

WSR 12-01-033

EXPEDITED RULES

SECRETARY OF STATE

(Division of Archives and Records Management)

[Filed December 13, 2011, 9:00 a.m.]

Title of Rule and Other Identifying Information: Chapter 434-624 WAC, Powers and duties of the state records committee.

NOTICE

THIS RULE IS BEING PROPOSED UNDER AN EXPEDITED RULE-MAKING PROCESS THAT WILL ELIMINATE THE NEED FOR THE AGENCY TO HOLD PUBLIC HEARINGS, PREPARE A SMALL BUSINESS ECONOMIC IMPACT STATEMENT, OR PROVIDE RESPONSES TO THE CRITERIA FOR A SIGNIFICANT LEGISLATIVE RULE. IF YOU OBJECT TO THIS USE OF THE EXPEDITED RULE-MAKING PROCESS, YOU MUST EXPRESS YOUR OBJECTIONS IN WRITING AND THEY MUST BE SENT TO Russell Wood, Office of the Secretary of State, Division of Archives and Records Management, P.O. Box 40238, Olympia, WA 98504-0238, AND RECEIVED BY February 20, 2012.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: To amend existing WAC 434-624-050 Committee meetings, to change the meeting time and frequency from "the first Wednesday of each month at 9:00 a.m." to "at least quarterly."

Reasons Supporting Proposal: Due to budget cuts, the state records committee will be reducing the frequency of their meetings. Meeting dates, times, and locations are published in the state register and on the agency web site.

Statutory Authority for Adoption: RCW 40.14.020.

Statute Being Implemented: RCW 40.14.050.

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

Name of Proponent: Office of the secretary of state, governmental.

Name of Agency Personnel Responsible for Drafting, Implementation and Enforcement: Russell Wood, Office of the Secretary of State, Olympia, Washington, (360) 586-4900.

December 12, 2011

Steve Excell

Assistant Secretary of State

AMENDATORY SECTION (Amending WSR 93-04-001, filed 1/21/93, effective 2/21/93)

WAC 434-624-050 Committee meetings. The state records committee shall meet in open session (~~(on the first Wednesday of each month at 9:00 a.m.)~~) at least quarterly to consider all business relevant to the duties of the committee, at the office of the state archivist, Olympia, Washington.

WSR 12-01-034

EXPEDITED RULES

SECRETARY OF STATE

(Division of Archives and Records Management)

[Filed December 13, 2011, 9:16 a.m.]

Title of Rule and Other Identifying Information: Chapter 434-630 WAC, Powers and duties of the local records committee.

NOTICE

THIS RULE IS BEING PROPOSED UNDER AN EXPEDITED RULE-MAKING PROCESS THAT WILL ELIMINATE THE NEED FOR THE AGENCY TO HOLD PUBLIC HEARINGS, PREPARE A SMALL BUSINESS ECONOMIC IMPACT STATEMENT, OR PROVIDE RESPONSES TO THE CRITERIA FOR A SIGNIFICANT LEGISLATIVE RULE. IF YOU OBJECT TO THIS USE OF THE EXPEDITED RULE-MAKING PROCESS, YOU MUST EXPRESS YOUR OBJECTIONS IN WRITING AND THEY MUST BE SENT TO Russell Wood, Office of the Secretary of State, Division of Archives and Records Management, P.O. Box 40238, Olympia, WA 98504-0238, AND RECEIVED BY February 20, 2012.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: To amend existing WAC 434-630-060 Committee meetings, to change the meeting time and frequency from "the last Thursday of each month at 10:00 a.m." to "at least quarterly."

Reasons Supporting Proposal: Due to budget cuts and the improved records retention schedule development and revision program, the local records committee will be reducing the frequency of their meetings. Meeting dates, times, and locations are published in the state register and on the agency web site.

Statutory Authority for Adoption: RCW 40.14.020.

Statute Being Implemented: RCW 40.14.050.

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

Name of Proponent: Office of the secretary of state, governmental.

Name of Agency Personnel Responsible for Drafting, Implementation and Enforcement: Russell Wood, Office of the Secretary of State, Olympia, Washington, (360) 586-4900.

December 12, 2011

Steve Excell

Assistant Secretary of State

AMENDATORY SECTION (Amending WSR 92-18-047, filed 8/28/92, effective 9/28/92)

WAC 434-630-060 Committee meetings. The local records committee shall meet in open public session (~~(on the last Thursday of each month at 10:00 a.m.)~~) at least quarterly to consider all business relevant to the duties of the committee, at the office of the state archivist, Olympia, Washington.

WSR 12-01-046
EXPEDITED RULES
DEPARTMENT OF REVENUE

[Filed December 14, 2011, 9:59 a.m.]

Title of Rule and Other Identifying Information: WAC 458-30-200 Definitions (Open Space Taxation Act rules). This rule provides definitions for the terms used in conjunction with land classified under the Open Space Taxation Act, codified as chapter 84.34 RCW.

NOTICE

THIS RULE IS BEING PROPOSED UNDER AN EXPEDITED RULE-MAKING PROCESS THAT WILL ELIMINATE THE NEED FOR THE AGENCY TO HOLD PUBLIC HEARINGS, PREPARE A SMALL BUSINESS ECONOMIC IMPACT STATEMENT, OR PROVIDE RESPONSES TO THE CRITERIA FOR A SIGNIFICANT LEGISLATIVE RULE. IF YOU OBJECT TO THIS USE OF THE EXPEDITED RULE-MAKING PROCESS, YOU MUST EXPRESS YOUR OBJECTIONS IN WRITING AND THEY MUST BE SENT TO Jay M. Jetter, Department of Revenue, P.O. Box 47471, Olympia, WA 98504-7471, fax (360) 534-1380, e-mail JayJ@dor.wa.gov, AND RECEIVED BY February 20, 2012.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The department proposes to amend WAC 458-30-200 to recognize and incorporate legislation from recent years:

- SSB 5359 (2011), which amended the definition of "contiguous" land;
- E2SHB 1597 (2010), which made technical and administrative corrections;
- EHB 1815 (2009), which amended provisions related to the income or investment requirements for parcels of "farm and agricultural land" between five and twenty acres; and
- SHB 1733 (2009), which amended provisions relating to land used primarily for equestrian related activities for which a charge is made.

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

Reasons Supporting Proposal: To recognize the legislative changes noted above.

Statutory Authority for Adoption: RCW 84.08.070 and 84.08.010(2).

Statute Being Implemented: RCW 84.34.020.

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

Name of Proponent: Department of revenue, governmental.

Name of Agency Personnel Responsible for Drafting: Jay M. Jetter, 1025 Union Avenue S.E., Suite #200, Olympia, WA, (360) 534-1405; Implementation and Enforcement: Kathy Beith, 1025 Union Avenue S.E., Suite #200, Olympia, WA, (360) 534-1403.

December 14, 2011

Alan R. Lynn
Rules Coordinator

AMENDATORY SECTION (Amending WSR 02-20-041, filed 9/24/02, effective 10/25/02)

WAC 458-30-200 Definitions. (1) **Introduction.** This ~~((rule))~~ section provides definitions for the terms used in conjunction with land classified under the Open Space Taxation Act, codified as chapter 84.34 RCW. The terms listed in this ~~((rule))~~ section are intended to act in concert with each other as appropriate.

(2) **Definitions.** For purposes of land classified under chapter 84.34 RCW, the following definitions apply:

(a) "Additional tax" means the additional property taxes that will be collected when classification is withdrawn or removed from land classified under chapter 84.34 RCW.

(b) "Affidavit" means the real estate excise tax affidavit required by chapter 82.45 RCW and chapter 458-61 WAC. The affidavit will be prescribed by the department and furnished to county treasurers. This form is used by landowners to report sales or transfers of classified land. The owner or transferor and the purchaser or transferee, or agents of each, must sign the affidavit under penalty of perjury.

(c) "Agreement" means an agreement executed between an owner and the granting authority regarding the classification or reclassification of land as either open space or timber land under chapter 84.34 RCW.

(d) "Agricultural product" means livestock and plants that are produced for commercial purposes and includes any agricultural, horticultural, or aquacultural produce or crop; the raising of livestock, poultry, bees, or fur-bearing animals; or the production of milk, eggs, wool, fur, meat, honey, or other substances obtained therefrom. When used in relation to livestock or fur-bearing animals used for food or fiber, "raising" means breeding or increasing the value, size, or weight of the animal.

(e) "Applicant" means the owner who submits an application for classification or reclassification of land under chapter 84.34 RCW.

~~((e))~~ (f) "Application" means an application for classification or reclassification of land under chapter 84.34 RCW.

~~((f))~~ (g) "Approval" means a determination by the granting authority that land qualifies for classification or reclassification under chapter 84.34 RCW.

~~((g))~~ (h) "Appurtenance" refers to something used with, and related to or dependent upon another thing; that is, something that belongs to something else, an adjunct. The thing appurtenant is strictly necessary and essential to the proper use and enjoyment of the land, as well as useful or necessary for carrying out the purposes for which the land was classified under chapter 84.34 RCW.

(i) In terms of farm and agricultural land, an appurtenance is something used for a particular sort of farm and is widely and routinely used in the operation of the commercial agricultural enterprise.

(ii) For example, an appurtenance may be an outhouse, barn, or tool shed (~~attached to or adjoining a dwelling~~) or it may be equipment used for a particular purpose or task, such as tools, instruments, or machinery.

~~((h))~~ (i) "Aquaculture" means the growing and harvesting of marine or fresh water flora or fauna in a soil or water medium for commercial agricultural ~~((activities))~~ purposes.

~~((j))~~ (j) "Assessor" means the county assessor or any agency or person who is authorized to act on behalf of the assessor.

~~((j))~~ (k) "Assessment year" means the year in which the property is listed and valued by the assessor and precedes the year in which the taxes on the property are due and payable.

~~((k))~~ (l) "Change in use" means a direct action taken by an owner that actually changes the use of, or has started changing the use of, classified land to a use that is not in compliance with the conditions of the agreement executed between the owner and the granting authority or to a use that is otherwise not in compliance with the provisions of chapter 84.34 RCW (see WAC 458-30-295).

~~((l))~~ (m) "Classified land" means a parcel(s) of land that has been approved by the appropriate granting authority for taxation under chapter 84.34 RCW.

~~((m))~~ (n) "Commercial agricultural purposes" means the use of land on a continuous and regular basis, prior to and subsequent to application for classification or reclassification, that demonstrates that the owner or lessee is engaged in and intends to obtain through lawful means, a monetary profit from cash income ~~((received by engaging in the following commercial agricultural activities:~~

~~(i) Raising, harvesting, and selling lawful crops;~~
~~(ii) Feeding, breeding, managing, and selling of live-stock, poultry, fur-bearing animals, or honey bees, or any products thereof;~~

~~(iii) Dairying or selling of dairy products;~~

~~(iv) Animal husbandry;~~

~~(v) Aquaculture;~~

~~(vi) Horticulture;~~

~~(vii) Participating in a government funded crop reduction or acreage set-aside program; or~~

~~(viii) Cultivating Christmas trees or short rotation hardwoods on land that has been prepared by intensive cultivation and tilling, such as by plowing or turning over the soil, and on which all unwanted plant growth is controlled continuously for the exclusive purpose of growing such trees)) by producing an agricultural product. In addition, commercial agricultural purposes include the following uses of agricultural land:~~

~~(i) Land enrolled in the federal conservation reserve program or its successor administered by the United States Department of Agriculture;~~

~~(ii) Land used primarily for equestrian related activities for which a charge is made, including but not limited to stabling, training, riding, clinics, schooling, shows, or grazing for feed;~~

~~(iii) Land used for incidental uses that do not exceed twenty percent of the total classified land and are compatible with commercial agricultural purposes;~~

~~(iv) Land on which appurtenances necessary to the production, preparation, or sale of the agricultural products exist in conjunction with the lands producing such products;~~

~~(v) Land on which employee housing or the principal residence of the farm owner or operator is located, if the housing or residence is on or contiguous to a classified parcel of twenty acres or more, and the use of the housing or the residence is integral to the use of the classified land for agricultural purposes;~~

~~(vi) Land, one to five acres which is not contiguous to a classified parcel, that constitutes an integral part of the farming operation being conducted on land qualifying as "farm and agricultural land";~~

~~(vii) Cultivating Christmas trees or short rotation hardwoods, or growing other standing crops on land that has been prepared by intensive cultivation and tilling, such as by plowing or turning over the soil, and on which all unwanted plant growth is controlled continuously for the exclusive purpose of growing such trees or other standing crops.~~

An owner or lessee must engage in commercial agricultural activities on the land to demonstrate a commercial agricultural purpose.

~~((n))~~ (o) "Contiguous" means land that adjoins and touches other land owned by the same owner or held under the same ownership. Land that is an integral part of a farming operation is considered contiguous even though the land may be separated by a public road, railroad, right of way, or waterway.

For purposes of this subsection (2)(o):

(i) "Same ownership" means owned by the same person or persons, except that parcels owned by different persons are deemed held by the same ownership if the parcels are:

(A) Managed as part of a single operation; and

(B) Owned by:

(I) Members of the same family;

(II) Legal entities that are wholly owned by members of the same family; or

(III) An individual who owns at least one of the parcels and a legal entity or entities that own the other parcel or parcels if the entity or entities are wholly owned by that individual, members of his or her family, or that individual and members of his or her family.

(ii) "Family" includes only:

(A) An individual and his or her spouse or domestic partner, child, stepchild, adopted child, grandchild, parent, stepparent, grandparent, cousin, or sibling;

(B) The spouse or domestic partner of an individual's child, stepchild, adopted child, grandchild, parent, stepparent, grandparent, cousin, or sibling;

(C) A child, stepchild, adopted child, grandchild, parent, stepparent, grandparent, cousin, or sibling of the individual's spouse or the individual's domestic partner; and

(D) The spouse or domestic partner of any individual described in this subsection (2)(o)(i)(B)(III).

~~((o))~~ (p) "County financial authority" and "financial authority" mean the treasurer or any agency or person charged with the responsibility of billing and collecting property taxes.

~~((p))~~ (q) "County legislative authority" means the county commission, council, or other legislative body.

~~((q))~~ (r) "County recording authority" means the auditor or any agency or person charged with the recording of documents.

~~((r))~~ (s) "Current" and "currently" means as of the date on which property is to be listed and valued by the assessor.

~~((s))~~ (t) "Current use value" means the taxable value of a parcel of land placed on the assessment rolls following its classification or reclassification under chapter 84.34 RCW.

~~((t))~~ (u) "Department" means the department of revenue.

~~((tt))~~ (v) "Farm woodlot" means an area of land within a parcel(s) of classified farm and agricultural land that is used in a manner compatible with commercial agricultural ~~((activities))~~ purposes including, but not limited to, the growing and cutting of trees for the use of the owner or the sheltering of livestock.

~~((vt))~~ (w) "Granting authority" means the appropriate agency or official that acts on an application for classification or reclassification under chapter 84.34 RCW. The granting authority for:

(i) Open space classification under RCW 84.34.020(1) and 84.34.037 is the county legislative authority. However, for applications within an incorporated area of a county, the granting authority is made up of three members of the county legislative body and three members of the city legislative body in the county in which the land is located;

(ii) Farm and agricultural classification under RCW 84.34.020(2) and 84.34.035 is the assessor or the assessor's designee; and

(iii) Timber land classification under RCW 84.34.020(3) and 84.34.041 is the county legislative authority. However, for applications within an incorporated area of a county, the granting authority is made up of three members of the county legislative body and three members of the city legislative body in the county in which the land is located.

~~((wt))~~ (x) "Gross income" means cash income derived from commercial agricultural ~~((activities, including))~~ purposes, as defined in (n) of this subsection. Gross income includes payments received from the United States Department of Agriculture for participating in a crop reduction or acreage set-aside program when such payments are based on the productive capacity of the land. It also includes the wholesale value of agricultural products produced from any parcel of classified land of at least five acres but less than twenty acres in which the agricultural products are donated to nonprofit food banks or feeding programs. The term ~~((shall))~~ does not include the following:

(i) The value of any products produced on the land and consumed by the owner or lessee;

(ii) Cash income derived from leases for the use of the land for noncommercial agricultural activities; ~~((or))~~

(iii) Payments for soil conservation programs; or

(iv) The value represented from an exchange of goods or services for other goods or services (bartering).

~~((xt))~~ (y) "Incidental use" means a use of land classified as farm and agricultural land or timber land that is compatible with commercial agricultural ~~((activities if it does not exceed twenty percent of the classified land))~~ purposes or the commercial growing and harvesting of timber. Incidental use for land classified as farm and agricultural land cannot exceed twenty percent of the total classified land, while incidental use for timber land cannot exceed ten percent of the total classified land. An incidental use may include, but is not limited to, wetland preservation, a gravel pit, a farm woodlot, or a produce stand.

~~((yt))~~ (z) "Integral" means that which is central to or inherent in the use or operation of classified farm and agricultural land for commercial agricultural ~~((activities))~~ purposes.

~~((zt))~~ (aa) "Interest" means the amount of applicable interest upon additional tax.

~~((aat))~~ (bb) "Net cash rental" means the earning or productive capacity of farm and agricultural land less the production costs customarily or typically paid by an owner or landlord. See WAC 458-30-260 for a more detailed explanation.

~~((bt))~~ (cc) "Notice of continuance" means the notice signed when land classified under chapter 84.34 RCW is sold or transferred if the new owner of the land intends to continue the classified use of the land and elects to have the land remain classified under chapter 84.34 RCW. This notice is part of the real estate excise tax affidavit or may be a separate document prepared by the department and attached to this affidavit.

~~((ct))~~ (dd) "Owner" means:

(i) Any person(s) having a fee interest in a parcel of land; or

(ii) The contract vendee when the land is subject to a real estate contract.

~~((dt))~~ (ee) "Parcel of land" means a property identified as such on the assessment roll. For purposes of chapter 84.34 RCW and this WAC chapter, a parcel ~~((shall))~~ does not include any land area not owned by the applicant including, but not limited to, a public road, right of way, railroad, or waterway.

~~((et))~~ (ff) "Penalty" means the amount due when land is removed from classification under chapter 84.34 RCW. The amount of the penalty is equal to twenty percent of the additional tax and interest calculated in accordance with RCW 84.34.080 or 84.34.108.

~~((ft))~~ (gg) "Planning authority" means the local government agency empowered by the appropriate legislative authority to develop policies and proposals relating to land use.

~~((gt))~~ (hh) "Primary use" means the existing use of a parcel or parcels of land so prevalent that when the characteristic use of the land is evaluated a conflicting or nonrelated use appears to be very limited or excluded. The primary use of a parcel does not represent a specific percentage of the total classified land.

~~((ht))~~ (ii) "Qualification of land" means the approval of an application for classification or reclassification of land by a granting authority in accordance with chapter 84.34 RCW.

~~((it))~~ (jj) "Rating system" means a public benefit rating system adopted for classified open space land according to RCW 84.34.055.

~~((jt))~~ (kk) "Reclassification" means the process by which land classified under chapter 84.34 or 84.33 RCW is changed from one classification to a different classification established by chapter 84.34 RCW or into forest land as described in chapter 84.33 RCW. For example, land classified as farm and agricultural land under RCW 84.34.020(2) may be reclassified as open space land under RCW 84.34.020(1).

~~((kt))~~ (ll) "Removal" or "removed" means land classified under chapter 84.34 RCW is removed from classification by the assessor either because the owner requests removal, the new owner fails to sign the notice of ~~((classification))~~

continuance, the assessor does not approve a notice of continuance, or the land is no longer being used for the purpose for which classification was granted.

~~((H))~~ ~~(mm)~~ "Sale of ownership" means the conveyance of the ownership of a parcel of land in exchange for valuable consideration.

~~((mm))~~ ~~(nn)~~ "Standing crop" includes short rotation hardwoods, Christmas trees, vineyards, fruit trees, or other perennial crops that:

(i) Are planted using agricultural methods normally used in the commercial production of that particular crop; and

(ii) Typically do not produce harvestable quantities in the initial years after planting.

~~(oo)~~ "Tax year" means the year when property tax is due and payable.

~~((mm))~~ ~~(pp)~~ "Timber management plan" means the plan filed with the county legislative authority or the assessor when classified timber land is sold or transferred. It is synonymous with a "forest management plan" and details an owner's plan regarding the management of classified timber land including, but not limited to, the planting, growing and/or harvesting of timber. The elements of such a plan are set forth in WAC 458-30-232.

~~((oo))~~ ~~(qq)~~ "Transfer" means the conveyance of the ownership of a parcel of land without an exchange of valuable consideration and may include situations where classified land is donated to an owner, corporation, partnership, or limited liability corporation.

~~((pp))~~ ~~(rr)~~ "True and fair value" is the value of a parcel of land placed on the assessment rolls at its highest and best use without regard to its current use. The term also refers to market value, that is, the amount of money a buyer of property willing, but not obligated to buy would pay a seller of property willing but not obligated to sell, taking into consideration all uses to which the property is adapted and might reasonably be applied.

~~((qq))~~ ~~(ss)~~ "Withdrawal" or "withdrawn" means action taken by the owner of land classified under chapter 84.34 RCW by filing a notice of request to withdraw the land from classification under the current use program in compliance with RCW 84.34.070. Once land has been classified under chapter 84.34 RCW, it must remain so classified for at least ten years from the date of classification. At any time after eight years of the initial ten-year classification period have elapsed, the owner may file a notice of request to withdraw all or a portion of the land from classification with the assessor of the county in which the land is located. Land is withdrawn from classification as a result of a voluntary act by the owner.

viding meals and services for a lump sum charge. It also explains the tax-reporting responsibilities of caterers and food service contractors, and of persons providing meals to employees.

WAC 458-20-124 (Rule 124) Restaurants, cocktail bars, taverns and similar businesses, explains Washington's B&O and retail sales tax applications to sales by restaurants and similar businesses. It includes how taxes apply to discounted meals, promotional meals, and meals provided without specific charge to employees.

NOTICE

THIS RULE IS BEING PROPOSED UNDER AN EXPEDITED RULE-MAKING PROCESS THAT WILL ELIMINATE THE NEED FOR THE AGENCY TO HOLD PUBLIC HEARINGS, PREPARE A SMALL BUSINESS ECONOMIC IMPACT STATEMENT, OR PROVIDE RESPONSES TO THE CRITERIA FOR A SIGNIFICANT LEGISLATIVE RULE. IF YOU OBJECT TO THIS USE OF THE EXPEDITED RULE-MAKING PROCESS, YOU MUST EXPRESS YOUR OBJECTIONS IN WRITING AND THEY MUST BE SENT TO Gayle Carlson, Department of Revenue, P.O. Box 47453, Olympia, WA 98504-7453, e-mail GayleC@dor.wa.gov, AND RECEIVED BY February 20, 2012.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: Rules 119 and 124 currently explain that the retailing B&O and retail sales taxes apply to meals provided without charge to employees. The department is proposing to amend these rules to recognize chapter 55, Laws of 2011 (SB 5501), which provides a B&O, retail sales, and use tax exemption for meals provided without specific charge to employees of restaurants. The proposed Rule 124 incorporates this legislation, and the proposed Rule 119 refers readers to Rule 124 for guidance on this subject.

Rule 119 also currently contains other tax-reporting information that is addressed in other documents. For example, Rule 119 provides tax-reporting information regarding sales of meals in school, college, and university dining rooms and by hospitals, nursing homes, and other similar institutions. Tax-reporting guidance for these sales is currently provided in WAC 458-20-167 Educational institutions, school districts, student organizations, and private schools and 458-20-168 Hospitals, nursing homes, boarding homes, adult family homes, and similar health care facilities. The department is proposing to remove this information from Rule 119, and change the rule title from *Sales of meals* to *Sales by caterers and food service contractors* to more accurately reflect the information retained in the proposed rule.

Copies of draft rules are available for viewing and printing on our web site at Rules Agenda.

Reasons Supporting Proposal: To recognize provisions of chapter 55, Laws of 2011 (SB 5501).

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

Statute Being Implemented: Chapter 55, Laws of 2011.

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

WSR 12-01-094
EXPEDITED RULES
DEPARTMENT OF REVENUE

[Filed December 20, 2011, 2:35 p.m.]

Title of Rule and Other Identifying Information: WAC 458-20-119 (Rule 119) Sales of meals, currently explains the business and occupation (B&O), retail sales, and use tax reporting responsibilities for persons selling meals, or pro-

Name of Proponent: Department of revenue, governmental.

Name of Agency Personnel Responsible for Drafting: Gayle Carlson, 1025 Union Avenue S.E., Suite #544, Olympia, WA, (360) 534-1576; Implementation: Alan R. Lynn, 1025 Union Avenue S.E., Suite #544, Olympia, WA, (360) 534-1599; and Enforcement: Russ Brubaker, 1025 Union Avenue S.E., Suite #544, Olympia, WA, (360) 534-1505.

December 20, 2011

Alan R. Lynn
Rules Coordinator

AMENDATORY SECTION (Amending WSR 10-06-069, filed 2/25/10, effective 3/28/10)

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

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

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

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

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

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

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

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

meals, and all other incidental costs, including an appropriate portion of overhead expenses.

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

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

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

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

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

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

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

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

~~(viii) Fraternities and sororities.~~ Fraternities, sororities, and other groups of individuals who reside in one place and jointly share the expenses of the household including

expense of meals are not considered to be making sales when meals are furnished to members.

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

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

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

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

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

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

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

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

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

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

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

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

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

(5) **Food service contractors.** The term "food service contractor" means a person who operates a food service at a kitchen, cafeteria, dining room, or similar facility owned by an institution or business. Food service contractors may manage the food service operation on behalf of the institution or business, or may actually make sales of meals or prepared foods.

(a) Sales of meals. Food service contractors who sell meals or prepared foods to consumers are subject to the retailing B&O and retail sales taxes upon their gross proceeds of sales. For example, the operation of a cafeteria which provides meals to employees of a manufacturing or financial business is generally a retail activity. The food service contractor is considered to be making retail sales of meals, whether payment for the meal is made by the employees or the business, unless the business itself is reselling the meals to the employees.

In all cases where the meals are prepared at offsite facilities not owned by the institution or business, the food service contractor is considered to be making sales of meals and the retailing B&O and retail sales taxes apply to the gross proceeds of sale, or gross income for sales to consumers.

(b) Food service management. The gross proceeds derived from the management of a food service operation are subject to the service and other business activities B&O tax. These tax reporting provisions apply whether the staff actually preparing the meals or prepared foods are employed by the institution or business hiring the food service contractor, or by the food service contractor itself. If the food service contractor merely manages the food service operation on behalf of an institution or business, that institution or business is considered to be selling meals or providing the meals as a part of the services the institution or business renders to its customers. These institutions and businesses should refer to the subsections (2) and (3) above to determine their B&O and retail sales tax liabilities.

Food service management includes, but is not limited to, the following activities:

(i) Food service contractors operating a cafeteria or similar facility which provides meals and prepared food for employees and/or guests of a business, but only where the

business owning the facility is the one actually selling the meals to its employees.

(ii) Food service contractors managing and/or operating a cafeteria, lunch room, or similar facility for the exclusive use of students or faculty at an educational institution or private school. The educational institution or private school provides these meals to the students and faculty as a part of its educational services. The food service contractor is managing a food service operation on behalf of the institution, and is not making retail sales of meals to the students, faculty, or institution. Sales of meals or prepared foods to guests in such areas are, however, subject to the retailing B&O and retail sales taxes. (Refer also to the subsection above entitled "School, college, or university dining rooms.")

(iii) Food service contractors managing and/or operating the dietary facilities of a hospital, nursing home, or similar institution, for the purpose of providing meals or prepared foods to patients or residents thereof. These meals are provided to the patients or residents by the hospital, nursing home, or similar institution as a part of the services rendered by the institution. The food service contractor is managing a food service operation on behalf of the institution, and is not considered to be making retail sales of meals to the patients, residents, or institution. Meals sold to doctors, nurses, visitors, and other employees through a cafeteria or similar facility are, however, subject to the retailing B&O and retail sales taxes. (Refer also to the subsection above entitled "Hospitals, nursing homes, and other similar institutions.")

(e) The following examples explain the application of the B&O and retail sales taxes to typical situations involving food service contractors managing a food service operation. These examples should be used only as a general guide. The tax results of other situations must be determined after a review of all facts and circumstances.

(i) GC Inc. is a food service contractor managing and operating an on-site cafeteria for B College. This cafeteria is operated for the exclusive use of students and faculty. Guests of students or faculty members, however, are allowed to use the facilities. All moneys collected in the cafeteria are retained by B College. College B pays GC's direct costs for managing and operating the cafeteria, including the costs of the unprepared food products, employee salaries, and overhead expenses. GC also receives a management fee.

GC Inc. is managing a food service operation. The measure of tax is the gross proceeds received from B College. GC Inc. may not claim a deduction on account of cost of materials, salaries, or any other expense. GC Inc.'s proceeds are subject to the service and other activities B&O tax classification. B College is considered to be making retail sales of meals to the guests and must collect and remit retail sales taxes on the gross proceeds of these sales. B College should refer to WAC 458-20-167 to determine whether the retailing B&O tax applies.

(ii) DF Food Service contracts with Hospital A to manage and operate Hospital A's dietary and cafeteria facilities. DF is to receive a per meal fee for meals provided to Hospital A's patients. DF Food Service retains all proceeds for sales of meals to physicians, nurses, and visitors in the cafeteria.

The gross proceeds received from Hospital A in regards to the meals provided to the patients is derived from the man-

agement of a food service operation. These proceeds are subject to the service and other activities B&O tax classification. DF, however, is making retail sales of meals to physicians, nurses, and visitors in the cafeteria. DF Food Service must pay retailing B&O, and collect and remit retail sales tax, on the gross proceeds derived from the cafeteria sales.

~~(6) Meals furnished to employees.~~ Sales of meals to employees are sales at retail and subject to the retailing B&O and retail sales taxes. This is true whether individual meals are sold, whether a flat charge is made, or whether meals are furnished as a part of the compensation for services rendered.

(a) Where a specific and reasonable charge is made to the employee, the measure of the tax is the selling price.

(b) Where no specific charge is made, the measure of the tax will be the average cost per meal served to each employee, based upon the actual cost of the food.

(c) It is often impracticable to collect the retail sales tax from employees on such sales. The employer may, in lieu of collecting such tax from employees, pay the tax directly to the department of revenue.

~~(d) Where meals furnished to employees are not recorded as sales, the tax due shall be presumed to apply according to the following formula for determining meal count:~~

~~(i) Those employees working shifts up to five hours, one meal; and~~

~~(ii) Employees working shifts of more than five hours, two meals.~~

~~(7) Sales of meals, beverages, and food at prices including sales tax.~~ Persons who advertise and/or sell meals, alcoholic or other beverages, or any kind of food products upon which retail sales tax is due should refer to WAC 458-20-244 (Food and food ingredients), WAC 458-20-124 (restaurants, etc.), and WAC 458-20-107 (Advertised prices including sales tax). The taxability of persons operating class H licensed restaurants is specifically addressed in WAC 458-20-124.

~~(8) Gratuities.~~ Tips or gratuities representing donations or gifts by customers under circumstances which are clearly voluntary are not part of the selling price subject to tax. However, mandatory additions to the price by the seller, whether labeled service charges, tips, gratuities, or otherwise must be included in the selling price and are subject to both the retailing classification of the B&O tax and the retail sales tax.

~~(9) Examples.~~ The following examples identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax results of other situations must be determined after a review of all facts and circumstances.

~~(a) ABC Hospital operates a cafeteria and sells meals to physicians and to persons who are visiting patients in the hospital. Meals are also provided to its employees at no charge. However, there is no accounting for the number of meals consumed by the employees. Payroll records do record the number of hours worked. On average, employees working shifts of up to five hours consume one meal while those working shifts of more than five hours consume two meals.~~

~~ABC Hospital is subject to retailing and retail sales taxes on the gross proceeds derived from the sales of meals to physicians and visitors. The retailing and retail sales taxes also~~

apply to the value of meals consumed by ABC's employees. The value subject to tax is determined by the average cost of meals consumed by the employees, based upon the actual cost of the food items, multiplied by the number of meals as determined through a review of the payroll records. While the presumption is that employees working shifts of up to five hours consume one meal with those working shifts of five to eight hours consuming two, this presumption may be rebutted under particular circumstances.

(b) X operates a boarding house and provides lodging and meals to ten nontransient residents. Each resident is charged a lump sum to cover both lodging and meals with no accounting for a fair selling price for the meals. X is making retail sales of meals to its residents. Retailing and retail sales taxes are due on the value of the meals served. This value must be computed as double the cost of the meal, including the cost of the food and drink ingredients, costs of meal preparation, and other costs associated with the meal preparation such as overhead expenses.

(c) Y Motor Inn contracts with Z Company to provide catering services for a function to be held at the motor inn. During discussions concerning the services to be provided, Z Company is informed that a 15% gratuity is generally recommended. Z Company negotiates the gratuity percentage to 10% and signs a catering contract stating that the agreed gratuity will be added. The gratuity charged to Z Company is subject to both the retailing B&O and retail sales taxes. This is not a voluntary gratuity since it is required to be paid as a condition of the contract. (Gratuities are not part of the selling price only when they are strictly voluntary.) (1) **Introduction.** This section explains Washington's business and occupation (B&O) tax and retail sales tax applications for sales by caterers and food service contractors.

(a) **Examples.** This section contains examples that identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax results of other situations must be determined after a review of all facts and circumstances.

(b) **What other sections might apply?** The following sections may contain additional relevant information:

- WAC 458-20-107 Requirement to separately state sales tax—Advertised prices including sales tax.
- WAC 458-20-124 Restaurants, cocktail bars, taverns and similar businesses.
- WAC 458-20-166 Hotels, motels, boarding houses, rooming houses, resorts, summer camps, trailer camps, etc.
- WAC 458-20-167 Educational institutions, school districts, student organizations, and private schools.
- WAC 458-20-168 Hospitals, nursing homes, boarding homes, adult family homes and similar health care facilities.
- WAC 458-20-175 Persons engaged in the business of operating as a private or common carrier by air, rail or water in interstate or foreign commerce.
- WAC 458-20-189 Sales to and by the state of Washington, counties, cities, towns, school districts, and fire districts.
- WAC 458-20-190 Sales to and by the United States—Doing business on federal reservations—Sales to foreign governments.
- WAC 458-20-244 Food and food ingredients.

(2) **Sales by caterers.** Sales of meals and prepared food by caterers are subject to the retailing B&O and retail sales taxes when sold to consumers. "Caterer" means a person who provides, prepares, and serves meals for immediate consumption at a location selected by the customer. The tax liability is the same whether the meals are prepared at the customer's site or the caterer's site. The retailing B&O and retail sales taxes also apply when caterers prepare and serve meals using ingredients provided by the customer.

(3) **Food service contractors.** The term "food service contractor" means a person who operates a food service at a kitchen, cafeteria, dining room, or similar facility owned by an institution or business. Food service contractors may manage the food service operation on behalf of the institution or business, or may actually make sales of meals or prepared foods.

(a) **Sales of meals.** Food service contractors who sell meals or prepared foods to consumers are subject to the retailing B&O and retail sales taxes on their gross proceeds of sales. For example, the operation of a cafeteria which provides meals to employees of a manufacturing or financial business is generally a retail activity. The food service contractor is considered to be making retail sales of meals, whether payment for the meal is made by the employees or the business, unless the business itself is reselling the meals to the employees.

In all cases where the meals are prepared at off-site facilities not owned by the institution or business, the food service contractor is considered to be making sales of meals and the retailing B&O and retail sales taxes apply to the gross proceeds of sale, or gross income for sales to consumers.

(b) **Food service management.** The gross proceeds derived from the management of a food service operation are subject to the service and other business activities B&O tax. These tax reporting provisions apply whether the staff actually preparing the meals or prepared foods is employed by the institution or business hiring the food service contractor, or by the food service contractor itself. If the food service contractor merely manages the food service operation on behalf of an institution or business, that institution or business is considered to be selling meals or providing the meals as a part of the services the institution or business renders to its customers. These institutions and businesses should refer to subsections (4) and (5) in this section to determine their B&O tax and retail sales tax liabilities.

Food service management includes, but is not limited to, the following activities:

(i) Food service contractors operating a cafeteria or similar facility which provides meals and prepared food for employees and/or guests of a business, but only where the business owning the facility is the one actually selling the meals to its employees.

(ii) Food service contractors managing and/or operating a cafeteria, lunch room, or similar facility for the exclusive use of students or faculty at an educational institution or private school. The educational institution or private school provides these meals to the students and faculty as a part of its educational services. The food service contractor is managing a food service operation on behalf of the institution, and is not making retail sales of meals to the students, faculty, or

institution. Sales of meals or prepared foods to guests in such areas are, however, subject to the retailing B&O and retail sales taxes.

(iii) Food service contractors managing and/or operating the dietary facilities of a hospital, nursing home, or similar institution, for the purpose of providing meals or prepared foods to patients or residents thereof. These meals are provided to the patients or residents by the hospital, nursing home, or similar institution as a part of the services rendered by the institution. The food service contractor is managing a food service operation on behalf of the institution, and is not considered to be making retail sales of meals to the patients, residents, or institution. Sales of meals to doctors, nurses, visitors, and other employees through a cafeteria or similar facility are, however, subject to the retailing B&O and retail sales taxes.

(c) Examples.

(i) GC Inc. is a food service contractor managing and operating an on-site cafeteria for B College. This cafeteria is operated for the exclusive use of students and faculty. Guests of students or faculty members, however, are allowed to use the facilities. All moneys collected in the cafeteria are retained by B College. B College pays GC's direct costs for managing and operating the cafeteria, including the costs of the unprepared food products, employee salaries, and overhead expenses. GC also receives a management fee.

GC Inc. is managing a food service operation. The measure of tax is the gross proceeds received from B College. GC Inc. may not claim a deduction on account of cost of materials, salaries, or any other expense. GC Inc.'s proceeds are subject to the service and other activities B&O tax classification. B College is considered to be making retail sales of meals to the guests and must collect and remit retail sales tax on the gross proceeds of these sales. B College should refer to WAC 458-20-167 to determine whether the retailing B&O tax applies.

(ii) DF Food Service contracts with Hospital A to manage and operate Hospital A's dietary and cafeteria facilities. DF is to receive a per meal fee for meals provided to Hospital A's patients. DF Food Service retains all proceeds for sales of meals to physicians, nurses, and visitors in the cafeteria.

The gross proceeds received from Hospital A in regards to the meals provided to the patients are derived from the management of a food service operation. These proceeds are subject to the service and other activities B&O tax classification. DF, however, is making retail sales of meals to physicians, nurses, and visitors in the cafeteria. DF Food Service must pay retailing B&O tax, and collect and remit retail sales tax, on the gross proceeds derived from the cafeteria sales.

(4) Retailing B&O and retail sales taxes. The sales of meals to consumers are subject to the retailing B&O tax and generally subject to retail sales tax. However, a retail sales tax exemption is available for the following sales of meals:

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

(b) Prepared meals sold to or for senior citizens, disabled persons, or low-income persons by a not-for-profit organization organized under chapter 24.03 or 24.12 RCW. However,

this exemption does not apply to purchases of prepared meals by not-for-profit organizations, such as hospitals, which provide the meals to patients as a part of the services they render.

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

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

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

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

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

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

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

AMENDATORY SECTION (Amending WSR 10-06-069, filed 2/25/10, effective 3/28/10)

WAC 458-20-124 Restaurants, cocktail bars, taverns and similar businesses. (1) Introduction. This section explains Washington's business and occupation (B&O) tax and retail sales tax applications to sales by restaurants and similar businesses. It discusses the sales of meals, beverages, and foods at prices inclusive of the retail sales tax. This section also explains how discounted and promotional meals are taxed. ((Persons operating restaurants and similar businesses should also refer to WAC 458-20-119 and 458-20-244.)) Caterers and persons who merely manage the operations of a restaurant or similar business should refer to WAC 458-20-119 to determine their tax liability.

(a) Restaurants, cocktail bars, and taverns. The term "restaurants, cocktail bars, taverns, and similar businesses" means every place where prepared foods and beverages are sold and served to individuals, generally for consumption on the premises where sold.

(b) Examples. This section contains examples that identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax

results of other situations must be determined after a review of all facts and circumstances.

(c) What other sections might apply? The following sections may contain additional relevant information:

- WAC 458-20-107 Requirement to separately state sales tax—Advertised prices including sales tax.
- WAC 458-20-119 Sales by caterers and food service contractors.
- WAC 458-20-131 Gambling activities.
- WAC 458-20-183 Amusement, recreation, and physical fitness services.
- WAC 458-20-187 Coin operated vending machines, amusement devices and service machines.
- WAC 458-20-189 Sales to and by the state of Washington, counties, cities, towns, school districts, and fire districts.
- WAC 458-20-190 Sales to and by the United States—Doing business on federal reservations—Sales to foreign governments.
- WAC 458-20-244 Food and food ingredients.

(2) (~~Business and occupation tax.~~ The tax liability of restaurants, cocktail bars, taverns and similar businesses is as follows:

(a)) **Retailing B&O and retail sales taxes.** Sales to consumers of meals and prepared foods by restaurants, cocktail bars, taverns and similar businesses are subject to the retailing tax classification and generally subject to retail sales tax. (~~Meals provided to employees are presumed to be in exchange for services received from the employee and are retail sales and also subject to the retailing tax. (See WAC 458-20-119, Sales of meals.)~~)

(b)) A retail sales tax exemption is available for the following sales of meals:

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

(b) Prepared meals sold to or for senior citizens, disabled persons, or low-income persons by a not-for-profit organization organized under chapter 24.03 or 24.12 RCW;

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

(d) Effective July 1, 2011, chapter 55 (SB 5501), Laws of 2011, exempts meals from retail sales tax when provided without specific charge to employees by a restaurant. The legislation also exempts such meals from B&O tax and use tax. If any charge is made for meals to employees, retailing B&O tax and retail sales tax apply.

For the purposes of (d) of this subsection, the following definitions apply:

(i) "Meal" means one or more items of prepared food or beverages other than alcoholic beverages. For the purposes of (d) of this subsection, "alcoholic beverage" and "prepared food" have the same meanings as provided in RCW 82.08.0293.

(ii) "Restaurant" means any establishment having special space and accommodation where food and beverages are regularly sold to the public for immediate, but not necessarily on-site, consumption, but excluding grocery stores, mini-

markets, and convenience stores. Restaurant includes, but is not limited to, lunch counters, diners, coffee shops, espresso shops or bars, concession stands or counters, delicatessens, and cafeterias. It also includes space and accommodations where food and beverages are sold to the public for immediate consumption that are located within:

- Hotels, motels, lodges, boarding houses, bed and breakfast facilities;
- Hospitals, office buildings, movie theaters; and
- Schools, colleges, or universities, if a separate charge is made for such food or beverages.

Restaurants also include:

- Mobile sales units that sell food or beverages for immediate consumption within a place, the entrance to which is subject to an admission charge; and
- Public and private carriers, such as trains and vessels, that sell food or beverages for immediate consumption if a separate charge is made for such food or beverages.

A restaurant is open to the public for purposes of this subsection if members of the public can be served as guests. "Restaurant" does not include businesses making sales through vending machines or through mobile sales units such as catering trucks or sidewalk vendors of food or beverage items.

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

((e)) (4) **Service B&O tax.** Compensation received from owners of (~~coin-operated~~) vending machines for allowing the placement of those machines at the restaurant, cocktail bar, tavern, or similar business is subject to the service and other business activities tax. Persons operating games of chance should refer to WAC 458-20-131.

((3) **Retail sales tax.** Sales to consumers of meals and prepared foods by restaurants, cocktail bars, taverns and similar businesses are generally subject to retail sales tax. This includes the meals sold or furnished to the employees of the business. A retail sales tax exemption is available for the following sales of meals:

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

(b) Prepared meals sold to or for senior citizens, disabled persons, or low-income persons by a not-for-profit organization organized under chapter 24.03 or 24.12 RCW;

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

~~(4))~~ (5) Deferred sales or use tax. If the seller fails to collect the appropriate retail sales tax, the purchaser is required to pay the deferred sales or use tax directly to the department.

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

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

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

(d) Purchases of paper plates, paper cups, paper napkins, toothpicks, or any other articles which are furnished to customers, the first actual use of which renders such articles unfit for further use, are not subject to retail sales tax when purchased by restaurants and similar businesses making actual sales of meals.

~~((5))~~ (6) Combination ((businesses)) business. Persons operating a combination of two kinds of food sales ~~((businesses))~~, of which one is the sale of prepared food ((for immediate consumption)) (i.e., ~~((a bakery))~~ an establishment, such as a deli, selling food products ready for consumption and in bulk quantities), ~~((are required to keep their accounting records and sales receipts segregated between taxable and tax exempt sales. Persons operating a combination business))~~ should refer to WAC 458-20-244 for taxability information.

~~((6))~~ (7) Discounted meals, promotional meals, and meals given away. Persons who sell meals on a "two for one" or similar basis are not giving away a free meal, but rather are selling two meals at a discounted price. Both the retailing B&O and retail sales taxes should be calculated on the reduced price actually received by the seller.

~~((a))~~ Persons who provide meals free of charge to persons other than employees are consumers of those meals. Persons operating restaurants or similar businesses are not required to report use tax on food and food ingredients given away, even if the food or food ingredients are part of prepared meals. For example, a restaurant providing meals to the homeless or hot dogs free of charge to a little league team will not incur a retail sales or use tax liability with respect to these items given away. A sale has not occurred, and the food and food ingredients exemption applies. Should the restaurant provide the little league team with soft drinks free of charge, the restaurant will incur a deferred retail sales or use tax liability with respect to those soft drinks. Soft drinks are excluded from the exemption for food and food ingredients. (See WAC 458-20-244 ~~((Food and food ingredients))~~.)

~~((b))~~ ~~Meals provided to employees are presumed to be in exchange for services received from the employee and are not considered to be given away. These meals are retail sales. (See WAC 458-20-119 on employee meals.)~~

~~(7))~~ (8) Sales of meals, beverages and food at prices including retail sales tax. Persons may advertise and/or sell meals, beverages, or any kind of food product at prices including sales tax. Any person electing to advertise and/or make sales in this manner must clearly indicate this pricing method on the menus and other price information.

If sales slips, sales invoices, or dinner checks are given to the customer, the sales tax must be separately stated on all

such sales slips, sales invoices, or dinner checks. If not separately stated on the sales slips, sales invoices, or dinner checks, it will be presumed that retail sales tax was not collected. In such cases the measure of tax will be gross receipts. ~~((Refer also to))~~ See WAC 458-20-107.)

~~((8) Class H restaurants.)~~ (9) Spirits, beer, and wine restaurant licensees. Restaurants operating under the authority of a ~~((class H liquor))~~ license from the liquor control board to sell spirits, beer, and wine by the glass for on-premises consumption generally have both dining and cocktail lounge areas. Customers purchasing beverages or food in lounge areas are generally not given sales invoices, sales slips, or dinner checks, nor are they generally provided with menus.

(a) Many ~~((class H restaurants))~~ spirits, beer, and wine restaurant licensees elect to sell beverages or food at prices inclusive of the sales tax in the cocktail lounge area. If this pricing method is used, notification that retail sales tax is included in the price of the beverages or foods must be posted in the lounge area in a manner and location so that customers can see the notice without entering employee work areas. It will be presumed that no retail sales tax has been collected or is included in the gross receipts when a notice is not posted and the customer does not receive a sales slip or sales invoice separately stating the retail sales tax.

(b) The election to include retail sales tax in the selling price in one area of a location does not preclude the restaurant operator from selling beverages or food at a price exclusive of sales tax in another. For example, ~~((an operator of a class H))~~ a spirits, beer, and wine restaurant licensee may elect to include the retail sales tax in the price charged for beverages in the lounge area, while the price charged in the dining area is exclusive of the sales tax.

(c) ~~((Class H))~~ Spirits, beer, and wine restaurant((s)) licensees are not required to post actual drink prices in the cocktail lounge areas. However, if actual prices are posted, the advertising requirements expressed in WAC 458-20-107 must be met.

~~((9))~~ (10) Gratuities. Tips or gratuities representing donations or gifts by customers under circumstances which are clearly voluntary are not part of the selling price subject to tax. However, mandatory additions to the price by the seller, whether labeled service charges, tips, gratuities or otherwise must be included in the selling price and are subject to both the retailing B&O and retail sales taxes. ~~((Refer also to WAC 458-20-119.))~~

~~(10) Vending machines and amusement devices.~~ Persons owning and operating vending machines and amusement devices should refer to WAC 458-20-187 ~~((Coin operated vending machines, amusement devices and service machines.))~~

(11) Examples. ~~((The following examples identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax status of each situation must be determined after a review of all of the facts and circumstances.))~~

~~(a) ABC Coffee Shop has its own bakery and also a counter and tables where it sells pastries and coffee for immediate consumption. ABC also sells donuts and other bakery items for consumption off the premises. No beverages are~~

~~sold in unsealed containers except for consumption on the premises. ABC accounts separately for its sales of products which are not intended for immediate consumption through a coding maintained by the cash register. ABC is operating a combination business. It is required to collect retail sales tax on items sold for consumption on the premises, but is not required to collect retail sales tax on baked goods intended for consumption off the premises.~~

~~(b))~~ (a) XYZ Restaurant operates both a cocktail bar and a dining area. XYZ has elected to sell drinks and appetizers in the bar at prices including the retail sales tax while selling drinks and meals served in the dining area at prices exclusive of the sales tax. There is a sign posted in the bar area advising customers that all prices include retail sales tax. Customers in the dining area are given sales invoices which separately state the retail sales tax. As an example, a typical well drink purchased in the bar for \$2.50 inclusive of the sales tax, is sold for \$2.50 plus sales tax in the dining area. The pricing requirements have been satisfied and the drink and food totals are correctly reflected on the customers' dinner checks. XYZ may factor the retail sales tax out of the cocktail bar gross receipts when determining its retailing and retail sales tax liability.

~~((e))~~ (b) RBS Restaurant operates both a cocktail bar and a dining area. RBS has elected to sell drinks at prices inclusive of retail sales tax for all areas where drinks are served. It has a sign posted to inform customers in the bar area of this fact and a statement is also on the dinner menu indicating that any charges for drinks includes retail sales tax. Dinner checks are given to customers served in the dining area which state the price of the meal exclusive of sales tax, sales tax on the meal, and the drink price including retail sales tax. Because the business has met the sign posting requirement in the bar area and has indicated on the menu that sales tax is included in the price of the drinks, RBS may factor the sales tax out of the gross receipts received from its drink sales when determining its taxable retail sales.

~~((d))~~ (c) Z Tavern sells all foods and drinks at a price inclusive of the retail sales tax. However, there is no mention of this pricing structure on its menus or reader boards. The gross receipts from Z Tavern's food and drink sales are subject to the retailing and retail sales taxes. Z Tavern has failed to meet the conditions for selling foods and drinks at prices including tax. Z Tavern may not assume that the gross receipts include any sales tax and may not factor the retail sales tax out of the gross receipts.

WSR 12-01-106

EXPEDITED RULES

OFFICE OF

INSURANCE COMMISSIONER

[Insurance Commissioner Matter No. R 2011-29—Filed December 21, 2011, 9:01 a.m.]

Title of Rule and Other Identifying Information: Valuation of life insurance policies.

NOTICE

THIS RULE IS BEING PROPOSED UNDER AN EXPEDITED RULE-MAKING PROCESS THAT WILL ELIMINATE THE NEED FOR THE AGENCY TO HOLD PUBLIC HEARINGS, PREPARE A SMALL BUSINESS ECONOMIC IMPACT STATEMENT, OR PROVIDE RESPONSES TO THE CRITERIA FOR A SIGNIFICANT LEGISLATIVE RULE. IF YOU OBJECT TO THIS USE OF THE EXPEDITED RULE-MAKING PROCESS, YOU MUST EXPRESS YOUR OBJECTIONS IN WRITING AND THEY MUST BE SENT TO Jim Tompkins, Insurance Commissioner, P.O. Box 40258, Olympia, WA 98504-0258, AND RECEIVED BY February 21, 2012.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: This proposed rule will amend WAC 284-74-340 to reflect changes to the NAIC model upon which this rule is based.

Reasons Supporting Proposal: WAC 284-74-340 is based upon a section of the NAIC Valuation of Life Insurance Policies Model Regulation. In 2009 the model was amended by the NAIC after input from various stakeholders. This amendment to WAC 284-74-340 will incorporate these changes into the rule.

Statutory Authority for Adoption: RCW 48.02.060, 48.74.030, and 48.74.080.

Statute Being Implemented: RCW 48.74.030, 48.74.070, and 48.74.080.

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

Name of Proponent: Mike Kreidler, insurance commissioner, governmental.

Name of Agency Personnel Responsible for Drafting: Lee Barclay, P.O. Box 40255, Olympia, WA 98504-0255, (360) 725-7115; Implementation and Enforcement: Beth Berendt, P.O. Box 40255, Olympia, WA 98504-0255, (360) 725-7117.

December 21, 2011

Mike Kreidler

Insurance Commissioner

AMENDATORY SECTION (Amending WSR 00-07-069, filed 3/13/00, effective 4/13/00)

WAC 284-74-340 General calculation requirements for basic reserves and premium deficiency reserves. (1) At the election of the company for any one or more specified plans of life insurance, the minimum valuation standard of mortality under RCW 48.74.030(1) for basic reserves may be calculated using the 1980 CSO mortality table with select mortality factors (or any other valuation mortality table adopted by the NAIC after the operative date of this regulation and promulgated by regulation by the commissioner for this purpose). If select mortality factors are elected, they may be:

(a) The ten-year select mortality factors incorporated into the 1980 amendments to the NAIC standard valuation law;

(b) The select mortality factors in WAC 284-74-380; or

(c) Any other table of select mortality factors adopted by the NAIC after the operative date of this regulation and pro-

mulgated by regulation by the commissioner for the purpose of calculating basic reserves.

(2) Deficiency reserves, if any, are calculated under RCW 48.74.070 for each policy as the excess, if greater than zero, of the quantity A over the basic reserve. The quantity A is obtained by recalculating the basic reserve for the policy using the minimum valuation standards of mortality under RCW 48.74.030(1) and rate of interest under RCW 48.74.030(3), and replacing the net premium by the actual gross premium in each contract year the actual gross premium is less than the corresponding net premium. The actual gross premiums shall be the maximum gross premiums guaranteed on the valuation date.

The quantity A and the corresponding net premiums used in the determination of quantity A shall be based upon the minimum valuation standard of mortality under subsection (1) of this section for basic reserves: Provided, That at the election of the company for any one or more specified plans of life insurance, the quantity A and the corresponding net premiums used in the determination of the quantity A may be based upon the 1980 CSO mortality table with select mortality factors (or any other valuation mortality table adopted by the NAIC after the operative date of this regulation and promulgated by regulation by the commissioner). If select mortality factors are elected, they may be:

(a) The ten-year select mortality factors incorporated into the 1980 amendments to the NAIC standard valuation law;

(b) The select mortality factors in WAC 284-74-380;

(c) Subject to the conditions in subsection (3) of this section, X percent of the select mortality factors in WAC 284-74-380; or

(d) Any other table of select mortality factors adopted by the NAIC after the operative date of this regulation and promulgated by regulation by the commissioner for the purpose of calculating deficiency reserves.

(3) If X percent of the select mortality factors in WAC 284-74-380 is elected under subsection (2)(c) of this section, then that election is subject to the following conditions:

(a) X may vary by policy year, policy form, underwriting classification, issue age, or any other policy factor expected to affect mortality experience;

~~(b) X shall not be less than twenty percent;~~

~~(c) X shall not decrease in any successive policy years;~~

~~(d))~~ Using the valuation interest rate for basic reserves, subparagraph (i) is greater than or equal to subparagraph (ii);

(i) The actuarial present value of future death benefits, calculated using the mortality rates resulting from the application of X;

(ii) The actuarial present value of future death benefits, calculated using anticipated mortality experience without recognition of mortality improvement beyond the valuation date;

~~((e))~~ (c) The mortality rates resulting from the application of X are at least as great as anticipated mortality experience, without recognition of mortality improvement beyond the valuation date, in each of the first five years after the valuation date;

~~((f))~~ (d) The appointed actuary shall increase X at any valuation date where it is necessary to continue to meet all the requirements of this subsection (3);

~~((g))~~ (e) The appointed actuary may decrease X at any valuation date ~~((as long as X does not decrease in any successive policy years and))~~ as long as it continues to meet all the requirements of this subsection (3); ~~((and))~~

~~((h))~~ (f) The appointed actuary shall specifically take into account the adverse effect on expected mortality and lapsation of any anticipated or actual increase in gross premiums~~((:)); and~~

~~((i))~~ (g) If X is less than one hundred percent at any duration for any policy, the following requirements shall be met:

(i) The appointed actuary shall annually prepare an actuarial opinion and memorandum in conformance with the requirements of WAC 284-07-380 through 284-07-400; ~~((and))~~

(ii) The appointed actuary shall disclose in the regulatory asset adequacy issues summary the impact of insufficiency of assets to support the payment of benefits and expenses and the establishment of statutory reserves during one or more interim periods; and

(iii) The appointed actuary shall annually opine for all policies subject to this regulation as to whether the mortality rates resulting from the application of X meet the requirements of this subsection (3). This opinion shall be included with or attached to the company's annual statement, and shall disclose the lowest X factor used for any policy on the valuation date. This opinion shall be supported by an actuarial report, subject to appropriate actuarial standards of practice promulgated by the Actuarial Standards Board of the American Academy of Actuaries. The X factors shall reflect anticipated future mortality, without recognition of mortality improvement beyond the valuation date, taking into account relevant emerging experience.

(4) This subsection applies to both basic reserves and deficiency reserves. Any set of select mortality factors may be used only for the first segment. However, if the first segment is less than ten years, the appropriate ten-year select mortality factors incorporated into the 1980 amendments to the NAIC standard valuation law may be used thereafter through the tenth policy year from the date of issue.

(5) In determining basic reserves or deficiency reserves, guaranteed maximum gross premiums without policy fees may be used where the calculation involves the guaranteed maximum gross premium but only if the policy fee is specified in the policy and is a level dollar amount for the entire premium paying period of the policy. In determining deficiency reserves, policy fees may be included in guaranteed maximum gross premiums, even if not included in the actual calculation of basic reserves.

(6) Reserves for policies under which the insurer has changed its guarantees after issue with respect to gross premiums, benefits, charges, or credits, with the new guarantees effective for more than one year after the date of the change, shall be the greatest of the following:

(a) Reserves calculated ignoring the change;

(b) Reserves assuming the guarantee was made at issue;

and

(c) Reserves assuming that the policy was issued on the date of the guarantee.

(7) The commissioner may require that the company document the extent of the adequacy of reserves for specified blocks, including, but not limited to, policies issued prior to the operative date of this regulation. This documentation may include a demonstration of the extent to which aggregation with other nonspecified blocks of business is relied upon in the formation of the appointed actuary opinion pursuant to and consistent with the requirements of WAC 284-07-380 and 284-07-400.