are the tax consequences that follow from such activity. In this respect this rule is intended to function similar to the decision tree provided in ETA 9003.2010.

1. Part 1: Are the products or services transferred electronically? If yes, go to Part 2.

2. Part 2: Does the product or service meet the general definitions of digital product or digital code? If yes, go to Part 3.

3. Part 3: Are there applicable exclusions from the general definitions of the digital product or digital code? If no, go to Part 4.

4. Part 4: Are the sales of the digital product or digital code sourced to Washington? If yes, go to Part 5.

5. Part 5: Are there applicable retail sales or use tax exemptions for the purchase or use of the digital product or

digital code? If no, the transaction is likely taxable in Washington.

6. Part 6: Miscellaneous provisions.

Examples included in this rule identify a number of facts and then state a general conclusion; they should be used only as a general guide. The tax consequences of all situations must be determined after a review of all the facts and circumstances. Additionally, each fact pattern in each example is self contained (e.g., "stands on its own") unless otherwise indicated by reference to another example. Examples concluding that sales tax applies to the transaction assume that no exclusions or exemptions apply, and the sale is sourced to Washington.

Part 1. Are the Products or Services Transferred Electronically?

(101) **Introduction.** Products or services must be transferred electronically in order to be digital products. If a product is transferred by means of a tangible storage media (e.g., compact disc, magnetic tape, hard drive, etc.), it is not a digital product. Digital codes need not be transferred electronically in order to be digital codes, but may be obtained by any means, including tangible storage media.

(102) **Transferred electronically.** Means the purchaser obtains the product by means other than tangible storage media. Generally, this means the product is transferred using the public internet, a private network, or some combination. However, it is not necessary that the product be delivered to the purchaser. As long as the purchaser may access the product, it will be considered to have been electronically transferred to the purchaser. For example, whether a digital movie is downloaded by the user or streamed by the user, it is considered to be "transferred electronically." Alternatively, the same movie purchased on tangible media (e.g., DVD, etc.) is the purchase of tangible personal property and is not considered to be either the sale of a digital product or transferred electronically.

Part 2. Does the Product or Service Meet the General Definition of Digital Product or Digital Code?

(201) **Introduction.** The term "digital product" means (1) digital goods and (2) digital automated services. Digital products transferred to an end user are generally subject to retail sales or use tax regardless of whether the purchaser's right of use is permanent, less than permanent (e.g., 24-hour period), or the purchaser is obligated to make continued payments as a condition of the sale (e.g., "subscriptions").

(202) **Digital goods.** Means sounds, images, data, facts, or information, or any combination thereof, transferred electronically, with certain exclusions discussed in Part 3 of this rule. The term "digital goods" includes within it the specific term "specified digital products" (as required by the Streamline Sales and Use Tax Agreement). The sale of a digital good is generally subject to retail sales tax and retailing business and occupation (B&O) tax.

(a) **Specified digital products.** Means electronically transferred digital audio-visual works, digital audio works, and digital books.

(i) **Digital audio works.** These are products that result from the fixation of a series of musical, spoken, or other

sounds. Digital audio works include ringtones, recorded or live music, readings of books or other written materials, speeches, and other sound recordings. For example, a music file in MP3 format accessed or downloaded through the internet is a digital audio work.

~~((+))~~ (A) A "ringtone" is a digitized sound file that is downloaded onto a communication device (e.g., mobile phone) and may be used to alert the user to an incoming communication such as a call or text message.

~~((2))~~ (B) A ringtone does not include "ring-back tones" or other digital audio files that are not stored on the purchaser's communication device. In other words a ring-back tone is not a "specified digital product." A ring-back tone may be a digital automated service or a digital good depending on the facts. See analysis for digital automated services in subsection (203) of this section.

(ii) **Digital audio visual works.** These products are a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any. Digital audio visual works include movies, music videos, videos of live events, and news and entertainment programs. For example, a movie downloaded or accessed via the internet is a digital audio visual work.

(iii) **Digital books.** These are books in a digital format that are generally recognized in the ordinary and usual sense as books. A digital book does not include periodicals, magazines, newspapers, chat rooms, or weblogs. For example, a cookbook in a PDF format downloaded or accessed through the internet is a digital book.

(b) **Other digital goods.** The following list illustrates the types of products that are also digital goods in addition to the subclass of "specified digital products" discussed above. This list is merely illustrative and not exhaustive:

~~((+))~~ (i) A digital schematic of a lawnmower engine transferred electronically.

~~((2))~~ (ii) A digital car history report transferred electronically.

~~((3))~~ (iii) A digital picture transferred electronically.

~~((4))~~ (iv) Digital periodicals or magazines transferred electronically.

~~((5))~~ (v) A digital presentation that includes still photos and accompanying audio content transferred electronically.

(c) **Digital goods prior to July 26, 2009.** The mere accessing or streaming of a digital good was not a retail sale before July 26, 2009. Instead, accessing or streaming a digital good was subject to the service and other activities B&O tax. The sale of a digital good to a customer who downloaded the digital good was a retail sale. See Part 6, subsection (604) of this section for a discussion of tax amnesty for past periods.

(203) **Digital automated services.** Means services transferred electronically that use one or more software applications. The sale of a digital automated service is generally subject to retail sales tax and retailing B&O tax.

(a) **Digital automated services may include.** One or more software applications either prewritten or custom, as well as components that are similar to stand-alone digital goods. For example, an online information service may contain data, facts, or information the use of which is facilitated by one or more software applications that provide search capabilities and other functionality. Thus, digital automated

services will include software and may include elements similar to stand alone digital goods, which operate together in an integrated fashion to provide an electronically transferred service.

Example 1. BFC provides an online service that facilitates apartment building management. The online service lists and advertises apartment vacancies, screens applicants, routes maintenance requests, and accepts and processes rental payments. In this example the software based service facilitates and automates various administrative functions and coordinates third-party services for apartment renting. The service is a digital automated service the sale of which is generally subject to retail sales tax and retailing B&O tax.

Example 2. QPR provides a service that uses one or more software applications to "crawl the internet" in order to identify, gather, and categorize digital information according to specified criteria. In this example software facilitates the gathering, identifying and categorizing of information acquired from the internet. The service is a digital automated service the sale of which is generally subject to retail sales tax and retailing B&O tax.

(i) **Distinguishing a digital good from digital automated services.** A digital good is not a service involving one or more software applications. A digital good consists solely of images, sounds, data, facts, information or any combination thereof. Clear examples of digital goods are digital books, digital music, digital video files, and raw data.

Example 3. XYZ provides an online service that uses one or more software applications to facilitate the use of news and information with features such as: Research history, natural and boolean searching, industry chat forums, chart creation, document and word flagging, and information organizing folders. In this example software features facilitate the search of the news or information. XYZ's service is a digital automated service the sale of which is subject to retail sales tax and retailing B&O tax.

Example 4. Company sells digital music files (i.e., digital goods) on its web site. In order to locate specific digital music files customers may use a free software based search function that is integrated into Company's web site. Customers may also find the digital music file they are seeking by clicking on a series of links to get to the desired music file. Company's software based search function associated with the sale of the digital music file does not transform the sale of the digital music file into a digital automated service. Company is selling a digital good (i.e., music file) subject to retail sales tax and retailing B&O tax.

(ii) **Distinguishing remote access prewritten software from digital automated services.** Remote access prewritten software (defined in RCW 82.04.050 (6)(b)) is solely prewritten software that is made remotely accessible from the vendor's server or other third-party server for a customer. To the extent that components similar to digital goods and/or additional services are supplied with the prewritten software the sale may be the sale of a digital automated service (see also Part 3, subsection (303)(h) of this section).

Example 5. CFC provides an online gaming service that allows subscribers to play a game with other subscribers in a real time multiplayer environment using software accessed via the internet. In this example the gaming software is com-

bined with additional capabilities that enable a real time multiplayer environment that is not otherwise available. The service is a digital automated service, the sale of which is generally subject to retail sales tax and retailing B&O tax.

Example 6. Company sells prewritten word processing software that is accessed by customers but hosted on Company's computers. The software includes access to clip-art image files that can be inserted into documents created with the remotely accessed prewritten word processing software. Company is selling remote access prewritten software and not a digital automated service or digital goods. The clip art made available with the software does not transform the remotely accessed prewritten software into a digital automated service or a digital good. Company is selling remote access prewritten software subject to retail sales tax and retailing B&O tax.

(b) **Digital automated service prior to July 26, 2009.** The sale of a digital automated service to consumers was not a retail sale before July 26, 2009. Generally, income earned from such sales was subject to B&O tax under the service and other activities classification.

(204) **Digital codes.** These are codes that provide a purchaser with the right to obtain one or more digital products, if all of the digital products to be obtained through the use of the code have the same retail sales and use tax treatment. A digital code may be obtained by any means, including e-mail or by tangible media regardless of its designation as song code, video code, book code, or some other term. For example, a digital code includes the sale of an alphanumeric code that, when entered online at a web site, provides the customer with a digital music file for download.

(a) **Products with mixed tax treatment.** Codes that provide the right to obtain one or more products that do not have the same retail sales and use tax treatment are not digital codes.

(b) **Codes that represent a stored monetary value, redeemable cards, gift cards, or gift certificates.** Codes that represent a stored monetary value that is deducted from a total as it is used by the purchaser or that represent a redeemable card, gift card, or gift certificate that entitles the holder to select digital products of an indicated cash value, are not digital codes.

Example 7. Calvin purchases a code at his local grocery store for use on Joe Seller's (JS) web site. At check out, Calvin tells the grocery store clerk to put \$25.00 in value on the plastic card containing the code. Calvin then goes to JS's web site and inputs the code from the card. The \$25.00 value of the card is stored in Calvin's "account" and can be used on any purchase by Calvin from JS's web site. Calvin then purchases five digital songs for \$5.00 from JS. At check-out from JS's web site, \$5.00 is deducted from Calvin's account to pay for the songs. When the transaction is complete, Calvin has a \$20.00 balance remaining in his account on JS's web site. Because the code represents a stored monetary value it is not a digital code and the sale of the code is not subject to retail sales tax or retailing B&O tax.

Part 3. Are There Applicable Exclusions from the General Definitions of Digital Product and Digital Code?

(301) **Introduction.** For certain products or services transferred electronically that otherwise meet the definition of digital good or digital automated service (as discussed in Part 2) there may be a specific exclusion from the applicable definition. If an exclusion applies, then the product or service will generally not be considered a digital good or digital automated service for retail sales and use tax purposes. For example, a service that is transferred electronically and that uses one or more software applications will generally be subject to retail sales tax as a digital automated service. However, if the service is an advertising service, then an exclusion applies, and the service will not be a digital automated service subject to retail sales tax; however, the service may still be subject to B&O tax. An excluded service may also still be subject to retail sales tax under certain circumstances. For example, telecommunications services are excluded from the definition of digital automated services, but remain subject to retail sales tax under their own separate definition of retail sale.

(302) **Exclusions from the definition of digital good are:**

(a) **Telecommunications and ancillary services** as defined in RCW 82.04.065. These services may be used to distribute digital goods, digital automated services, and digital codes, but are not themselves any of these products.

(b) **Computer software** as defined in RCW 82.04.215 and WAC 458-20-15502. These are coded instructions designed to cause a computer or automatic data processing equipment to perform a task.

(c) **The internet and internet access** as defined in RCW 82.04.297.

(d) **Professional or personal services** represented in electronic form are not a digital good. This exclusion applies where the service primarily involves the application of human effort by the service provider, and the human effort originated after the customer requested the service. For example, an electronic engineering report created at the customer's request that reflects an engineer's professional analysis, calculations, and judgment, which is sent to the customer electronically, is considered evidence of a professional service and not a digital good.

((+)) **Photography.** This exclusion for professional or personal services does not apply to photographers in respect to amounts received for the taking of digital photographs that are transferred electronically to the end user/customer as defined in RCW 82.04.190(11). See Example 39 for an example of a nonend user transaction involving photography that is subject to royalties B&O tax.

(e) **Exclusions listed directly below for digital automated services** are also exclusions from the definition of digital good.

(303) **Exclusions from the definition of digital automated service are:**

(a) **Services that require primarily human effort by the seller** and the human effort originated after the customer requested the service. In this context, "primarily" means greater than fifty percent of the effort to perform the service involved human labor. To determine whether the fifty percent

or greater threshold is satisfied, the average of the time and cost factors is considered. The time factor is determined by dividing the time spent to perform the human effort portion for customers by the total time spent performing the service. The cost factor is determined by dividing the direct costs incurred to perform the human effort portion for customers by the total direct costs incurred to perform the service. Direct costs of the human effort component include salaries, employee benefits and similar direct costs. Direct costs of the automated component include the cost of software, computers, hosting services and other similar direct costs. If the average of the time and cost factors is greater than fifty percent then the service requires primarily human effort and is not a digital automated service in which case the service will generally be subject to service and other activities B&O tax.

Example 8. RepuCo.com performs a reputation monitoring service on the internet for its clients. The service utilizes software and other technology that searches the internet for web sites that allow posting of information that may be harmful to RepuCo.com's client's reputation ("the automated component"). If the automated component finds a web site that is posting erroneous or harmful information about one of RepuCo.com's clients, then a RepuCo.com employee will contact the owner of the web site by phone or e-mail and work with the owner and the client to resolve the matter to the satisfaction of the client ("the human effort component"). If the human effort time factor is 20% and the human effort direct cost factor is 60%, then the average of the two factors is 40% ($80\%/2 = 40\%$). Accordingly, the service is performed using 40% human effort which is less than 50% and therefore the service does not require primarily human effort and is subject to retail sales tax as a digital automated service.

Alternative methods. If the time and cost factors in this rule do not fairly represent the extent to which the service is performed using primarily human effort, the taxpayer may ask in writing for, or the department may require, the employment of another reasonable method to equitably determine whether the service is performed using primarily human effort.

(b) **Loaning or transferring money or the purchase, sale, or transfer of financial instruments.** For purposes of this section, "financial instruments" include cash, accounts receivable and payable, loans and notes receivable and payable, debt securities, equity securities, as well as derivative contracts such as forward contracts, swap contracts, and options. For example, the electronic transfer of money from a savings account to a checking account, whether done for the customer by a bank teller or by an ATM machine, is excluded from the definition of digital automated service.

(c) **Dispensing cash or other physical items from a machine.** Includes an ATM that dispenses cash to users.

(d) **Payment processing services,** including services such as electronic credit card processing activities conducted online or in physical retail stores via electronic transmission.

(e) **Parimutuel wagering and handicapping contests** as authorized by chapter 67.16 RCW.

(f) **Telecommunications services and ancillary services** as those terms are defined in RCW 82.04.065. For additional information, refer to the discussion above concerning

the comparable exclusion from the definition of digital goods (see Part 3, subsection (302)(a) of this section).

(g) **The internet and internet access** as those terms are defined in RCW 82.04.297.

(h) **Remote access prewritten software.** Remote access prewritten software (defined in RCW 82.04.050 (6)(b)) provided on a standalone basis is excluded from the definition of digital automated service. However, software that is used in connection with a service that is transferred electronically would generally be included in the definition of a digital automated service.

Example 9. Company sells prewritten gaming software that is identical in all substantive respects to the same software available in stores for individual use and installation on home computers except that it is hosted on Company's servers and accessed by customers. Company's sales to consumers would be treated as a sale of remote access prewritten software and therefore is excluded from the definition of digital automated services and generally subject to retail sales tax and retailing B&O tax.

Example 10. Same facts as Example 9 except that Company uses the remote access prewritten software to provide a monthly subscription service that provides a real item multiplayer environment. Company is selling a digital automated service. In this case the customers are not merely receiving the individual use of software, but instead an online gaming service facilitated by the software. Thus, the monthly subscription service is not excluded from the definition of digital automated service and is subject to retail sales tax and retailing B&O tax.

(i) **Online education programs** provided by the following:

- (i) Public or private elementary or secondary schools; or
- (ii) An institution of higher education as defined in Sections 1001 or 1002 of the federal Higher Education Act of 1965 (Title 20 U.S.C. Sections 1001 and 1002), as existing on July 1, 2009. This would include most colleges and universities. For the purposes of this section, an online educational program must be encompassed within the institution's accreditation.

Example 11. ABC University, a qualifying institution of higher education under the federal Higher Education Act of 1965, provides an accredited online Spanish course for which it charges a quarterly access and use fee to students. The course is remotely accessed by students logging into a web site and accessing a fully interactive program that includes components of video, text, and audio, as well as extensive software code. This service would generally be considered a digital automated service. However, it is specifically excluded from the definition of digital automated service as an online educational program and ~~((would generally))~~ may be subject to service and other activities B&O tax if another exclusion, deduction, or exemption does not apply.

(j) **Live presentations** such as lectures, seminars, workshops, or courses, where participants are connected to other participants and presenters via the internet or other networks, allowing the participants and the presenters to provide, receive, and discuss information together in real time.

Example 12. Company provides an online seminar service for Customer. Company provides a panel of live speak-

ers that make a presentation to Customer's employees listening to and viewing the seminar through an internet connection supplied by a third-party service provider. The seminar allows Customer's employees and panelists to ask and answer questions on a real time basis. Company's online seminar service is transferred electronically and uses one or more software applications and therefore would generally be considered a digital automated service. However, this type of service allowing live interaction is specifically excluded from the definition of digital automated service and would generally be subject to service and other activities B&O tax.

Example 13. Same facts as Example 12 except that Company records the seminar and charges other individuals a fee for accessing the seminar from Company's web site. The recorded presentation allows these customers to watch the presentation but it does not allow them to ask questions on a real time basis. Because the presentation was prerecorded there is no live interaction contemporaneous with the presentation and therefore Company is selling a digital good generally subject to retail sales tax and retailing B&O tax.

Example 14. Company provides online training courses to Steve for a fee. The training courses provide key interactive elements such as study guides, knowledge testing, and automated help, all facilitated by one or more software applications. Such courses are not live presentations and do not provide human interaction. Accordingly, Company is selling a digital automated service generally subject to retail sales tax and retailing B&O tax.

(k) **Travel agent services**, including online travel services, and automated systems used by travel agents to book reservations.

(l) **Online marketplace related activities**, which are services that allow the person receiving the services to make online sales of products or services, digital or otherwise, using either:

- (i) The service provider's web site; or
- (ii) The service recipient's web site, but only when the service provider's technology is used either to:

~~((+))~~ (A) Create or host the service recipient's web site;

or

~~((2))~~ (B) Process orders from customers using the service recipient's web site.

Example 15. Company provides an "electronic marketplace" service to Holcomb that allows Holcomb to list and sell his coffee mugs on the internet using Company's web site. This online marketplace service is excluded from the definition of digital automated services and charges for the service would generally be subject to service and other activities B&O tax.

Example 16. Same facts as Example 15, except that now Holcomb decides he no longer wants to be just another seller on Company's web site. Instead, Holcomb wants his own "retailing presence" on the internet so Holcomb contracts with Company to create and host Holcomb's new coffee mug web site, "HolcombsCoffeeWorld.com." This is still an online marketplace service that is excluded from the definition of digital automated services and charges for the service would generally be subject to service and other activities B&O tax.

(iii) **Exclusion limitation.** The services described in this subsection do not include the underlying sale of the products or services, digital or otherwise, by the person receiving the service. For instance, in Examples 15 and 16, the sale by Holcomb of coffee mugs would still generally be subject to retail sales tax and retailing B&O tax as the sale of tangible personal property.

(m) **Advertising services** means all services directly related to the creation, preparation, production, or the dissemination of advertisements. Advertising services include: Layout, art direction, graphic design, mechanical preparation, production supervision, placement, and rendering advice to a client concerning the best methods of advertising that client's products or services. Advertising services also include online referrals, search engine marketing and lead generation optimization, web campaign planning, the acquisition of advertising space in the internet media, and the monitoring and evaluation of web site traffic for purposes of determining the effectiveness of an advertising campaign. Advertising services do not include web hosting services and domain name registration.

Example 17. Company provides marketing services to customers wishing to promote their products using the internet. Amy sells widgets on the internet and hires Company to market her products. Company consults with Amy on her marketing needs and then creates a marketing plan for her business. Company also creates and distributes online banners, links, and targeted "e-mail blasts" that promote Amy's business. All of the services provided by Company are advertising services excluded from the definition of digital automated services and would generally be subject to service and other activities B&O tax.

Example 18. RVP, Inc. creates "sponsored links" on its web site that drive customer traffic to Amy's web site. RVP is paid by Amy for each click on a sponsored link on RVP's web site. The services provided by RVP are advertising services excluded from the definition of digital automated services and charges for such would generally be subject to service and other activities B&O tax.

(n) **Storage, hosting, and back-up.** The mere storage of digital products, digital codes, computer software, or master copies of software is excluded from the definition of digital automated services. This exclusion includes providing space on a server for web hosting or backing-up data or other information.

Example 19. Company charges Rowe a fee for 25 terabytes of storage space under its "basic storage service" offering. Company also charges Rowe an additional and optional fee for its "premium service" package offering, which involves services beyond mere storage. The "basic storage" services are mere storage services and excluded from the definition of digital automated services. These services would generally be subject to service and other activities B&O tax. However, the charges for the optional premium services are more than mere storage or hosting services. As such, the premium services are not excluded from the definition of digital automated services and would generally be subject to retail sales tax and retailing B&O tax.

(o) **Data processing services** means a primarily automated service provided to a business or other organization

where the primary object of the service is the systematic performance of operations by the service provider on data supplied in whole or in part by the customer to: ~~((+))~~ (i) Extract the required information in an appropriate form, or ~~((=))~~ (ii) to convert the data to usable information. Data processing services include check processing, image processing, form processing, survey processing, payroll processing, claim processing, and similar activities. Data processing does not include remote access prewritten software used by the customer to process their own data.

Example 20. Bango Corp., in preparation for litigation, hires Company to use its automated technology to search Bango's computers and gather documents relevant to the lawsuit. Company's service also provides software tools that allow Bango to categorize, copy, store, and notate the gathered documents. Company's service is not data processing. The services performed primarily involve gathering data, and providing software tools that allow the customer to categorize, copy, store and notate documents in preparation for litigation. Accordingly, Company is selling a digital automated service generally subject to retail sales tax and retailing B&O tax.

Example 21: Company provides check processing services to Wallo Corp., a bank operating in Washington. Company accepts scanned checks provided by Wallo and then uses its software and technology to extract the check dollar amount, account number, and verify the check has been signed. Company then provides this extracted and reformatted data back to Wallo allowing it to reconcile its customer's accounts. Company provides data processing services which are excluded from the definition of digital automated services. These services would generally be subject to service and other activities B&O tax.

Example 22. Same facts as Example 21, except that Company accepts checks provided directly by Wallo's customers. Thus, check images come from both Wallo and Wallo's customers. The services provided by Company are still data processing services excluded from the definition of digital automated services even though the data does not come exclusively from Wallo. These services would generally be subject to service and other activities B&O tax.

Part 4. Are the Sales of the Digital Product or Digital Code Sourced to Washington?

(401) **Introduction.** Once it is determined that a transaction involves the sale of a digital product or digital code, the sale must be sourced to Washington in order to be subject to Washington's retail sales tax and B&O tax. If the sale is sourced outside Washington it is not subject to Washington sales tax or B&O tax. Sales of digital products are sourced using the same statute that applies to other retail sales, RCW 82.32.730 as outlined below.

(402) Sourcing retail sales.

(a) **Business location.** When a digital product or digital code is received by the buyer at a business location of the seller, the sale is sourced to that business location.

Example 23. Frank goes to BigBox brick-and-mortar store in Washington and purchases a music file from an electronic kiosk in the store. Frank purchases and downloads the music file inside BigBox's store by connecting his digital

music player to the kiosk in the store. The sale of the music file is sourced to BigBox's store location in Washington and is generally subject to retail sales tax and retailing B&O tax.

(b) **Place of receipt.** If the first sourcing rule explained above in (a) of this subsection does not apply, the sale is sourced to the location where receipt takes place.

(i) The digital product or digital code may be received by the buyer at the buyer's location or by the buyer's donee (e.g., a gift recipient) at the donee's location.

(ii) In the context of digital products and digital codes, "receive" and "receipt" means: ~~((+))~~ (A) Making first use of digital automated services; or ~~((+))~~ (B) taking possession or making first use of digital goods or digital codes, whichever comes first.

Example 24. Drogba Inc., located in Olympia, Washington, purchases a digital automated service generally subject to retail sales tax from Company. Drogba's employees access and make first use of the service at their computer workstations located in Olympia. Company knows that the digital automated service is received in Olympia and therefore will source the sale of the digital automated service to that location.

(c) **Address in records.** If the first two sourcing rules explained ~~((above))~~ in (a) and (b) of this subsection do not apply, the sale is sourced to the location indicated by an address for the buyer that is available from the seller's business records maintained in the ordinary course of business, so long as use of this address does not constitute bad faith. For example, any address of the buyer held by the seller that reasonably estimates the receipt location will be sufficient, including an address contained in a relevant service contract or an address used for accounts receivable purpose.

Example 25. Nani Corp., located in California, purchases a digital automated service generally subject to retail sales tax and retailing B&O tax from Company located in Washington. The purchase contract between Nani and Company provides that Nani may have 5 users access the digital automated service. Company does not know where the digital automated service is actually received. However, Company has Nani's California address in its business records and will therefore source the sale to Nani's California address. Because the sale is sourced outside Washington, it is not subject to Washington's retail sales tax or retailing B&O tax. Note, to the extent that Nani Corp., receives the service at locations in Washington, it may have a use tax liability. See subsection (403) of this section for more on use tax.

(d) **Address obtained during sale.** If the first three sourcing rules explained ~~((above))~~ in (a), (b), and (c) of this subsection do not apply, the sale is sourced to the location indicated by an address for the buyer obtained during the consummation of the sale. For example, an address obtained during consummation of the sale would include the address of a buyer's payment instrument (e.g., billing address for a credit card), if no other address is available, so long as use of this address does not constitute bad faith.

~~((+))~~ **Internet protocol (IP) address.** The buyer's IP address is acceptable location information obtained at the time of sale if an address cannot otherwise be obtained during consummation of the sale.

(e) **Origin.** If the first four sourcing rules explained ~~((above))~~ in (a), (b), (c), or (d) of this subsection do not apply, including the circumstance where the seller is without sufficient information to apply those provisions, then the sale must be sourced to the location determined by the address from which the digital good or digital code was first available for transmission by the seller, or from which the digital automated service was provided. Any location that merely provided the digital transfer of the product sold shall be disregarded.

(403) **Sourcing for use tax purposes.** The sales sourcing rules above in subsection (402) of this section are for sourcing sales subject to retail sales tax under RCW 82.08.020 and RCW 82.32.730. What follows below is a discussion of use tax reporting obligations with respect to digital goods, digital automated services, and digital codes. Generally, use tax applies to the use of a digital product or digital code in Washington if retail sales tax has not already been paid and no exemption otherwise applies.

(a) **Digital good or digital code.** "Use" means the first act within this state by which the taxpayer, as a consumer, views, accesses, downloads, possesses, stores, opens, manipulates, or otherwise uses or enjoys the digital good or digital code.

(b) **Digital automated service.** "Use" means the first act within this state by which the taxpayer, as a consumer, uses, enjoys, or otherwise receives the benefit of the service.

Example 26. Company, located in New York, sells a digital automated service generally subject to retail sales tax and retailing B&O tax to Lampard Inc., located in Washington. Lampard's employees in Washington use the internet to access Company's services using an internet web browser. However, Company does not have nexus with Washington and is therefore not required to charge and collect retail sales tax on the sale of its service to Lampard. Lampard has a use tax reporting obligation because it uses, enjoys, or otherwise receives the benefit of Company's digital automated service at its location in Washington.

Part 5. Are there Applicable Retail Sales or Use Tax Exemptions for the Purchase or Use of the Digital Product or Digital Code?

(501) **Introduction.** After determining that a digital product or digital code has been sold or used and the sale or use is sourced to Washington, exemptions from retail sales or use tax should be examined. What follows is not an exhaustive list of exemptions but instead an explanation of the most common exemptions for digital products. Some exemptions may apply only with respect to certain digital products (e.g., some exemptions apply only to digital goods, not digital automated services). Exemptions may also require an exemption certificate or reseller permit.

(502) **Resale.** The purchase of a digital product or digital code for resale with no intervening use is not subject to retail sales or use tax. Sellers should obtain from buyers a copy of the buyer's reseller permit, a properly completed "Digital Products and Remote Access Software Exemption Certificate," or otherwise comply with RCW 82.04.470 to substantiate the wholesale nature of the sale. See RCW 82.32.780.

(503) **Component of a new product.** Generally, purchasing, acquiring, owning, holding, or using any digital product or digital code for purposes of incorporating it into a new product for sale will not be subject to retail sales tax. The digital product or digital code must become a component of the new product for sale. A digital code becomes a component of a new product if the digital good or digital automated service acquired through the use of the digital code becomes incorporated into a new product. RCW 82.04.190(11). This is also discussed in subsection (602) of this section in the context of wholesale sales.

~~((a))~~ **Product.** For purposes of this subsection, "product" means a digital product, an article of tangible personal property, or remote access prewritten software as defined in RCW 82.04.050 (6)(b). For example, an industrial drill manufacturer and seller combines hardware, software, and data to create a new product, a "smart drill." Software embedded in the drill uses the variance data (also embedded in the drill) to control the hardware during drill operations. The data is a digital good purchased for use as a component of a new product for sale (i.e., the drill). Sellers should obtain from buyers a copy of the buyer's reseller permit, a properly completed "Digital Products and Remote Access Software Exemption Certificate," or otherwise comply with RCW 82.04.470 to substantiate the wholesale nature of the sale.

(504) **Made available free to the general public.** Retail sales and use tax does not apply to the purchase or use by a business or other organization of a digital product (including a digital product acquired through the use of a digital code) in order to make that digital product (1) available free of charge for the use or enjoyment of (2) the general public. Buyers claiming this exemption must provide the seller with a properly completed "Digital Products and Remote Access Software Exemption Certificate" or other exemption certificate acceptable to the department. See RCW 82.08.02082.

(a) **Available for free.** In order to qualify, the digital product purchased must be made available for free. In this context, "free" means that the recipient of the digital product does not need to provide anything of significant value. If the purchaser requires something of significant value from the recipient in exchange for the digital product, it is not given away for free.

Example 27. Mauro purchases 1,000 digital music files from Company to be used for a "give away" to the first 1,000 people to visit Mauro's web site. When people visit Mauro's web site they are required to fill out a marketing survey before they may receive a digital music file. The information gathered from the marketing survey is then sold to a marketing company by Mauro. Thus, Mauro has required that recipients provide something of significant value in exchange for the digital music file. This is not a "free" transaction and therefore, Mauro's purchase of the digital music from Company does not qualify for the exemption and would be subject to retail sales tax and retailing B&O tax. (See also Example 29.)

(b) **"General public"** means all persons and is not limited or restricted to a particular class of persons, except that the general public includes:

(i) **Certain classes of persons defined by their residency or property ownership.** The general public includes a

class of persons residing or owning property within the boundaries of any state (e.g., Washington), political subdivision of a state (e.g., King County), or a municipal corporation (e.g., Seattle).

Example 28. The City of Evergreen (a municipal corporation) makes satellite images of land parcels available for free only to persons residing in Evergreen. Residents are required to enter their zip code prior to accessing the images and certify that they are a resident of the City. Accordingly, the City of Evergreen can purchase the satellite images exempt from retail sales tax.

(ii) **Library customers.** With respect to libraries, the term general public includes authorized library patrons.

(c) **Buyer must have the legal rights to provide the digital product to the general public.** The exemption provided in this subsection does not apply unless the purchaser has the legal right to broadcast, rebroadcast, transmit, retransmit, license, relicense, distribute, redistribute, or exhibit the digital product, in whole or in part, to the general public.

Example 29. Same facts as Example 27, except this time visitors to Mauro's web site are provided free access to the digital music files and no survey information is required in exchange. Additionally, Mauro purchased the digital music files from Company with the right to distribute them to the general public. Mauro also provided the seller with an exemption certificate. Accordingly, Mauro's purchase from Company qualifies for the exemption because he has made the digital audio files available free of charge to the general public pursuant to a contract that gives him rights of distribution. Mauro only purchased 1,000 files and therefore must limit the distribution to the first 1,000 people. Most "give-aways" will have similar quantity limitations but this fact alone will not disqualify such transactions under the "general public" requirement.

(505) **Purchased solely for business purpose.**

(a) **Introduction.** Retail sales and use tax does not apply to the sale to or use by a business of digital goods and services rendered in respect to those digital goods, where the digital goods and services rendered in respect to digital goods are purchased solely for business purposes. This exemption only applies to purchases of digital goods and does not apply to the purchase of digital automated services, prewritten software, or remote access prewritten software. The exemption is only available when the buyer provides the seller with an exemption certificate. Buyers may use the department's "Digital Products and Remote Access Software Exemption Certificate" to claim this exemption. See RCW 82.08.02087.

(b) **Digital codes.** This exemption also applies to the sale to or use by a business of a digital code if all of the digital goods to be obtained through the use of the code will be used solely for business purposes. If the digital code purchased by a business for a business purpose provides access to both digital goods and digital automated services, the purchase of the digital code does not qualify for this exemption.

(c) **"Business purposes"** means the digital good is relevant to the buyer's business needs.

(d) **Personal or household purpose.** This exemption does not apply to the purchase for personal or household purposes.

(e) **Government entities.** This exemption does not apply to purchases by a governmental entity.

(f) **Prior periods.** For the period July 26, 2009, through June 30, 2010, the "business purpose" exemption applied only to "standard digital information." Standard digital information is a subset of digital goods.

((+)) **Standard digital information** is a digital good that consists primarily of data, facts, and/or information that is not generated or compiled for a specific client or customer. Standard digital information does not include a digital good that is comprised primarily of sounds or images.

(506) **Purchases of standard financial information by qualifying international investment management companies.** Effective October 1, 2013, the purchase of standard financial information by a qualifying international investment management company is exempt from retail sales tax. The exemption applies regardless of whether the standard financial information is provided in a tangible format or on a tangible storage medium or as a digital product transferred electronically. This sales and use tax exemption expires July 1, 2021.

(a) **"Qualifying international investment management company"** means a person:

(i) Who is primarily engaged in the business of providing investment management services; and

(ii) Who has gross income that is at least ten percent derived from providing investment management services to:

(A) Persons or collective investment funds residing outside the United States; or

(B) Collective investment funds with at least ten percent of their investments located outside the United States.

(b) The definitions in RCW 82.04.293 generally apply here to this subsection (506) except as follows:

(i) **Important distinction.** This definition of "qualifying international investment management company" is more narrow than the definition in RCW 82.04.293; this definition in (a)(ii)(B) of this subsection excludes "persons" and only allows for "collective investment funds" unlike RCW 82.04.293 (1)(b)(ii) which includes "persons or collective investment funds" for B&O tax purposes.

(ii) **"Standard financial information"** means financial data, facts, or information, or financial information services, not generated, compiled, or developed only for a single customer. Standard financial information includes, but is not limited to, financial market data, bond ratings, credit ratings, and deposit, loan, or mortgage reports.

(iii) **"Financial market data"** means market pricing information, such as for securities, commodities, and derivatives; corporate actions for publicly and privately traded companies, such as dividend schedules and reorganizations; corporate attributes, such as domicile, currencies used, and exchanges where shares are traded; and currency information.

(iv) **Filing and documentation.** Sellers making tax-exempt sales should obtain a completed buyer's retail sales tax exemption certificate from the buyer. In lieu of an exemption certificate, a seller may capture the relevant data elements as allowed under the streamlined sales and use tax agreement. The seller must retain a copy of the exemption certificate or other relevant data elements for the seller's files.

For sellers who electronically file their taxes, the department will provide a separate tax reporting line for exemption amounts claimed under this section.

(v) **Limitations on exemption.** A buyer may not continue to claim the exemption once the buyer has purchased standard financial information during the current calendar year with an aggregate total selling price in excess of fifteen million dollars and an exemption has been claimed for such standard financial information. The fifteen million dollar limitation under this subsection does not apply to any other exemption that applies to standard financial information.

(vi) **Sellers' responsibilities.** Sellers are not responsible for ensuring a buyer's compliance with the fifteen million dollar limitation under this subsection. Sellers may not be assessed for uncollected sales tax on a sale to a buyer claiming an exemption under this section after having exceeded the fifteen million dollar limitation under this subsection, except as provided in RCW 82.08.050 (4) and (5).

(vii) **Reporting requirements for buyers.** This sales and use tax exemption for standard financial information is subject to additional reporting requirements. Buyers must report the amount of tax preference received as directed by the department. Buyers are not required to report the amount of preference received if the tax benefit to a buyer is less than one thousand dollars per year; or the buyer files an annual tax return with the department.

(507) **Multiple points of use (MPU).** Retail sales tax does not apply to the sale of digital products or digital codes concurrently available for use within and outside this state. See RCW 82.12.02088 and 82.08.02088. Note that Washington use tax still applies to the use of the digital product or digital code used in Washington.

(a) **Requirements.** A buyer is entitled to claim the MPU exemption only if:

(i) The buyer is a business or other organization.

(ii) The digital product purchased (or obtained by using the digital code purchased) will be concurrently available for use within and outside this state (not for personal use).

(iii) The buyer provides the seller with a valid exemption certificate acceptable to the department claiming the MPU exemption. Buyers may use the department's "Digital Products and Remote Access Software Exemption Certificate" to claim this exemption.

(b) **Concurrently available.** "Concurrently available for use within and outside this state" means that employees or other agents of the buyer may use the digital product simultaneously from one or more locations within this state and one or more locations outside this state.

Example 30. Company sells an online patent searching service to Iniesta Corp., for simultaneous use at Iniesta's headquarters in Washington and its research and development facility in California. This service would generally be considered the sale of a digital automated service subject to retail sales tax and retailing B&O tax. In this case, the digital automated service is concurrently available for use by Iniesta's employees both within Washington and outside Washington, and therefore Iniesta may claim the MPU exemption from retail sales tax for its purchase of the digital automated service from Company. See (c) of this subsection ((directly

below)) for an explanation of how to apportion the use tax in this example.

(c) **Apportionment (allocation) of use tax.** For purposes of this subsection on multiple points of use, "allocation" and "apportionment" have the same meaning. A business or other organization subject to use tax on digital products or digital codes that are concurrently available for use within and outside this state is entitled to apportion the amount of tax due this state based on users in this state compared to users everywhere. For example, in the case of Iniesta in Example 30, if we assume Iniesta had five employees in California and five employees in Washington using the service concurrently, Iniesta would allocate one-half of the purchase price to Washington because five of its ten users are in Washington (e.g., $5/10 = 50\%$). Thus Iniesta would pay use tax to Washington based on fifty percent of the value of the digital automated service. Additionally, the department may authorize or require an alternative method of allocation supported by the taxpayer's records that fairly reflects the proportion of in-state to out-of-state use by the taxpayer.

(i) **Records requirement.** No allocation under this section is allowed unless the allocation method is supported by the taxpayer's records kept in the ordinary course of business.

(ii) **"User"** means an employee or agent of the taxpayer who is authorized by the taxpayer to use the digital product purchased in the performance of his or her duties as an employee or other agent of the taxpayer.

(d) **Application to digital codes.** A digital code is concurrently available for use within and outside this state if users may use the digital goods or digital automated services to be obtained by the code simultaneously at one or more locations within this state and one or more locations outside this state.

(e) **Reporting.** A buyer claiming an exemption under this section must report and pay state and local use tax directly to the department. As explained ((above)) in (c) of this subsection, use tax may be reported and paid on an apportioned basis if supported by the buyer's records.

((507)) **(508) Machinery and equipment.** Generally retail sales and use tax does not apply to sales to or use by a manufacturer or processor for hire of certain machinery and equipment used directly in a manufacturing or research and development operation. This exemption is commonly referred to as the M&E exemption. (See RCW 82.08.02565 and 82.12.02565 and WAC 458-20-13601 for information regarding the M&E exemption.) Included within the definition of "machinery and equipment" for purposes of the M&E exemption are digital goods. Accordingly, digital goods acquired by manufacturers and processors for hire and used directly in a manufacturing or research and development operation are exempt from retail sales and use tax, provided all of the requirements for the M&E exemption are met.

((508)) **(509) Audio or video programming.** Income received from the sale of regular audio or video programming by a radio or television broadcaster is generally subject to service and other B&O tax and therefore not subject to retail sales tax. However, the sale of audio or video programming sold on a pay per program or subscription on-demand basis is generally subject to retail sales and use tax except as provided in (d) and (e) of this subsection.

(a) **"Radio and television broadcasters"** include satellite radio providers, satellite television providers, cable television providers, and providers of subscription internet television.

(b) **"Pay per program or subscription on-demand basis"** means programming that the buyer pays for on a per program basis or a service that allows the buyer to access a library of programs at any time for a specific charge.

(c) **"Regular programming"** is scheduled programming. The person watching cannot stop, pause, rewind, or otherwise control the broadcast of the scheduled programming, including the time that the scheduled program is broadcast.

((+)) The fact that a customer uses a recording device, such as a VCR or DVR, does not result in the broadcaster's programming being characterized as a digital good.

(d) **Cable television providers paying franchise fees.** Cable television providers' sales of programming to consumers on a pay-per-program or subscription on-demand basis are not subject to retail sales and use tax if the cable television provider is subject to a franchise fee (under the authority of Title 47 U.S.C. Sec. 542(a)) on the gross revenue received from such sales. If the cable television provider is not subject to a franchise fee on the income from the sale of programming on a pay-per-program or subscription on-demand basis, then the exemption does not apply and the cable television provider must collect and remit retail sales tax on the retail sale of such programming.

Example 31. XYZ sells video programming to customers using cable technology. XYZ does not pay a franchise fee. Customers of XYZ are charged a monthly subscription fee to receive video programming. Customers are charged additional fees to view selected movies. XYZ must charge and collect retail sales tax on the additional fees charged to view the selected movies, but not on the monthly subscription fee which would generally be subject to service and other activities B&O tax.

(e) Satellite television providers do not generally pay franchise fees and therefore do not qualify for the retail sales and use tax exemption based on payment of franchise fees as described in (d) of this subsection.

((509)) **(510) Newspapers.** Generally, retail sales and use tax does not apply to sales of newspapers transferred electronically, provided that the electronic version has a printed counterpart, and the electronic version:

(a) Shares content with the printed newspaper; and

(b) Is prominently identified by the same name as the printed newspaper or otherwise conspicuously indicates that it is a complement to the printed newspaper.

(c) "Printed newspaper" means a publication issued regularly at stated intervals at least twice a month and printed on newsprint in tabloid or broadsheet format folded loosely together without stapling, glue, or any other binding of any kind, including any supplement of a printed newspaper.

((510)) **(511) Received for free by end user.** Digital products and digital codes obtained by the end user for free are not subject to use tax.

(a) For example, a person's use of a free search engine is not subject to use tax.

(b) For example, a person reading an online article or viewing an online picture for free is not subject to use tax.

~~((511))~~ (512) **Other use tax exemptions.** Use tax does not apply to the use of digital goods that are:

(a) Noncommercial in nature, such as personal e-mail communications;

(b) Created solely for an internal audience; or

(c) Created solely for the business needs of the person who created the digital good and is not the type of digital good that is offered for sale, including business e-mail communications.

Example 32. Gary, an employee of Kadabbera Corp., creates a digital audio-visual presentation using presentation authoring software and his innate creative capacity. Gary distributes the presentation internally to various divisions within Kadabbera in order to train employees on changes to company policies. Gary has created and distributed an item that meets the definition of "digital good." However, the distribution and use of this digital good is not subject to use tax as long as it is used solely internally or solely for the business needs of Kadabbera.

Part 6. Miscellaneous Provisions

(601) **Retail services.** Washington imposes retail sales and use tax on certain enumerated services under RCW 82.04.050 ("retail services"). For example, the sale of credit bureau services is subject to retail sales tax. However, when a retail service is transferred electronically and also meets the definition of digital automated service or digital good, such service will be treated as a digital product and is eligible for all applicable digital products retail sales and use tax exemptions as described above in Part 5 of this rule. Retail services that are not transferred electronically or those retail services that are excluded from the definitions of digital good or digital automated service (e.g., telecommunications services and ancillary services) continue to be taxed as retail services.

Example 33. ABC creates a "canned" digital report on Company X's creditworthiness prepared prior to a customer request for the report. The report may be a credit bureau service and/or a digital good (if transferred electronically). The "canned" report is listed for sale on ABC's web site. An employee of InvestCo, Inc. purchases and downloads a digital copy of the "canned" credit report from ABC's web site for InvestCo's business purpose. ABC is selling a digital good generally subject to retail sales tax. However, the "canned" report is purchased by InvestCo solely for a business purpose and therefore exempt from retail sales tax (see subsection (505) of this section for more on this exemption).

Example 34. Company sells credit reports and credit research services. EPD Corp., requests that Company prepare a credit report for EPD's specialized business purposes. After receiving the request, Company's employee researches, analyzes and generates information from various digital sources to prepare the credit report for EPD. Company then sends the report electronically as a digital file to EPD. Company is not selling a digital good because the digital item supplied to EPD is merely a representation of a professional service performed by EPD's employee. Therefore, Company's services are not a "digital product." However, Company is still required to charge and collect retail sales tax because Com-

pany is still providing credit bureau services, a retail service, subject to retail sales tax.

Example 35. Company sells an online credit reporting service. The service includes access to searchable data bases, digital data analysis, and digital data reporting tools. ManageCo investigates the credit worthiness of individuals and therefore purchases access to Company's online service. Company is selling a digital automated service to be used solely for a business purpose by ManageCo. However, the "used solely for a business purpose" exemption is limited to digital goods and is not applicable to digital automated services. As such, Company is required to charge and collect retail sales tax on its sale of the digital automated service to ManageCo.

(602) **Royalties and wholesaling B&O tax on digital products.** The sale of digital products to "nonend users" may be subject to royalties or wholesaling B&O tax depending on the type of transaction and the intangible rights provided to the purchaser. Transactions which provide the right to resell digital products (no copying rights) to consumers will generally be treated as wholesale sales. Additionally, transactions which allow the purchaser the right to incorporate a digital product into a new product for sale will also be treated as wholesale sales. See also subsection (503) of this section. Other nonend user transactions involving digital products or digital codes will generally be treated as royalties transactions.

Example 36. Media Corp., licenses to Rerun Inc., the right to further broadcast a digital movie file on Rerun's web site for a specified period of time. In this case Media Corp. provides Rerun with the right by contract to further commercially broadcast or exhibit a digital movie to its subscribers. This is a nonend user transaction subject to royalties B&O tax. Media Corp. would report its gross receipts from this transaction under the royalties B&O tax classification and not charge and collect retail sales tax on the transaction with Rerun. Rerun's charges for the subscription service provided to consumers are generally subject to retail sales tax and retailing B&O tax.

Example 37. Same facts as Example 36 except Rerun purchases individual digital movie files from Media Corp. with the right to resell those individual files to end users at retail instead of rebroadcasting or exhibiting to the public. In this case Media Corp. has provided Rerun with the right to resell individual digital movie files to end users. Media Corp. would report its gross receipts from this transaction under the wholesaling B&O tax classification and not charge and collect retail sales tax on the transaction with Rerun. Rerun's charges to consumers for the movie files are generally subject to retail sales tax and retailing B&O tax.

Example 38. Same facts as Example 37 except that Rerun purchases a single digital movie file with the right provided by contract to duplicate and sell that movie file. In this case Media Corp. has provided Rerun with the right to duplicate and sell individual digital movie files. Media Corp. would report its gross receipts from this transaction under the royalties B&O tax classification. Media Corp. would not need to charge and collect retail sales or use tax from Rerun. Rerun's charges to consumers for the movie files are generally subject to retail sales tax and retailing B&O tax.

Example 39. Jack is a photographer who creates a digital picture of Mt. Rainier. Jack licenses, by contract, to Cashman the right to duplicate and sell copies of the Mt. Rainier picture in retail stores. Cashman's payment to Jack is for the grant of an intangible right and subject to royalties B&O tax. Cashman's sale of the picture at retail to customers is subject to retail sales tax and retailing B&O tax.

(603) **Substantial nexus** is not established in Washington if a business's only contact with the state of Washington is ownership of, or rights in, computer software as defined in RCW 82.04.215, including computer software used in providing a digital automated service; master copies of software; a digital goods or digital codes residing on servers in Washington. For purposes of this section, "substantial nexus" means the requisite connection that a person must have with a state to allow the state to subject the person to the state's taxing authority, consistent with the commerce clause of the United States Constitution.

(604) **Amnesty.** Before July 26, 2009, retail sales of downloaded digital goods on a permanent or nonpermanent basis were subject to retail sales tax. This did not include accessed or streamed digital goods. However, amnesty is available to those who did not collect or pay retail sales or use tax on digital goods and digital codes during that time. Sales of digital automated services and accessed or streamed digital goods were subject to service and other B&O tax before July 26, 2009, and amnesty does not extend to these transactions because they were not subject to retail sales tax during that time period.

(a) **Refunds and credits of retail sales or use tax.** No refund or credit will be given for state and local retail sales and use taxes properly paid on the sale or use, before July 26, 2009, of digital goods or of installing, repairing, altering, or improving digital goods.

(b) **No B&O tax refund or credit unless sales tax was paid.** If a taxpayer paid B&O tax under the service and other activities classification prior to July 26, 2009, on income received from retail sales of digital products or digital codes, the taxpayer may not receive a refund or credit for the difference between the B&O tax actually paid and the B&O tax that should have been paid under the retailing classification unless the taxpayer has remitted the retail sales tax for those sales.

(605) **Bundled transactions.** A "bundled transaction" is the retail sale of two or more products, which are distinct and identifiable for one nonitemized price. Because retail sales of digital products and digital codes are subject to retail sales tax, the general rules on the taxation of bundled transactions may apply to certain transactions involving digital products and digital codes. See RCW 82.08.190 and 82.08.195 for more information on the tax treatment of bundled transactions.

(606) **Property tax.** The excise tax laws relating to digital products and digital codes do not have any impact in the characterization of digital goods and digital codes as tangible or intangible personal property for purposes of property taxation and may not be used in any way in construing Title 84 RCW. See section 1201, chapter 535, Laws of 2009.

WSR 14-13-093
PERMANENT RULES
DEPARTMENT OF REVENUE

[Filed June 17, 2014, 9:57 a.m., effective July 18, 2014]

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

Purpose: The changes relate to the recent legislation SB 5715, section 1, chapter 309, Laws of 2013. Section 1 of this legislation amended RCW 82.32.215 adding language that the department of revenue may, by order, revoke the certificate of registration of a taxpayer for specific reasons concerning the nonpayment of taxes.

Citation of Existing Rules Affected by this Order: Amending WAC 458-20-101 Tax registration and tax reporting.

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

Other Authority: RCW 82.32.215.

Adopted under notice filed as WSR 14-07-055 on March 14, 2014.

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

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

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

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

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

Date Adopted: June 17, 2014.

Dylan Waits
Rules Coordinator

AMENDATORY SECTION (Amending WSR 08-16-073, filed 7/31/08, effective 8/31/08)

WAC 458-20-101 Tax registration and tax reporting.

(1) **Introduction.** This section explains tax registration and tax reporting requirements for the Washington state department of revenue as established in RCW 82.32.030 and 82.32.045. This section discusses who is required to be registered, and who must file excise tax returns. This section also discusses changes in ownership requiring a new registration, the administrative closure of taxpayer accounts, and the revocation and reinstatement of a tax reporting account with the department of revenue. Persons required to file tax returns should also refer to WAC 458-20-104 (Small business tax relief based on volume of business).

(2) **Persons required to obtain tax registration endorsements.** Except as provided in (a) of this subsection, every person who is engaged in any business activity for which the department of revenue is responsible for administering and/or collecting a tax or fee, shall apply for and obtain a tax registration endorsement with the department of revenue.

nue. (See RCW 82.32.030.) This endorsement shall be reflected on the face of the business person's registrations and licenses document. The tax registration endorsement is non-transferable, and valid for as long as that person continues in business.

(a) Registration under this section is not required if all of the following conditions are met:

(i) The person's value of products, gross proceeds of sales, or gross income of the business, from all business activities taxable under chapter 82.04 RCW (business and occupation tax), is less than twelve thousand dollars per year;

(ii) A person's gross income from all business activities taxable under chapter 82.16 RCW (public utility tax), is less than twelve thousand dollars per year;

(iii) The person is not required to collect or pay to the department of revenue retail sales tax or any other tax or fee which the department is authorized to administer and/or collect; and

(iv) The person is not otherwise required to obtain a license or registration subject to the master application procedure provided in chapter 19.02 RCW. For the purposes of this section, the term "license or registration" means any agency permit, license, certificate, approval, registration, charter, or any form or permission required by law, including agency rule, to engage in any activity.

(b) The term "tax registration endorsement," as used in this section, has the same meaning as the term "tax registration" or "certificate of registration" used in Title 82 RCW and other sections in chapter 458-20 WAC.

(c) The term "person" has the meaning given in RCW 82.04.030.

(d) The term "tax reporting account number" as used in this section, is the number used to identify persons registered with the department of revenue.

(3) **Requirement to file tax returns.** Persons registered with the department must file tax returns and remit the appropriate taxes to the department, unless they are placed on an "active nonreporting" status by the department.

(a) The department may relieve any person of the requirement to file returns by placing the person in an active nonreporting status if all of the following conditions are met:

(i) The person's value of products (RCW 82.04.450), gross proceeds of sales (RCW 82.04.070), or gross income of the business (RCW 82.04.080), from all business activities taxable under chapter 82.04 RCW (business and occupation tax), is(=

~~(A) Beginning July 1, 1999,~~) less than twenty-eight thousand dollars per year (~~(chapter 357, Laws of 1999); or~~

~~(B) Prior to July 1, 1999, less than twenty-four thousand dollars per year);~~

(ii) The person's gross income (RCW 82.16.010) from all business activities taxable under chapter 82.16 RCW (public utility tax) is less than twenty-four thousand dollars per year; and

(iii) The person is not required to collect or pay to the department retail sales tax or any other tax or fee the department is authorized to collect.

(b) The department will notify those persons it places on an active nonreporting status. (A person may request to be

placed on an active nonreporting status if the conditions of (a) of this subsection are met.)

(c) Persons placed on an active nonreporting status by the department are required to timely notify the department if their business activities do not meet any of the conditions explained in (a) of this subsection. These persons will be removed from an active nonreporting status, and must file tax returns and remit appropriate taxes to the department, beginning with the first period in which they do not qualify for an active nonreporting status.

(d) Persons that have not been placed on an active nonreporting status by the department must continue to file tax returns and remit the appropriate taxes.

(4) **Examples.** The following examples identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The status of each situation must be determined after a review of all facts and circumstances.

(a) Bob Brown is starting a bookkeeping service. The gross income of the business is expected to be less than twelve thousand dollars per year. Due to the nature of the business activities, Bob is not required to pay or collect any other tax which the department is authorized to collect.

Bob Brown is not required to apply for and obtain a tax registration endorsement with the department of revenue. The conditions under which a business person may engage in business activities without obtaining the tax registration endorsement have been met. However, if Bob Brown in some future period has gross income exceeding twelve thousand dollars per year, he will be required to obtain a tax registration endorsement. If Bob's gross income exceeds twenty-eight thousand dollars per year, he will be required to file tax returns and remit the appropriate taxes.

(b) Cindy Smith is opening a business to sell books written for children to local customers at retail. The gross proceeds of sales are expected to be less than twelve thousand dollars per year.

Cindy Smith must apply for and obtain a tax registration endorsement with the department of revenue. While gross income is expected to be less than twelve thousand dollars per year, Cindy Smith is required to collect and remit retail sales tax.

(c) Alice Smith operates a taxicab service with an average gross income of eighteen thousand dollars per year. She also owns a management consulting service with an average gross income of fifteen thousand dollars per year. Assume that Alice is not required to collect or pay to the department any other tax or fee the department is authorized to collect. Alice qualifies for an active nonreporting status because her taxicab income is less than the twenty-four thousand dollar threshold for the public utility tax, and her consulting income is less than the twenty-four thousand dollar threshold for the business and occupation (B&O) tax. If the department of revenue does not first place her on an active nonreporting status, she may request the department to do so.

(5) **Out-of-state businesses.** The B&O and public utility taxes are imposed on the act or privilege of engaging in business activity within Washington. RCW 82.04.220 and 82.16.020. Out-of-state persons who have established sufficient nexus in Washington to be subject to Washington's

B&O or public utility taxes must obtain a tax registration endorsement with this department if they do not satisfy the conditions expressed in subsection (2)(a) of this section. Out-of-state persons required to collect Washington's retail sales or use tax, or who have elected to collect Washington's use tax, even though not statutorily required to do so, must obtain a tax registration endorsement.

(a) Persons with out-of-state business locations should not include income that is disassociated from their in-state activities in their computations for determining whether the gross income thresholds provided in subsection (2)(a)(i) and (ii) of this section are satisfied.

(b) Out-of-state persons making sales into or doing business within Washington should also refer to the following rules in chapter 458-20 WAC for a discussion of their tax reporting responsibilities:

- (i) WAC 458-20-103 (Time and place of sale);
- (ii) WAC 458-20-193 (Inbound and outbound interstate sales of tangible personal property);
- (iii) WAC 458-20-193D (Transportation, communication, public utility activities, or other services in interstate or foreign commerce);
- (iv) WAC 458-20-194 (Doing business inside and outside the state); and
- (v) WAC 458-20-221 (Collection of use tax by retailers and selling agents).

(6) **Registration procedure.** The state of Washington initiated the unified business identifier (UBI) program to simplify the registration and licensing requirements imposed on the state's business community. Completion of the master application enables a person to register or license with several state agencies, including the department of revenue, using a single form. The person will be assigned one unified business identifier number, which will be used for all state agencies participating in the UBI program. The department may assign the unified business identifier number as the taxpayer's revenue tax reporting account number, or it may assign a different or additional number as the revenue tax reporting account number.

(a) Persons completing the master application will be issued a registrations and licenses document. The face of this document will list the registrations and licenses (endorsements) which have been obtained.

(b) The department of revenue does not charge a registration fee for issuing a tax registration endorsement. Persons required to complete a master application may, however, be subject to other fees.

(c) While the UBI program is administered by the department of licensing, master applications are available at any participating UBI service provider location. The following agencies of the state of Washington participate in the UBI program (see RCW 19.02.050 for a more complete listing of participating agencies):

- (i) The office of the secretary of state;
- (ii) The department of licensing;
- (iii) The department of employment security;
- (iv) The department of labor and industries;
- (v) The department of revenue.

(7) **Temporary revenue registration certificate.** A temporary revenue registration certificate may be issued to any person who operates a business of a temporary nature.

(a) Temporary businesses, for the purposes of registration, are those with:

- (i) Definite, predetermined dates of operation for no more than two events each year with each event lasting no longer than one month; or
- (ii) Seasonal dates of operation lasting no longer than three months. However, persons engaging in business activities on a seasonal basis every year should refer to subsection (8) of this section.

(b) Each temporary registration certificate is valid for a single event. Persons that subsequently make sales into Washington may incur additional tax liability. Refer to WAC 458-20-193 (Inbound and outbound interstate sales of tangible personal property) for additional information on tax reporting requirements. It may be required that a tax registration endorsement be obtained, in lieu of a temporary registration certificate. See subsection (2) of this section.

(c) Temporary revenue registration certificates may be obtained by making application at any participating UBI agency office, or by completing a seasonal registration form.

(8) **Seasonal revenue tax reporting accounts.** Persons engaging in seasonal business activities which do not exceed two quarterly reporting periods each calendar year may be eligible for a tax reporting account with a seasonal reporting status. This is a permanent account until closed by the taxpayer. The taxpayer must specify in which quarterly reporting periods he or she will be engaging in taxable business activities. The quarterly reporting periods in which the taxpayer is engaging in taxable business activities may or may not be consecutive, but the same quarterly period or periods must apply each year. The taxpayer is not required to be engaging in taxable business activities during the entire period.

The department will provide and the taxpayer will be required to file tax returns only for the quarterly reporting periods specified by the taxpayer. Examples of persons which may be eligible for the seasonal reporting status include persons operating Christmas tree and/or fireworks stands. Persons engaging in taxable business activities in more than two quarterly reporting periods in a calendar year will not qualify for the seasonal reporting status.

(9) **Display of registrations and licenses document.** The taxpayer is required to display the registrations and licenses document in a conspicuous place at the business location for which it is issued.

(10) **Multiple locations.** A registrations and licenses document is required for each place of business at which a taxpayer engages in business activities for which the department of revenue is responsible for administering and/or collecting a tax or fee, and any main office or principal place of business from which excise tax returns are to be filed. This requirement applies to locations both within and without the state of Washington.

(a) For the purposes of this subsection, the term "place of business" means:

- (i) Any separate establishment, office, stand, cigarette vending machine, or other fixed location; or

(ii) Any vessel, train, or the like, at any of which the taxpayer solicits or makes sales of tangible personal property, or contracts for or renders services in this state or otherwise transacts business with customers.

(b) A taxpayer wishing to report all tax liability on a single excise tax return may request a separate registrations and licenses document for each location. The original registrations and licenses document shall be retained for the main office or principal place of business from which the returns are to be filed, with additional documents obtained for all branch locations. All registrations and licenses documents will reflect the same tax reporting account number.

(c) A taxpayer desiring to file a separate excise tax return covering a branch location, or a specific construction contract, may apply for and receive a separate revenue tax reporting account number. A registrations and licenses document will be issued for each tax reporting account number and will represent a separate account.

(d) A master application must be completed to obtain a separate registrations and licenses document, or revenue tax reporting account number, for a new location.

(11) Change in ownership. When a change in ownership of a business occurs, the new owner must apply for and obtain a new registrations and licenses document. The original document must be destroyed, and any further use of the tax reporting account number for tax purposes is prohibited.

(a) A "change in ownership," for purposes of registration, occurs upon but is not limited to:

(i) The sale of a business by one individual, firm or corporation to another individual, firm or corporation;

(ii) The dissolution of a partnership;

(iii) The withdrawal, substitution, or addition of one or more partners where the general partnership continues as a business organization and the change in the composition of the partners is equal to or greater than fifty percent;

(iv) Incorporation of a business previously operated as a partnership or sole proprietorship;

(v) Changing from a corporation to a partnership or sole proprietorship; or

(vi) Changing from a corporation, partnership or sole proprietorship to a limited liability company or a limited liability partnership.

(b) For the purposes of registration, a "change in ownership" does not occur upon:

(i) The sale of all or part of the common stock of a corporation;

(ii) The transfer of assets to an assignee for the benefit of creditors or upon the appointment of a receiver or trustee in bankruptcy;

(iii) The death of a sole proprietor where there will be a continuous operation of the business by the executor, administrator, or trustee of the estate or, where the business was owned by a marital community or registered domestic partnership, by the surviving spouse or surviving domestic partner of the deceased owner;

(iv) The withdrawal, substitution, or addition of one or more partners where the general partnership continues as a business organization and the change in the composition of the partners is less than fifty percent; or

(v) A change in the trade name under which the business is conducted.

(c) While changes in a business entity may not result in a "change in ownership," the completion of a new master application may be required to reflect the changes in the registered account.

(12) Change in location. Whenever the place of business is moved to a new location, the taxpayer must notify the department of the change. A new registrations and licenses document will be issued to reflect the change in location.

(13) Lost registrations and licenses documents. If any registrations and licenses document is lost, destroyed or defaced as a result of accident or of natural wear and tear, a new document will be issued upon request.

(14) Administrative closure of taxpayer accounts. The department may, upon written notification to the taxpayer, close the taxpayer's tax reporting account and rescind its tax registration endorsement whenever the taxpayer has reported no gross income and there is no indication of taxable activity for two consecutive years.

The taxpayer may request, within thirty days of notification of closure, that the account remain open. A taxpayer may also request that the account remain open on an "active non-reporting" status if the requirements of subsection (3)(a) of this section are met. The request shall be reviewed by the department and if found to be warranted, the department will immediately reopen the account. The following are acceptable reasons for continuing as an active account:

(a) The taxpayer is engaging in business activities in Washington which may result in tax liability.

(b) The taxpayer is required to collect or pay to the department of revenue a tax or fee which the department is authorized to administer and/or collect.

(c) The taxpayer has in fact been liable for excise taxes during the previous two years.

(15) Reopening of taxpayer accounts. A business person choosing to resume business activities for which the department of revenue is responsible for administering and/or collecting a tax or fee, may request a previously closed account be reopened. The business person must complete a new master application. When an account is reopened a new registrations and licenses document, reflecting a current tax registration endorsement, shall be issued. Persons requesting the reopening of an account which had previously been closed due to a revocation action should refer to subsection (16) of this section.

(16) Revocation and reinstatement of tax registration endorsements. Actions to revoke tax registration endorsements must be conducted by the department pursuant to the provisions of chapter 34.05 RCW, the Administrative Procedure Act, and the taxpayers bill of rights of chapter 82.32A RCW. Persons should refer to WAC 458-20-10001, Adjudicative proceedings—Brief adjudicative proceedings—Wholesale and retail cigarette license revocation/suspension—Certificate of registration (tax registration endorsement) revocation, for an explanation of the procedures and processes pertaining to the revocation of tax registration endorsements.

(a) The department of revenue may, by order, revoke a tax registration endorsement if:

(i) Any tax warrant issued under the provisions of RCW 82.32.210 is not paid within thirty days after it has been filed with the clerk of the superior court (or for any other reason expressly provided by law); or

(ii) The taxpayer is delinquent, for three consecutive reporting periods, in the transmission to the department of retail sales tax collected by the taxpayer; or

(iii) Either:

(A) The taxpayer was convicted of violating RCW 82.32.290(4) and continues to engage in business without fully complying with RCW 82.32.290 (4)(b)(i) through (iii); or

(B) A person convicted of violating RCW 82.32.290(4) is an owner, officer, director, partner, trustee, member, or manager of the taxpayer, and the person and taxpayer have not fully complied with RCW 82.32.290 (4)(b)(i) through (iii).

For purposes of (a)(iii) of this subsection, the terms "manager," "member," and "officer" mean the same as defined in RCW 82.32.145.

(b) The revocation order will be, if practicable, posted in a conspicuous place at the main entrance to the taxpayer's place of business (~~and~~). The department may also post a copy of the revocation order in any public facility, as may be allowed by the public entity that owns or occupies the facility. The revocation order posted at the taxpayer's place of business must remain posted until the tax registration endorsement has been reinstated or the taxpayer has abandoned the premises. A revoked endorsement will not be reinstated until:

(i) The amount due on the warrant has been paid, or satisfactory arrangements for payment have been approved by the department (~~and~~

~~(ii)~~), and the taxpayer has posted with the department a bond or other security in an amount not exceeding one-half the estimated average annual liability of the taxpayer; or

(ii) The taxpayer and, if applicable, the owner, officer, director, partner, trustee, member, or manager of the taxpayer who was convicted of violating RCW 82.32.290(4) are in full compliance with RCW 82.32.290 (4)(b)(i) through (iii), if the tax registration endorsement was revoked as described in (a)(iii) of this subsection.

(c) It is unlawful for any taxpayer to engage in business after its tax registration endorsement has been revoked.

(17) **Penalties for noncompliance.** The law provides that any person engaging in any business activity, for which registration with the department of revenue is required, shall obtain a tax registration endorsement.

(a) The failure to obtain a tax registration endorsement prior to engaging in any taxable business activity constitutes a gross misdemeanor.

(b) Engaging in business after a tax registration endorsement has been revoked by the department constitutes a Class C felony.

(c) Any tax found to have been due, but delinquent, and any tax unreported as a result of fraud or misrepresentation, may be subject to penalty as provided in chapter 82.32 RCW, WAC 458-20-228 and 458-20-230.

WSR 14-13-096

PERMANENT RULES

DEPARTMENT OF REVENUE

[Filed June 17, 2014, 10:50 a.m., effective July 18, 2014]

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

Purpose: The department amends WAC 458-20-261 ("Rule 261") to recognize provisions of ESSB 5024, sections 718 and 719, chapter 306, Laws of 2013, regular session; and ESSB 6001, passed legislature, section 707, Laws of 2014 regular session. The commute trip reduction incentives provided by chapter 82.70 RCW were extended to June 30, 2015. The law was also amended to reduce the fiscal year limitation on the credit for the fiscal year periods beginning July 1, 2013, through June 30, 2016, from \$2.75 million to \$1.5 million for these final fiscal years.

Other language changes include removing language from the rule that reference the pre-2005 tax periods. After these changes and the removal of the language describing the pre-2005 periods from the rule, the remaining section designations in the rule consisting of letters and roman numerals were adjusted as necessary.

Citation of Existing Rules Affected by this Order: Amending WAC 458-20-261 Commute trip reduction incentives.

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

Other Authority: RCW 82.70.020 and 82.70.040.

Adopted under notice filed as WSR 14-08-057 on March 28, 2014.

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

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

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

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

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

Date Adopted: June 17, 2014.

Dylan Waits
Rules Coordinator

AMENDATORY SECTION (Amending WSR 06-01-026, filed 12/13/05, effective 1/13/06)

WAC 458-20-261 Commute trip reduction incentives. (1) **Introduction.** This rule explains the various commute trip reduction incentives that are available. First, RCW 82.04.355 and 82.16.047 provide exemptions from business and occupation (B&O) tax and public utility tax on amounts received from providing commuter ride sharing and ride sharing for persons with special transportation needs. RCW 82.08.0287 and 82.12.0282 provide sales and use tax exemp-

tions for sales or use of passenger motor vehicles as ride-sharing vehicles. Finally, chapter 82.70 RCW provides commute trip reduction incentives in the form of B&O tax or public utility tax credit, effective July 1, 2003, in connection with ride sharing, public transportation, car sharing, and nonmotorized commuting.

(2) **B&O tax and public utility tax exemptions on providing commuter ride sharing or ride sharing for persons with special transportation needs.** Amounts received in the course of commuter ride sharing or ride sharing for persons with special transportation needs are exempt from the business and occupation tax and from the public utility tax. RCW 82.04.355 and 82.16.047.

(a) **What is "commuter ride sharing"?** "Commuter ride sharing" means a car pool or van pool arrangement, whereby one or more fixed groups:

- (i) Not exceeding fifteen persons each, including the drivers; and
- (ii) Either:
 - (A) Not fewer than five persons, including the drivers; or
 - (B) Not fewer than four persons, including the drivers, where at least two of those persons are confined to wheelchairs when riding;

Are transported in a passenger motor vehicle with a gross vehicle weight not exceeding ten thousand pounds, excluding any special rider equipment. The transportation must be between their places of residence or near such places of residence, and their places of employment or educational or other institutions. Each group must be in a single daily round trip where the drivers are also on the way to or from their places of employment or educational or other institutions.

(b) **What is "ride sharing for persons with special transportation needs"?** "Ride sharing for persons with special transportation needs" means an arrangement, whereby a group of persons with special transportation needs, and their attendants, is transported by a public social service agency or a private, nonprofit transportation provider, in a passenger motor vehicle as defined by the department of licensing to include small buses, cutaways, and modified vans not more than twenty-eight feet long. The driver need not be a person with special transportation needs.

(i) **What is a "private, nonprofit transportation provider"?** A "private, nonprofit transportation provider" is any private, nonprofit corporation providing transportation services for compensation solely to persons with special transportation needs.

(ii) **What is "persons with special transportation needs"?** "Persons with special transportation needs" are those persons, including their personal attendants, who because of physical or mental disability, income status, or age, are unable to transport themselves or to purchase appropriate transportation.

(3) **Retail sales tax and use tax exemptions on sales or use of passenger motor vehicles as ride-sharing vehicles.** RCW 82.08.0287 and 82.12.0282 provide retail sales tax and use tax exemptions for sales and use of passenger motor vehicles as ride-sharing vehicles.

(a) **What are the requirements?** The requirements are that the passenger motor vehicles must be used:

(i) For commuter ride sharing or ride sharing for persons with special transportation needs; and

(ii) As ride-sharing vehicles for thirty-six consecutive months beginning from the date of purchase (retail sales tax exemption) and the date of first use (use tax exemption). If the vehicle is used as a ride-sharing vehicle for less than thirty-six consecutive months, the registered owner must pay the retail sales tax or use tax.

(b) **Additional requirements in certain cases.** Vehicles with five or six passengers, including the driver, used for commuter ride sharing must be operated within a county, or a city or town within that county, which has a commute trip reduction plan under chapter 70.94 RCW in order to be exempt from retail sales tax or use tax. In addition, for the exemptions to apply, at least one of the following conditions must apply:

(i) The vehicle must be operated by a public transportation agency for the general public;

(ii) The vehicle must be used by a major employer, as defined in RCW 70.94.524, as an element of its commute trip reduction program for their employees; or

(iii) The vehicle must be owned and operated by individual employees and must be registered either with the employer as part of its commute trip reduction program or with a public transportation agency serving the area where the employees live or work.

Individual-employee owned and operated motor vehicles require certification that the vehicle is registered with a major employer or a public transportation agency. Major employers who own and operate motor vehicles for their employees must certify that the commute ride-sharing arrangement conforms to a car pool/van pool element contained within their commute trip reduction program.

(4) **B&O tax or public utility tax credit for ride sharing, public transportation, car sharing, or nonmotorized commuting.** Effective July 1, 2003, RCW 82.70.020 provides a credit against B&O tax or public utility tax liability for ride sharing in vehicles carrying two or more persons, for using public transportation, for using car sharing, or for using nonmotorized commuting.

(a) **Who is eligible for this credit?**

(i) Employers in Washington are eligible for this credit, for amounts paid to or on behalf of their own or other employees, as financial incentives to such employees for ride sharing, for using public transportation, for using car sharing, or for using nonmotorized commuting.

(ii) Property managers who manage worksites in Washington are eligible for this credit, for amounts paid to or on behalf of persons employed at those worksites, as financial incentives to such persons for ride sharing, for using public transportation, for using car sharing, or for using nonmotorized commuting.

(b) **What is "ride sharing"?** "Ride sharing" means a car pool or van pool arrangement, whereby a group of at least two but not exceeding fifteen persons, including the driver, is transported in a passenger motor vehicle with a gross vehicle weight not exceeding ten thousand pounds, excluding any special rider equipment. The transportation must be between their places of residence or near such places of residence, and their places of employment or educational or other institu-

tions. The driver must also be on the way to or from his or her place of employment or educational or other institution. "Ride sharing" includes ride sharing on Washington state ferries.

(c) **What is "public transportation"?** "Public transportation" means the transportation of packages, passengers, and their incidental baggage, by means other than by charter bus or sight-seeing bus, together with the necessary passenger terminals and parking facilities or other properties necessary for passenger and vehicular access to and from such people moving systems. "Public transportation" includes passenger services of the Washington state ferries.

(d) **What is "car sharing"?** "Car sharing" means a membership program intended to offer an alternative to car ownership under which persons or entities that become members are permitted to use vehicles from a fleet on an hourly basis.

(e) **What is "nonmotorized commuting"?** "Nonmotorized commuting" means commuting to and from the workplace by an employee, by walking or running or by riding a bicycle or other device not powered by a motor. "Nonmotorized commuting" does not include teleworking, which is a program where work functions normally performed at a traditional workplace are instead performed by an employee at his or her home, at least one day a week for the purpose of reducing the number of trips to the employee's workplace.

(f) **What is the credit amount?** The amount of the credit is equal to the amount paid to or on behalf of each employee multiplied by fifty percent, but may not exceed sixty dollars per employee per fiscal year.

(g) **What is a "fiscal year"?** A "fiscal year" begins at July 1st of one year and ends on June 30th of the following year.

(h) **When will the credit expire?** The credit program is scheduled to expire ~~(July 1, 2013)~~ June 30, 2015.

(i) **What are the limitations of the credit?** ~~((H))~~ For periods after June 30, 2005:

~~((A))~~ (i) The credit may not exceed the amount of B&O tax or public utility tax that would otherwise be due for the same fiscal year.

~~((B))~~ (ii) A person may not receive credit for amounts paid to or on behalf of the same employee under both B&O tax and public utility tax.

~~((C))~~ (iii) A person may not take a credit for amounts claimed for credit by other persons.

~~((D))~~ (iv) Total credit received by a person against both B&O tax and public utility tax may not exceed two hundred thousand dollars for a fiscal year. This limitation does not apply to credits deferred from prior fiscal years as described in ~~(i)((H)(G))~~ (vii) and ~~((H))~~ (viii) of this subsection.

~~((E))~~ (v) Total credit granted to all persons under both B&O tax and public utility tax ~~((may not exceed two million seven hundred fifty thousand dollars for a fiscal year)), including any credits carried forward from prior fiscal years as described in (i)((H)(G)) (vii) of this subsection, may not exceed:~~

(A) Two million seven hundred fifty thousand dollars in any fiscal year through the fiscal year ending June 30, 2013; and

(B) One million five hundred thousand dollars per fiscal year for the period beginning July 1, 2013, through June 30, 2016.

~~((F))~~ (vi) No credit or portion of a credit denied, because of exceeding the limitations in ~~(i)((H)(D))~~ (iv) or ~~((E))~~ (v) of this subsection, may be used against tax liability for other fiscal years, subject to ~~(i)((H)(G))~~ (vii) and ~~((H))~~ (viii) of this subsection.

~~((G))~~ (vii) A person, with B&O tax and public utility tax liability equal to or in excess of the credit for a fiscal year, may use all or part of the credit deferred prior to July 1, 2005, for a period of not more than three fiscal years after the fiscal year in which the credit accrued. No credit deferred under this paragraph (i)((H)(G)) (vii) of this subsection may be used after June 30, 2008. The person must submit an application, as provided in ~~(j)(i)((A))~~ of this subsection, in the fiscal year tax credit will be applied, and the credit must be approved by the department before use. This application is subject to eligibility under ~~(i)((H)(E))~~ (v) of this subsection for the fiscal year tax credit will be applied. If a deferred credit is subject to proportional reduction under ~~(j)((H)(D))~~ (iv) of this subsection, the amount of deferred credit reduced may be carried forward as long as the period of deferral does not exceed three years after the year the credit was earned.

~~((H))~~ (viii) For deferred credit approved by the department after June 30, 2005, the approved credit may be carried forward to subsequent years until used. The limitation described in ~~(i)((H)(E))~~ (v) of this subsection does not apply to such deferred credit approved after June 30, 2005.

~~((H))~~ (ix) No person is eligible for the tax credit, including the deferred tax credit authorized under ~~(i)((H)(G))~~ (vii) and ~~((H))~~ (viii) of this subsection, after June 30, ~~(2013)~~ 2014.

~~((H))~~ (x) No person is eligible for tax credit if the additional revenues for the multimodal transportation account created under RCW 46.68.035(1), 82.08.020(3), 82.12.045(7), 46.16.233(2), and 46.16.690 (created by the Engrossed Substitute House Bill No. 2231, chapter 361, Laws of 2003) are terminated.

~~((ii) For periods prior to July 1, 2005:~~

~~(A) The credit may not exceed the amount of B&O tax or public utility tax that would otherwise be due for the same fiscal year.~~

~~(B) A person may not receive credit for amounts paid to or on behalf of the same employee under both B&O tax and public utility tax.~~

~~(C) A person may not take a credit for amounts claimed for credit by other persons.~~

~~(D) Total credit received by a person against both B&O tax and public utility tax may not exceed two hundred thousand dollars for a fiscal year. This limitation does not apply to credits deferred from prior fiscal years as described in (i)(ii)(G) of this subsection.~~

~~(E) Total credit granted to all persons under both B&O tax and public utility tax may not exceed two million two hundred fifty thousand dollars for a fiscal year, including any credits carried forward from prior fiscal years as described in (i)(ii)(G) of this subsection.~~

~~(F) No credit or portion of a credit denied, because of exceeding the limitations in (i)(ii)(D) or (E) of this subsec-~~

tion, may be used against tax liability for other fiscal years, subject to (i)(ii)(G) of this subsection.

~~(G) A person, with B&O tax and public utility tax liability equal to or in excess of the credit for a fiscal year, may defer all or part of the credit for a period of not more than three fiscal years after the fiscal year in which the credit accrued. Such person deferring tax credit must submit an application in the fiscal year tax credit will be applied. This application is subject to eligibility under (i)(ii)(E) of this subsection for the fiscal year tax credit will be applied.~~

~~(H) No person is eligible for the tax credit, including the deferred tax credit authorized under (i)(ii)(G) of this subsection, after June 30, 2013.~~

~~(I) No person is eligible for tax credit if the additional revenues for the multimodal transportation account created under RCW 46.68.035(1), 82.08.020(3), 82.12.045(7), 46.16.233(2), and 46.16.690 (created by the Engrossed Substitute House Bill No. 2231, chapter 361, Laws of 2003) are terminated.)~~

~~(j) What are the credit procedures? ((+)) For periods after June 30, 2005:~~

~~((A)) (i) Persons applying for the credit must complete an application. The application must be received by the department between January 1 and January 31, following the calendar year in which the applicants made incentive payments. The application must be made to the department in a form and manner prescribed by the department.~~

~~((B)) (ii) An application due by January 31, 2006, must not include incentive payments made from January 1, 2005, to June 30, 2005.~~

~~((C)) (iii) The department must rule on an application within sixty days of the January 31 deadline. In addition, the department must disapprove an application not received by the January 31 deadline. Once the application is approved and tax credit is granted, the department is not allowed to increase the credit.~~

~~((D)) (iv) If the total amount of credit applied for by all applicants in a fiscal year exceeds the limitation as provided in (i)((+)(E)) (v) of this subsection, the amount of credit allowed for all applicants is proportionally reduced so as not to exceed the limit. The amount reduced may not be carried forward and claimed in subsequent fiscal years, except as provided in (i)((+)(G)) (vii) of this subsection.~~

~~((ii) For periods prior to July 1, 2005:~~

~~(A) Persons apply for the credit, by completing a commute trip reduction reporting schedule and filing it with the excise tax return covering the period for which the credit is claimed. The commute trip reduction reporting schedule is available upon request from the department of revenue.~~

~~(B) Credit must be claimed by the due date of the last tax return for the fiscal year in which the payment to or on behalf of employees was made.~~

~~(I) Credit not previously claimed may not be claimed for the first time on supplemental or amended tax returns filed after the due date of the last tax return for the fiscal year in which the payment to or on behalf of employees was made.~~

~~(H) If the department of revenue has granted an extension of the due date for the last tax return for the fiscal year in which the payment to or on behalf of employees was made, the credit must be claimed by the extended due date.~~

~~(C) Once the statewide limitation of two million two hundred fifty thousand dollars is reached in a fiscal year, no further credit will be available for that fiscal year. Credit is permitted by the department of revenue on a first come first serve basis. Credit claimed after the statewide limitation is reached may be deferred to the next three fiscal years before the credit expires.)~~

(k) **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) An employer pays one hundred eighty dollars for a yearly bus pass for one employee. For another employee, the employer buys a bicycle helmet and bicycle lock for a total of fifty dollars. These are the total expenditures during a fiscal year of amounts paid to or on behalf of employees in support of ride sharing, using public transportation, using car sharing, and using nonmotorized commuting. The employer may claim a credit of sixty dollars for the amount spent for the employee using the bus pass. Fifty percent of one hundred eighty dollars is ninety dollars, but the credit is limited to sixty dollars per employee. The employer may claim a credit of twenty-five dollars (fifty percent of fifty dollars) for the amount spent for the employee who bicycles to work. Even though fifty percent of two hundred thirty dollars, the amount spent on both employees, works out to be less than sixty dollars per employee, the credit is computed by looking at actual spending for each employee and not by averaging the spending for both employees.

(ii) An employer provides parking spaces for the exclusive use of ride-sharing vehicles. Amounts spent for signs, painting, or other costs related to the parking spaces do not qualify for the credit. This is because the credit is for financial incentives paid to or on behalf of employees. While the parking spaces support the use of ride-sharing vehicles, they are not financial incentives and do not involve amounts paid to or on behalf of employees.

(iii) As part of its commute trip reduction program, an employer pays the cab fare for an employee who has an emergency and must leave the workplace but has no vehicle available because he or she commutes by ride-sharing vehicle. The cab fare qualifies for the credit, if it does not cause the sixty-dollar limitation to be exceeded, because it is an amount paid on behalf of a specific employee.

(iv) An employer pays the property manager for a yearly bus pass for one employee who works at the worksite managed by the property manager. The property manager in turn pays the amount received from the employer to a public transportation agency to purchase the bus pass. Either the employer or the property manager, but not both, may take the credit for this expenditure.

WSR 14-13-098

PERMANENT RULES

DEPARTMENT OF REVENUE

[Filed June 17, 2014, 11:52 a.m., effective July 18, 2014]

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

Purpose: WAC 458-20-10004 Brief adjudicative proceedings for matters related to assessments and warrants for unpaid fees issued under chapter 59.30 RCW for manufactured and mobile home communities, is a new rule to provide brief adjudicative proceedings to those impacted by agency actions of the department of revenue in the administration of chapter 59.30 RCW. These brief adjudicative proceedings are authorized by RCW 34.05.482 through 34.05.494. This rule explains the process by which a taxpayer may seek administrative review of agency actions of the department of revenue in the administration of chapter 59.30 RCW regarding the assessment of the one-time business license fee; assessment of the annual renewal application fee; assessment of the annual registration assessment fee; and assessment of the delinquency fee for manufactured and mobile home communities.

Statutory Authority for Adoption: RCW 84.33.096, 82.32.300, and 82.01.060(2).

Other Authority: RCW 34.05.482 through 34.05.494.

Adopted under notice filed as WSR 14-06-089 on March 4, 2014.

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

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

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

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

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

Date Adopted: June 17, 2014.

Dylan Waits
Rules Coordinator

NEW SECTION

WAC 458-20-10004 Brief adjudicative proceedings for matters related to assessments and warrants for unpaid fees issued under chapter 59.30 RCW for manufactured and mobile home communities. (1) Introduction. The department of revenue (department) conducts adjudicative proceedings pursuant to chapter 34.05 RCW, the Administrative Procedure Act (APA). The department adopts in this section, the procedures as provided in RCW 34.05.482 through 34.05.494 for the administration of brief adjudicative proceedings to review the department's actions described in subsection (2) of this section.

This section explains the procedure pertaining to the adopted brief adjudicative proceedings.

(2) Department's action. The following actions taken by the department are subject to the brief adjudicative proceeding process described in this section:

(a) Assessment of the one-time business license application fee or annual renewal application fee in RCW 59.30.050 (3)(a);

(b) Assessment of the annual registration assessment fee in RCW 59.30.050 (3)(b); and

(c) Assessment of the delinquency fee in RCW 59.30.050(4).

The assessment of more than one type of fee against a manufactured/mobile home community owner or landlord in RCW 59.30.050 does not result in the creation of more than one adjudicative proceeding if those fees are issued in the same document, on the same date.

As explained in RCW 59.30.020(4), the terms "landlord" and "community owner" both refer to the owner of the mobile home park or manufactured home community or their agents. For purposes of this rule, the department refers to such persons as "community owners."

(3) Conduct of brief adjudicative proceedings. To initiate an appeal of the department's action, the community owner has twenty-one calendar days from the date on the department's action to request a review of that action. The community owner must file a written notice of appeal explaining why the community owner disagrees with the action.

A form notice of appeal is available at <http://dor.wa.gov> or by calling 1-800-647-7706. The completed form should be mailed or faxed to the department at:

Department of Revenue
Special Programs
Review of Annual Registration for Manufactured/
Mobile Home Communities
P.O. Box 47472
Olympia, WA 98504-7472
Fax: 360-534-1320

(a) A presiding officer, who will be a person designated by the director of the department (director) or the assistant director of special programs division, will conduct brief adjudicative proceedings. The presiding officer for brief adjudicative proceedings will have agency expertise in the subject matter but will not otherwise have participated in the specific matter. The presiding officer's review is limited to the written record.

(b) As part of the notice of appeal, the community owner or the community owner's representative may include written documentation explaining the community owner's view of the matter. The presiding officer may also request additional documentation from the community owner or the department and will designate the date by which the documents must be submitted.

(c) In addition to the record, the presiding officer for brief adjudicative proceedings may employ agency expertise as a basis for decision.

(d) Within twenty-one calendar days of receipt of the community owner's notice of appeal, the presiding officer will enter an initial order including a brief explanation of the decision under RCW 34.05.485. All orders in these brief adjudicative proceedings will be in writing. The initial order will become the department's final order unless a petition for review is made to the department's appeals division under subsection (4) of this section. If the presiding officer's order

invalidates the department action, the department may in its discretion initiate another action that corrects the defects in the prior action.

(4) Review of initial order from brief adjudicative proceeding. A community owner that has received an initial order upholding a department action under subsection (3) of this section may request a review by the department by filing a written petition for review or by making an oral request for review with the department's appeals division within twenty-one calendar days after the service of the initial order on the community owner as described in subsection (8) of this section.

A form petition of review is available at <http://dor.wa.gov>. A request for review should state the reasons for the review.

The address, telephone number, and fax number of the appeals division are:

Appeals Division
 Manufactured/Mobile Home Community Appeals
 Department of Revenue
 P.O. Box 47460
 Olympia, WA 98504-7460
 Telephone Number: 360-534-1335
 Fax: 360-534-1340

(a) A reviewing officer, who will be either the assistant director of the appeals division or such other person as designated by the director, will conduct a brief adjudicative proceeding and determine whether the initial order was correctly decided. The reviewing officer's review is limited to the written record.

(b) The agency record need not constitute the exclusive basis for the reviewing officer's decision. The reviewing officer will have the authority of a presiding officer.

(c) The order of the reviewing officer will be in writing and include a brief statement of the reasons for the decision, and it must be entered within thirty calendar days of the petition for review. The order will include a notice that judicial review may be available. The order of the reviewing officer represents a final order of the department. If a final order invalidates the department's action, the department may in its discretion initiate another action that corrects the defects in the prior action.

(5) Record in brief adjudicative proceedings. The record with respect to the brief adjudicative proceedings under RCW 34.05.482 through 34.05.494 will consist of:

(a) The record before the presiding officer: The record before the presiding officer consists of the notice of the department action; the community owner's appeal of the department action; all records relied upon by the department or submitted by the community owner related to the department's action; and all correspondence between the community owner and the department regarding the department's action.

(b) The record before the reviewing officer: The record before the reviewing officer consists of all documents included in the record before the presiding officer; the community owner's petition for review; and all correspondence between the community owner and the department regarding the community owner's petition for review.

(6) Court appeal. Court appeal from the final order of the department is available pursuant to Part V, chapter 34.05 RCW. However, court appeal may be available only if a review of the initial decision has been requested under subsection (4) of this section and all other administrative remedies have been exhausted. See RCW 34.05.534.

(7) Computation of time. In computing any period of time prescribed by this section or by the presiding officer or reviewing officer, the day of the act or event after which the designated period is to run is not to be included. The last day of the period is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the next day which is not a Saturday, Sunday, or legal holiday.

(8) Service. All notices and other pleadings or papers filed with the presiding or reviewing officer must be served on the community owner, their representatives/agents of record, and the department.

(a) Service is made by one of the following methods:

(i) In person;

(ii) By first-class, registered or certified mail;

(iii) By fax and same-day mailing of copies;

(iv) By commercial parcel delivery company; or

(v) By electronic delivery pursuant to RCW 82.32.135.

(b) Service by mail is regarded as completed upon deposit in the United States mail properly stamped and addressed.

(c) Service by electronic fax is regarded as completed upon the production by the fax machine of confirmation of transmission.

(d) Service by commercial parcel delivery is regarded as completed upon delivery to the parcel delivery company, properly addressed with charges prepaid.

(e) Service by electronic delivery is regarded as completed on the date that the department electronically sends the information to the parties or electronically notifies the parties that the information is available to be accessed by them.

(f) Service to a community owner, their representative/agent of record, the department, and presiding officer must be to the address shown on the form notice of appeal described in subsection (3) of this section.

(g) Service to the reviewing officer must be to the appeals division at the address shown in subsection (4) of this section.

(h) Where proof of service is required, the proofs of service must include:

(i) An acknowledgment of service;

(ii) A certificate, signed by the person who served the document(s), stating the date of service; that the person did serve the document(s) upon all or one or more of the parties of record in the proceeding by delivering a copy in person to (names); and that the service was accomplished by a method of service as provided in this subsection.

(9) Continuance. The presiding officer or reviewing officer may grant, in their sole discretion, a request for a continuance by motion of the community owner, the department, or on its own motion.

(10) Conversion of a brief adjudicative proceeding to a formal proceeding. The presiding officer or reviewing officer, in their sole discretion, may convert a brief adjudicative proceeding to a formal proceeding at any time on motion of

the community owner, the department, or the presiding/reviewing officer's own motion.

(a) The presiding/reviewing officer will convert the proceeding when it is found that the use of the brief adjudicative proceeding violates any provision of law, when the protection of the public interest requires the agency to give notice to and an opportunity to participate to persons other than the parties, and when the issues and interests involved warrant the use of the procedures of RCW 34.05.413 through 34.05.479.

(b) When a proceeding is converted from a brief adjudication to a formal proceeding, the director may become the presiding officer or may designate a replacement presiding officer to conduct the formal proceedings upon notice to the community owner and the department.

(c) In the conduct of the formal proceedings, WAC 458-20-10002 will apply to the proceedings.

WSR 14-13-101
PERMANENT RULES
DEPARTMENT OF HEALTH

[Filed June 17, 2014, 1:49 p.m., effective July 18, 2014]

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

Purpose: Chapter 246-120 WAC creates a new chapter clarifying the secretary of health's authority to issue civil penalties against health carriers and third-party administrators. WAC 246-10-501, amending the application of brief adjudicative proceedings to allow adjudicative proceedings involving civil penalties against health carriers and third-party administrators to be conducted under brief adjudicative proceedings.

Citation of Existing Rules Affected by this Order: Amending WAC 246-10-501.

Statutory Authority for Adoption: RCW 70.290.060.

Other Authority: Chapter 70.290 RCW.

Adopted under notice filed as WSR 14-08-085 on April 1, 2014.

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

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 5, Amended 1, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 5, Amended 1, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 5, Amended 1, Repealed 0.

Date Adopted: June 12, 2014.

Dennis Worsham
Deputy Secretary for
Public Health Operations
for John Wiesman, DrPH, MPH
Secretary

AMENDATORY SECTION (Amending WSR 13-19-087, filed 9/18/13, effective 10/19/13)

WAC 246-10-501 Application of brief adjudicative proceedings. (1) If an adjudicative proceeding is requested, a brief adjudicative proceeding will be conducted where the matter involves one or more of the following:

(a) A determination whether an applicant for a professional, business, or facility license meets the minimum criteria for an unrestricted license and the department proposes to deny such a license or to issue a restricted license;

(b) An application to approve a water system plan under WAC 246-290-100;

(c) An application to approve a project report under WAC 246-290-110;

(d) An application for source approval under WAC 246-290-130;

(e) An application to approve construction documents under WAC 246-290-120;

(f) An application to approve an existing Group A water system under WAC 246-290-140;

(g) An application for source approval under WAC 246-291-100 or 246-291-110;

(h) An application to approve a design report under WAC 246-291-120;

(i) An application to approve an existing Group B water system under WAC 246-291-130;

(j) An application to approve a water system plan under WAC 246-291-140;

(k) A decision under WAC 246-293-190;

(l) A decision with respect to service area conflicts under WAC 246-293-430;

(m) An application for approval as a satellite management agency under WAC 246-295-040;

(n) A civil penalty imposed under RCW 70.119A.040 when the amount of the civil penalty does not exceed two thousand five hundred dollars;

(o) A request to bank nursing home beds under RCW 70.38.111(8) and 70.38.115(13);

(p) A determination as to whether a person is in compliance with the terms and conditions of a final order previously issued by the department;

(q) Any approval of a school or curriculum when such approval by the department is required or authorized by statute or rule;

(r) A determination whether a license holder requesting renewal has submitted all required information and meets minimum criteria for license renewal;

(s) A decision to deny, modify, or impose conditions upon an operating permit under WAC 246-294-050; ((or))

(t) A decision to deny or revoke certification as a home care aide when a long-term care worker is disqualified from working with vulnerable persons under chapter 74.39A RCW; or

(u) A civil penalty imposed against a health carrier or third-party administrator under RCW 70.290.060.

(2) If an adjudicative proceeding is requested, in a matter not listed in subsection (1) of this section, a brief adjudicative proceeding may be conducted in the discretion of the presiding officer when it appears that protection of the public interest does not require that the department provide notice and an

opportunity to participate to persons other than the parties and:

- (a) Only legal issues exist; or
- (b) Both parties have agreed to a brief proceeding.

Chapter 246-120 WAC

CIVIL PENALTIES OF HEALTH CARRIERS AND THIRD-PARTY ADMINISTRATORS

NEW SECTION

WAC 246-120-010 Purpose. The purpose of this chapter is to describe the procedures and conditions by which the secretary must issue civil penalties to health carriers and third-party administrators. This chapter is adopted under RCW 70.290.060.

NEW SECTION

WAC 246-120-020 Definitions. The definitions in this section apply throughout this chapter unless the context clearly requires otherwise:

- (1) "Health carrier" has the same meaning as defined in RCW 70.290.010.
- (2) "Secretary" means the secretary of the department of health.
- (3) "Third-party administrator" has the same meaning as defined in RCW 70.290.010.
- (4) "Washington vaccine association" or "association" means the association created under chapter 70.290 RCW. The association collects and remits adequate funds from health carriers and third-party administrators for the cost of vaccines provided to certain children in Washington state.

NEW SECTION

WAC 246-120-030 Penalty—Failure to reimburse audit costs. (1) Following a compliance audit by Washington vaccine association pursuant to RCW 70.290.060 and upon certification of the audit costs, the Washington vaccine association shall notify the health carrier or third-party administrator in writing that there is an outstanding obligation to reimburse the Washington vaccine association for the cost of the audit.

(2) The health carrier or third-party administrator must reimburse the Washington vaccine association for the cost of the audit within forty-five days after receiving written notice of the obligation.

(3) The Washington vaccine association shall notify the secretary if the health carrier or third-party administrator fails to timely reimburse the Washington vaccine association for the cost of the audit. Upon receipt of such notice, the secretary shall assess a civil penalty of one hundred fifty percent of the amount of the costs of the audit against the health carrier or third-party administrator.

(4) The secretary shall serve notice of the civil penalty for failure to pay the audit costs in writing upon the health carrier or third-party administrator by personal service or by certified mail in a manner that shows proof of receipt. The civil penalty is due and payable twenty-eight days at the place

specified in the notice after receipt by the health carrier or third-party administrator.

(5) A health carrier or third-party administrator who has received written notification of an assessed civil penalty according to this section may request a brief adjudicative proceeding pursuant to WAC 246-120-050. The sole issue at the brief adjudicative proceeding shall be whether the health carrier or third-party administrator paid the cost of the audit in the required time and manner.

NEW SECTION

WAC 246-120-040 Penalty—Failure to remit assessment. (1) Following Washington vaccine association's notice of assessment pursuant to RCW 70.290.060 and the plan of operation, the health carrier or third-party administrator must remit the amount of the assessment to the Washington vaccine association within ninety days after receiving the written notice or timely pay in accordance with an approved payment plan with the Washington vaccine association.

(2) The Washington vaccine association shall notify the secretary if the health carrier or third-party administrator fails to pay the amount of the assessment or, after notification from the Washington vaccine association to the health carrier or third-party administrator of an outstanding obligation, the amount owed on the approved payment plan. The notice must provide the amount due to the Washington vaccine association. Upon receipt of such notice, the secretary shall assess a civil penalty of one hundred fifty percent of the assessment amount due against the health carrier or third-party administrator.

(3) The secretary shall serve notice of the civil penalty for failure to pay the assessment or amount owed on the approved payment plan in writing upon the health carrier or third-party administrator by personal service or by certified mail in a manner that shows proof of receipt. The civil penalty is due and payable twenty-eight days at the place specified in the notice after receipt by the health carrier or third-party administrator.

(4) A health carrier or third-party administrator who has received written notification of an assessed civil penalty according to this section may request a brief adjudicative proceeding pursuant to WAC 246-120-050. The sole issue at the brief adjudicative proceeding shall be whether the health carrier or third-party administrator failed to pay the annual assessment or the amount owed on the approved payment plan in the required time and manner.

NEW SECTION

WAC 246-120-050 Request for a brief adjudicative proceeding. (1) A health carrier or third-party administrator who has received written notification of an assessed civil penalty according to this chapter may request a brief adjudicative proceeding pursuant to chapter 34.05 RCW.

(2) The application for a brief adjudicative proceeding must:

- (a) Be in writing;
- (b) State the basis for contesting the civil penalty;
- (c) Include a copy of the adverse notice;

(d) Be served on and received by the department within twenty-eight days of the health carrier or third-party administrator receiving the notice of a civil penalty; and

(e) Be served in a manner which shows proof of receipt at the following address:

Adjudicative Clerk Office
310 Israel Rd. S.E.
Olympia, WA 98504-7879

(3) If a health carrier or third-party administrator files a timely and sufficient application for a brief adjudicative proceeding, the secretary shall not implement the action for the civil penalty until the final order is entered. The presiding or reviewing officer may permit the secretary to implement part or all of the action while the proceedings are pending, if the health carrier or third-party administrator causes an unreasonable delay in the proceedings or for other good cause.

WSR 14-13-102
PERMANENT RULES
DEPARTMENT OF HEALTH
(Board of Denture Technology)

[Filed June 17, 2014, 1:53 p.m., effective July 18, 2014]

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

Purpose: WAC 246-812-240 and 246-812-250, the new rules meet requirements of SHB 1271. They establish the education and training required before a dentist may provide nonorthodontic removable oral devices and teeth whitening services; set criteria for board approval of education curriculum; provide a process for declaration of education and training to the board; and require the dentist obtain signed patient consent on a board-approved form for teeth whitening services.

Statutory Authority for Adoption: Chapter 18.30 RCW, SHB 1271 (chapter 172, Laws of 2013).

Adopted under notice filed as WSR 14-07-049 on March 13, 2014.

Changes Other than Editing from Proposed to Adopted Version: From SHB 1271 without material change: WAC 246-812-240(1), that services must include written encouragement to have services from a licensed dentist; and a new subsection (3) that the practice of denturism does not include making, placing, constructing, altering, reproducing or repairing nonorthodontic devices intended to treat obstructive sleep apnea or TMJ. Other changes are editing only.

A final cost-benefit analysis is available by contacting Vicki Brown, Health Professions and Facilities, Board of Denturists, P.O. Box 47852, Olympia, WA 98504-7852, phone (360) 236-4865, fax (360) 236-2901, e-mail vicki.brown@doh.wa.gov.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 2, Amended 0, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

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

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

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 2, Amended 0, Repealed 0.

Date Adopted: April 25, 2014.

Michael Gillispie, Chairperson
Board of Denturists

NEW SECTION

WAC 246-812-240 Nonorthodontic removable oral devices. (1) A licensed dentist may provide nonorthodontic removable oral devices after receiving an endorsement to his or her dentist license. These devices must be accompanied by written encouragement to have regular dental checkups with a licensed dentist.

(2) Nonorthodontic removable oral devices are limited to:

(a) Bruxism devices also known as occlusal splints, occlusal bite guard, bruxism appliance, bite plate, and night guard;

(b) Sports mouth guards;

(c) Removable cosmetic appliances, regardless of whether the patient is missing teeth; and

(d) Snoring devices, but only after a physician has ruled out snoring associated with sleep breathing disorders to include obstructive sleep apnea.

(3) The practice of denturism does not include the making, placing, constructing, altering, reproducing, or repairing of nonorthodontic removable oral devices intended to treat obstructive sleep apnea or to treat temporomandibular joint dysfunction.

(4) To qualify for an endorsement, a dentist must complete the following education and training in nonorthodontic removable oral devices:

(a) A minimum of four hours of instruction in snore guards and sleep apnea; and

(b) A minimum of two hours in bruxism devices, sports mouth guards, and removable cosmetic appliances.

(5) Nonorthodontic removable oral devices education and training must be obtained through a board-approved program or course.

(a) The program or course curriculum must include training on each subject listed under subsection (2)(a) through (d) of this section.

(b) A presenter must submit the training curriculum to the board for review and approval prior to providing the training.

(c) The board may review previously approved curriculums as necessary or as determined by the board.

(6) To receive a nonorthodontic removable oral devices endorsement, the dentist must provide evidence of successfully completing the education and training requirements in this section by submitting to the board:

(a) A declaration on a form approved by the board that verifies proof of completion of education and training signed and dated by both the presenter and the dentist; or

(b) A declaration on a form approved by the board that the education and training was included in a board-approved educational program signed and dated by both the instructor and the student.

NEW SECTION

WAC 246-812-250 Teeth whitening services. (1) A licensed dentist may provide teeth whitening services after receiving an endorsement to his or her dentist license.

(2) Teeth whitening services include:

(a) Fabricating whitening trays;

(b) Providing nonprescription strength whitening solutions with over-the-counter equivalent concentrations; and

(c) Providing required follow-up care and instructions for use of the trays and solutions at home.

(3) To qualify for an endorsement, a dentist must complete a minimum of two hours of instruction in teeth whitening services.

(4) Education and training in teeth whitening services must be obtained through a board-approved program or course curriculum.

(a) A presenter must submit the training curriculum to the board for review and approval prior to providing the training.

(b) The board may review previously approved curriculums as necessary or as determined by the board.

(5) To receive an endorsement for teeth whitening services, the dentist must provide evidence of successfully completing the education and training requirement in this section by submitting to the board:

(a) A declaration on a form approved by the board that verifies proof of completion of education and training signed and dated by both the presenter and the dentist; or

(b) A declaration on a form approved by the board that the education and training was included in a board-approved educational program signed and dated by both the instructor and the student.

(6) A dentist providing teeth whitening services to patients shall provide the patient with written and verbal information and answer any questions related to teeth whitening trays and teeth whitening solutions including:

(a) Procedure;

(b) Alternatives; and

(c) Risks.

(7) The dentist shall obtain written patient consent on a form approved by the board for the procedure(s) and retain the signed form in the patient record.

Purpose: WAC 458-20-169 (Rule 169) Nonprofit organizations explain how the business and occupation tax, retail sales tax and use tax apply to activities often performed by nonprofit organizations. Rule 169 has been revised to:

- Add information pertaining to 2013 legislation that provides a use tax exemption for items valued at less than \$10,000 and purchased or received as a prize from a nonprofit organization or a library.
- Replace resale certificate language with reseller permit language.
- Change references pertaining to "nonprofit boarding homes" to "nonprofit assisted living facilities."
- Include reference to RCW 82.08.02573 that provides a retail sales tax exemption for the sales exempt under RCW 82.04.3651.
- Add language that health or social welfare organizations qualify for a deduction for compensation received for providing mental health services, and child welfare services, when under a government-funded program.
- Add that temporary medical housing qualifies under health or welfare services when criteria are met.

Citation of Existing Rules Affected by this Order: WAC 458-20-169 Nonprofit organizations.

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

Adopted under notice filed as WSR 14-08-056 on March 28, 2014.

Changes Other than Editing from Proposed to Adopted Version: The effective date of July 1, 2008, has been removed from subsection (6)(e)(xiii) as not needed.

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

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

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

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

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

Date Adopted: June 17, 2014.

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Rules Coordinator

AMENDATORY SECTION (Amending WSR 10-06-070, filed 2/25/10, effective 3/28/10)

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 the activities of nonprofit organizations. Washington's business tax is imposed upon all entities that generate gross

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PERMANENT RULES

DEPARTMENT OF REVENUE

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receipts or proceeds, unless there is a specific statutory exemption or deduction. This ~~((section))~~ rule 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 ~~((section))~~ rule. The ~~((section))~~ rule describes the most common exemptions and deductions for the B&O, retail sales, 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 ~~((sections))~~ rules 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, 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.)~~ WAC 458-20-167, Educational institutions, school districts, student organizations, and private schools;

(b) WAC 458-20-168, Hospitals, nursing homes, assisted living facilities, adult family homes and similar health care facilities;

(c) WAC 458-20-183, Amusement, recreation, and physical fitness services;

(d) WAC 458-20-249, Artistic or cultural organizations; and

(e) WAC 458-20-256, Trade shows, conventions and seminars.

(2) **Registration requirements.** Nonprofit organizations with \$12,000 or more per year in gross receipts from sales, and/or gross income from services subject to the B&O tax, or ~~((who))~~ that are required to collect or pay to the department of revenue (department) retail sales tax or any other tax or fee which the department administers (regardless of the level of annual gross receipts) must register with the department. Nonprofit organizations ~~((that have))~~ with less than twelve thousand dollars per year in gross receipts ((of less than \$12,000 per year)) and ((who)) that are not required to collect retail sales tax or any other tax or fee administered by the department are not required to register with the department.

~~((For more details on registration requirements see))~~ Refer to WAC 458-20-101 (Tax registration and tax reporting) for more information on registration requirements.

(3) **Filing excise 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 ~~((f))~~, Small business tax relief based on income of business~~((g))~~.) The 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 (Tax reporting frequency) 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))~~ on every person((s)) with substantial nexus in Washington (see RCW 82.04.067) engaged in business activities within this state, unless the income is specifically exempt or deductible under state law. The B&O tax applies to the value of products, gross proceeds of sales, or gross income of the business, as the case may be. RCW 82.04.220.

(i) **Common B&O tax classifications.** Chapter 82.04 RCW provides a number of classifications that apply to specific activities. The most common B&O tax classifications ~~((that apply))~~ applying to income received by nonprofit organizations are the ~~((service and other activities-))~~ retailing, ((and)) wholesaling, and service, and other activities classifications. RCW 82.04.250, 82.04.270, and 82.04.290. If an organization engages in more than one kind of business activity, the gross income from each activity must be reported under the appropriate tax classification. RCW 82.04.440(1).

(ii) **Measure of tax.** The most common measures of the B&O tax are "gross proceeds of sales" and "gross income of the business." RCW 82.04.070 and 82.04.080, respectively. These measures include the value proceeding or accruing from the sale of tangible personal property or services rendered without any deduction for the cost of property sold, cost of materials used, labor costs, discounts paid, delivery costs, taxes, losses, or any other expenses.

(b) **Retail sales tax.** A nonprofit organization must collect and remit retail sales tax on all retail sales, unless the sale is specifically exempt by statute. Examples of retail sales tax exemptions that ~~((commonly))~~ may apply to nonprofit organizations are those for sales of certain food products (see WAC 458-20-244 ~~((for more information regarding sales of))~~, Food 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 (see RCW 82.08.02915), and fund-raising activities (see subsection (5)~~((e))~~ (g) of this ~~((section))~~ rule). New construction includes renovating an existing structure to provide new housing for youth in crisis.

A nonprofit organization must pay retail sales tax when it purchases goods or retail services for its own use as a consumer, unless the purchase is specifically exempt by statute.

Items purchased for resale without intervening use are purchases at wholesale and are not subject to the retail sales tax. ~~The purchaser should provide the seller with a resale certificate 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))~~ if the seller takes from the buyer a copy of the buyer's reseller permit. The reseller permit documents the wholesale nature of any sale. Reseller permits replaced resale certificates effective January 1, 2010. See WAC 458-20-102 (Reseller permits) for more information on reseller permits and their proper use. 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 ~~((+))~~ WAC 458-20-178 for more information regarding the use tax. ~~((+))~~

Except for fund-raising, ~~((exemptions from))~~ use tax exemptions generally correspond to ~~((the))~~ retail sales tax exemptions. For example, ~~((+))~~ the use tax exemption for construction materials acquired by a health or social welfare organization for new construction of alternative housing for youth in crisis, to be licensed as a family foster home ~~((+))~~ (RCW 82.12.02915 ~~((+))~~) corresponds with the retail sales tax exemption described in subsection (4)(b) ~~((above))~~ of this rule for purchasing these construction materials.

(i) **Use tax exemption for donated items.** RCW 82.12.02595 provides a use tax exemption for personal property donated to a nonprofit charitable organization. This exemption is available for the nonprofit charitable organization and the donor, if the donor did not previously use the ~~((item))~~ personal property as a consumer. It also applies to the use of property by a donor who is incorporating the property into a nonprofit organization's real or personal property for no charge.

The exemption also applies to another person using property originally donated to a charitable nonprofit organization that is subsequently donated or bailed to that person by the charitable nonprofit organization, provided that person uses the property in furtherance of the charitable purpose for which the property was originally donated to the charitable nonprofit organization. For example, a hardware store donates an industrial pressure washer to a nonprofit community center for neighborhood cleanup, the community center bails this washer to people enrolled in its neighborhood improvement group for neighborhood clean-up projects. No use tax is due from any of the participants in these transac-

tions. 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))~~ (g) of this rule explains that a retail sales tax exemption is available for certain fund-raising sales. However, there is usually no comparable use tax exemption provided to the buyer/user of property purchased at these fund-raising sales. While the nonprofit organization is ~~((under no obligation))~~ not obligated to collect use tax from the buyer, the organization is encouraged to inform the buyer of the buyer's possible use tax obligation.

(iii) Effective October 1, 2013, RCW 82.12.225 provides a use tax exemption for the use of any article of personal property, valued at less than ten thousand dollars, purchased or received as a prize in a contest of chance, as defined in RCW 82.04.285, from a nonprofit organization or a library. This exemption only applies if the gross income from the sale by the nonprofit organization or library is exempt under RCW 82.04.3651. This exemption is scheduled to expire July 1, 2017.

(5) **Exemptions.** The following sources of income are specifically exempt from tax. As such they should not be included or reported as gross income if the organization is required to file an excise tax return.

(a) **Adult family homes.** ~~((The))~~ RCW 82.04.327 exempts from B&O tax ~~((does not apply to income earned by a))~~ amounts received by licensed adult family homes or ~~((+))~~ adult family homes that are exempt from licensing under rules of the department of social and health services. ~~((RCW 82.04.327.))~~

(b) **Nonprofit assisted living facilities.** RCW 82.04.-4262 exempts from B&O tax amounts received by a nonprofit assisted living facility licensed under chapter 18.20 RCW for providing room and domiciliary care to residents of the assisted living facility. Nonprofit assisted living facilities were formerly known as "nonprofit boarding homes" in the statute.

(c) **Camp or conference centers.** RCW 82.04.363 and 82.08.830 respectively ~~((provide))~~ exempt from B&O tax and retail sales ~~((exemptions to))~~ tax amounts received by a nonprofit organization from the sale or furnishing of certain items or services at a camp or conference center conducted on property exempt from the property tax under RCW 84.36.030 (1), (2), or (3). See WAC 458-16-210 (Nonprofit organizations or associations organized and conducted for nonsectarian purposes), WAC 458-16-220 (Church camps), and WAC 458-16-230 (Character building organizations) for more information about property tax exemptions that may apply.

~~((Income derived))~~ Amounts received from the sale of the following items and services ~~((s))~~ are exempt:

(i) Lodging, conference and meeting rooms, camping facilities, parking, and similar licenses to use real property;

(ii) Food and meals;

(iii) Books, tapes, and other products that are available exclusively to the participants at the camp, conference, or meeting and are not available to the public at large. Effective July 26, 2009, electronically transferred items are included in the exemption.

~~((The property tax exemptions are further discussed at WAC 458-16-210 (Church camps), WAC 458-16-220 (Non-profit organizations or associations organized and conducted for nonsectarian purposes), and WAC 458-16-230 (Character building organizations)).~~

~~((e))~~ (d) Child care resource and referral services. ~~((The))~~ RCW 82.04.3395 exempts from B&O tax ~~((does not apply to nonprofit organizations with respect to))~~ amounts received ~~((for))~~ by nonprofit organizations for providing child care resource and referral services. Child care resource and referral services do not include child care services provided directly to children. ~~((RCW 82.04.3395.~~

~~((d))~~ (e) Credit and debt services. RCW 82.04.368 ~~((provides a))~~ exempts from 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))~~ (f) Day care provided by churches. ~~((The))~~ RCW 82.04.339 exempts from B&O ~~((tax does not apply to income derived))~~ amounts received by a church for the care of children of any age for periods of less than twenty-four hours, provided the church is exempt from property tax under RCW 84.36.020. ~~((RCW 82.04.339.~~

~~((f))~~ (g) Fund-raising. RCW 82.04.3651 ~~((provides a))~~ and 82.08.02573 respectfully exempt from B&O tax ~~((exemption for))~~ and retail sales tax 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 only 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 ((f)) See WAC 458-20-159((g)) (Consignees, bailees, factors, agents and auctioneers) for more information regarding such sales.

(i) **What nonprofit organizations qualify?** Nonprofit organizations that qualify for this exemption are those that are:

(A) A tax-exempt nonprofit organization described by section 501 (c)(3) (educational and charitable), 501 (c)(4) (social welfare), or 501 (c)(10) (fraternal societies operating as lodges) of the Internal Revenue Code; or

(B) A nonprofit organization that would qualify for tax exemption under ~~((these codes))~~ section 501 (c)(3), (4), or (10) except that it is not organized as a nonprofit corporation; or

(C) A nonprofit organization that does not pay its members, stockholders, officers, directors, or trustees any amounts from its gross income, except as payment for services rendered, does not pay more than reasonable compensation to any person for services rendered, and does not engage in a substantial amount of political activity. Political activity includes, but is not limited to, influencing legislation and participating in any campaign on behalf of any candidate for political office.

~~((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 B&O tax and retail sales tax ~~((and business and occupation tax))~~ to the extent these amounts represent an exchange ~~((for))~~ of goods and services for money to further the goals of the nonprofit group. The money earned from the pledges above the value of the goods and services exchanged is exempt as a fund-raising contribution of money to further the goals of the nonprofit organization.

(C) A nonprofit group sells ice cream bars at booths leased during the two-week runs of three county fairs, for a total of six weeks during the year, to fund youth camps maintained by the nonprofit group. The money earned from the booths is exempt from both B&O tax and retail sales tax ~~((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 edu-

cational 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))~~ is titled by the two organizations.

It is not unusual for the person making a gift to require some accountability for how the gift is used as a condition for receiving the gift or future gifts. Such gifts remain exempt, provided the "accountability" required does not result in a direct benefit to the donor (examples of direct benefits to a donor are: Money given for a report on the soil contamination levels of land owned by the donor, medical services provided to the donor or the donor's family, or market research ~~((benefitting))~~ benefiting 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))~~ is not 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))~~ is in the business of broadcasting programs. It ~~((had))~~ has a regular site for broadcasting programs and ~~((ran))~~ runs broadcasts for twenty-four hours every day. Broadcasting ~~((was))~~ is a part of its business activity performed from a regular place of business during regular hours. The money received from the group with the requirement that its seminars be broadcast would not qualify as money received from a fund-raising activity even though the parties viewed the money as a "donation."

(B) A nonprofit organization that makes catalog sales throughout the year with a twenty-four hour telephone line for taking orders has a regular place of business at the location where the sales orders are processed and regular hours of twenty-four hours a day. Catalog sales are not exempt as fund-raising amounts even though the funds are raised for a nonprofit purpose.

(C) A nonprofit group organized as a community playhouse has three plays during the year at a leased theatre. The plays run for a total of six weeks and the group provides concessions at each of the performances. The playhouse has a regular place of business with regular hours for that type of business. The concessions are done at that regular place of business during regular hours. The concessions are not exempt as fund-raising activities even though amounts raised from the concessions may be used to further the nonprofit purpose of that group.

(D) A nonprofit student group, that raises money for scholarships and other educational needs, sets up an espresso stand that is open for two hours every morning during the school year. The espresso stand is a regular place of business with regular hours for that type of business. The money earned from the espresso stand is not exempt, even though the amounts are raised to further the student group's nonprofit purpose.

(v) **Fund-raising sales by libraries.** RCW 82.04.3651 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))~~ Effective July 1, 2010, RCW 82.08.02573 provides a comparable retail sales tax exemption for the same sales, as mentioned above, made by a library. See RCW 82.04.3651.

~~((h))~~ (h) Group training homes. RCW 82.04.385 ~~((provides a))~~ exempts from 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. RCW 71A.22.020.

~~((h))~~ (i) Sheltered workshops. RCW 82.04.385 ~~((provides a))~~ also exempts from 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))~~ (j) Student loan services. RCW 82.04.367 ~~((provides a))~~ exempts from B&O tax ~~((exemption for the gross income of))~~ amounts received by nonprofit organizations that

are exempt from federal income tax under section 501 (c)(3) of the Internal Revenue Code that:

(i) Are guarantee agencies under the federal guaranteed student loan program or that issue debt to provide or acquire student loans; or

(ii) Provide guarantees for student loans made through programs other than the federal guaranteed student loan program.

(6) B&O tax deduction of ~~((government))~~ payments made to health or social welfare organizations.

(a) Compensation from public entities. RCW 82.04.4297 provides a B&O tax deduction to health or social welfare organizations for amounts received from the United States, any instrumentality of the United States, the state of Washington, or any municipal corporation or political subdivision of the state of Washington as compensation for or to support health or social welfare services, rendered by a health or social welfare organization, as defined in RCW 82.04.431, or by a municipal corporation or political subdivision. ~~((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 excise tax return, and then deducted on the return when determining the amount of the organization's taxable income. A deduction is not allowed, however, for amounts that are received under an employee benefit plan.

(b) Mental health services. Effective August 1, 2011, health or social welfare organizations also qualify for a deduction for amounts received as compensation for providing mental health services under a government-funded program. Regional support networks may also deduct from the measure of tax amounts received from the state of Washington for distribution to health or social welfare organizations eligible to deduct the distribution under RCW 82.04.4277. Persons claiming deductions under RCW 82.04.4277 must file an annual report with the department. See RCW 82.32.534. These deductions are scheduled to expire August 1, 2016.

(c) Child welfare services. Also effective August 1, 2011, health or social welfare organizations qualify for a deduction for amounts received as compensation for providing child welfare services under a government-funded program. Persons may also deduct from the measure of tax amounts received from the state of Washington for distribution to health or social welfare organizations eligible to deduct the distribution under RCW 82.04.4275(1).

~~((a))~~ **(d) What is a health or social welfare organization?** A health or social welfare organization is ~~((a non-profit))~~ an organization, including any community action council, providing health or social welfare services ~~((that is also:))~~ as defined in subsection (6)(e) of this rule. To be exempt under RCW 82.04.4297, a corporation must satisfy all of the following conditions:

(i) Be a corporation sole under chapter 24.12 RCW or a domestic or foreign not-for-profit corporation under chapter 24.03 RCW. It does not include a corporation providing professional services authorized under chapter 18.100 RCW;

(ii) Be governed by a board of not less than eight individuals who are not paid corporate employees when the organization is a not-for-profit corporation;

(iii) ~~((paying))~~ pay any part of its corporate income directly or indirectly to its members, stockholders, officers, directors, or trustees except as executive or officer compensation or as services rendered by the corporation in accordance with its purposes and bylaws to a member, stockholder, officer, or director or as an individual;

(iv) Only ~~((paying))~~ pay compensation to corporate officers and executives for actual services rendered. This compensation must be at a level comparable to like public service positions within Washington;

(v) ~~((Irrevocably dedicating))~~ Have irrevocably dedicated its corporate assets to health or social welfare activities. Upon corporate liquidation, dissolution, or abandonment, any distribution or transfer of corporate assets may not inure directly or indirectly to the benefit of any member or individual, except for another health or social welfare organization;

(vi) Be duly licensed or certified as required by law or regulation;

(vii) ~~((Using))~~ Use government payments to provide health or social welfare services;

(viii) ~~((Making))~~ Make its services available regardless of race, color, national origin, or ancestry; and

(ix) Provide~~((s))~~ access to the corporation's books and records to the department's authorized agents upon request.

~~((b))~~ **(e) Qualifying health or welfare services.** The term "health or social welfare services ((are))" includes and is 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))~~ causes of poverty in communities of the state of Washington; and

(xiii) Temporary medical housing, as defined in RCW 82.08.997, if the housing is provided only:

(A) While the patient is receiving medical treatment at a hospital required to be licensed under RCW 70.41.090 or at an outpatient clinic associated with such hospital, including any period of recuperation or observation immediately following such medical treatment; and

(B) By a person that does not furnish lodging or related services to the general public.