

WSR 21-01-205

PROPOSED RULES

DEPARTMENT OF AGRICULTURE

[Filed December 23, 2020, 7:48 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 20-14-112.

Title of Rule and Other Identifying Information: Chapter 16-218 WAC, Hops—Certification analysis—Fees, as a result of a petition from the Washington hop commission, the department is proposing increasing all fees related to the certification of hops under WAC 16-218-015, 16-218-025, and 16-218-035 by approximately forty-five percent. In addition, the department is proposing updating section titles to move away from a question and answer format and modifying the language to improve readability.

Hearing Location(s): On February 9, 2021, at 10:00 a.m., Skype conference line. Join by link <https://lync.wa.gov/agr.wa.gov/meet/grobinson/77GFSGDC?sl=1>.

Join by phone: 1-360-407-3816, Conference ID: 86838. Due to the mandated social distancing requirements in place during the current COVID-19 pandemic, the public hearing will be held solely over video and teleconference.

Date of Intended Adoption: February 16, 2021.

Submit Written Comments to: Gloriann Robinson, Agency Rules Coordinator, P.O. Box 42560, Olympia, WA 98504-2560, email wsdarulescomments@agr.wa.gov, fax 360-902-2092, by 5:00 p.m., February 9, 2021.

Assistance for Persons with Disabilities: Contact Deanna Painter, phone 360-902-2061, TTY 800-833-6388 or 711, email dpainter@agr.wa.gov, by February 2, 2021.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: WAC 16-532-035 requires that all varieties of hops produced in the state be inspected and certified by the federal/state hop inspection service prior to marketing or processing. The Washington state department of agriculture's (WSDA) hop inspection program provides this service to the hop industry by carrying out site inspections for phytosanitary certificates, chemical analysis, and certification of the state's hop crop. The program takes a representative sample of all hop lots during harvest, as well as accepting a number of samples submitted by hop producers directly. WSDA last increased hop inspection fees in 2005. The Washington hop commission determined that a fee increase is necessary to stabilize and maintain the financial health of the hop inspection program and petitioned the department to conduct rule making to do so. The Washington hop commission also determined the amount of the increase that should be implemented.

The proposed amendment would increase fees for the certification of hops by approximately forty-five percent. This includes all fees listed under WAC 16-218-015, 16-218-025, and 16-218-035. The anticipated effects from this would be increased costs to businesses in Washington that pay to certify their hops.

Reasons Supporting Proposal: RCW 22.09.790 requires the department maintain fees at a level necessary to cover the cost of providing service. Eight years ago, the hop inspection program went through a streamlining process in order to reduce costs and improve operational efficiency. Everyday operations were analyzed to see how they could be improved to speed up processing and reduce time and labor. Some sys-

tems were made electronic or automated in order to reduce the number of staff needed for processing. These changes greatly reduced the program's operational costs. However, due to external factors, a fee increase has become necessary. The amount of hops produced annually in the state has increased, creating a greater workload for staff. Additionally, the program has experienced a significant rise in operational costs, due to a mandated wage increase. During peak harvest season from late August to mid-October, inspections are performed seven days a week. Additional temporary staff are hired during this time to meet demand and staff typically work long hours, often outside of their normal schedules. This is done in order to provide the quick turn-around time that growers both request and depend on for test results and the certification of their hops. These factors have led to a dramatic increase in operational costs, which the current fees are not able to cover.

A fee increase is necessary to stabilize and maintain the financial health of the hop inspection program. Current projections indicate the program is running below a six month operating budget and will have difficulty performing necessary functions after the 2021 hop season. The program is projected to reach a zero balance within the next three years. Without a fee increase the hop inspection program would no longer be able to test hops or perform inspections in a timely manner and therefore, could not provide needed services to the hop industry. This would result in negative impacts to Washington hop producers and increased costs, as they would need to ship their samples to Oregon or Idaho for inspection. Not only could this result in a loss of sales for growers, as the turn-around time for test results would be much slower, but Oregon and Idaho likely would not have the capacity to test all of Washington's hops. Since testing is required under WAC 16-532-035, this would leave growers with the legal requirement to have their hops tested, but no place to have that testing performed.

Statutory Authority for Adoption: RCW 22.09.020 and 22.09.790.

Statute Being Implemented: Chapter 22.09 RCW.

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

Name of Proponent: Washington hop commission, governmental.

Name of Agency Personnel Responsible for Drafting, Implementation, and Enforcement: Mike Firman, 21 North 1st Avenue, Suite 106, Yakima, WA 98902, 509-249-6933.

A school district fiscal impact statement is not required under RCW 28A.305.135.

A cost-benefit analysis is not required under RCW 34.05.328. WSDA is not a listed agency under RCW 34.05.328 (5) (a) (i).

The proposed rule does impose more-than-minor costs on businesses.

Small Business Economic Impact Statement
Chapter 16-218 WAC
Hops—Certification Analyses—Fees
December 23, 2020

SECTION 1: Describe the proposed rule, including: A brief history of the issue; an explanation of why the proposed rule is needed; and a brief description of the probable compliance requirements and the kinds of professional services that a small business is likely to need in order to comply with the proposed rule.

History and Overview: Washington state is the top producing region for hops in the United States. With an estimated 41,263 acres of commercial hop production in 2019, Washington hops account for nearly seventy percent of the total hop production in the United States¹. A majority of the state's hops are grown in the Yakima Valley where the climate, soil, and available water make it an ideal growing area.

1 Hop Growers of America. (2020). *Enthusiasts*. Retrieved from USA Hops: <https://www.usahops.org/enthusiasts/>.

WAC 16-532-035 requires that all varieties of hops produced in the state be inspected and certified by the federal/state hop inspection service prior to marketing or processing. WSDA's hop inspection program provides this service to the hop industry by carrying out site inspections for phytosanitary certificates, chemical analysis, and certification of the state's hop crop. The program takes a representative sample of all hop lots during harvest, as well as accepting a number of samples submitted by hop producers directly. The hop industry also has the option of utilizing the services of the Oregon or Idaho departments of agriculture for inspection and certification services.

Each sample is analyzed for the presence of seeds, leaves, and stems, in accordance with United States Department of Agriculture (USDA) procedures. Samples are given a grade that can be used to determine the commercial value of each lot. Hops containing a high amount of leaves and stems are considered less valuable. The hop industry requests sample testing results be provided within twenty-four hours so they can fix any problems with processing if a high amount of leaves and stems are found in their crop.

Seeds are another concern for the hop industry, as they can form an oil when brewed which results in a lower value beer and makes the brewing process harder to control. This can lead to increased brewing costs. Some brewers will even request seedless (contains less than two percent seed) hops. As a result, low seed crops are more attractive to sellers and can fetch a higher market price. Washington traditionally uses low seed farming practices which has given it a reputation for growing hops containing low amounts of seed. The testing conducted by the hop inspection program helps demonstrate the high quality of hops produced in the state. After a hop sample is analyzed, the hop inspection program issues an inspection certificate, which is used for buying and selling the hops.

The program also tests for brewing values of hops, hop pellets, and hop extract; and moisture and hop storage index. Growers and dealers may also submit unofficial samples to the department for these specific tests. By performing these functions and issuing the associated documents necessary for trade, the hop inspection program ensures continued access to international and interstate markets for Washington's hop producers.

RCW 22.09.790 requires the department maintain fees at a level necessary to cover the cost of providing service. As a result of a petition from the Washington hop commission, the department is proposing amendments to WAC 16-218-015, 16-218-025, and 16-218-035 by increasing all fees related to the certification of hops by approximately forty-five percent. Additionally, the department is updating section titles to move away from a question and answer format and modifying the language to improve readability.

Why the Rule Change is Needed: The department last increased hop inspection fees in 2005. Eight years ago, the hop inspection program began going through a LEAN process in order to streamline operations

and reduce costs. Everyday operations were analyzed to see how they could be improved to speed up processing and reduce time and labor. Some systems were made electronic or automated in order to reduce the number of staff needed for processing. These changes greatly reduced the program's operational costs. However, even after all the increased efficiencies that were implemented, a fee increase has become necessary after fifteen years.

The amount of hops produced annually in the state has increased, creating a greater workload for staff. Additionally, the program has experienced a significant rise in operational costs, due to a mandated wage increase. During peak harvest season from late August to mid-October, inspections are performed seven days a week. Additional temporary staff are hired during this time to meet demand and staff typically work long hours. This is done in order to provide the quick turn-around time that growers both request and depend on for test results and the certification of their hops. These factors have led to a dramatic increase in operational costs, which the current fees are not able to cover.

A fee increase is necessary to stabilize and maintain the financial health of the hop inspection program. Current projections indicate the program is running below a six month operating budget and will have difficulty performing necessary functions after the 2021 hop season. The program is projected to reach a zero balance within the next three years. Without a fee increase the hop inspection program would no longer be able to test hops or perform inspections in a timely manner and therefore, could not provide needed services to the hop industry. This would result in negative impacts to Washington hop producers and increased costs, as they would need to ship their samples to Oregon or Idaho for inspection. Not only could this result in a loss of sales for growers, as the turn-around time for test results would be much slower, but Oregon and Idaho likely would not have the capacity to test all of Washington's hops. Since testing is required under WAC 16-532-035, this would leave growers with the legal requirement to have their hops tested, but no place to have that testing performed.

Probable Compliance Requirements: The only probable compliance requirement is businesses utilizing the services provided by the hop inspection program will pay higher fees for those services.

Professional Services Needed to Comply with Proposed Amendment: No professional services will be required for businesses to comply with the proposed rule amendment.

SECTION 2: Identify which businesses are required to comply with the proposed rule using the North American Industry Classification System (NAICS) codes and what the minor cost thresholds are.

**NAICS Code (4, 5 or 6 Digit)	NAICS Business Description	Number of Impacted Businesses in Washington	±Minor Cost Threshold = 1% of Average Annual Payroll	*Minor Cost Threshold = 0.3% of Average Annual Revenue
111140	Wheat Farming	1	\$510.52	\$394.90
111191	Oilseed and Grain Combination Farming	1	\$666.26	Data not available
111219	Other Vegetable (except Potato) and Melon Farming	1	\$3,635.27	\$7,061.89
111320	Citrus (except Orange) Groves	1	Data not available	Data not available
111331	Apple Orchards	4	\$8,511.33	\$3,400.20
111334	Berry (except Strawberry) Farming	2	\$3,088.45	\$8,107.59
111336	Fruit and Tree Nut Combination Farming	1	\$5,069.29	\$768.86

**NAICS Code (4, 5 or 6 Digit)	NAICS Business Description	Number of Impacted Businesses in Washington	±Minor Cost Threshold = 1% of Average Annual Payroll	*Minor Cost Threshold = 0.3% of Average Annual Revenue
111998	All Other Miscellaneous Crop Farming	23	\$9,118.76	\$1,179.40
112111	Beef Cattle Ranching and Farming	2	\$844.82	\$357.61
112990	All Other Animal Production	2	\$499.58	\$421.90
311942	Spice and Extract Manufacturing	1	\$12,436.35	\$13,488.59
424480	Fresh Fruit and Vegetable Merchant Wholesalers	1	\$15,475.73	\$39,111.14
424590	Other Farm Product Raw Material Merchant Wholesalers	3	\$4,316.84	\$5,883.37
493130	Farm Product Warehousing and Storage	1	\$8,450.79	\$9,117.33
541990	All Other Professional; Scientific; and Technical Services	1	\$4,801.34	\$2,535.65

±Data source: 2018 Dataset from the Washington state employment security department (ESD) and United States Bureau of Labor Statistics.

*Data source: 2018 Dataset from the Washington state department of revenue (DOR).

** These codes reflect the NAICS codes that affected businesses chose when registering with DOR.

SECTION 3: Analyze the probable cost of compliance. Identify the probable costs to comply with the proposed rule, including: Cost of equipment, supplies, labor, professional services and increased administrative costs; and whether compliance with the proposed rule will cause businesses to lose sales or revenue.

Proposed amendments to WAC 16-218-015, 16-218-025, and 16-218-035 increase all fees related to the certification of hops by approximately forty-five percent. Under the proposed amendments, fees would be assessed as follows:

WAC 16-218-015 Fees for the certification of hops:

Service	Current Fee	Proposed Fee (Approximately Forty-Five Percent Increase)
Official lot inspections and certification for baled hops	\$1.25 per bale with minimum charge of \$30 per lot for official inspection and grading with certification	\$1.81 per bale with a minimum charge of \$44 per lot for official inspection and grading with certification
Submitted sample inspections and certification	\$150 for an unofficial sample submitted for grading with certification of a quantity not to exceed 100,000 lbs. of dried hops	\$217.50 for an unofficial sample submitted for grading with certification of a quantity not to exceed 100,000 lbs. of dried hops

WAC 16-218-025 Charges for chemical analysis regarding brewing values and additional constituents in raw hops, hop extract, hop pellets, and hop powder. Fees for the chemical analyses of officially sampled raw hops:

Type of Analyses	Current Fee Per Bale	Proposed Fee (Approximately Forty-Five Percent Increase) Per Bale	Current Minimum Fee Per Sample	Proposed Minimum Fee (Approximately Forty-Five Percent Increase) Per Sample
American Society of Brewing Chemists (ASBC) spectrophotometric with moisture	\$0.35	\$0.50	\$30.00	\$50.00
ASBC spectrophotometric/conductometric or exhaled breath condensate (EBC) conductometric without moisture	\$0.30	\$0.44	\$30.00	\$44.00

Type of Analyses	Current Fee Per Bale	Proposed Fee (Approximately Forty-Five Percent Increase) Per Bale	Current Minimum Fee Per Sample	Proposed Minimum Fee (Approximately Forty-Five Percent Increase) Per Sample
Mebak, Zurich, Verzele, Ganzlin, or conductometric	\$0.60	\$0.87	\$60.00	\$87.00

Fees for chemical analyses of submitted raw hops, hop extract, hop pellets or hop powders:

Type of Analyses	Current Fees	Proposed Fees (Approximately Forty-Five Percent Increase)
ASBC spectrophotometric	\$30.00	\$44.00
ASBC conductometric	\$30.00	\$44.00
EBC conductometric	\$30.00	\$44.00
EBC conductometric (Wollmer, Zurich, Mebak, Verzele, Ganzlin, or Resins (hard or soft))	\$60.00	\$87.00
H ₂ O	\$10.00	\$14.50
Total oil	\$25.00	\$36.00
Wort test, particle size	\$10.00	\$14.50

WAC 16-218-035 Fees for issuing export certification for hops and hop products:

Service	Current Fee	Proposed Fee (Approximately Forty-Five Percent Increase)
State phytosanitary certificates	\$25.00	\$36.00
Other certificates attesting to origin, compliance with standards of other states or nations or specifications of contracts, or conditions of production or processing	\$20.00	\$29.00

WAC 16-532-035 requires that all varieties of hops produced in the state be inspected and certified. Under the proposed amendments, the only required fee is under WAC 16-218-015 and is for official lot inspections and the certification of baled hops. This fee is currently \$1.25 per bale with a minimum charge of \$30 per lot and would increase to \$1.81 per bale with a minimum charge of \$44 per lot under the proposed changes. The average value for one bale of hops is estimated around \$1,000 or more. When comparing this amount to the fee, the cost is relatively minimal. For example, a sample submitted to the hop inspection program may cost the business \$217.50 for analysis, but the value of the lot submitted may be around \$200,000. In fact, in 2019 the USDA hop report stated that the total value of Washington hops was \$475 million. The fees collected that year by the hop inspection program were a total of \$630,000.

All fees listed under ASBC and moisture testing are optional fees for service.

Increased fees under the proposed amendment will not cause businesses to lose sales or decrease their revenue, however it will likely increase overall expenses for each business. Additionally, there will be no increased cost for businesses to comply with the proposed rule in terms of extra costs for equipment, supplies, labor, professional services, or administrative costs. In contrast, if the program was not able to continue providing the current level of service or had to shut down completely due to lack of funds, the businesses it serves would

likely lose sales due to the inability to have their crops tested and certified as required.

In 2019, an estimated thirty-six small businesses and nine large businesses paid fees for the certification of hops. Table 3.1 shows the total fees paid by each business, as well as the estimated cost under the proposed fee increase.

Table 3.1 - Estimated cost for each business that paid fees in 2019

Business	Business Size	NAICS Code	Total Cost 2019	Total Cost w/ Approximately Forty- Five Percent Increase	Cost Difference Between 2019 and Approximately Forty- Five Percent Increase
1	Small	111140	\$9,700.60	\$14,065.87	\$4,365.27
2	Small	111191	\$7,563.75	\$10,967.44	\$3,403.69
3	Large	111219	\$7,752.50	\$11,241.13	\$3,488.63
4	Small	111320	\$17,530.00	\$25,418.50	\$7,888.50
5	Small	111331	\$6,887.50	\$9,986.88	\$3,099.38
6	Small	111331	\$5,891.25	\$8,542.31	\$2,651.06
7	Small	111331	\$7,513.75	\$10,894.94	\$3,381.19
8	Small	111331	\$165.85	\$240.48	\$74.63
9	Small	111334	\$9,487.15	\$13,756.37	\$4,269.22
10	Large	111334	\$79,979.20	\$115,969.84	\$35,990.64
11	Small	111336	\$33,834.05	\$49,059.37	\$15,225.32
12	Small	111998	\$3,047.50	\$4,418.88	\$1,371.38
13	Small	111998	\$16,176.80	\$23,456.36	\$7,279.56
14	Small	111998	\$13,010.65	\$18,865.44	\$5,854.79
15	Small	111998	\$15,440.00	\$22,388.00	\$6,948.00
16	Small	111998	\$12,851.25	\$18,634.31	\$5,783.06
17	Small	111998	\$6,465.25	\$9,374.61	\$2,909.36
18	Small	111998	\$3,903.75	\$5,660.44	\$1,756.69
19	Small	111998	\$4,171.00	\$6,047.95	\$1,876.95
20	Small	111998	\$107.50	\$155.88	\$48.38
21	Small	111998	\$5,255.00	\$7,619.75	\$2,364.75
22	Small	111998	\$4,258.75	\$6,175.19	\$1,916.44
23	Small	111998	\$18,339.95	\$26,592.93	\$8,252.98
24	Small	111998	\$1,571.25	\$2,278.31	\$707.06
25	Large	111998	\$12,986.25	\$18,830.06	\$5,843.81
26	Large	111998	\$28,830.00	\$41,803.50	\$12,973.50
27	Small	111998	\$570.00	\$826.50	\$256.50
28	Small	111998*	\$243.75	\$353.44	\$109.69
29	Small	111998*	\$536.30	\$777.64	\$241.34
30	Small	111998*	\$580.00	\$841.00	\$261.00
31	Small	111998*	\$5,595.00	\$8,112.75	\$2,517.75
32	Small	111998*	\$175.00	\$253.75	\$78.75
33	Large	111998*	\$362.50	\$525.63	\$163.13
34	Small	111998*	\$13,043.75	\$18,913.44	\$5,869.69
35	Small	112111	\$4,075.00	\$5,908.75	\$1,833.75
36	Large	112111	\$8,953.75	\$12,982.94	\$4,029.19
37	Small	112990	\$9,629.60	\$13,962.92	\$4,333.32

Business	Business Size	NAICS Code	Total Cost 2019	Total Cost w/ Approximately Forty- Five Percent Increase	Cost Difference Between 2019 and Approximately Forty- Five Percent Increase
38	Small	112990	\$283.75	\$411.44	\$127.69
39	Large	311942	\$22,093.75	\$32,035.94	\$9,942.19
40	Small	424480	\$63,031.25	\$91,395.31	\$28,364.06
41	Small	424590	\$18,537.90	\$26,879.96	\$8,342.06
42	Small	424590	\$6,118.15	\$8,871.32	\$2,753.17
43	Small	424590	\$178.75	\$259.19	\$80.44
44	Large	493130	\$46,658.90	\$67,655.41	\$20,996.51
45	Large	541990	\$29,036.25	\$42,102.56	\$13,066.31

* No NAICS code found so assigned 111998 (the classification for hop farming).
Sources: Data from fees paid in 2019, Buzzfile.com, and Manta.com.

Costs will vary greatly between businesses, with one small business seeing an increase of \$48 and another seeing an increase of \$28,364. This is also the case when analyzing the cost difference for large businesses, with one seeing an increase of \$163 and another seeing an increase of \$35,990. These varying costs are a result of the number of samples taken and tests requested by each business. This is not necessarily related to the size of the business.

SECTION 4: Analyze whether the proposed rule may impose more than minor costs on businesses in the industry.

Total fees paid by each Washington business in 2019 were compared with estimated costs under the approximate forty-five percent increase. The resulting difference is shown in Table 4.1 and 4.2 under the "Estimated cost increase" column. Totals in this column were compared to the minor cost thresholds identified in Section 2. Under the proposed amendment, some businesses are expected to experience cost increases exceeding the minor cost threshold. This is shown in Table 4.1.

Table 4.1 - Businesses with estimated cost increases expected to exceed the minor cost threshold

Business	Business Size	NAICS Code	Estimated Cost Increase**	Minor Cost Threshold±
1	Small	111140	\$4,365.27	\$510.52
2	Small	111191	\$3,403.69	\$666.26
4	Small	111320	\$7,888.50	***\$894.97
10	Large	111334	\$35,990.64	\$8,107.59
11	Small	111336	\$15,225.32	\$5,069.29
26	Large	111998	\$12,973.50	\$9,118.76
34	Small	111998*	\$5,869.69	\$9,118.76
35	Small	112111	\$1,833.75	\$844.82
36	Large	112111	\$4,029.19	\$844.82
37	Small	112990	\$4,333.32	\$499.58
41	Small	424590	\$8,342.06	\$5,883.37
44	Large	493130	\$20,996.51	\$8,450.79
45	Large	541990	\$13,066.31	\$4,801.34

* No NAICS code found so assigned 111998 (the classification for hop farming).

** Calculated using fees paid by each business in 2019.

± Determined based on highest amount between one percent of average annual payroll and 0.3% of average annual revenue for each NAICS code. Data from ESD and DOR.

*** Data not available so minor cost threshold calculated using estimated annual revenue.

Table 4.1 indicates that of the forty-five businesses which paid fees in 2019, thirteen are expected to have costs exceeding the minor cost threshold. Eight of these businesses are considered to be small and five large.

However, not all businesses that paid fees in 2019 are expected to have costs exceeding the minor cost threshold. Table 4.2 shows that thirty-two businesses are expected to have cost increases less than the minor cost threshold. Twenty-eight of these businesses are considered small and four large.

Table 4.2 - Businesses with estimated cost increases expected to be less than the minor cost threshold

Business	Business Size	NAICS Code	Estimated Cost Increase**	Minor Cost Threshold***
3	Large	111219	\$3,488.63	\$7,061.89
5	Small	111331	\$3,099.38	\$8,511.33
6	Small	111331	\$2,651.06	\$8,511.33
7	Small	111331	\$3,381.19	\$8,511.33
8	Small	111331	\$74.63	\$8,511.33
9	Small	111334	\$4,269.22	\$8,107.59
12	Small	111998	\$1,371.38	\$9,118.76
13	Small	111998	\$7,279.56	\$9,118.76
14	Small	111998	\$5,854.79	\$9,118.76
15	Small	111998	\$6,948.00	\$9,118.76
16	Small	111998	\$5,783.06	\$9,118.76
17	Small	111998	\$2,909.36	\$9,118.76
18	Small	111998	\$1,756.69	\$9,118.76
19	Small	111998	\$1,876.95	\$9,118.76
20	Small	111998	\$48.38	\$9,118.76
21	Small	111998	\$2,364.75	\$9,118.76
22	Small	111998	\$1,916.44	\$9,118.76
23	Small	111998	\$8,252.98	\$9,118.76
24	Small	111998	\$707.06	\$9,118.76
25	Large	111998	\$5,843.81	\$9,118.76
27	Small	111998	\$256.50	\$9,118.76
28	Small	*111998	\$109.69	\$9,118.76
29	Small	*111998	\$241.34	\$9,118.76
30	Small	*111998	\$261.00	\$9,118.76
31	Small	*111998	\$2,517.75	\$9,118.76
32	Small	*111998	\$78.75	\$9,118.76
33	Large	*111998	\$163.13	\$9,118.76
38	Small	112990	\$127.69	\$499.58
39	Large	311942	\$9,942.19	\$13,488.59
40	Small	424480	\$28,364.06	\$39,111.14
42	Small	424590	\$2,753.17	\$5,883.37
43	Small	424590	\$80.44	\$5,883.37

* No NAICS code found so assigned 111998 (the classification for hop farming).

** Calculated using fees paid by each business in 2019.

*** Determined based on highest amount between 1% of average annual payroll and 0.3% of average annual revenue for each NAICS code. Data from ESD and DOR.

SECTION 5: Determine whether the proposed rule may have a disproportionate impact on small businesses as compared to the ten percent of businesses that are the largest businesses required to comply with the proposed rule.

RCW 19.85.040(1) requires the department compare the cost of compliance for small businesses with the cost of compliance for the largest ten percent of businesses required to comply with the proposed rule amendment. One or more of the following methods can be used as a basis for comparing costs: (a) Cost per employee; (b) cost per hour of labor; or (c) cost per one hundred dollars of sales.

Costs per employee were analyzed for the top ten percent of large businesses impacted by the proposed changes. This was compared with the cost per employee for all impacted small businesses. Table 5.1 shows the results of the analysis, which indicates that small businesses will be disproportionately impacted by the proposed rule amendments.

Table 5.1 - Comparison of estimated costs per employee for top ten percent of large businesses and all small businesses impacted by the proposed amendments

Business	Size	NAICS Code	Estimated Number of Employees	Estimated Cost Increase	Cost per Employee
10	Large	111334	1,000	\$35,990.64	\$35.99
33	Large	***111998	*350.5	\$163.13	\$0.47
45	Large	541990	*174.5	\$13,066.31	\$74.88
39	Large	311942	*125.5	\$9,942.19	\$79.22
44	Large	493130	100	\$20,996.51	\$209.97
3	Large	111219	*74.5	\$3,488.63	\$46.83
43	Small	424590	46	\$80.44	\$1.75
11	Small	111336	45	\$15,225.32	\$338.34
40	Small	424480	38	\$28,364.06	\$746.42
9	Small	111334	35	\$4,269.22	\$121.98
7	Small	111331	33	\$3,381.19	\$102.46
25	Small	111998	*30.5	\$707.06	\$23.18
15	Small	111998	30	\$6,948.00	\$231.60
4	Small	111320	25	\$7,888.50	\$315.54
6	Small	111331	25	\$2,651.06	\$106.04
14	Small	111998	25	\$5,854.79	\$234.19
5	Small	111331	20	\$3,099.38	\$154.97
23	Small	111998	20	\$1,916.44	\$95.82
34	Small	***111998	20	\$5,869.69	\$293.48
37	Small	112990	20	\$4,333.32	\$216.67
16	Small	111998	12	\$5,783.06	\$481.92
42	Small	424590	12	\$2,753.17	\$229.43
2	Small	111191	10	\$3,403.69	\$340.37
41	Small	424590	10	\$8,342.06	\$834.21
8	Small	111331	5	\$74.63	\$14.93
19	Small	111998	5	\$1,756.69	\$351.34
20	Small	111998	5	\$1,876.95	\$375.39
24	Small	111998	5	\$8,252.98	\$1,650.60
32	Small	***111998	5	\$78.75	\$15.75

Business	Size	NAICS Code	Estimated Number of Employees	Estimated Cost Increase	Cost per Employee
35	Small	112111	4	\$1,833.75	\$458.44
13	Small	111998	2	\$7,279.56	\$3,639.78
18	Small	111998	2	\$2,909.36	\$1,454.68
21	Small	111998	2	\$48.38	\$24.19
22	Small	111998	2	\$2,364.75	\$1,182.38
29	Small	***111998	2	\$241.34	\$120.67
30	Small	***111998	2	\$261.00	\$130.50
31	Small	***111998	2	\$2,517.75	\$1,258.88
1	Small	111140	1	\$4,365.27	\$4,365.27
12	Small	111998	1	\$1,371.38	\$1,371.38
38	Small	112990	1	\$127.69	\$127.69
28	Small	111998	Unknown	\$256.50	**\$256.50
17	Small	***111998	Unknown	\$109.69	**\$109.69

* Range given for number of employees, therefore median number used for calculation.
 ** Data on number of employees was unavailable, so calculated as one staff employed.
 *** No NAICS code found so assigned 111998 (the classification for hop farming).

The average cost per employee for the top ten percent of large businesses impacted by the proposed amendments is \$74.56. In comparison, the average cost per employee for all small businesses impacted by the proposed amendments is \$604.90. Despite costs per employee varying widely for both large and small businesses, it is evident that small businesses will be disproportionately impacted by the proposed amendment.

Table 5.2 shows a comparison by NAICS code of the average estimated cost per employee for all large and small businesses impacted by the proposed amendment. Under this table, cells with "None" listed indicate that no businesses of that size and NAICS code were found to be impacted. NAICS codes with only one size of business impacted by the proposed amendment are considered to be disproportionately impacted.

Table 5.2 - Comparison of average estimated costs per employee for all large and small businesses by NAICS code

NAICS Code	Average Estimated Cost Per Employee	
	Large Businesses	Small Businesses
111140 - Wheat Farming	None	\$4,365.27
111191 - Oilseed and Grain Combination Farming	None	\$340.37
112129 - Other Vegetable (except Potato) and Melon Farming	\$46.83	None
111320 - Citrus (except Orange) Groves	None	\$315.54
111331 - Apple Orchards	None	\$94.60
111334 - Berry (except Strawberry) Farming	\$35.99	\$121.98
111336 - Fruit and Tree Nut Combination Farming	None	\$338.34
*111998 - All Other Miscellaneous Crop Farming	\$90.28	\$694.33
112111 - Beef Cattle Ranching and Farming	\$67.15	\$458.44
112990 - All Other Animal Production	None	\$172.18
311942 - Spice and Extract Manufacturing	\$79.22	None
424480 - Fresh Fruit and Vegetable Merchant Wholesalers	None	\$746.42
424590 - Other Farm Product Raw Material Merchant Wholesalers	None	\$355.13
493130 - Farm Product Warehousing and Storage	\$209.97	None
541990 - All Other Professional; Scientific; and Technical Services	\$74.88	None

* Some businesses in this category had no NAICS code available so were assigned 111998.
 Bold indicates disproportionate impact.

It was found that small businesses in the following NAICS categories will be disproportionately impacted by the proposed amendments: 111140 - Wheat Farming, 111191 - Oilseed and Grain Combination Farming, 111320 - Citrus (except Orange) Groves, 111331 - Apple Orchards, 111334 - Berry (except Strawberry) Farming, 111336 - Fruit and Tree Nut Combination Farming, 111998 - All Other Miscellaneous Crop Farming, 112111 - Beef Cattle Ranching and Farming, 112990 - All Other Animal Production, 424480 - Fresh Fruit and Vegetable Merchant Wholesalers, and 424590 - Other Farm Product Raw Material Merchant Wholesalers.

SECTION 6: If the proposed rule has a disproportionate impact on small businesses, identify the steps taken to reduce the costs of the rule on small businesses. If the costs cannot be reduced provide a clear explanation of why.

RCW 19.85.030(2) requires consideration of the following methods of reducing the impact of the proposed amendment on small businesses:

(a) *Reducing, modifying, or eliminating substantive regulatory requirements:* RCW 22.09.790 requires the department maintain fees at a level necessary to cover the cost of providing service. Due to the mandated wage increase, the fees currently set in rule are no longer able to cover the costs of providing these services. The Washington hop commission requested the fee increase, including the recommended approximate forty-five percent increase amount. They determined the increase is necessary in order to maintain the current level of service provided by the program. Modifying the amount in which the fee is increased would lower the level of service the program is currently providing, potentially to a point that the program would not be operational at all and would be in conflict with the statutory mandate.

(b) *Simplifying, reducing, or eliminating recordkeeping and reporting requirements:* There are no recordkeeping or reporting requirements associated with the proposed rule amendment.

(c) *Reducing the frequency of inspections:* Inspections are a fundamental part of the hop inspection program and are required in order to complete the necessary services offered by the program. Therefore, any reduction in the number of inspections would have a negative impact on stakeholders and the industry as a whole.

(d) *Delaying compliance timetables:* Delaying compliance timetables is not a viable mitigation measure. The proposed rule amendment is necessary to maintain the financial health of the program and ensure its continued operation. Delaying compliance timetables could result in a financial deficit making the program unable to perform required duties. This could negatively impact businesses in the industry. However, the new fees would not go into effect until August 2021.

(e) *Reducing or modifying fine schedules for noncompliance:* There are no fines associated with this rule.

(f) *Any other mitigation techniques including those suggested by small businesses or small business advocates:* In the past, projects have been initiated to cut costs in an attempt to financially streamline the program. WSDA also proposed conducting private sampling and using unofficial certificates to save on costs. However, this was not widely utilized and it was determined that the industry preferred official services. It was eventually determined by the industry that a proposed fee increase was necessary to maintain the financial health of the program. The industry submitted a request to the department which outlined the increase amount for each fee. No other mitigation

techniques were suggested by small businesses or small business advocates.

SECTION 7: Describe how small businesses were involved in the development of the proposed rule.

Budgetary concerns related to the hop inspection program were discussed at meetings with the Washington hop commission. The commission is an organization consisting of representatives from both large and small businesses within the hop industry. Commission meetings are open to the public and well attended by stakeholders, including both dealers and growers. During one of these meetings, the board determined a fee increase was necessary to maintain the financial health of the hop inspection program and requested that the department move forward with the proposed rule amendment to increase fees related to the certification of hops. A committee was convened by the commission to discuss the details of the amendment and determine the amount the fees would be increased. The fee changes within the proposed amendment reflect the recommendations of the committee.

SECTION 8: Identify the estimated number of jobs that will be created or lost as the result of compliance with the proposed rule.

No jobs are expected to be created or lost as a result of compliance with the proposed rule amendment.

A copy of the statement may be obtained by contacting Gloriann Robinson, Agency Rules Coordinator, P.O. Box 42560, Olympia, WA 98504-2560, phone 360-902-1802, fax 360-902-2092, TTY 800-833-6388, email wsdarulescomments@agr.wa.gov.

December 23, 2020
 Brad White
 Assistant Director

OTS-2804.1

AMENDATORY SECTION (Amending WSR 05-07-150, filed 3/23/05, effective 4/23/05)

WAC 16-218-015 ((What fees does the department charge)) Fees for the certification of hops((?)). (1) Based upon standards established by the Federal Grain Inspection Service of the United States Department of Agriculture, the Washington state department of agriculture's (department) fees for the certification of hops are:

Type of Inspection and Other Service	Fee Charged for Inspection and Other Service
(a) Official lot inspections and certification for baled hops.	((One dollar and twenty-five cents)) <u>\$1.81</u> per bale with a minimum charge of ((thirty dollars)) <u>\$44.00</u> per lot for official inspection and grading with certification.

Type of Inspection and Other Service	Fee Charged for Inspection and Other Service
(b) Official lot inspection and/or certification for alternative methods of packaging hops, or other services for which no fee has been established.	A contract fee may be negotiated, based on the agency's costs to furnish the services.
(c) Submitted sample inspections and certification.	((One hundred fifty dollars)) \$217.50 for an unofficial sample submitted for grading with certification of a quantity not to exceed 100,000 lbs. of dried hops.
(d) Appeal inspections.	The Federal Grain Inspection Service in Portland, Oregon establishes the charges for appeal inspections, and payments for such inspections must be made to them. Department time for sampling, handling and administration regarding appeal inspections will be assessed at the sampler hourly rate.

(2) (a) Before official sampling of baled hops takes place, each and every bale in a lot of hops must be readily accessible so that:

(i) Each bale can be properly stenciled; and

(ii) Samples can be drawn from the bales selected by the inspector.

(b) Official samples drawn from baled hops must be brought back to the laboratory by the inspector for grading analysis.

(3) The department may perform official lot inspection and/or certification of hops packaged by alternative methods (e.g., hops not baled prior to processing) subject to conditions specified in a written agreement between the department and the person(s) requesting the service.

(4) (a) Submitted samples provided by a grower or dealer for grading analysis must be representative of the lot(s) and the hop material.

(b) Submitted samples ~~((are))~~ must be delivered to the laboratory.

[Statutory Authority: Chapters 22.09 and 34.05 RCW, 2003 1st sp.s. c 25 § 309(2). WSR 05-07-150, § 16-218-015, filed 3/23/05, effective 4/23/05.]

AMENDATORY SECTION (Amending WSR 08-17-024, filed 8/12/08, effective 9/12/08)

WAC 16-218-025 (~~What does the department charge~~) Fees for chemical analysis regarding brewing values and additional constituents in raw hops, hop extract, hop pellets and hop powder(?).

(1) Before official sampling of baled hops takes place, each and every bale in a lot of hops must be readily accessible so that:

(a) Each bale can be properly stenciled (not done for brewing value only sampling); and

(b) Samples can be drawn from the bales selected by the inspector.

(2) Official samples drawn from baled hops must be brought back to the laboratory by the inspector for chemical analysis, simultaneous with grading analysis.

(3) Brewing value samples are obtained from a representative composite of the official samples drawn for grade analysis.

(4) Brewing value samples not sampled simultaneously for grade analysis will be charged at the same fee per bale.

(5) When department personnel officially sample hops, a brewing value certificate will be issued when the chemical analysis is done.

(6) (a) Submitted brewing value samples provided by a grower or dealer for chemical analysis must be representative of the lot(s).

(b) Submitted samples (~~are~~) must be delivered to the laboratory.

(7) Submitted brewing value certificates will be issued for submitted samples when the chemical analysis is done.

(8) Department fees for the chemical analyses of officially sampled raw hops are:

Type of Analyses	Fee	Minimum Fee
(a) ASBC spectrophotometric with moisture	(\$0.35) <u>\$0.50</u> per bale	(\$30.00) <u>\$50.00</u> per sample
(b) ASBC spectrophotometric/ conductometric or EBC conductometric without moisture	(\$0.30) <u>\$0.44</u> per bale	(\$30.00) <u>\$44.00</u> per sample
(c) Mebak, Zurich, Verzele, Ganzlin, or conductometric	(\$0.60) <u>\$0.87</u> per bale	(\$60.00) <u>\$87.00</u> per sample

(9) Department fees for chemical analyses of submitted raw hops, hop extract, hop pellets or hop powders are:

Type of Analyses	Fee
(a) ASBC spectrophotometric	(\$30.00) <u>\$44.00</u>
(b) ASBC conductometric	(\$30.00) <u>\$44.00</u>
(c) EBC conductometric	(\$30.00) <u>\$44.00</u>
(d) EBC conductometric (Wollmer, Zurich, Mebak, Verzele, Ganzlin, or Resins (hard or soft))	(\$60.00) <u>\$87.00</u>

	Type of Analyses	Fee
(e)	H ₂ O	(\$10.00) \$14.50
(f)	Total oil	(\$25.00) \$36.00
(g)	Wort test, particle size	(\$10.00) \$14.50

(10) (a) The department will assess hourly charges for analytical chemistry work if no other fee has been established.

(b) Hourly charges are set by written agreement and shall be based on the costs incurred to conduct the analysis, such as:

- Labor
- Laboratory equipment
- Chemicals and materials
- Administration and overhead.

[Statutory Authority: Chapters 22.09 and 34.05 RCW. WSR 08-17-024, § 16-218-025, filed 8/12/08, effective 9/12/08. Statutory Authority: Chapters 22.09 and 34.05 RCW, 2003 1st sp.s. c 25 § 309(2). WSR 05-07-150, § 16-218-025, filed 3/23/05, effective 4/23/05.]

AMENDATORY SECTION (Amending WSR 05-07-150, filed 3/23/05, effective 4/23/05)

WAC 16-218-035 (~~What does the department charge~~) Fees for issuing export certificates for hops and hop products(?). The department charges the following fees for issuing certificates related to hops and hop products:

	Type of Certificate	Fee for Each Certificate
(1)	State phytosanitary certificates	(\$25.00) \$36.00
(2)	Other certificates attesting to origin, compliance with standards of other states or nations or specifications of contracts, or conditions of production or processing	(\$20.00) \$29.00

[Statutory Authority: Chapters 22.09 and 34.05 RCW, 2003 1st sp.s. c 25 § 309(2). WSR 05-07-150, § 16-218-035, filed 3/23/05, effective 4/23/05.]

AMENDATORY SECTION (Amending WSR 05-07-150, filed 3/23/05, effective 4/23/05)

WAC 16-218-040 (~~When are the~~) Payment of fees and charges (~~required by this chapter due to the department~~). (1) The department will bill (~~you~~) for (~~the~~) services (~~it renders~~) rendered. (2) The fees and charges billed (~~to you~~) are due to the department within thirty days of the statement date.

(3) If the department does not receive (~~your~~) payment within thirty days of the statement date, the department may:

(a) Withhold (~~its~~) services (~~from you~~) until (~~your~~) the delinquent account is paid; and

(b) Accept only cash payments (~~from you~~) for future services rendered.

(4) The department assesses a penalty of twelve percent per annum on all delinquent account balances.

[Statutory Authority: Chapters 22.09 and 34.05 RCW, 2003 1st sp.s. c 25 § 309(2). WSR 05-07-150, § 16-218-040, filed 3/23/05, effective 4/23/05.]

WSR 21-02-048

PROPOSED RULES

WASHINGTON STATE LOTTERY

[Filed December 31, 2020, 12:02 p.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 20-03-055.

Title of Rule and Other Identifying Information: Chapter 315-04 WAC, Licensing procedure, proposed amendments to this chapter will provide clarity for applicants and licensees, streamline processes, and align rule language with current practices.

Hearing Location(s): On February 18, 2021, at 8:30 a.m., virtual. In response to the COVID-19 public health emergency, the commission will not provide a physical location in order to promote social distancing. See walottery.com or call or email Kristi Weeks for details on how to participate virtually.

Date of Intended Adoption: February 18, 2021.

Submit Written Comments to: Kristi Weeks, P.O. Box 4300, Olympia, WA 98504-3000, email KWeeks@walottery.com, fax 360-515-0416, by February 17, 2021.

Assistance for Persons with Disabilities: Contact Debbie Robinson, phone 360-791-3045, fax 360-515-0416, TTY 360-586-0933, email DRobinson@walottery.com, by February 10, 2021.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The proposed amendments to chapter 315-04 WAC will provide clear and consistent direction for applicants, licensees, and staff. These revisions include eliminating language that is no longer applicable, aligning the rules with current practices, and clarifying wording that may be confusing to applicants, licensees, and the public.

Reasons Supporting Proposal: The current language in chapter 315-04 WAC contains some outdated practices and language that has not been updated in a number of years. The proposed changes will eliminate potential confusion among applicants, licensees and staff, as well as improve the licensing process.

Statutory Authority for Adoption: RCW 67.70.040 (1), (3).

Statute Being Implemented: RCW 67.70.040.

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

Name of Proponent: Washington's lottery, governmental.

Name of Agency Personnel Responsible for Drafting: Kristi Weeks, 814 4th Avenue East, Olympia, WA, 360-810-2881; Implementation and Enforcement: Dan Devoe, 814 4th Avenue East, Olympia, WA, 360-810-2874.

A school district fiscal impact statement is not required under RCW 28A.305.135.

A cost-benefit analysis is not required under RCW 34.05.328. The lottery is not an agency listed in RCW 34.05.328 (5)(a)(ii). Further, the lottery does not voluntarily make that section applicable to the adoption of this rule pursuant to the subsection (5)(a)(ii) and to date the joint administrative rules review committee has not made the section applicable to the adoption of this rule.

This rule proposal, or portions of the proposal, is exempt from requirements of the Regulatory Fairness Act because the proposal:

Is exempt under RCW 19.85.025(3) as the rules adopt, amend, or repeal a procedure, practice, or requirement relating to agency hearings; or a filing or related process requirement for applying to an agency for a license or permit.

December 31, 2020
 Kristi Weeks
 Director of Legal Services

OTS-2838.1

AMENDATORY SECTION (Amending WSR 07-11-154, filed 5/22/07, effective 6/22/07)

WAC 315-04-010 Lottery retailers. The director shall license as lottery retailers such persons who will best serve the public interest and convenience, promote the sale of tickets, and meet the eligibility criteria for application and licensure. "Lottery retailer," formerly known as "licensed agent," means a person licensed by the director and shall have the same meaning as licensed agent. Said lottery retailers shall be authorized to sell such tickets as in the director's opinion will promote the best interests of the commission and produce maximum revenue, but a lottery retailer need not be authorized to sell tickets for all games operated by the director. A lottery retailer or applicant may be required to post a surety bond, security deposit, or (~~cash in lieu of a bond~~) savings certificate in such terms and conditions as the director may require.

[Statutory Authority: RCW 67.70.040 (1), (3) and 67.70.040. WSR 07-11-154, § 315-04-010, filed 5/22/07, effective 6/22/07. Statutory Authority: RCW 67.70.040. WSR 86-01-060 (Order 83), § 315-04-010, filed 12/16/85; WSR 85-09-004 (Order 72), § 315-04-010, filed 4/5/85; WSR 84-01-002 (Order 41), § 315-04-010, filed 12/8/83. Statutory Authority: 1982 2nd ex.s. c 7. WSR 82-21-039 (Order 4), § 315-04-010, filed 10/15/82.]

AMENDATORY SECTION (Amending WSR 00-24-100, filed 12/6/00, effective 1/6/01)

WAC 315-04-020 License application eligibility. (~~(Any person may submit an application for licensure except:~~

- ~~(1) No person may submit an application for licensure who is under 18 years of age.~~
- ~~(2) No person may submit an application who will))~~ An applicant for a lottery retail license must:
 - (1) Be at least eighteen years of age.
 - (2) Not be engaged, or intend to be engaged, exclusively in the business of selling tickets.
 - (3) ((No person may submit an application for licensure who is)) Not be a member or employee of the commission or who is the spouse, child, brother, sister, or parent residing as a member of the same household in the principal place of abode of any member or employee of the commission.
 - (4) ((No person may submit an application who is)) Not be, or ((is)) not be owned or controlled by or affiliated with, a vendor or

contractor of the commission or director for the development, operation, management, security or any other aspect of a specific game.

(5) ~~((No person may submit an application who is not))~~ Be legally registered and licensed to conduct business in the state of Washington or ~~((who has not))~~ have submitted an application for a business license in the state of Washington.

~~((The submission of an application shall not entitle any person to receipt of a license to act as a lottery retailer. An application may be denied for any reason permitted by statute or these rules.))~~

[Statutory Authority: RCW 67.70.040. WSR 00-24-100, § 315-04-020, filed 12/6/00, effective 1/6/01; WSR 86-01-060 (Order 83), § 315-04-020, filed 12/16/85. Statutory Authority: 1982 2nd ex.s. c 7. WSR 82-21-039 (Order 4), § 315-04-020, filed 10/15/82.]

AMENDATORY SECTION (Amending WSR 86-01-060, filed 12/16/85)

WAC 315-04-030 License application. (1) Any eligible person may apply for a license to act as a lottery retailer by first filing with the director ~~((an))~~ a completed application on a form approved by the director, together with any supplement thereto, which shall include, but not be limited to, authorization to investigate criminal history, financial records and financial sources, said forms and supplements to be signed under oath.

(2) The submission of an application shall not entitle any person to receive a license to act as a lottery retailer. An application may be denied for any reason permitted by statute or these rules.

[Statutory Authority: RCW 67.70.040. WSR 86-01-060 (Order 83), § 315-04-030, filed 12/16/85. Statutory Authority: 1982 2nd ex.s. c 7. WSR 82-21-037 (Order 2), § 315-04-030, filed 10/15/82.]

AMENDATORY SECTION (Amending WSR 07-11-154, filed 5/22/07, effective 6/22/07)

WAC 315-04-060 Provisional license. A provisional license temporarily authorizes a lottery retailer to conduct the sale of tickets pending processing of the general license ~~((or application renewal))~~.

(1) The director may issue a provisional license to an applicant for a general license after receipt of a person's fully completed lottery retailer's application, the authorization of a complete personal background check, and completion of a preliminary background check. The provisional license shall expire at the time of issuance of the general license or ninety days from the date the provisional license is issued, whichever occurs first. The provisional license may be extended by the director for one additional ninety-day period of time.

(2) If the ownership of an existing lottery retailer location changes, the director may issue a provisional license to the new owner. The provisional license shall expire twenty ~~((working))~~ days from the date of issuance if the director has not received the new owner's fully completed lottery retailer's application and authorization of a complete personal background check. If the required materials have been timely received by the director and a preliminary background

check has been completed, the provisional license shall expire at the time of issuance of the general license or ninety days from the date the provisional license is issued, whichever occurs first.

[Statutory Authority: RCW 67.70.040 (1), (3) and 67.70.040. WSR 07-11-154, § 315-04-060, filed 5/22/07, effective 6/22/07. Statutory Authority: RCW 67.70.040. WSR 86-01-060 (Order 83), § 315-04-060, filed 12/16/85; WSR 85-09-004 (Order 72), § 315-04-060, filed 4/5/85; WSR 84-22-047 (Order 68), § 315-04-060, filed 11/7/84. Statutory Authority: 1982 2nd ex.s. c 7. WSR 82-21-039 (Order 4), § 315-04-060, filed 10/15/82.]

AMENDATORY SECTION (Amending WSR 03-11-054, filed 5/19/03, effective 6/19/03)

WAC 315-04-065 Promotional license. (1) The director may issue a promotional license for a marketing promotion for a period not exceeding one hundred eighty days for the sale of scratch and/or (~~en-~~line) draw game tickets.

(2) The director may establish financial and criminal history or other criteria for the issuance of a promotional license based on the duration of the promotion and the variety and quantity of tickets to be sold by the applicant.

(3) The director may waive any license fees or charges in issuing a promotional license and may establish procedures to streamline payments by promotional retailers to the lottery.

(4) Any retailer issued a promotional license must apply for and be issued a provisional/general license as set forth in this chapter 315-04 WAC and lottery policy in order to continue to sell lottery tickets after the expiration of (~~his/her~~) the promotional license.

[Statutory Authority: RCW 67.70.040(1). WSR 03-11-054, § 315-04-065, filed 5/19/03, effective 6/19/03.]

AMENDATORY SECTION (Amending WSR 87-10-043, filed 5/4/87)

WAC 315-04-070 License charges. (1) A charge of twenty-five dollars shall be assessed for each license application submitted to the lottery. This charge is to (~~reimburse~~) offset the lottery's (~~for~~) processing costs incident to licensure (~~and relicensure~~).

(2) All fees established in this section or other sections of this Title 315 WAC, are not refundable.

[Statutory Authority: RCW 67.70.040. WSR 87-10-043 (Order 101), § 315-04-070, filed 5/4/87; WSR 87-01-058 (Order 97), § 315-04-070, filed 12/16/86; WSR 85-09-004 (Order 72), § 315-04-070, filed 4/5/85; WSR 84-12-057 (Order 58), § 315-04-070, filed 6/4/84; WSR 84-01-002 (Order 41), § 315-04-070, filed 12/8/83; WSR 83-19-019 (Order 36), § 315-04-070, filed 9/12/83. Statutory Authority: 1982 2nd ex.s. c 7. WSR 82-21-039 (Order 4), § 315-04-070, filed 10/15/82.]

AMENDATORY SECTION (Amending WSR 01-12-039, filed 5/30/01, effective 6/30/01)

WAC 315-04-085 Accessibility for persons with disabilities.

Pursuant to lottery rules and policy, lottery retailers shall comply with state and federal laws prohibiting discrimination against and requiring accessibility for persons with disabilities ~~((r))~~ including, but not limited to, the Americans with Disabilities Act of 1990 and chapter 49.60 RCW. Prior to any sale of lottery tickets, new lottery retailers must certify that they comply with state and federal laws or must submit a plan that ensures that they will comply within a reasonable amount of time. ~~((Within time limits specified by the lottery, retailers who hold lottery licenses at the time this rule takes effect must certify that they comply with state and federal laws or must submit a plan that ensures that they will comply within a reasonable amount of time.))~~

[Statutory Authority: RCW 67.70.040. WSR 01-12-039, § 315-04-085, filed 5/30/01, effective 6/30/01.]

AMENDATORY SECTION (Amending WSR 07-11-154, filed 5/22/07, effective 6/22/07)

WAC 315-04-090 License issuance eligibility. (1) The director may issue a license to any person to act as a lottery retailer who meets the eligibility criteria established by chapter 67.70 RCW, and these rules.

(2) Before issuing a license, the director ~~((shall))~~ may consider:

(a) The financial responsibility and security of the person and its business or activity;

(b) The results of any background check;

(c) The ~~((background and))~~ reputation of the person in the community for honesty and integrity;

~~((e))~~ (d) The type of business owned or operated by the person to ensure consonance with the dignity of the state, the general welfare of the people, and the operation and integrity of the lottery;

~~((d))~~ (e) The conformance of businesses located in residential areas to local land use and zoning codes, regulations, and ordinances;

~~((e))~~ (f) The accessibility of the person's place of business or activity to the public;

~~((f))~~ (g) The sufficiency of existing licenses to serve the public convenience;

~~((g))~~ (h) The volume of expected sales;

~~((h))~~ (i) The veracity of the information supplied in the application for a lottery retailer license; and

~~((i))~~ (j) The person's indebtedness to the state of Washington, local subdivisions of the state, and/or the United States government.

(3) The director may condition the issuance of any license upon the posting of a bond, security deposit, or ~~((cash in lieu of a bond))~~ savings certificate in such terms and conditions as the director may require.

[Statutory Authority: RCW 67.70.040 (1), (3) and 67.70.040. WSR 07-11-154, § 315-04-090, filed 5/22/07, effective 6/22/07. Statutory

Authority: RCW 67.70.040. WSR 98-20-013, § 315-04-090, filed 9/25/98, effective 10/26/98; WSR 87-10-043 (Order 101), § 315-04-090, filed 5/4/87; WSR 86-01-060 (Order 83), § 315-04-090, filed 12/16/85. Statutory Authority: RCW 67.70.040 and 67.70.050. WSR 83-05-029 (Order 14), § 315-04-090, filed 2/10/83. Statutory Authority: 1982 2nd ex.s. c 7. WSR 82-21-037 (Order 2), § 315-04-090, filed 10/15/82.]

AMENDATORY SECTION (Amending WSR 10-14-010, filed 6/24/10, effective 7/25/10)

WAC 315-04-095 Retailer credit criteria. (1) The director shall deny a lottery retailer license to any applicant whose credit is found to be poor as defined in this section.

(2) The director may grant a lottery retailer license to an applicant whose credit is rated as marginal or minimum as defined in this section. Provided, the director shall require:

(a) Applicants whose credit is rated as marginal as defined in this section to obtain a surety bond, security deposit, or savings certificate under terms and conditions established by the director prior to issuance of the license. Such surety bond must be secured from a company licensed to do business in the state of Washington. The bond, security deposit, or certificate shall be in the amount of three thousand five hundred dollars unless the director determines a higher amount is required.

(b) Applicants whose credit is rated as minimum as defined in this section may be required to obtain a surety bond or (~~post cash in lieu of a bond~~) security deposit under terms and conditions established by the director (~~or submit three letters of credit to the lottery~~) prior to issuance of a lottery retailer license. Such surety bond must be secured from a company licensed to do business in the state of Washington. The bond or cash shall be in the amount of three thousand five hundred dollars unless the director determines a higher amount is required, based on (~~sales volume and~~) financial solvency of the retailer.

(3) In the event the retailer's credit is rated as poor or marginal as defined in this section subsequent to the issuance of the license the director may:

(a) Revoke or suspend a retailer's license; and/or

(b) Require such a retailer to secure a surety bond from a company licensed to do business in the state of Washington, submit a security deposit, or post a savings certificate under terms and conditions established by the director. The surety bond, security deposit, or savings certificate shall be in the amount of three thousand five hundred dollars unless the director determines, based on sales volume and financial solvency of the retailer, a higher amount is required.

(4) Credit rating is defined as the ability to meet financial obligations when they become due. It includes current reporting accounts payable and public financial record information including, but not limited to, court records(~~(r)~~) and other public records up to three years prior to the lottery's credit check request, and reports from credit bureaus or other credit reporting agencies up to (~~three~~) two years prior to the lottery's credit check request. A significant incident may include a lien, judgment, bankruptcy, involuntary collection action, or any similar incident (~~which~~) that reflects on the individual's willingness and ability to pay creditors. A numerical rating

of "one" represents excellent credit. A numerical rating of "nine" represents involuntary collection.

(a) A "poor" credit rating indicates public record showing three or more significant incidents within the past three years.

(b) A "marginal" credit rating indicates public record information showing one or more significant incidents within the past three years.

(c) A "minimum" credit rating indicates the information is insufficient for evaluation.

(d) An "acceptable" credit rating indicates that there have been no significant incidents in the public record within the past three years. Provided, at least three accounts must be evaluated in order to receive an "acceptable" rating.

(5) Credit rating checks shall be conducted as follows:

(a) Corporation business credit ratings shall be checked. Personal credit ratings of the corporate officers and owners of ten percent or more equity in the corporation may also be checked.

(b) Sole proprietors and partnership business credit ratings shall be checked. Personal credit ratings of:

(i) The sole proprietor and his or her spouse; or

(ii) All partners and their spouses shall also be checked.

(c) Findings shall be applied in accordance with subsections (1), (2), and (3) of this section.

(d) Financial solvency status for licensees previously required to post a surety bond, security deposit, or savings certificate under this section shall be reviewed annually by the lottery for status improvement and possible reduction or release of the requirement.

[Statutory Authority: RCW 67.70.040 (1), (3). WSR 10-14-010, § 315-04-095, filed 6/24/10, effective 7/25/10. Statutory Authority: RCW 67.70.040 (1), (3) and 67.70.040. WSR 07-11-154, § 315-04-095, filed 5/22/07, effective 6/22/07. Statutory Authority: RCW 67.70.040. WSR 98-20-013, § 315-04-095, filed 9/25/98, effective 10/26/98.]

AMENDATORY SECTION (Amending WSR 07-11-154, filed 5/22/07, effective 6/22/07)

WAC 315-04-130 Death or incapacity of licensee. (1) In the event of the proven incapacity, death, receivership, bankruptcy, or assignment for benefit of creditors of any lottery retailer, upon approval of the director, the license may be transferred to a court appointed or court confirmed guardian, executor or administrator, receiver, trustee, or assignee for the benefit of creditors, who may continue to operate the activity under the license, subject to the provisions of chapter 67.70 RCW and these rules.

(2) The person to whom a license is transferred hereunder must be otherwise qualified to hold a license.

(3) The license following transfer shall be void upon that person ceasing to hold such a court appointed or court confirmed position.

(4) The director may condition the transfer of any license under this section upon the posting of a bond (~~or cash in lieu of a bond~~), security deposit, or savings certificate in such terms and conditions as the director may require.

[Statutory Authority: RCW 67.70.040 (1), (3) and 67.70.040. WSR 07-11-154, § 315-04-130, filed 5/22/07, effective 6/22/07. Statutory Authority: RCW 67.70.040. WSR 98-20-013, § 315-04-130, filed 9/25/98, effective 10/26/98; WSR 86-01-060 (Order 83), § 315-04-130, filed 12/16/85; WSR 85-09-004 (Order 72), § 315-04-130, filed 4/5/85. Statutory Authority: 1982 2nd ex.s. c 7. WSR 82-21-039 (Order 4), § 315-04-130, filed 10/15/82.]

AMENDATORY SECTION (Amending WSR 07-11-154, filed 5/22/07, effective 6/22/07)

WAC 315-04-132 Change of business structure, ownership, or officers. (1) Every change of business structure of a person to whom a license has been issued must be reported to the lottery prior to the change. A change of business structure shall mean the change from one form of business organization to another, such as from sole proprietorship to partnership or corporation.

(2) Every substantial change of ownership of a person to whom a license has been issued must be reported to the lottery prior to the change. A substantial change of ownership shall mean the transfer of ten percent or more equity, or the addition or deletion of an owner of ten percent or more of the person.

(3) Every change of officers of a person to whom a license has been issued must be reported to the lottery not later than ten days following the effective day of the change.

(4) If the substantial change of ownership involves the addition or deletion of one or more owners or officers, the lottery retailer shall submit a license application reflecting the change(s) and any other documentation the director may require.

(5) If the substantial change of ownership involves the addition of one or more owners or officers who does not have on file with the lottery current "personal history information" and "criminal history information" forms, the director may require each such owner or officer to submit the required forms.

(6) Failure to comply with these requirements may result in suspension or revocation of the license.

[Statutory Authority: RCW 67.70.040 (1), (3) and 67.70.040. WSR 07-11-154, § 315-04-132, filed 5/22/07, effective 6/22/07. Statutory Authority: RCW 67.70.040. WSR 90-11-040, § 315-04-132, filed 5/10/90, effective 6/10/90; WSR 87-01-058 (Order 97), § 315-04-132, filed 12/16/86; WSR 86-01-060 (Order 83), § 315-04-132, filed 12/16/85; WSR 85-09-004 (Order 72), § 315-04-132, filed 4/5/85; WSR 84-12-057 (Order 58), § 315-04-132, filed 6/4/84.]

AMENDATORY SECTION (Amending WSR 86-01-060, filed 12/16/85)

WAC 315-04-160 Display of material. Lottery retailers shall display lottery point-of-sale material approved by the director in a manner which is readily seen by and available to the public. Upon request, the director may make additional point-of-sale materials available to lottery retailers at no cost or at such costs as determined by

the director. Lottery retailers are responsible for the maintenance and security of point-of-sale and other materials or signage provided by the lottery and accepted by the retailer. Lottery retailers may use and/or display other promotional and point-of-sale material, provided, it is in accord with the image and/or theme established by the lottery((r)) including, but not limited to, design, script style, color scheme, and logo; and it is consonant with the dignity of the state. The director may require removal of objectionable material and/or its use be discontinued.

[Statutory Authority: RCW 67.70.040. WSR 86-01-060 (Order 83), § 315-04-160, filed 12/16/85; WSR 84-22-047 (Order 68), § 315-04-160, filed 11/7/84. Statutory Authority: 1982 2nd ex.s. c 7. WSR 82-21-039 (Order 4), § 315-04-160, filed 10/15/82.]

AMENDATORY SECTION (Amending WSR 07-11-154, filed 5/22/07, effective 6/22/07)

WAC 315-04-170 Tickets convenient to public. (1) Every lottery retailer shall make the purchase of tickets convenient and readily accessible to the public.

(2) Unless otherwise agreed by the director in writing, each lottery retailer shall make tickets available for sale during its normal business hours at the location designated on its lottery retailer license, master business license, and lottery retailer contract.

[Statutory Authority: RCW 67.70.040 (1), (3) and 67.70.040. WSR 07-11-154, § 315-04-170, filed 5/22/07, effective 6/22/07. Statutory Authority: RCW 67.70.040. WSR 86-01-060 (Order 83), § 315-04-170, filed 12/16/85. Statutory Authority: 1982 2nd ex.s. c 7. WSR 82-21-039 (Order 4), § 315-04-170, filed 10/15/82.]

AMENDATORY SECTION (Amending WSR 16-13-090, filed 6/15/16, effective 7/16/16)

WAC 315-04-180 Obligations of lottery retailers. (1)(a) Upon acceptance of a pack of instant tickets from the director, the retailer shall be responsible for the condition and security of the pack. The retailer shall hold the pack in its own safekeeping until it is ready to begin sale of the pack. Immediately prior to beginning sale, the retailer shall place the pack in "activated" status (~~in the lottery's instant ticket accounting system (ITAS))~~ on the lottery-issued terminal. Placement in activated status designates that the tickets in the pack may be sold, and prizes in the pack may be paid. Tickets must not be sold before being placed in active status.

(b) In the event that instant tickets accepted by the retailer are lost, stolen, or in any way unaccounted for prior to their being placed in activated status (~~on ITAS~~), the retailer shall, upon discovery of their disappearance, immediately notify the director of each pack or portion of a pack so unaccounted for, lost, or stolen. The retailer may be required to provide the director a police report or other evidence of the pack's disappearance. The retailer may be charged

twenty-five dollars for each pack or portion of a pack unaccounted for, lost, or stolen.

(c) A retailer may return an unopened pack, at no charge, to the director at any time prior to the pack having been placed in activated status. Within thirty days of the official end of an instant game, a retailer shall return to the director all packs never activated in that game.

(d) Upon placement of a pack in activated status, the retailer shall be liable to the director for payment for the pack, in the amount calculated under WAC 315-06-035. Payment for a pack shall be due to the director (1) no later than fifty calendar days after the pack has been placed in activated status or when eighty percent of the low tiered prizes have been validated, thereby validating the pack; or (2) payment for a pack shall be due to the director no later than twenty-one days after activation. The director shall not reimburse the retailer for any ticket losses which occur after activation of the pack from which the tickets came, except as allowed by WAC 315-04-210(2) or 315-06-190.

(e) Each lottery retailer and lottery license applicant shall sign and comply with a lottery (~~instant~~) retailer (~~agreement~~) contract. Failure to sign or to comply shall result in revocation or denial of a retailer's lottery license.

(2) Each lottery retailer shall abide by the law, these rules, and all other directives or instructions issued by the director.

(3) Each lottery retailer grants to the director an irrevocable license to enter upon the premises of the lottery retailer in which tickets may be sold or any other location under the control of the lottery retailer where the director may have good cause to believe lottery materials and/or tickets are stored or kept in order to inspect said lottery materials and/or tickets and the licensed premises.

(4) All property given, except tickets, to a lottery retailer remains the property of the director, and, upon demand, the lottery retailer agrees to deliver forthwith the same to the director. The lottery retailer also agrees to be responsible for the maintenance and security of such property.

(5) All books and records pertaining to the lottery retailer's lottery activities shall be made available for inspection and copying, during the normal business hours of the lottery retailer and between 8:00 a.m. and 5:00 p.m., Monday through Friday, upon demand by the director.

(6) All books and records pertaining to the lottery retailer's lottery activities shall be subject to seizure by the director without prior notice.

(7) No lottery retailer shall advertise or otherwise display advertising in any part of the lottery retailer's premises as a licensed location which may be considered derogatory or adverse to the operations or dignity of the lottery.

[Statutory Authority: RCW 67.70.040 (1) and (3). WSR 16-13-090, § 315-04-180, filed 6/15/16, effective 7/16/16. Statutory Authority: RCW 67.70.040 (1), (3) and 67.70.040. WSR 07-11-154, § 315-04-180, filed 5/22/07, effective 6/22/07. Statutory Authority: RCW 67.70.040. WSR 98-11-091, § 315-04-180, filed 5/20/98, effective 6/20/98; WSR 94-11-027, § 315-04-180, filed 5/6/94, effective 6/6/94; WSR 94-03-020, § 315-04-180, filed 1/7/94, effective 2/9/94; WSR 86-01-060 (Order 83), § 315-04-180, filed 12/16/85; WSR 84-05-008 (Order 51), § 315-04-180, filed 2/7/84; WSR 83-19-019 (Order 36), § 315-04-180,

filed 9/12/83. Statutory Authority: 1982 2nd ex.s. c 7. WSR 82-21-037 (Order 2), § 315-04-180, filed 10/15/82.]

AMENDATORY SECTION (Amending WSR 07-11-154, filed 5/22/07, effective 6/22/07)

WAC 315-04-200 Denial, suspension or revocation of a license.

The director may deny an application for or suspend or revoke any license issued pursuant to these rules (~~for one or more of the following reasons~~) if:

(1) ~~((Failure))~~ The applicant, lottery retailer, or any employee or representative of the lottery retailer:

~~((a) Failure))~~ (a) Fails to meet or maintain the eligibility criteria for license application and issuance established by chapter 67.70 RCW, or these rules;

~~((b) Failure))~~ (b) Fails to account for lottery tickets received or the proceeds of the sale of tickets or to post a bond if required by the director or to comply with the instructions of the director concerning the licensed activity;

~~((c) Failure))~~ (c) Fails to pay to the lottery any obligation when due;

~~((d) Violating))~~ (d) Violates any of the provisions of chapter 67.70 RCW, or these rules;

~~((e) Failure))~~ (e) Fails to file any return or report or to keep records required by the director or by these rules;

~~((f) Failure))~~ (f) Fails to pay any federal, state, or local tax or indebtedness;

~~((g))~~ (g) Commits any fraud, deceit, misrepresentation, or conduct prejudicial to public confidence in the lottery;

~~((8) If public convenience is adequately served by other licensees;~~

~~((9) Failure))~~ (h) Fails to sell a sufficient number of tickets to meet administrative costs;

~~((10) If there is a history of thefts or other forms of losses of tickets or revenue there from;~~

~~((11) Failure))~~ (i) Fails to follow the instructions of the director for the conduct of any particular game or special event;

~~((12) Failure))~~ (j) Fails to follow security procedures of the director for the handling of tickets or for the conduct of any particular game or special event;

~~((13))~~ (k) Makes a misrepresentation of fact to the purchaser, or prospective purchaser, of a ticket, or to the general public with respect to the conduct of a particular game or special event or the status of a ticket;

~~((14) Failure))~~ (l) Fails to comply with lottery point-of-sale requirements which have been published and disseminated to lottery retailers;

~~((15) Failure or inability))~~ (m) Fails or is unable to meet financial obligations as they fall due in the normal course of business;

~~((16) If there is a)~~ (n) Delays in accounting or depositing in the designated depository the revenues from the ticket sales;

~~((17))~~ (o) Has violated, or failed or refused to comply with any of the provisions, requirements, conditions, limitations, or duties imposed by chapter 9.46 RCW (Gambling Act), or chapter 7, Laws of 1982 2nd ex. sess., or when a violation of any provisions of chapter

7, Laws of 1982 2nd ex. sess., has occurred upon any premises occupied or operated by any such person or over which he or she has substantial control;

~~((18))~~ (p) Knowingly causes, aids, abets, or conspires with another to cause any person to violate any of the laws of this state;

~~((19))~~ (q) Has obtained a license by fraud, misrepresentation, concealment, or through inadvertence or mistake;

~~((20))~~ (r) Has been convicted of, or forfeited bond upon a charge of, or pleaded guilty to, forgery, larceny, extortion, conspiracy to defraud, ~~((willful))~~ willful failure to make required payments or reports to a governmental agency at any level, or filing false reports, or of any similar offense or offenses, or of bribing or otherwise unlawfully influencing a public official or employee of any state or the United States, or of any misdemeanor, involving any gambling activity or physical harm to individuals or involving moral turpitude, or of any misdemeanor within the past six months of the license application date, or of any felony within ten years of the license application date; except as specifically provided by law, the provisions of chapter 9.96A RCW apply. However, RCW 9.96A.020 does not apply to a person who is required to register as a sex offender under RCW 9A.44.130;

~~((21))~~ (s) Makes a misrepresentation of, or fails to disclose, a material fact to the commission or director on any report, record, application form, or questionnaire required to be submitted to the commission or director. Misrepresentation of, or failure to disclose, criminal history shall be considered a material fact for purposes of this section;

~~((22))~~ (t) Denies the commission or director or their authorized representatives, including authorized local law enforcement agencies, access to any place where a licensed activity is conducted, or fails to promptly produce for inspection or audit any book, record, document, or item required by law or these rules;

~~((23))~~ (u) Is subject to current prosecution or pending charges, or a conviction which is under appeal, for any of the offenses indicated under subsection ~~((20))~~ (1)(r) of this section: Provided, That at the request of an applicant for an original license, the director may defer decision upon the application during the pendency of such prosecution or appeal;

~~((24))~~ (v) Has pursued or is pursuing economic gain in an occupational manner or context which is in violation of the criminal or civil public policy of this state if such pursuit creates probable cause to believe that the participation of such person in lottery or gambling or related activities would be inimical to the proper operation of an authorized lottery or gambling or related activity in this state. For the purposes of this section, occupational manner or context shall be defined as the systematic planning, administration, management, or execution of an activity for financial gain;

~~((25))~~ (w) Is a career offender or a member of a career offender cartel or an associate of a career offender or career offender cartel in such a manner which creates probable cause to believe that the association is of such a nature as to be inimical to the policy of this state or to the proper operation of the authorized lottery or gambling or related activities in this state. For the purposes of this section, career offender shall be defined as any person whose behavior is pursued in an occupational manner or context for the purpose of economic gain utilizing such methods as are deemed criminal violations of the public policy of this state. A career offender cartel shall be

defined as any group of persons who operate together as career offenders.

(2) Public convenience is adequately served by other licensees.

(3) There is a history of theft or other form of loss of tickets or revenue from the locations specified on the license or another licensed location owned or operated, in part or total, by the same licensed retailer or applicant.

[Statutory Authority: RCW 67.70.040 (1), (3) and 67.70.040. WSR 07-11-154, § 315-04-200, filed 5/22/07, effective 6/22/07. Statutory Authority: RCW 67.70.040. WSR 99-01-038, § 315-04-200, filed 12/9/98, effective 1/9/99; WSR 94-23-047, § 315-04-200, filed 11/10/94, effective 12/11/94; WSR 87-01-058 (Order 97), § 315-04-200, filed 12/16/86; WSR 85-16-031 (Order 77), § 315-04-200, filed 7/30/85; WSR 85-09-004 (Order 72), § 315-04-200, filed 4/5/85. Statutory Authority: RCW 67.70.040 and 67.70.050. WSR 83-07-022 (Order 17), § 315-04-200, filed 3/11/83. Statutory Authority: 1982 2nd ex.s. c 7. WSR 82-21-037 and 82-21-068 (Orders 2 and 2A), § 315-04-200, filed 10/15/82 and 10/20/82.]

AMENDATORY SECTION (Amending WSR 91-11-033, filed 5/9/91, effective 6/9/91)

WAC 315-04-205 Reapplication following license denial or revocation. Unless otherwise specified in the final decision or order, the director shall not grant a license based on reapplication less than ninety days following the agency's final decision or order of denial or revocation under WAC 315-04-200.

[Statutory Authority: RCW 67.70.040. WSR 91-11-033, § 315-04-205, filed 5/9/91, effective 6/9/91.]

AMENDATORY SECTION (Amending WSR 94-11-027, filed 5/6/94, effective 6/6/94)

WAC 315-04-210 Procedure if license is terminated, suspended or revoked. (1) Upon termination, revocation, or suspension of a lottery retailer's license for any reasons whatsoever, the lottery retailer must, by a date designated by the director, render a final lottery accounting and surrender all lottery property, as well as unsold lottery tickets which have been placed in activated status, to the director.

(2) The director shall reimburse each retailer whose license is terminated, suspended, or revoked for payments made for unsold tickets which had been placed in activated status prior to termination, suspension, or revocation which the retailer returns to the director.

[Statutory Authority: RCW 67.70.040. WSR 94-11-027, § 315-04-210, filed 5/6/94, effective 6/6/94; WSR 94-03-020, § 315-04-210, filed 1/7/94, effective 2/9/94; WSR 86-01-060 (Order 83), § 315-04-210, filed 12/16/85. Statutory Authority: 1982 2nd ex.s. c 7. WSR 82-21-039 (Order 4), § 315-04-210, filed 10/15/82.]

AMENDATORY SECTION (Amending WSR 87-01-057, filed 12/16/86)

WAC 315-04-230 Licensing of enterprises operated by or subject to jurisdiction of Indian tribes. (1) The director is authorized to license as lottery retailers businesses which are operated by federally recognized Indian tribes, or operated upon lands subject to the jurisdiction of such Indian tribes, if the tribal council of the tribe having jurisdiction has passed an ordinance or resolution agreeing to the following provisions:

(a) All matters relating to the issuance, suspension, and revocation of such license, as well as the manner in which the sale of lottery tickets is conducted by the licensee, shall be governed exclusively by the laws of the state of Washington, and no inconsistent tribal laws, ordinances, resolutions, or rules exist or will be enacted.

(b) In the event of litigation involving the issuance, suspension, or revocation of any such license, the conduct of the business as a lottery retailer, the financial relationship between any licensee and the lottery or any other matter connected with the lottery or its operation, the courts of the state of Washington shall have jurisdiction, and venue shall be proper only in Thurston County.

(c) Administrative disputes shall be submitted to the jurisdiction of the director, Washington state lottery, or any lawfully appointed designee thereof, and shall be conducted in accordance with Washington state law.

(d) Lottery employees and vendors, including investigators and enforcement officers, may enter upon trust lands and property including lands owned by the tribe or its members, solely for the purposes of conducting investigations and enforcing the provisions of chapter 67.70 RCW.

(2) A certified copy of such ordinance or resolution shall be filed along with the application for licensure of any business located on Indian lands, or operated by an Indian tribe.

(3) In the event any law of the state of Washington relating to matters contained in subsection (1) of this section is enacted, modified, or repealed, tribal laws, ordinances, resolutions, or rules must be changed to be consistent with the revised laws of the state of Washington. The director may (a) suspend licenses issued pursuant to this section pending tribal council action to make such changes, and/or (b) revoke such licenses if the required changes are not made within ninety days.

[Statutory Authority: RCW 67.70.040. WSR 87-01-057 (Order 96), § 315-04-230, filed 12/16/86.]

WSR 21-02-067

PROPOSED RULES

DEPARTMENT OF LICENSING

[Filed January 5, 2021, 7:56 a.m.]

Continuance of WSR 20-19-131.

Preproposal statement of inquiry was filed as WSR 20-06-073.

Title of Rule and Other Identifying Information: Amending WAC 308-30-020 Definitions, 308-30-030 Application process for notary public commission, 308-30-040 Approval or denial of application, 308-30-050 Term of commission, 308-30-150 Completion of electronic notarial certificate, 308-30-200 Format of journals of notarial acts, 308-30-220 Fees for notarial acts, 308-30-270 Termination or suspension of commission or endorsement; and adding new WAC 308-30-290 Authorized remote notarial acts, 308-30-300 Standards for technology identity proofing, 308-30-310 Standards for communication technology, 308-30-320 Certificate of notarial act for remote notarial acts, and 308-30-330 Retention of audio-visual recordings and repositories.

Hearing Location(s): On February 9, 2021, at 1:30 p.m., virtual public hearing. Join virtually via Zoom at Meeting [<https://dol-wa.zoom.us/j/94268156669?pwd=SnV2TWJWJWMXZGVm9wRHpvblhsMFdHdz09>, Passcode: 910920, or iPhone one-tap: US: +12532158782,,94268156669#,,,,*910920# or +14086380968,,94268156669#,,,,*910920#], or telephone: US: +1 253 215 8782 or +1 408 638 0968 or +1 669 900 6833 or +1 346 248 7799 or +1 312 626 6799 or +1 646 876 9923 or +1 301 715 8592. Webinar ID: 942 6815 6669, Passcode: 910920. In response to the coronavirus disease 2019 (COVID-19) public health emergency, the department of licensing (DOL) will not provide a physical location for this hearing to promote social distancing and the safety of the citizens of Washington state. A virtual public hearing, without a physical space, will be held instead. Presenters and staff will participate remotely. The public may call-in or join the meeting using the Webinar ID and Passcode or the information provided for the telephonic conference.

Date of Intended Adoption: February 10, 2021.

Submit Written Comments to: Dee Sharp, DOL, Business and Professions Division, Notary Program, P.O. Box 3917, Seattle, WA 98124-3917, email notaries@dol.wa.gov, by February 8, 2021.

Assistance for Persons with Disabilities: Contact Dee Sharp, phone 360-664-1550, TTY 771 [711], email notaries@dol.wa.gov, by February 8, 2021.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: Rule changes are necessary to update the WAC to incorporate changes required by SB 5641 to establish rules for remote notarization being performed by licensed Washington notaries. SB 5641 is effective October 1, 2020, as passed by the 2019 Washington legislature to allow licensed Washington notaries to perform remote notarizations.

Reasons Supporting Proposal: Rule modifications and adoptions are proposed to comply with the state legislature's intent to allow licensed Washington notaries to perform remote notarizations.

Statutory Authority for Adoption: RCW 42.45.250.

Statute Being Implemented: None.

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

Name of Proponent: DOL, governmental.

Name of Agency Personnel Responsible for Drafting, Implementation, and Enforcement: Dee Sharp, 2000 4th Avenue West, Olympia, WA 98507, 360-664-1550.

A school district fiscal impact statement is not required under RCW 28A.305.135.

A cost-benefit analysis is not required under RCW 34.05.328. A cost-benefit analysis is not required under subsections (5)(b)(ii) and (v) of RCW 34.05.328 as these rules relate to business and professional licensing application processes and are dictated by statute.

This rule proposal, or portions of the proposal, is exempt from requirements of the Regulatory Fairness Act because the proposal:

Is exempt under RCW 19.85.025(3) as the rule content is explicitly and specifically dictated by statute; and rules set or adjust fees under the authority of RCW 19.02.075 or that set or adjust fees or rates pursuant to legislative standards, including fees set or adjusted under the authority of RCW 19.80.045.

January 5, 2021
Damon Monroe
Rules Coordinator

OTS-2172.2

AMENDATORY SECTION (Amending WSR 18-12-028, filed 5/29/18, effective 7/1/18)

WAC 308-30-020 Definitions. Words and terms used in these rules have the same meaning as in the Revised Uniform Law on Notarial Acts, RCW 42.45.010.

"Appear personally" means:

(a) Being in the same physical location as another individual and close enough to see, hear, communicate with, and exchange tangible identification credentials with that individual; or

(b) For remote notarial acts, being in a different physical location from another individual but able to see, hear, and communicate with that individual by means of communication technology.

"Commission" is equivalent to the term "license" as defined in RCW 18.235.010(6).

"Department" means the Washington state department of licensing.

"Director" means the director of the department of licensing or the director's designee.

"Electronic journal" means a chronological record of notarizations maintained by a notary public in an electronic format in compliance with these rules.

"Electronic notarial acts" means notarizations or notarial acts with respect to electronic records.

"Electronic notarial certificate" means the part of, or attachment to, an electronic record that is completed by the notary public, contains the information required under RCW 42.45.130 and the notary's official stamp, bears that notary's electronic signature, and states the facts attested to by the notary in a notarization performed on an electronic record.

"Enroll" and "enrollment" mean a process for registering a notary public with a technology provider to access and use a tamper-evident technology in order to perform electronic notarial acts.

"Principal" means:

- (a) An individual whose electronic signature is notarized; or
- (b) An individual, other than a witness required for an electronic notarial act, taking an oath or affirmation from the notary public.

"Remote notarial act" means a notarization that is performed using audio-video technology that meets the requirements in WAC 308-30-310 that allows for direct interaction between the notary and the individuals that are remotely located.

"Sole control" means at all times being in the direct physical custody of the notary public or safeguarded by the notary with a password or other secure means of authentication.

"Tamper-evident technology" means a set of applications, programs, hardware, software, or other technologies designed to enable a notary public to perform electronic notarial acts and to display evidence of any changes made to an electronic record.

"Technology provider" means an individual or entity that offers the services of a tamper-evident technology for electronic notarial acts.

"Venue" means the state and county where the notary public is physically located while performing a notarial act.

[Statutory Authority: RCW 42.45.250. WSR 18-12-028, § 308-30-020, filed 5/29/18, effective 7/1/18. Statutory Authority: RCW 42.44.190. WSR 06-20-061, § 308-30-020, filed 9/29/06, effective 11/1/06; WSR 93-05-009, § 308-30-020, filed 2/5/93, effective 3/8/93. Statutory Authority: 1985 c 156 §§ 5 and 20. WSR 85-24-025 (Order PL 571), § 308-30-020, filed 11/26/85, effective 1/1/86.]

AMENDATORY SECTION (Amending WSR 18-12-028, filed 5/29/18, effective 7/1/18)

WAC 308-30-030 Application process for notary public commission.

(1) To apply for a notary public commission, an applicant who meets the requirements of RCW 42.45.200(2) shall submit an application on forms provided by the department. The application shall include:

- (a) Evidence of a ten thousand dollar surety bond, signed by the notary public, that conforms to RCW 42.45.200(4);
- (b) Payment of the prescribed fee; and
- (c) A signed and notarized oath of office.

(2) As part of a notary public commission application, an applicant shall provide both their legal name and their commission name. The applicant's commission name must contain their surname, and at least the initials of the applicant's first and middle name.

(3) To apply for an electronic records notary public endorsement, an applicant who meets the requirements of RCW 42.45.200(7) shall submit an electronic records notary public application on forms provided by the department and pay the prescribed fee.

(4) An applicant may only apply for an electronic records notary public endorsement if:

- (a) They currently hold an active notary public commission; or
- (b) They are applying for a notary public commission and an electronic records notary public endorsement simultaneously.

(5) An individual applying for an electronic records notary public endorsement must inform the department within thirty days of applying of the tamper-evident technology provider that they have enrolled with before they perform their first electronic notarial act.

(6) To apply for a remote notary endorsement, an electronic records notary public shall submit a remote notary endorsement application on forms provided by the department.

(7) An applicant may only apply for a remote notary endorsement if:

(a) They currently hold an active notary public commission with an electronic records notary public endorsement;

(b) They currently hold an active notary public commission, and are applying for an electronic records notary public endorsement and a remote notary endorsement simultaneously; or

(c) They are applying for a notary public commission, an electronic records notary public endorsement, and a remote notarial acts endorsement simultaneously.

(8) A notary public shall reapply with the department for each commission term before performing notarial acts.

~~((7))~~ (9) A notary public may elect not to apply for an electronic records notary public endorsement or a remote notary endorsement.

[Statutory Authority: RCW 42.45.250. WSR 18-12-028, § 308-30-030, filed 5/29/18, effective 7/1/18. Statutory Authority: RCW 42.44.190. WSR 93-05-009, § 308-30-030, filed 2/5/93, effective 3/8/93. Statutory Authority: 1985 c 156 §§ 5 and 20. WSR 85-24-025 (Order PL 571), § 308-30-030, filed 11/26/85, effective 1/1/86.]

AMENDATORY SECTION (Amending WSR 18-12-028, filed 5/29/18, effective 7/1/18)

WAC 308-30-040 Approval or denial of application. (1) Upon ~~((the))~~ an applicant's fulfillment of the requirements for a notary public commission ~~((or))~~ and/or an electronic records notary public endorsement, and/or a remote notary endorsement, the department shall approve the application and issue the notary public commission ~~((or))~~ and/or any appropriate endorsements.

(2) If the department receives an incomplete or invalid application, the department shall hold the application for thirty calendar days to allow the applicant to cure any defects. After the thirty day period, the application shall be canceled and any application fees forfeited.

(3) An applicant may not perform any notarial acts on a tangible or electronic record before receiving a notary public commission and the appropriate endorsement from the department.

~~((A notary public may not perform any electronic notarial acts before receiving an electronic records notary public endorsement from the department.~~

~~((5))~~) The department may deny a commission or endorsement application if the applicant fails to comply with these rules or does not meet the requirements for licensure.

[Statutory Authority: RCW 42.45.250. WSR 18-12-028, § 308-30-040, filed 5/29/18, effective 7/1/18. Statutory Authority: RCW 42.44.190.]

WSR 93-05-009, § 308-30-040, filed 2/5/93, effective 3/8/93. Statutory Authority: 1985 c 156 §§ 5 and 20. WSR 85-24-025 (Order PL 571), § 308-30-040, filed 11/26/85, effective 1/1/86.]

AMENDATORY SECTION (Amending WSR 18-12-028, filed 5/29/18, effective 7/1/18)

WAC 308-30-050 Term of commission. (1) The term of a notary public commission shall expire on the expiration date of the notary public's surety bond, no more than four years after their commission date.

(2) Unless terminated pursuant to WAC 308-30-270, an electronic records notary public endorsement (~~(is)~~) and the remote notary endorsement are valid from the date the endorsement is issued by the department, and continues as long as the notary public's current commission remains valid.

[Statutory Authority: RCW 42.45.250. WSR 18-12-028, § 308-30-050, filed 5/29/18, effective 7/1/18. Statutory Authority: RCW 42.44.190. WSR 93-05-009, § 308-30-050, filed 2/5/93, effective 3/8/93. Statutory Authority: 1985 c 156 §§ 5 and 20. WSR 85-24-025 (Order PL 571), § 308-30-050, filed 11/26/85, effective 1/1/86.]

AMENDATORY SECTION (Amending WSR 18-12-028, filed 5/29/18, effective 7/1/18)

WAC 308-30-150 Completion of electronic notarial certificate.

(1) For every electronic notarial act and remote notarial act, a notary public shall complete an electronic notarial certificate that complies with the requirements of these rules, RCW 42.45.130 and 42.45.140.

(2) An electronic notarial certificate shall be completed at the time of notarization and in the (~~(physical)~~) presence of the principal.

[Statutory Authority: RCW 42.45.250. WSR 18-12-028, § 308-30-150, filed 5/29/18, effective 7/1/18. Statutory Authority: RCW 42.44.190. WSR 93-05-009, § 308-30-150, filed 2/5/93, effective 3/8/93.]

AMENDATORY SECTION (Amending WSR 18-12-028, filed 5/29/18, effective 7/1/18)

WAC 308-30-200 Format of journals of notarial acts. (1) A tangible notarial journal shall:

(a) Be a permanent, bound book with numbered pages; and

(b) Have the capacity to record for each notarial act:

(i) The information required by RCW 42.45.180(4);

(ii) A description of the notary public's method of identifying the principal; and

(iii) The principal's signature, or the signature of an authorized party in compliance with RCW 42.45.070, or a notation in the no-

tary journal that the notarial act was performed via remote notarization.

(2) If a notary public keeps an electronic journal pursuant to RCW 42.45.180(3), the electronic journal shall:

- (a) Be maintained only in addition to the tangible journal;
- (b) Have the capacity to record the information required for a tangible notarial journal;
- (c) Enable access by a password or other secure means of authentication;
- (d) Be tamper-evident;
- (e) Create a duplicate record of the journal as a backup; and
- (f) Be capable of providing tangible or electronic copies of any entry made in the journal.

(3) A notary public's journal is the exclusive property of the notary public, and shall not be surrendered to an employer upon demand or termination, whether the employer paid for the journal or the notary's bond or application fees.

(4) A notary performing remote notarization must maintain a tangible notary journal as required in RCW 42.45.180 and WAC 308-30-190, this section, and WAC 308-30-210. Notaries performing remote notarization are not required to collect and maintain the signatures of the signers when those notarizations were performed remotely. Notaries must note in their tangible notary log that a notarization was performed remotely.

[Statutory Authority: RCW 42.45.250. WSR 18-12-028, § 308-30-200, filed 5/29/18, effective 7/1/18.]

AMENDATORY SECTION (Amending WSR 18-12-028, filed 5/29/18, effective 7/1/18)

WAC 308-30-220 Fees for notarial acts. (1) The maximum fees a notary may charge for notarial acts are:

Notarial Act	Fee
Witnessing or attesting a signature	\$10.00
Taking an acknowledgment or a verification upon oath or affirmation	\$10.00
Certifying or attesting a copy	\$10.00
Administering an oath or affirmation	\$10.00
Certifying that an event has occurred or an act has been performed	\$10.00

(2) A notary public need not charge for notarial acts.

(3) A notary public may not charge fees for receiving or noting a protest of a negotiable instrument.

(4) A notary public may additionally charge the actual costs of copying any instrument or record.

(5) A notary public may charge a travel fee when traveling to perform a notarial act if:

(a) The notary public and the individual requesting the notarial act agree upon the travel fee in advance of the travel; and

(b) The notary public explains to the individual requesting the notarial act that the travel fee is in addition to the notarial fee in subsection (1) of this section and is not required by law.

(6) Notwithstanding the maximum fees set forth in subsection (1) of this section and the prohibition set forth in subsection (3) of this section, a notary public may charge a maximum fee of twenty-five dollars to perform a remote notarial act.

[Statutory Authority: RCW 42.45.250. WSR 18-12-028, § 308-30-220, filed 5/29/18, effective 7/1/18.]

AMENDATORY SECTION (Amending WSR 18-12-028, filed 5/29/18, effective 7/1/18)

WAC 308-30-270 Termination or suspension of commission or endorsement. (1) The department may take action against the commission and/or endorsement of a notary public who fails to comply with these rules as provided in RCW 42.45.210, 42.45.270, and chapter 18.235 RCW. Any restriction, suspension, or revocation of a notary public's commission will automatically have the same effect on any endorsement the notary public holds.

(2) A notary public may terminate their notary public commission and/or electronic records endorsement or remote notary endorsement by notifying the department of this intent in writing and disposing of all or any part of a tamper-evident technology in the notary's control whose purpose was to perform electronic notarizations.

(3) A notary public may terminate the electronic records notary public endorsement or the remote notary endorsement and maintain the underlying notary public commission.

(4) A notary public whose commission is terminated or expired, either by the notary or the department, shall disable their official stamp by destroying, defacing, damaging, or securing the device against use. The notary shall maintain their notarial journals for ten years as required by RCW 42.45.180 and WAC 308-30-210.

[Statutory Authority: RCW 42.45.250. WSR 18-12-028, § 308-30-270, filed 5/29/18, effective 7/1/18.]

NEW SECTION

WAC 308-30-290 Authorized remote notarial acts. (1) A notary public who has received both an electronic records notary public endorsement and a remote notarial acts endorsement from the department may perform the following remote notarial acts:

- (a) Taking an acknowledgment;
- (b) Taking a verification on oath or affirmation;
- (c) Witnessing or attesting a signature;
- (d) Certifying or attesting a copy;
- (e) Certifying that an event has occurred or an act has been performed; and
- (f) Noting a protest of a negotiable instrument, if the notary public is:
 - (i) Acting under the authority of an attorney who is licensed to practice law in this state or another state; or
 - (ii) Acting under the authority of a financial institution regulated by this state, another state, or the federal government.

(2) In performing remote notarial acts, a notary public shall comply with all requirements for electronic notarial acts under this chapter.

[]

NEW SECTION

WAC 308-30-300 Standards for identity proofing. (1) In performing remote notarial acts, if a notary public does not have satisfactory evidence of the identity of a remotely located individual under subsection (4) of this section, the notary public must reasonably verify the individual's identity through two different types of identity proofing consisting of a credential analysis procedure and a dynamic knowledge-based authentication assessment as provided in subsections (2) and (3) of this section.

(2) Credential analysis must use public or private data sources to confirm the validity of the identification credential presented by a remotely located individual and shall, at a minimum:

(a) Use automated software processes to aid the notary public in verifying the identity of each remotely located individual;

(b) Require the identification credential to pass an authenticity test, consistent with sound commercial practices, that uses appropriate technologies to confirm the integrity of visual, physical, or cryptographic security features and to confirm that the identification credential is not fraudulent or inappropriately modified;

(c) Use information held or published by the issuing source or an authoritative source, as available and consistent with sound commercial practices, to confirm the validity of personal details and identification credential details; and

(d) Enable the notary public visually to compare for consistency the information and photograph on the identification credential and the remotely located individual as viewed by the notary public in real time through communication technology.

(3) A dynamic knowledge-based authentication assessment is successful if it meets the following requirements:

(a) The remotely located individual must answer a quiz consisting of a minimum of five questions related to the individual's personal history or identity formulated from public or private data sources;

(b) Each question must have a minimum of five possible answer choices;

(c) At least eighty percent of the questions must be answered correctly;

(d) All questions must be answered within two minutes;

(e) If the remotely located individual fails the first attempt, the individual may retake the quiz one time within twenty-four hours;

(f) During a retake of the quiz, a minimum of forty percent of the prior questions must be replaced;

(g) If the remotely located individual fails the second attempt, the individual is not allowed to retry with the same online notary public within twenty-four hours of the second failed attempt; and

(h) The notary public must not be able to see or record the questions or answers.

(4) A notary public has satisfactory evidence of the identity of a remotely located individual if:

(a) The notary public has personal knowledge of the identity of the individual; or

(b) The individual is identified by oath or affirmation of a credible witness in accordance with the following requirements:

(i) To be a credible witness, the witness must have personal knowledge of the remotely located individual;

(ii) The notary public must have personal knowledge of the credible witness or verify the identity of the credible witness by two different types of identity proofing in accordance with subsections (1), (2), and (3) of this section; and

(iii) A credible witness may be outside the physical presence of the notary public or remotely located individual if the notary public, credible witness, and remotely located individual can communicate by using communication technology.

[]

NEW SECTION

WAC 308-30-310 Standards for communication technology. (1) Communication technology for remote notarial acts must provide for synchronous audio-visual feeds of sufficient audio clarity and video resolution to enable the notary public and remotely located individual to see and speak with each other. The process must provide a means for the notary public reasonably to confirm that an electronic record before the notary public is the same record in which the remotely located individual made a statement or on which the remotely located individual executed a signature.

(2) Communication technology must provide reasonable security measures to prevent unauthorized access to:

(a) The live transmission of the audio-visual feeds;

(b) The methods used to perform identify verification; and

(c) The electronic record that is the subject of the remote notarial act.

(3) If a remotely located individual must exit the workflow, the individual must restart the identify verification process required under WAC 308-30-300 from the beginning.

[]

NEW SECTION

WAC 308-30-320 Certificate of notarial act for remote notarial acts. (1) A form of notarial certificate for a remote notarial act satisfies the requirement of RCW 42.45.280(4) and 42.45.130 (1)(g) if it is in the form provided by applicable law and contains a statement substantially as follows: "This notarial act involved the use of communication technology."

(2) A short form of acknowledgment prescribed in RCW 42.45.140 satisfies the requirement of RCW 42.45.280(4) and 42.45.130 (1)(g) if it is in substantially one of the following forms for the purposes indicated:

(a) For an acknowledgment in an individual capacity:

State of Washington
County of

This record was acknowledged before me by means of communication technology on (date) by (name(s) of individuals).

.....
(Signature of notary public)

Notary Public

(Electronic official stamp)

(My commission expires:)

(b) For an acknowledgment in a representative capacity:

State of Washington
County of

This record was acknowledged before me by means of communication technology on (date) by (name(s) of individuals) as (type of authority, such as officer or trustee) of (name of party on behalf of whom the instrument was executed).

.....
(Signature of notary public)

Notary Public

(Electronic official stamp)

(My commission expires:)

(c) For verification on oath or affirmation:

State of Washington
County of

Signed and sworn to (or affirmed) before me by means of communication technology on (date) by (name(s) of individuals making statement).

.....
(Signature of notary public)

Notary Public

(Electronic official stamp)

(My commission expires:)

(d) For witnessing or attesting a signature:

State of Washington
County of

Signed or attested before me by means of communication technology on (date) by (name(s) of individuals).

.....
(Signature of notary public)

Notary Public

(Electronic official stamp)

(My commission expires:)

[]

NEW SECTION

WAC 308-30-330 Retention of audio-visual recordings and repositories. (1) A notary public must retain any audio-visual recording created under RCW 42.45.280 (3) (c) in a computer or other electronic storage device that protects the recording against unauthorized access by password or other secure means of authentication. The recording must be created in an industry-standard audio-visual file format and must not include images of any electronic record that was the subject of the remote notarial act.

(2) An audio-visual recording must be retained for at least ten years after the recording is made.

(3) A notary public must take reasonable steps to ensure that a backup of the audio-visual recording exists and is secure from unauthorized use.

(4) The fact that the notary public's employer, contractor, or repository keeps or stores any audio-visual recordings shall not relieve the notary of the duties required by these rules.

(5) The personal representative or guardian of a notary public shall follow RCW 42.45.280(6) related to the disposition of the notary public's audio-visual recordings upon the death or adjudication of incompetency of the notary public.

(6) The notary public, or the notary's personal representative or guardian, shall provide access instructions to the department for any audio-visual recordings maintained or stored by the notary, upon commission resignation, revocation, or expiration without renewal, or upon the death or adjudication of incompetency of the notary.

(7) A notary public, or the notary's personal representative or guardian, may by written contract engage a third party to act as a repository to provide the storage required by this section. A third party under contract under this section shall be deemed a repository under RCW 42.45.280(6).

(8) Any contract under subsection (7) of this section must:

(a) Enable the notary public, or the notary's personal representative or guardian, to comply with the retention requirements of this section even if the contract is terminated; or

(b) Provide that the information will be transferred to the notary public, or to the notary's personal representative or guardian, if the contract is terminated.

[]

WSR 21-02-070
PROPOSED RULES
GAMBLING COMMISSION
[Filed January 5, 2021, 10:14 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 20-03-157.

Title of Rule and Other Identifying Information: WAC 230-11-025 Bundling and selling tickets at a discount, and 230-11-055 Authorized alternative drawing formats.

Hearing Location(s): On February 11, 2021, at 9:00 a.m., at Washington State Gambling Commission, 4565 7th Avenue S.E., Lacey, WA 98503. Public hearings will take place at scheduled commission meetings. The meeting dates, times, and locations are tentative. Visit our website at www.wsgc.wa.gov approximately seven days prior to the meeting, select "The Commission," and then select "Public Meetings" to confirm the hearing date, location, start time, and agenda items.

Date of Intended Adoption: February 11, 2021.

Submit Written Comments to: Ashlie Laydon, P.O. Box 42400, Olympia, WA 98504-2400, email rules.coordinator@wsgc.wa.gov, fax 360-486-3632, by January 29, 2021.

Assistance for Persons with Disabilities: Contact Julie Anderson, phone 360-486-3453, TTY 360-496-3637, email julie.anderson@wsgc.wa.gov, by January 29, 2021.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The gambling commission is considering amending WAC 230-11-025 Bundling and selling tickets at a discount, to allow additional discount levels, and WAC 230-11-055 Authorized alternative drawing formats, to authorize two additional alternative drawing formats.

Reasons Supporting Proposal: The changes proposed above would offer additional options to nonprofit organizations when conducting raffles.

Statutory Authority for Adoption: RCW 9.46.070.

Statute Being Implemented: RCW 9.46.070.

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

Name of Proponent: Washington state gambling commission, governmental.

Name of Agency Personnel Responsible for Drafting: Brian Considine, Attorney, 4565 7th Avenue S.E., Lacey, WA 98503, 360-486-3469; Implementation: David Trujillo, Director, 4565 7th Avenue S.E., Lacey, WA 98503, 360-486-3512; and Enforcement: Tina Griffin, Assistant Director, 4565 7th Avenue S.E., Lacey, WA 98503, 360-486-3546.

A school district fiscal impact statement is not required under RCW 28A.305.135.

A cost-benefit analysis is not required under RCW 34.05.328 (5) (a) (i).

The proposed rule does not impose more-than-minor costs on businesses. Following is a summary of the agency's analysis showing how costs were calculated. The proposed rule change was initiated by staff after discussions with nonprofit organizations regarding obstacles they face when conducting raffles. The proposed changes would allow charitable and nonprofit organizations the option of offering additional discount levels and/or two additional alternative drawing formats when conducting raffles. It is unlikely that the implementation of either of these options would have any additional costs associated

with them compared to the raffle options already allowed under current rules, they simply offer more flexibility for the operator, therefore a small business economic impact statement is not necessary.

January 5, 2021
Ashlie Laydon
Rules Coordinator

OTS-2835.1

AMENDATORY SECTION (Amending WSR 06-20-040, filed 9/26/06, effective 1/1/08)

WAC 230-11-025 Bundling and selling tickets at a discount. (1) Licensees may put tickets together in a bundle and sell them at a discount level if they:

- (a) Create the discount (~~(plan)~~) levels before selling any raffle tickets; and
- (b) Do not change the discount (~~(plan)~~) levels during the raffle; and
- (c) Make single nondiscounted tickets available to all participants; and
- (d) Use (~~only one~~) up to three discount (~~(plan)~~) levels for each raffle; and

(2) Booklets of bundled discounted tickets must contain the number of tickets named in the discount (~~(plan)~~) levels; and

(3) Licensees must not remove tickets from a booklet to sell them individually; and

(4) Each booklet of bundled tickets must have the following information printed on the cover:

- (a) A description of the discount (~~(plan)~~) levels; and
- (b) The number of tickets in the booklet; and
- (c) The total cost of the booklet; and
- (d) A consecutive number; and

(5) Licensees must establish controls and accounting procedures necessary to determine gross gambling receipts from ticket sales.

[Statutory Authority: RCW 9.46.070. WSR 06-20-040 (Order 602), § 230-11-025, filed 9/26/06, effective 1/1/08.]

AMENDATORY SECTION (Amending WSR 13-19-056, filed 9/16/13, effective 10/17/13)

WAC 230-11-055 Authorized alternative drawing formats. Except for enhanced raffles, licensees may use the following types of alternative drawing formats or similar random selection processes:

(~~(Mock races.)~~)

(1) Mock races. The licensee sells participants consecutively numbered tickets that identify a specific corresponding numbered mock animal(s), ball(s), or other similar object(s) that can use natural

elements to move the objects (water, gravity, wind) in a race. All objects must be identical in weight, size, and shape, to have an equal opportunity to win. The licensee must release all objects simultaneously at a start line. The first numbered object to cross the finish line wins.

~~((Poker runs.))~~

(2) Poker runs. The licensee sells participants consecutively numbered tickets or poker tally sheets to participants. Participants travel a predetermined course with predetermined drawing stations (typically five drawing stations). At each drawing station, participants draw one playing card for each ticket purchased. Station attendants must verify the card drawn and record the card value on the poker ticket tally sheet. After all participants have completed the course, the participant with the best recorded poker hand wins.

~~((Ball drops.))~~

(3) Ball drops. The licensee sells participants consecutively numbered tickets that identify a specific corresponding numbered ball. All balls must be equal in size, weight, and shape, to have an equal opportunity to win. The licensee suspends all purchased numbered balls in the air and simultaneously releases them over a target zone. The ball, closest or first, to hit the predetermined target wins.

~~((Animal plops.))~~

(4) Animal plops. The licensee sells participants consecutively numbered tickets that identify a specific corresponding square on a numbered grid. The licensee releases the animal into the grid area until the animal has completed its plop. The numbered square containing the plop wins.

~~((Multiple stage drawings.))~~

(5) Multiple stage drawings. The licensee sells participants consecutively numbered tickets. The licensee uses multiple drawing phases to eliminate participants until the licensee declares the remaining ticket holder(s) the winner(s). The licensee may use second element of chance plans as long as the plans meet the criteria set out in WAC 230-11-060.

~~((Bucket raffles.))~~

(6) Bucket raffles. The licensee sells participants consecutively numbered tickets. Participants place their tickets into any number of separate buckets or other receptacles for separate prizes. We consider the multiple drawings one single raffle. If licensees use different tickets for each receptacle, we consider each drawing an individual raffle.

~~((Calendar raffles.))~~

(7) Calendar raffles. The licensee sells participants consecutively numbered calendars with removable stubs. The licensee places all sold calendar stubs into the drawing receptacle. On predetermined dates identified on the calendar, the licensee conducts drawings. The licensee places all winning stubs back into the drawing receptacle for future drawings.

(8) Heads/tails raffles. The licensee sells participants consecutively numbered tickets. Every participant who purchased a ticket stands up and places their hands on either their head or their tail.

The licensee then flips a coin to determine heads or tails. Participants who selected the losing outcome (heads or tails) must sit down. The process is repeated until there is only one participant standing and they win the prize.

(9) Number raffles. The licensee sells participants consecutively numbered tickets. The participants select a number from a spot or square on a grid or from a list of numbers. The licensee then draws a number(s) that corresponds to the numbers on the grid or list to determine the winner(s).

[Statutory Authority: RCW 9.46.070 and 9.46.0209. WSR 13-19-056 (Order 692), § 230-11-055, filed 9/16/13, effective 10/17/13. Statutory Authority: RCW 9.46.070. WSR 06-20-040 (Order 602), § 230-11-055, filed 9/26/06, effective 1/1/08.]

WSR 21-02-072

PROPOSED RULES

HEALTH CARE AUTHORITY

[Filed January 5, 2021, 2:54 p.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 20-15-036.

Title of Rule and Other Identifying Information: WAC 182-530-5000
Billing requirements—Pharmacy claim payment.

Hearing Location(s): On February 9, 2021, at 10:00 a.m. In response to the coronavirus disease 2019 (COVID-19) public health emergency, the agency will not provide a physical location for this hearing. This promotes social distancing and the safety of the citizens of Washington state. A virtual public hearing, without a physical meeting space, will be held instead. To attend the virtual public hearing, you must register at the following link <https://attendee.gotowebinar.com/register/3206809637312512526>. Webinar ID: 760-399-595. After registering, you will receive a confirmation email containing the information about joining the webinar.

Date of Intended Adoption: Not sooner than February 10, 2021.

Submit Written Comments to: HCA Rules Coordinator, P.O. Box 42716, Olympia, WA 98504-2716, email arc@hca.wa.gov, fax 360-586-9727, by February 9, 2021.

Assistance for Persons with Disabilities: Contact Amber Lougheed, phone 360-725-1349, fax 360-586-9727, telecommunication[s] relay service 711, email amber.lougheed@hca.wa.gov, by January 22, 2021.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The agency is amending this rule to revise the signature requirement for pharmacy products dispensed and delivered directly to a medicaid client or their provider's office. The proposed rule requires either the client or the provider to sign for delivered products.

Reasons Supporting Proposal: The new signature requirement ensures proof of delivery for prescriptions sent to a provider's office, which decreases the potential for medicaid fraud and duplicate billing.

Statutory Authority for Adoption: RCW 41.05.021, 41.05.160.

Statute Being Implemented: RCW 41.05.021, 41.05.160.

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

Agency Comments or Recommendations, if any, as to Statutory Language, Implementation, Enforcement, and Fiscal Matters: Not applicable.

Name of Proponent: Health care authority (HCA), governmental.

Name of Agency Personnel Responsible for Drafting: Melinda Froud, P.O. Box 42716, Olympia, WA 98504-2716, 360-725-1408; Implementation and Enforcement: Amy Irwin, P.O. Box 45502, Olympia, WA 98504-5502, 360-725-1673.

A school district fiscal impact statement is not required under RCW 28A.305.135.

A cost-benefit analysis is not required under RCW 34.05.328. RCW 34.05.328 does not apply to HCA rules unless requested by the joint administrative rules review committee or applied voluntarily.

The proposed rule does not impose more-than-minor costs on businesses. Following is a summary of the agency's analysis showing how costs were calculated. This rule making does not impose any costs on businesses.

January 5, 2021
Wendy Barcus
Rules Coordinator

OTS-2176.2

AMENDATORY SECTION (Amending WSR 16-01-046, filed 12/9/15, effective 1/9/16)

WAC 182-530-5000 Billing requirements—Pharmacy claim payment.

(1) When billing the medicaid agency for pharmacy services, providers must:

- (a) Use the appropriate agency claim form or electronic billing specifications;
- (b) Include the actual eleven-digit national drug code (NDC) number of the product dispensed from a rebate eligible manufacturer;
- (c) Bill the agency using metric decimal quantities which is the National Council for Prescription Drug Programs (NCPDP) billing unit standard;

(d) Meet the general provider documentation and record retention requirements in WAC 182-502-0020; and

(e) Maintain proof of delivery receipts.

(i) When a provider delivers an item directly to the client or the client's authorized representative, the provider must be able to furnish proof of delivery, including ~~((signature))~~ the signature of either the client or the provider, the client's name, and a detailed description of the item or items delivered.

(ii) When a provider mails an item to the client, the provider must be able to furnish proof of delivery including a mail log.

(iii) When a provider uses a delivery or shipping service to deliver items, the provider must be able to furnish proof of delivery and it must:

(A) Include the delivery service tracking slip with the client's name or a reference to the client's package or packages; the delivery service package identification number; and the delivery address.

(B) Include the supplier's shipping invoice, with the client's name; the shipping service package identification number; and a detailed description.

(iv) Make proof of delivery receipts available to the agency upon request.

(2) When billing drugs under the expedited authorization process, providers must insert the authorization number, which includes the corresponding criteria code or codes in the appropriate data field on the drug claim.

(3) Pharmacy services for clients on restriction under WAC 182-501-0135 must be prescribed by the client's primary care provider and are paid only to the client's primary pharmacy, except in cases of:

- (a) Emergency;
- (b) Family planning services; or
- (c) Services properly referred from the client's assigned pharmacy or physician/ARNP.

[Statutory Authority: RCW 41.05.021 and 41.05.160. WSR 16-01-046, § 182-530-5000, filed 12/9/15, effective 1/9/16. WSR 11-14-075, recodified as § 182-530-5000, filed 6/30/11, effective 7/1/11. Statutory Authority: RCW 74.04.050, 74.08.090, 74.09.530, and 74.09.700. WSR 07-20-049, § 388-530-5000, filed 9/26/07, effective 11/1/07.]

WSR 21-02-073

WITHDRAWAL OF PROPOSED RULES

GAMBLING COMMISSION

[Filed January 5, 2021, 3:26 p.m.]

The gambling commission would like to withdraw CR-102 WSR 20-19-084, filed on September 16, 2020, proposing to amend WAC 230-06-035 Credit, loans, or gifts prohibited, and 230-14-047 Standards for electronic video pull-tab dispensers, to accept credit cards as a payment method option for card games, pull-tabs, and bingo.

At their December 17, 2020, public meeting, commissioners chose to withdraw rule making at this time citing that there needed to be more analysis and stakeholder work on how the proposed rule may contribute to problem gambling and a broader discussion on the role of credit cards used in the gambling industry.

Ashlie Laydon
Rules Coordinator

WSR 21-02-075

PROPOSED RULES

UNIVERSITY OF WASHINGTON

[Filed January 5, 2021, 3:46 p.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 20-21-064.

Title of Rule and Other Identifying Information: Chapter 478-121 WAC, Student conduct code for the University of Washington.

Hearing Location(s): On February 16, 2021, at 9:00 - 10:00 a.m. This will be held via video and phone conference and the link will be available on the University Policy and Rules Website [<https://www.washington.edu/rules/wac/>]. Due to the governor's restrictions on in-person gatherings, the University of Washington will hold the public hearing via video and phone conference and will have the link and details located on the University Policy and Rules Website [<https://www.washington.edu/rules/wac/>].

Date of Intended Adoption: March 10, 2021.

Submit Written Comments to: Barbara Lechtanski, Director and State Rules Coordinator for the University Policy and Rules Office, Box 351210 Seattle, WA 98195-1210, email rules@uw.edu, by February 16, 2021, end of business.

Assistance for Persons with Disabilities: Contact disability services office, phone 206-543-6450, fax 206-685-7264, TTY 206-543-6452, email dso@uw.edu, by February 5, 2021.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The university edited sections and created new sections to update current chapter 478-121 WAC, Student conduct code for the University of Washington, in order to be in compliance with the new United States Department of Education (DOE) Title IX regulations that went into effect on August 14, 2020.

Reasons Supporting Proposal: The new DOE Title IX regulations went into effect, and in order to maintain compliance with these new regulations, the University of Washington updated existing sections and created new sections to our current chapter 478-121 WAC, Student conduct code for the University of Washington. Agencies not in compliance would be at risk of losing federal funding. The university currently has an emergency rule filed to maintain compliance while we complete this permanent rule making.

Statutory Authority for Adoption: RCW 28B.20.130.

Statute Being Implemented: 34 C.F.R. Part 106.

Rule is necessary because of federal law, 34 C.F.R. Part 106.

Name of Proponent: University of Washington, governmental.

Name of Agency Personnel Responsible for Drafting: Mags Alex, Deputy Title IX Coordinator, 4311 11th Avenue N.E., Seattle, WA 98105, 206-221-7932; Implementation: Valery Richardson, Title IX Coordinator, 4311 11th Avenue N.E., Seattle, WA 98105, 206-221-7932; and Enforcement: Jane Yung, Executive Compliance and Risk Officer, 4311 11th Avenue N.E., Seattle, WA 98105, 206-221-7932.

A school district fiscal impact statement is not required under RCW 28A.305.135.

A cost-benefit analysis is not required under RCW 34.05.328. RCW 34.05.328 does not apply to the university, and the university has not voluntarily decided to apply it.

This rule proposal, or portions of the proposal, is exempt from requirements of the Regulatory Fairness Act because the proposal:

Is exempt under RCW 19.85.061 because this rule making is being adopted solely to conform and/or comply with federal statute or regulations. Citation of the specific federal statute or regulation and description of the consequences to the state if the rule is not adopted: 34 C.F.R. Part 106, DOE, Title IX regulation updates. If a university is not in compliance, they could risk the loss of federal funding.

Is exempt under RCW 19.85.025(4).

Explanation of exemptions: The proposed rule has no impact on small businesses.

January 5, 2021
Barbara Lechtanski
Director of the University
Policy and Rules Office
and State Rules Coordinator

OTS-2510.3

AMENDATORY SECTION (Amending WSR 17-15-068, filed 7/14/17, effective 8/18/17)

WAC 478-121-020 General application of the student conduct code.

This conduct code applies to all students from the time of admission through the actual conferral of a degree, including any period between terms of enrollment.

The disciplinary sanctions specified in WAC 478-121-210, up to and including suspension or dismissal, may be imposed on any student or student organization found responsible for prohibited conduct set forth in WAC 478-121-100 through 478-121-173, WAC 478-121-605, and as described in relevant university policies.

[Statutory Authority: RCW 28B.20.130. WSR 17-15-068, § 478-121-020, filed 7/14/17, effective 8/18/17.]

AMENDATORY SECTION (Amending WSR 17-15-068, filed 7/14/17, effective 8/18/17)

WAC 478-121-040 Jurisdiction of the university. (1) The scope of the university's jurisdiction includes reports that prohibited conduct occurred:

(a) On any university premises or in connection with any university-sponsored program or activity, regardless of the location of the program or activity; or

(b) Off campus (i.e., conduct that does not occur on university premises or in the context of a university-sponsored program or activity) where: The university reasonably determines that the conduct adversely affects a university interest or, has continuing adverse effects or may create a hostile environment on university premises or in the context of a university-sponsored program or activity.

(2) Nothing in this conduct code shall be construed to limit academic action that may be taken by schools, colleges, or programs against a respondent based on an established violation of this conduct code that demonstrates a failure to meet the academic and/or professional standards of the school, college, or program.

(3) If a respondent withdraws from the university (or fails to reenroll) while a conduct proceeding is pending, the university may move forward with the conduct proceeding and, if so, the respondent will be provided with a continued opportunity to participate.

(4) Under regulations established by the United States Department of Education, 34 C.F.R. Part 106, the prohibited conduct defined in WAC 478-121-605 must be addressed as provided under Part VII of this code, not as provided under Parts II through V, if, and only if: It is alleged to have occurred in a university education program or activity, and it is against a person in the United States.

[Statutory Authority: RCW 28B.20.130. WSR 17-15-068, § 478-121-040, filed 7/14/17, effective 8/18/17.]

AMENDATORY SECTION (Amending WSR 17-15-068, filed 7/14/17, effective 8/18/17)

WAC 478-121-100 General application. Prohibited conduct under this code includes, but is not limited to, the prohibited conduct described in WAC 478-121-100 through 478-121-173, WAC 478-121-605, and relevant university policies. For additional interpretation of prohibited conduct, see *Student Governance and Policies, chapter 209, student conduct policy for academic misconduct and behavioral misconduct, and chapter 210, student conduct policy for discriminatory and sexual harassment, intimate partner violence, sexual misconduct, stalking, and retaliation* (~~and chapter 209, student conduct policy for academic misconduct and behavioral misconduct~~).

[Statutory Authority: RCW 28B.20.130. WSR 17-15-068, § 478-121-100, filed 7/14/17, effective 8/18/17.]

**PART VII
COMPLIANCE WITH DEPARTMENT OF EDUCATION FEDERAL REGULATIONS REGARDING
SEXUAL HARASSMENT**

NEW SECTION

WAC 478-121-600 Scope of Part VII. The United States Department of Education federal regulations, 34 C.F.R. Part 106, establish a definition of "sexual harassment" that includes all of the prohibited conduct listed under WAC 478-121-605 (Department of Education federal regulations prohibited conduct or EDFR prohibited conduct). The con-

duct listed under WAC 478-121-605 is prohibited conduct under this code and is subject to the procedures set forth under Part VII of this code if, and only if:

- (1) The EDFR prohibited conduct occurs in a university education program or activity; and
- (2) The EDFR prohibited conduct is against a person in the United States.

EDFR prohibited conduct that does not meet both of these requirements or is reported by a person who is not eligible to file a formal complaint under WAC 478-121-625 is subject to Parts II through V of this code.

For the purposes of Part VII of this code, "education program or activity" includes locations, events, or circumstances over which the university exercised substantial control over both the respondent and the context in which the EDFR prohibited conduct occurred and also includes any building owned or controlled by a recognized student organization. Part VII only applies to formal complaints made on or after August 14, 2020, and only when 34 C.F.R. Part 106 is deemed enforceable by law and/or by United States courts.

[]

NEW SECTION

WAC 478-121-605 Department of Education federal regulations prohibited conduct (sexual harassment). Department of Education federal regulations (EDFR) define "sexual harassment" as conduct on the basis of sex that satisfies one or more of the following, which are referred to collectively under this code as "EDFR prohibited conduct":

- (1) EDFR hostile environment sexual harassment. EDFR hostile environment sexual harassment is unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the university's education program or activity.
- (2) EDFR sexual assault. EDFR sexual assault includes a sex offense under the uniform crime reporting system of the Federal Bureau of Investigation. Specifically, EDFR sexual assault means one or more of the following:
 - (a) The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the complainant.
 - (b) The oral or anal sexual intercourse with a complainant, without the consent of the complainant, including instances where the complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.
 - (c) The use of an object or instrument to penetrate, however slightly, the genital or anal opening of the body of a complainant, without the consent of the complainant, including instances where the complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.
 - (d) The touching of the private body parts of a complainant (e.g., buttocks, groin, breasts) for the purpose of sexual gratification, without the consent of the complainant, including instances where the complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

(e) Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by Washington law.

(f) Sexual intercourse with a person who is under the statutory age of consent of Washington.

(3) EDFR dating violence. EDFR dating violence is an act or acts of violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the complainant. The existence of such a relationship will be determined based on the length and type of relationship as well as the frequency of interaction between the individuals involved in the relationship.

(4) EDFR domestic violence. EDFR domestic violence is an act or acts of violence committed by a current or former intimate partner of the complainant, by a person with whom the complainant shares a child in common, or by a person who is cohabitating with or has cohabitated with the complainant as an intimate partner.

(5) EDFR stalking. EDFR stalking is engaging in a course of conduct directed at a complainant that would cause a reasonable person to fear for the complainant's safety or the safety of others, including the safety of the respondent, or would cause a reasonable person to suffer substantial emotional distress.

(a) For the purposes of this section, "course of conduct" means two or more acts including, but not limited to, acts in which the respondent directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property. Stalking also includes cyberstalking such as through electronic media, the internet, social networks, blogs, cell phones, or text messages.

(b) For the purposes of this section, "substantial emotional distress" means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

[]

NEW SECTION

WAC 478-121-610 Consent for purposes of EDFR prohibited conduct.

Consent means that at the time of and throughout the sexual contact, there are words or conduct that reasonably communicate freely given agreement between or among the persons engaging in the sexual contact.

(1) Consistent with WAC 478-121-150, consent cannot be obtained when force or threat is used to gain consent; consent cannot be obtained where the respondent knew or reasonably should have known the complainant was incapacitated; and consent cannot be given or granted by a person who is under the statutory age of consent in accordance with the criminal code of Washington, chapter 9A.44 RCW, Sex offenses. A respondent's use of alcohol or drugs is not a valid defense to a charge of EDFR sexual assault, and a respondent will be held to the standard of a reasonable sober person in evaluating whether the respondent knew or reasonably should have known the complainant was incapacitated.

(2) For the purposes of determining whether consent was present:

(a) Consent cannot solely be inferred from silence, passivity, or a lack of resistance, and relying on nonverbal communication alone may violate the code;

(b) Consent cannot be inferred merely from an existing or previous dating or sexual relationship;

(c) Even in the context of a relationship, there must be mutual consent to engage in sexual contact;

(d) Past consent alone is not sufficient to imply future consent;

(e) Consent given to one person does not constitute consent given to another person;

(f) Consent to one sexual act does not constitute consent to other sexual acts; and

(g) Consent can be withdrawn at any time, and once consent is withdrawn and reasonably communicated, sexual contact must stop immediately.

(3) As used in the definition of consent, incapacity means an individual lacks the ability to understand the facts, nature, extent, or implications of the sexual contact for any reason including, but not limited to, being asleep, unconscious, unaware that the sexual contact is occurring, mentally or physically impaired due to an intellectual or other disability, or mentally or physically incapacitated due to the effects of alcohol or other drugs.

(a) When assessing whether the respondent "knew or reasonably should have known" the complainant was incapacitated, indicators of incapacitation include, but are not limited to, stumbling, falling down, an inability to stand or walk on the complainant's own, slurred speech or incoherent communication, an inability to focus the complainant's eyes or confusion about what is happening around the complainant, combativeness, emotional volatility, incontinence, passing out, or vomiting.

(b) A failure to exhibit any of these behaviors, however, does not necessarily mean that a person is capable of giving consent or is not incapacitated.

[]

NEW SECTION

WAC 478-121-615 Additional definitions. For the purposes of Part VII of this code and where a respondent is charged with prohibited conduct defined under WAC 478-121-605:

(1) Complainant. Complainant is an individual who is alleged to be the victim of conduct that could constitute EDFR prohibited conduct.

(2) Formal complaint. Formal complaint is a document filed by a complainant or signed by the university's Title IX coordinator alleging EDFR prohibited conduct against a respondent and requesting that the university investigate the allegation of EDFR prohibited conduct. When filed by a complainant, the formal complaint must contain the complainant's physical or digital signature or otherwise indicate that the complainant is the person filing the formal complaint.

(3) Hearing advisor. Hearing advisor refers to the person who may accompany a complainant or respondent to any part of the investigation or hearing outlined in Part VII of this code. At a hearing, a complainant and a respondent must have a hearing advisor to conduct oral

cross-examination on that party's behalf. This hearing advisor may or may not be an attorney, as defined in WAC 478-121-050(1). If a party does not choose a hearing advisor prior to a hearing, the university will provide a hearing advisor of the university's choice to conduct cross-examination on behalf of the party at the hearing. One hearing advisor and one support advisor are the only persons a party is permitted to bring with them to any part of the investigation or hearing. Hearing advisors and support advisors may be referred to collectively as "advisors."

(4) Hearing officer. Hearing officer is the individual delegated authority by the university to preside over the hearing and act as the decision-maker to reach a determination about responsibility. The hearing officer may simultaneously preside over a hearing under this Part VII of this code and a full adjudicative proceeding, consistent with WAC 478-121-400 through 478-121-427.

(5) Investigator(s). Investigator is an individual delegated authority by the university to provide written notification of a formal complaint, interview witnesses, gather documentation, and prepare the investigative report.

(6) Party or parties. Party or parties refers to a complainant and/or respondent.

(7) Respondent. Respondent is an individual who has been reported to be the perpetrator of conduct that could constitute EDFR prohibited conduct. A respondent must be a student as defined in WAC 478-121-050(14).

(8) Support advisor. Support advisor refers to a person who may accompany a party to any part of the investigation or hearing outlined in this Part VII of this code. If a party has both a support advisor and hearing advisor, the support advisor's ability to communicate with the hearing officer and other party and the other party's advisors at a hearing will be limited. One support advisor and one hearing advisor are the only persons a party is permitted to bring with them to any part of the investigation or hearing. Support advisors and hearing advisors may be referred to collectively as "advisors."

(9) Supportive measure. Supportive measures are nondisciplinary, nonpunitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Supportive measures are designed to restore or preserve equal access to the university's education programs and activities without unreasonably burdening the respondent, including measures designed to deter EDFR prohibited conduct or protect the safety of all parties or the university's educational environment. Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.

[]

NEW SECTION

WAC 478-121-620 Reporting EDFR prohibited conduct. (1) Any person may report EDFR prohibited conduct in person, by mail, by telephone, or by electronic mail, using the contact information listed on the website for the university's Title IX coordinator, or designee, or by any other means that results in the Title IX coordinator receiving the person's verbal or written report. The person reporting may, but need not, be the person alleged to be the victim of conduct that could constitute EDFR prohibited conduct.

(2) Upon receipt of a report as provided under subsection (1) of this section, the Title IX coordinator, or designee, will promptly contact the complainant to discuss the availability of supportive measures, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.

[]

NEW SECTION

WAC 478-121-625 Formal complaint. (1) Only a complainant or the university's Title IX coordinator may file a formal complaint. At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in a university education program or activity. The authority to initiate conduct proceedings provisions outlined in WAC 478-121-215 (1) and (2) do not apply to Part VII of this code.

(2) A complainant may file a formal complaint with the Title IX coordinator or designee in person, by mail, or by electronic mail at the address provided on the Title IX coordinator's website.

(3) Upon receipt of a formal complaint, the university will, at a minimum, provide the following written notice to the known parties:

(a) The allegations potentially constituting EDFR prohibited conduct, including the identities of the parties involved in the incident, if known, the conduct allegedly constituting EDFR prohibited conduct, and the date and location of the alleged incident, if known;

(b) Information regarding the university's grievance process for formal complaints, including the parties' right to be accompanied by a hearing advisor and support advisor and to inspect and review evidence; and

(c) An explanation regarding presumptions regarding nonresponsibility and good-faith filing.

(4) The university may consolidate formal complaints where allegations of EDFR prohibited conduct arise out of the same facts or circumstances. The university may also join or consolidate any complaint alleging prohibited conduct under Part II of this code with a formal complaint if the allegations arise out of or relate to the same facts or circumstances. Should the university consolidate a formal complaint under Part VII with allegations of prohibited conduct under Part II, the university may elect to hold one hearing to consider all allegations. During such a hearing, the university may adhere to the process described in Parts II through V to the extent feasible for allegations of prohibited conduct outlined in Part II and to the process described

in Part VII for allegations of EDFR prohibited conduct. Where these processes conflict, Part VII will be followed.

[]

NEW SECTION

WAC 478-121-630 Dismissal of a formal complaint. (1) Mandatory dismissal. In accordance with the Department of Education federal regulations, the university will dismiss a formal complaint for purposes of Title IX and its implementing regulations if the alleged conduct:

- (a) Would not constitute EDFR prohibited conduct even if proved;
- (b) Did not occur in the university's education program or activity;
- (c) Did not occur against a person in the United States; or
- (d) Was alleged by or in respect to a complainant who is not participating in or attempting to participate in a university education program or activity.

If dismissal occurs under this subsection (1) of this section, the university may pursue a conduct proceeding under other parts of this code.

(2) Discretionary dismissal. The university may dismiss the formal complaint, or any allegations therein, for the purposes of Title IX and its implementing regulations, if at any time during the investigation or hearing:

(a) A complainant notifies the university's Title IX coordinator in writing that the complainant would like to withdraw the formal complaint or any specific allegations in the formal complaint;

(b) The respondent is no longer an enrolled university student;

or

(c) Specific circumstances prevent the university from gathering evidence sufficient to reach a determination as to the formal complaint or any allegations made in the formal complaint.

(3) Notice. Upon a dismissal required or permitted under this section, the university will promptly send written notice of the dismissal and reason(s) therefore simultaneously to the parties.

(4) Consequences of dismissal. Dismissal of a formal complaint does not preclude the university from investigating alleged misconduct under Part II or adjudicating such alleged misconduct under Parts III through V of this code.

(5) Appeal. If the university dismisses a formal complaint, the parties have a right to appeal, as described in WAC 478-121-635.

[]

NEW SECTION

WAC 478-121-635 Appeal from a dismissal of a formal complaint.

(1) A party may appeal a dismissal of a formal complaint or dismissal of any allegations in a formal complaint on any of the following bases:

- (a) Procedural irregularity affected the outcome of the matter;

(b) New evidence that was not reasonably available at the time the dismissal was made; and/or

(c) A university official involved in the dismissal of the formal complaint had a conflict of interest or bias for or against complainants or respondents generally, or the individual complainant or respondent, that affected the outcome of the matter.

If one of the grounds is to consider newly discovered evidence, that evidence must be provided with the appeal.

(2) An appeal must be submitted in writing to the investigator within five business days of the notice of dismissal of formal complaint. The appeal is the party's opportunity to provide the party's position regarding why the appeal should be granted, and it must identify at least one of the grounds outlined in subsection (1) of this section.

(3) When an appeal is received, the university will:

(a) Notify both parties in writing that the appeal was received, of the name of the individual(s) who will be deciding the outcome of the appeal, and when the nonappealing party's response is due;

(b) Provide the nonappealing party an opportunity to submit a written statement within five business days of receipt of notice of the appeal. This is the nonappealing party's opportunity to respond to the appeal;

(c) Consider the available evidence, which may include, but is not limited to, any summaries of interviews conducted by the investigator, evidence gathered by or provided to the investigator, and/or any newly discovered evidence;

(d) Issue a written decision describing the result of the appeal and rationale for such result; and

(e) Provide the written decision simultaneously to both parties.

(4) Communications with the individual(s) deciding the appeal, except for communications related to procedural aspects of maintaining an orderly process, must be made in the presence of, or with a copy to, all other parties, advisors (if any), and the investigator(s). Any communications not following such a procedure will be placed on the record, and others will be given an opportunity to respond.

(5) Appeals of a dismissal of a formal complaint may be decided by a single individual, and such appeals will be decided within five business days of the deadline for the nonappealing party's response.

[]

NEW SECTION

WAC 478-121-640 Informal resolution. If a formal complaint has been filed and parties have received notice of the allegations, the university may facilitate an informal resolution process consistent with RCW 34.05.060. Parties will be informed of the informal resolution process, including circumstances where the parties would be precluded from resuming a formal complaint based on the same allegations. Before an informal resolution process can proceed, both parties must provide voluntary, written consent to the process. A party has the right to withdraw from an informal resolution process at any time prior to agreeing to a resolution. If a party withdraws from such informal resolution process, the investigation or adjudication process resumes.

[]

NEW SECTION

WAC 478-121-645 Emergency removal. The university may remove a respondent from the university's educational programs or activities on an emergency basis pursuant to WAC 478-121-237. Such emergency removal must be based on a belief the alleged EDFR prohibited conduct poses an immediate threat to the physical health, safety, or welfare of any student or other individual(s).

[]

NEW SECTION

WAC 478-121-650 Investigation. (1) After a formal complaint is filed, the university will commence an investigation. Throughout the investigative process, including meetings with an investigator, a party may be accompanied by a hearing advisor and/or a support advisor. During the investigation, a party's hearing advisor and/or support advisor may provide advice to the party but may not speak on behalf of the party. The initial interview of a respondent will be scheduled to allow time for the respondent to prepare a response following receipt of the notice of formal complaint.

(2) During an investigation, parties may present witnesses as well as other inculpatory and exculpatory evidence for the investigator to consider. Parties will be provided an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint so that each party may meaningfully respond to the evidence prior to the conclusion of the investigation.

(3) Prior to completion of the investigative report, the university will send to each party and the party's advisors, if any, the evidence subject to inspection and review. The parties will have at least ten calendar days to submit a written response, which the investigator will consider prior to completion of the investigative report.

(4) At least ten calendar days prior to the hearing, the investigator will provide the parties with the final investigative report and all evidence gathered during the investigation. The final investigative report and all evidence related to the allegations will be included in the record for the hearing.

(5) No later than at the conclusion of the investigation, the investigator will notify the hearing officer that it is appropriate to commence a hearing to consider the allegations contained in the formal complaint. Such notification is consistent with a conversion to full adjudicative proceeding, as described in WAC 478-121-205, and consistent with RCW 34.05.413 through 34.05.476.

[]

NEW SECTION

WAC 478-121-655 Hearings. (1) The hearing officer, or designee, will set the time and place of the hearing and give ten or more calendar days' notice to all parties and the investigator. At the hearing officer's discretion, any or all parties, witnesses, and other participants, such as advisors and investigator(s), may appear at the hearing virtually, with technology enabling participants simultaneously to see and hear each other.

(2) Communications with the hearing officer, except for communications related to procedural aspects of maintaining an orderly process, must be made in the presence of, or with a copy to, all other parties, advisors (if any), and the investigator(s). Any communications not following such a procedure will be placed on the record, and other parties, hearing advisor(s), or investigator(s) will be given an opportunity to respond.

(3) Prior to the hearing, the hearing officer, upon a self-initiated motion or upon request of the parties, may request that the parties, advisors (if any), and the investigator(s) engage in a meeting or meetings to consider:

- (a) Simplification of issues;
- (b) Necessity of amending notices, if any;
- (c) The possibility of obtaining stipulations;
- (d) Limitations on the number of witnesses and/or which witnesses will testify at the hearing;
- (e) Procedural matters; and/or
- (f) Other matters that may aid in the disposition or settlement of the proceeding.

If such a prehearing meeting(s) is held, it may occur in person, by telephone conference, or by other technological means as determined by the hearing officer or designee. Further, if such a prehearing meeting(s) occurs, the hearing officer will issue, in writing, determinations regarding the issues discussed at the meeting(s). The determinations will be effective when served on the parties and advisors.

(4) At appropriate stages, the hearing officer will give parties reasonable opportunity to submit and respond to requests, such as pleadings, motions, and objections.

(5) The hearing officer has the discretion to grant postponements, continuances, extensions of time, and/or adjournment if good cause is shown.

(6) The applicable standard of proof is the "preponderance of evidence" standard. This means that, in order for a respondent to be held responsible for EDFR prohibited conduct as defined in WAC 478-121-605, the hearing officer must conclude, based on all of the evidence in the record, that it is more likely than not that the respondent engaged in an act or acts of EDFR prohibited conduct. The parties will be provided equal opportunity to present witnesses and other inculpatory and exculpatory evidence.

(7) During a hearing, all testimony of parties and witnesses shall be made under oath or affirmation. The hearing officer will permit each party's hearing advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination will be conducted directly, orally, and in real-time. Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the hearing officer will first determine whether the ques-

tion is relevant and explain any decision to exclude a question as not relevant. If a hearing advisor is disruptive or interferes with any aspect of the proceeding, as determined by the hearing officer, the hearing advisor may be removed and a new hearing advisor made available to the party.

(8) The university will create an audio, audiovisual, or transcribed recording of the hearing. Upon request to the hearing office or as may otherwise be required under Part VII of this code, the university will make the recording available to the parties for inspection and review.

(9) Hearings will be conducted in accordance with the Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. Sec. 1232g) and its implementing regulations (34 C.F.R. Part 99) except to the extent preempted by 34 C.F.R. Part 106.

[]

NEW SECTION

WAC 478-121-660 Determination regarding responsibility. (1)

Following a hearing, the hearing officer will apply the preponderance of the evidence standard described in WAC 478-121-655(6) and issue a written determination regarding responsibility in accordance with RCW 34.05.461, which will be simultaneously served on the parties. The written determination will include:

(a) Identification of the allegations as defined in WAC 478-121-605;

(b) A description of procedural steps taken from receipt of the formal complaint through the determination;

(c) Findings of fact supporting the hearing officer's determination;

(d) Conclusions regarding the application of Part VII of this code to the facts and the rationale for those conclusions; and

(e) Directions as to any sanctions imposed on the respondent or remedies provided to the complainant.

(2) One or more of the disciplinary sanctions outlined in WAC 478-121-210 may be imposed for any violation of EDFR prohibited conduct. In determining an appropriate sanction, if any, the hearing officer may consider the factors contained in WAC 478-121-210 (2) and (3), which are incorporated herein by this reference. Remedies for the complainant may be the same as the individualized services that comprise supportive measures or may be effectuated via sanctions impacting the respondent.

(3) The hearing officer must provide the written determination to the parties simultaneously and include the university's procedures for the parties to appeal. The determination regarding responsibility and any applicable sanction imposed becomes final and effective either on the date that the university provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.

[]

NEW SECTION

WAC 478-121-665 Appeal from determination regarding responsibility. (1) A party may appeal a determination of responsibility on any of the following bases:

- (a) Procedural irregularity affected the outcome of the matter;
- (b) A material error substantially affected the outcome of the fact finding or sanctioning;
- (c) New evidence that was not reasonably available at the time the determination regarding responsibility and/or dismissal was made could affect the outcome of the matter; and/or
- (d) A university official involved in the formal complaint investigation or adjudication had a conflict of interest or bias for or against complainants or respondents generally, or the individual complainant or respondent, that affected the outcome of the matter.

If one of the grounds is to consider newly discovered evidence, that evidence must be provided with the appeal.

(2) An appeal must be submitted in writing to the hearing officer within twenty-one calendar days of service of the determination of responsibility. The appeal is the party's opportunity to provide the party's position regarding why the appeal should be granted, and it must identify at least one of the grounds outlined in subsection (1) of this section.

(3) When an appeal is received, the university will:

- (a) Notify both parties in writing that the appeal was received; of the name of the individual(s) who will be deciding the outcome of the appeal; and when the nonappealing party's response is due;
- (b) Provide the nonappealing party an opportunity to submit a written statement within twenty-one calendar days of receipt of notice of the appeal. This is the nonappealing party's opportunity to respond to the appeal;
- (c) Consider the available evidence, which may include, but is not limited to, the transcript of the hearing, any summaries of interviews conducted by the investigator, evidence gathered by or provided to the investigator, the investigative report, decisions related to the hearing, the recording of the hearing, the written determination of responsibility, the appeal and/or response to the appeal, and/or any newly discovered evidence;
- (d) Issue a written decision describing the result of the appeal and rationale for such result; and
- (e) Provide the written decision simultaneously to both parties.

(4) Communications with the individual(s) deciding the appeal, except for communications related to procedural aspects of maintaining an orderly process, must be made in the presence of, or with a copy to, all other parties, advisors, the investigator(s), and the hearing officer. Any communications not following such a procedure will be placed on the record, and others will be given an opportunity to respond.

(5) Appeals of a determination regarding responsibility will be made by a panel consisting of an odd number of members, and such appeals will be decided within thirty calendar days of the deadline for the nonappealing party's response. The panel will be managed by a non-voting individual who may be the review coordinator as defined in WAC 478-121-050(11). The panel may include reviewing officers, as defined by WAC 478-121-050(13), and may decide appeals of determinations of responsibility regarding EDFR prohibited conduct under Part VII or initial orders regarding prohibited conduct under Part II of this code.

[]

NEW SECTION**WAC 478-121-670 Service and time—Subpoenas—No discovery.** (1)

Service of all university notices will be sent by electronic mail (email) addressed to the parties' university-issued email addresses unless either party provides an alternative and preferred email address. Parties are permitted to file documents, provide evidence, and respond to investigators, the hearing officer, or other individuals responsible for appeals via email. Service is complete at the moment the email is sent to the email addresses.

(2) In computing any period of time prescribed or allowed under Part VII of this code, the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, a Sunday, nor a legal holiday. Legal holidays are prescribed in RCW 1.16.050. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. A "business day" is any Monday, Tuesday, Wednesday, Thursday, or Friday that is not a legal holiday. A "calendar day" is any day of the week, Monday through Sunday, including legal holidays.

(3) Typically, the period from commencement of a proceeding conducted under Part VII of this code to the issuance of the investigative report, inclusive of the time parties may review the draft report and provide feedback will not exceed eighteen weeks. The period from issuance of an investigative report to the date of the hearing will not exceed seven weeks. Finally, the period from the hearing to the determination of responsibility, inclusive of the time frames required by the Department of Education federal regulations in light of those required to comply with state law for any appeal, will not exceed twenty-two weeks. Investigators and the hearing officer, or designee(s), will notify the parties in writing of any delay in the proceedings and the cause for such delay. Delays are permissible for good cause, which may include, and not be limited to, the absence or unavailability of a party or witness, scheduling conflicts, concurrent law enforcement activity, holidays, or academic calendar breaks.

(4) The hearing officer may issue subpoenas. The parties may also request that the hearing officer issue subpoenas or a party's attorney of record may also issue a subpoena on whose behalf the witness is required to appear at a hearing. The requesting party is responsible for serving the subpoena upon the witness.

(5) Discovery, including depositions, interrogatories, requests for production, entry onto land for inspection or other purposes, and physical and mental examinations, is not available in conduct proceedings under this code.

[]

NEW SECTION

WAC 478-121-675 Evidence. (1) If a party or witness does not submit to questioning or cross-examination at the hearing, the hearing officer cannot rely on any statement of that party or witness in reaching a determination regarding responsibility. The hearing officer may not draw an inference about determination regarding responsibility based solely on a party's or witness's absence from the hearing or refusal to answer questions or submit to cross-examination. This subsection does not apply to allegations of prohibited conduct under Part II of this code, WAC 478-121-103 through 478-121-173. The term "statement" does not include statements that constitute verbal conduct.

(2) Questions or evidence about a complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions or evidence about a party's sexual behavior are offered to prove that someone other than the respondent committed the sexual conduct alleged by the complainant or such questions or evidence concern specific incidents of the parties' prior sexual behavior and such information is relevant to determine the presence or absence of consent.

(3) Except as otherwise provided in this section, evidence may be considered if, in the judgment of the hearing officer, it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of such reasonably prudent person's affairs. The relevance of evidence will be determined by the hearing officer at a hearing. The hearing officer may exclude from consideration evidence that is not relevant. Statements of personal opinion or general reputation about a party or witness are generally not considered to be relevant. Evidence that is duplicative of other evidence is generally not considered to be relevant.

(4) An investigator or hearing officer may not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has voluntarily waived the privilege in writing. An investigator or hearing officer also may not access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent.

[]

NEW SECTION

WAC 478-121-680 Disqualification. (1) Any person designated by the university as an investigator, hearing officer, or Title IX coordinator, or to determine an appeal or facilitate an informal resolution process shall self-recuse if this person discovers a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent or otherwise cannot act impartially.

(2) A party shall promptly petition for the disqualification of an individual described in subsection (1) of this section upon receipt

ing notice of a formal complaint or upon discovering facts establishing grounds for disqualification. Such petition must be in writing and delivered to the person whose disqualification is requested, with copies of the petition delivered simultaneously to other known parties and any person known to be designated by the university as an investigator, hearing officer, or Title IX coordinator, or to determine an appeal or facilitate an informal resolution process.

(3) The individual whose disqualification is requested shall determine whether to grant the petition, stating facts and reasons for the determination. If the individual whose disqualification is requested does not self-disqualify, the party may cite such failure for disqualification as a reason to appeal a dismissal or determination of responsibility. If the individual whose disqualification is requested self-disqualifies, an appropriate individual will be substituted for the disqualified individual's role in the investigation, hearing, appeal, or informal resolution process.

[]

NEW SECTION

WAC 478-121-685 General record keeping. Records related to proceedings under Part VII of this code shall be maintained consistent with RCW 34.05.476 and 34.05.494, university records retention policies, and other relevant policies, rules, and regulations. If federal regulations under 34 C.F.R. Part 106 differ from Washington state law requirements or university policies, rules, or regulations, records will be maintained in accord with the more stringent standard.

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WSR 21-02-088

PROPOSED RULES

EMPLOYMENT SECURITY DEPARTMENT

[Filed January 6, 2021, 10:07 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 20-16-151.

Title of Rule and Other Identifying Information: Amending WAC 192-510-050 How will the department assess the size of new employers?, 192-560-010 Which businesses are eligible for small business assistance grants?, 192-620-020 What information will the department request from an employee when filing for weekly benefits? (amended section title), 192-620-035 When will a weekly benefit amount be prorated? and 192-800-045 Can an appeal be withdrawn? (amended section title); and adding WAC 192-610-090 What is an "illegal act" for the purposes of benefit disqualification?, 192-700-006 What hours are considered "worked" for the purposes of employment restoration?, 192-700-007 Employment restoration requirements for predecessor and successor employers, and 192-800-155 What information from a proceeding before the appeal tribunal or commissioner is publicly disclosable?

Hearing Location(s): On February 9, 2021, at 9:00 a.m., conference call number 360-407-3780, Pin: 802059#. Hearing will be held remotely due to COVID-19.

Date of Intended Adoption: On or after February 16, 2021.

Submit Written Comments to: April Amundson, Employment Security Department (ESD), P.O. Box 9046, Olympia, WA 98507-9046, email rules@esd.wa.gov, by February 9, 2021.

Assistance for Persons with Disabilities: Contact Teresa Eckstein, state EO officer, phone 360-480-5708, TTY 711, email Teckstein@esd.wa.gov, by February 2, 2021.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The proposed amendments and new rules implement a number of changes which include: Technical changes to ensure the rules are consistent with Title 50A RCW and other paid leave rules under Title 192 WAC; technical and grammatical changes for clarification; adding a definition of "illegal act" for the purposes of benefit disqualification under RCW 50A.15.060; clarifying employment restoration requirements for successor and predecessor employers to align with federal requirements; clarifying what hours are considered "worked" for the purposes of employment restoration to align with federal requirements; adding language for withdrawal of an appeal when a redetermination has been made in the appellant's favor; and adding a requirement that hearings be closed to the public unless an open hearing is agreed upon by all parties.

Reasons Supporting Proposal: The proposed rules are necessary to clarify requirements, make technical corrections, streamline the hearing process, and align language with statute and other paid family and medical leave (PFML) rules. The proposed rules will provide clear and usable guidance to the public regarding program operations.

Statutory Authority for Adoption: RCW 50A.05.060, 50A.25.030.

Statute Being Implemented: RCW 50A.05.010, 50A.10.030, 50A.15.060, 50A.24.010; chapter 50A.25 RCW; RCW 50A.50.010, 50A.50.030, 50A.50.050, 50A.50.070.

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

Name of Proponent: ESD, PFML division, governmental.

Name of Agency Personnel Responsible for Drafting, Implementation, and Enforcement: April Amundson, Lacey, Washington, 360-485-2816.

A school district fiscal impact statement is not required under RCW 28A.305.135.

A cost-benefit analysis is required under RCW 34.05.328. A preliminary cost-benefit analysis may be obtained by contacting April Amundson, ESD, P.O. Box 9046, Olympia, WA 98507-9046, phone 360-485-2816, email rules@esd.wa.gov.

A cost-benefit analysis is required for WAC 192-610-090.

The following rules do not require a cost-benefit analysis:

WAC 192-510-050 is exempt under RCW 34.05.328 (5)(b)(iv) and (v) because the rule clarifies language without changing its effect, and is explicitly and specifically dictated by statute.

WAC 192-560-010 is exempt under RCW 34.05.328 (5)(b)(ii), (iv), and (v) because it is a procedural rule that adopts a policy pertaining to the internal operations of the department. Procedural rules are not significant legislative rules under RCW 34.05.328 (5)(c)(iii) and (a)(i). The rule also clarifies language without changing its effect, and is explicitly and specifically dictated by statute.

WAC 192-620-020 and 192-620-035 are exempt under RCW 34.05.328 (5)(b)(iv) because the rules clarify language without changing their effect.

WAC 192-700-006 and 192-700-007 are exempt under RCW 34.05.328 (5)(b)(iii) because the rules adopt or incorporate by reference federal regulations without material change.

WAC 192-800-045 and 192-800-155 are exempt under RCW 34.05.328 (5)(c)(i)(A) because they are procedural rules related to agency hearings. Procedural rules are not significant legislative rules under RCW 34.05.328 (5)(c)(iii) and (a)(i).

This rule proposal, or portions of the proposal, is exempt from requirements of the Regulatory Fairness Act because the proposal:

Is exempt under RCW 19.85.025(3) as the rules relate only to internal governmental operations that are not subject to violation by a nongovernment party; rules are adopting or incorporating by reference without material change federal statutes or regulations, Washington state statutes, rules of other Washington state agencies, shoreline master programs other than those programs governing shorelines of statewide significance, or, as referenced by Washington state law, national consensus codes that generally establish industry standards, if the material adopted or incorporated regulates the same subject matter and conduct as the adopting or incorporating rule; rules only correct typographical errors, make address or name changes, or clarify language of a rule without changing its effect; rule content is explicitly and specifically dictated by statute; and rules adopt, amend, or repeal a procedure, practice, or requirement relating to agency hearings; or a filing or related process requirement for applying to an agency for a license or permit.

Explanation of exemptions: WAC 192-510-050 How will the department assess the size of new employers? The rule is exempt under RCW 34.05.310 (4)(d) and (e) because the rule clarifies language without changing its effect, and the rule is explicitly and specifically dictated by statute.

WAC 192-560-010 Which businesses are eligible for small business assistance grants? The rule is exempt under RCW 34.05.310 (4)(b), (d),

and (e) because the rule is related to the internal operations of the department, clarifies language without changing its effect, and is explicitly and specifically dictated by statute.

WAC 192-620-020 What information will the department request from an employee when filing for weekly benefits? The rule is exempt under RCW 34.05.310 (4) (d) because the rule clarifies language without changing its effect.

WAC 192-620-035 When will a weekly benefit amount be prorated? The rule is exempt under RCW 34.05.310 (4) (d) because the rule clarifies language without changing its effect.

WAC 192-700-006 What hours are considered "worked" for the purposes of employment restoration? The rule is exempt under RCW 34.05.310 (4) (c) because the rule adopts or incorporates by reference federal regulations without material change.

WAC 192-700-007 Employment restoration requirements for predecessor and successor employers. The rule is exempt under RCW 34.05.310 (4) (c) because the rule adopts or incorporates by reference federal regulations without material change.

WAC 192-800-045 Can an appeal be withdrawn? The rule is exempt under RCW 34.05.310 (4) (g) (i) because the amendment outlines a procedure, practice, or requirement relating to agency hearings.

WAC 192-800-155 What information from a proceeding before the appeal tribunal or commissioner is publicly disclosable? The rule is exempt under RCW 34.05.310 (4) (g) (i) because the amendment outlines a procedure, practice, or requirement relating to agency hearings.

The proposed rule does not impose more-than-minor costs on businesses. Following is a summary of the agency's analysis showing how costs were calculated. WAC 192-610-090 What is an "illegal act" for the purposes of benefit disqualification?

January 6, 2021

April Amundson

Policy and Rules Manager for
Paid Family and Medical Leave

OTS-2778.1

AMENDATORY SECTION (Amending WSR 20-01-087, filed 12/12/19, effective 1/12/20)

WAC 192-510-050 How will the department assess the size of new employers? An employer that has not been in business in Washington long enough to report four calendar quarters by September 30th will have its size calculated after the second quarter of reporting is due by averaging the number of employees reported over the quarters for which reporting exists. Premium assessment based on this determination will begin on this reporting date. This size determination remains in effect ~~((until))~~ for the following ~~((September 30th pursuant to))~~ calendar year under RCW 50A.10.030 ~~((+)(e))~~.

[Statutory Authority: RCW 50A.05.60 [50A.05.060] and 50A.25.030. WSR 20-01-087, § 192-510-050, filed 12/12/19, effective 1/12/20. Statutory

Authority: RCW 50A.04.215. WSR 18-12-032, § 192-510-050, filed 5/29/18, effective 6/29/18.]

OTS-2779.2

AMENDATORY SECTION (Amending WSR 19-23-090, filed 11/19/19, effective 12/20/19)

WAC 192-560-010 Which businesses are eligible for small business assistance grants? (1) An employer((s)) determined to have one hundred fifty or fewer employees in the state that are assessed the employer share of the premium are eligible to apply for small business assistance grants.

(2) An employer((s)) determined to have fewer than fifty employees ((are)) is only eligible for a small business assistance grant if ((those)) the employer((s)) opts to pay the employer share of the premiums. ((Such)) The employer((s)) will be assessed the employer share of the premium for a minimum of ((three years)) twelve calendar quarters beginning with the first calendar quarter after ((any)) the most recent grant is received. ((An)) The employer may provide notice ((for opting)) to opt out after the ((three-year period)) twelfth quarter has ended.

(3) An employer is not eligible for a small business assistance grant if, at the time of application, the employer has outstanding and delinquent reports, outstanding and delinquent payments, or due and owing penalties or interest under Title 50A RCW.

(4) An employer may request only one grant per year for each employee who takes paid family or medical leave under this title. Submissions under (a) and (b) of this subsection do not qualify as grant applications and therefore do not count against the employer's limit of ten applications per year.

(a) An employer that qualifies for a grant under RCW 50A.24.010 ((3)(b)) for an amount that is less than one thousand dollars may submit documentation of significant additional wage-related costs incurred after filing the initial grant application in an attempt to qualify for additional grant funds.

(b) An employer may submit a revised application for a grant under RCW 50A.24.010 ((3)(e)) in an attempt to qualify for additional grant funds.

(5) An employer must apply for ((the)) any grant no later than four months following the last day of the employee's paid family or medical leave.

[Statutory Authority: RCW 50A.04.215. WSR 19-23-090, § 192-560-010, filed 11/19/19, effective 12/20/19; WSR 18-22-080, § 192-560-010, filed 11/2/18, effective 12/3/18.]

OTS-2780.2

NEW SECTION

WAC 192-610-090 What is an illegal act for the purposes of benefit disqualification? (1) Under RCW 50A.15.060, an employee is not entitled to paid family or medical leave benefits for any absence resulting from any injury or illness sustained in the perpetration by the employee of an illegal act.

(2) For purposes of benefit disqualification the following definitions apply:

(a) An "illegal act" is any unlawful action punishable as a felony or misdemeanor of which the individual has been convicted, has entered an Alford plea, has agreed to a stipulation of facts, or has admitted committing to a competent authority.

(b) A "competent authority" is:

(i) A court (including magistrate or court commissioner), prosecuting attorney, or law enforcement agency;

(ii) An administrative law judge;

(iii) A regulatory agency or professional association charged by law with maintaining professional standards or codes of conduct;

(iv) Any other person or body, other than your employer, with authority to administer disciplinary action against you.

(3) An admission to your employer or to an employee of the department that you have committed a criminal act is not considered an admission to a competent authority for the purposes of RCW 50A.15.060.

[]

OTS-2781.2

AMENDATORY SECTION (Amending WSR 19-13-001, filed 6/5/19, effective 7/6/19)

WAC 192-620-020 What information will the department request from an employee((s)) when filing for weekly benefits? (1) The department must determine if an employee qualifies for benefits when the employee files a weekly claim for the payment of benefits. For the week that the employee is claiming, the department will ask if the employee:

(a) Physically worked for wages during the week, and for the hours associated with that work;

(b) Received any paid leave such as vacation leave, sick leave, or other paid time off that was not considered a supplemental benefit payment provided by the employer, and the hours associated with that leave;

(c) Received any benefit that may disqualify the employee for paid family or medical leave, such as unemployment insurance; and

(d) Experienced a change in the qualifying event that affects the eligibility for, or duration of, paid family or medical leave benefits.

(2) The employee may be asked to provide additional information.

[Statutory Authority: RCW 50A.04.215. WSR 19-13-001, § 192-620-020, filed 6/5/19, effective 7/6/19.]

AMENDATORY SECTION (Amending WSR 20-20-073, filed 10/2/20, effective 11/2/20)

WAC 192-620-035 When will a weekly benefit amount be prorated?

(1) For an employee on paid family or medical leave, a weekly benefit amount is prorated when:

(a) The employee reports hours physically worked;

(b) The employee reports hours for paid sick leave, paid vacation leave, or other paid time off that is not considered a supplemental benefit payment as defined in WAC 192-500-180; or

(c) The employee files a weekly application for benefits that contains a day or days for which the employee did not claim paid family or medical leave.

(2) If an employee reports hours under subsection (1)(a) or (b) of this section, proration will be calculated as specified by RCW 50A.15.020(2).

(3) If an employee claims part of a week under subsection (1)(c) of this section, proration will be calculated by dividing the employee's typical workweek hours and weekly benefit amount for that week by sevenths, then multiplying by the number of days for which the employee claimed paid family or medical leave for that week. The remainder of the week will be calculated as specified by RCW 50A.15.020(2) and subsection (1)(a) and (b) of this section.

Example 1: An employee has already served a waiting period in the claim year and files a claim for a week of paid medical leave. The employee typically works forty hours a week at eight hours per day. In the week for which the employee is claiming, the employee claimed one day of paid medical leave and worked the other four days. This employee's weekly benefit is usually eight hundred dollars. The weekly benefit would then be prorated by the hours on paid medical leave (eight hours) relative to the typical workweek hours (forty hours). Eight hours is twenty percent of forty hours. The employee's weekly benefit would be prorated to twenty percent for a total of one hundred sixty dollars.

Example 2: An employee files a claim for eight hours of paid family (~~and~~) or medical leave and takes sick leave from the employer for the same day. The employer does not offer the sick leave as a supplemental benefit payment. The sick leave is considered hours worked by the employee. The employee is being paid for the same hours claimed on paid family (~~and~~) or medical leave. This employee is not eligible for benefits for this week.

Example 3: The employee's typical workweek hours are forty hours per week, and the weekly benefit amount is one thousand dollars. The employee files a claim for leave that starts on a Tuesday. Because the employee's claim did not include Sunday or Monday of that week, the employee's typical workweek hours and weekly benefit amount for that week will be prorated by two-sevenths, or two days of the seven days in the week. For that week only, the employee's typical workweek hours will be twenty-eight (five-sevenths of forty, rounded down to the nearest hour) and the weekly benefit amount will be seven hundred fourteen dollars (five-sevenths of one thousand dollars, rounded down to the nearest dollar).

[Statutory Authority: RCW 50A.05.060. WSR 20-20-073, § 192-620-035, filed 10/2/20, effective 11/2/20. Statutory Authority: RCW 50A.04.215. WSR 19-23-090, § 192-620-035, filed 11/19/19, effective 12/20/19.]

OTS-2782.2

NEW SECTION

WAC 192-700-006 What hours are considered worked for the purposes of an employee's eligibility for employment restoration? For the purposes of employment restoration under Title 50A RCW, the number of hours worked is determined in accordance with 29 C.F.R. Sec. 825.110(c) and any subsequent amendments to that regulation.

[]

NEW SECTION

WAC 192-700-007 Employment restoration requirements for predecessor and successor employers. For the purposes of employment restoration under Title 50A RCW, hours worked for a predecessor employer will be considered worked for the successor employer as described in 29 C.F.R. Sec. 825.107 and any subsequent amendments to that regulation.

[]

OTS-2783.2

AMENDATORY SECTION (Amending WSR 20-20-073, filed 10/2/20, effective 11/2/20)

WAC 192-800-045 ((When)) Can an appeal be withdrawn? (1) An aggrieved party may withdraw their appeal or petition for review upon approval by the office of administrative hearings or the commissioner's review office, respectively, at any time prior to the decision (~~in which case~~). When an appeal or petition for review is withdrawn, the determination, redetermination, order and notice of assessment of premiums or penalties, or other decision that was appealed, ((shall be)) is final in accordance with the provisions of Title 50A RCW.

(2) If an appeal is filed and a determination or redetermination of the decision has been made in the aggrieved party's favor, the appeal will be considered withdrawn unless the aggrieved party contests the withdrawal of the appeal in writing within thirty days of the date of redetermination.

[Statutory Authority: RCW 50A.05.060. WSR 20-20-073, § 192-800-045, filed 10/2/20, effective 11/2/20. Statutory Authority: RCW 50A.04.215. WSR 19-23-090, § 192-800-045, filed 11/19/19, effective 12/20/19.]

NEW SECTION

WAC 192-800-155 When are proceedings open to the public, and what information from a proceeding before the appeal tribunal or commissioner is publicly disclosable? To maintain confidentiality of records under chapter 50A.25 RCW:

(1) All proceedings will be closed to the public unless otherwise agreed upon by all parties appearing for hearing;

(2) All proceeding records will be sealed for hearings closed to the public and are not publicly disclosable; and

(3) All personal identifying information concerning an individual or employer will be redacted from the record if the hearing is open to the public.

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