WSR 06-03-081
PERMANENT RULES
DEPARTMENT OF
SOCIAL AND HEALTH SERVICES
(Health and Recovery Services Administration)
[Filed January 12, 2006, 4:33 p.m., effective February 12, 2006]

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

Purpose:

- Change all references of "Medical Assistance Administration (MAA)" to "the department";
- Add a definition for "enrollees representative";
- Clarify where in the department to send a completed enrollment form;
- Add the requirement of being a "recognized urban Indian Health Center or tribal clinic" to the primary care case management (PCCM) provider requirements;
- Add "delivery case rate payment" under the managed care payment section;
- Clarify that the department covers medically necessary categorically needy services that are excluded from coverage in the managed care organization's (MCO) contract;
- Clarify ninety-day coverage policy for enrollees outside their service area for emergency care and for medically necessary covered benefits that cannot wait;
- Clarify that the MCO must acknowledge receipt of grievances either orally or in writing within five working days and each appeal in writing within five working days;
- Remove the incorrect reference to "provider" under WAC 388-538-110 (7)(f)(v) and replace it with enrollee's representative;
- Remove the word "appeal" and replace it with "hearing requests" under WAC 388-538-110 (7)(m) and (n);
- Remove the word "appeal" and replace it with "hearing requests" under WAC 388-538-112 [(3)](a) and (b);
- Add contract language on MCO oversight of delegated entities responsible for any delegated activity under quality of care;
- Add language on individualized treatment plans for enrollees with special health care needs which ensure integration of clinical and nonclinical disciplines and services in the overall plan of care; and
- Add contract language on noncompliance with any contractual, state, or federal requirements.

Citation of Existing Rules Affected by this Order: Amending WAC 388-538-050, 388-538-060, 388-538-061, 388-538-063, 388-538-065, 388-538-067, 388-538-068, 388-538-070, 388-538-095, 388-538-100, 388-538-110, 388-538-111, 388-538-112, 388-538-120, 388-538-130, and 388-538-140.

Statutory Authority for Adoption: RCW 74.08.090 and 74.09.522.

Adopted under notice filed as WSR 05-23-027 on November 8, 2005.

A final cost-benefit analysis is available by contacting Penny Dow/Michael Paulson, Division of Program Support, P.O. Box 45530, Olympia, WA 98504-5530, phone (360) 725-1636 or (360) 725-1641, fax (360) 753-7315, e-mail dowpl@dshs.wa.gov or paulsmj@dshs.wa.gov. The preliminary cost-benefit analysis is unchanged and will be final.

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

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

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

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 16, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 16, Repealed 0.

Date Adopted: January 9, 2006.

Andy Fernando, Manager
Rules and Policies Assistance Unit

AMENDATORY SECTION (Amending WSR 05-01-066, filed 12/8/04, effective 1/8/05)

WAC 388-538-050 Definitions. The following definitions and abbreviations and those found in WAC 388-500-0005, Medical definitions, apply to this chapter. References to managed care in this chapter do not apply to mental health managed care administered under chapter 388-865 WAC.

"Action" ((~~means~~)):

(1) The denial or limited authorization of a requested service, including the type or level of service;

(2) The reduction, suspension, or termination of a previously authorized service;

(3) The denial, in whole or in part, of payment for a service;

(4) The failure to provide services in a timely manner, as defined by the state; or

(5) The failure of a((~~n~~)) managed care organization (MCO) to act within the time frames provided in 42 C.F.R. 438.408(b).

"Ancillary health services" ((~~means~~)) - Health services ordered by a provider, including but not limited to, laboratory services, radiology services, and physical therapy.

"Appeal" ((~~means~~)) - A request by an enrollee or provider ((~~or covered enrollee~~)) with written permission of an enrollee for reconsideration of an action.

"Assign" or **"assignment"** ((~~means that the medical assistance administration (MAA)~~)) - The department selects ((~~a managed care organization (MCO)~~)) an MCO or primary care case management (PCCM) provider to serve a client who has ((~~failed to~~)) not selected an MCO or PCCM provider.

"Auto enrollment" ((~~means that MAA~~)) - When the department automatically enrolls a client into an MCO in his or her area((~~, rather than waiting for the client to enroll with an MCO~~)).

"Basic health" or **"BH"** ((~~means~~)) The health care program authorized by chapter 70.47 RCW and administered by

the health care authority (HCA). ((~~MAA considers basic health to be third-party coverage, however, this does not include basic health plus (BH+).~~))

"Basic Health Plus" - Refer to WAC 388-538-065.

"Children with special health care needs" ((~~means~~)) - Children under nineteen years of age identified by ((~~DSHS~~)) the department as having special health care needs. This includes:

(1) Children designated as having special health care needs by the department of health (DOH) and ((~~served~~)) receiving services under the Title V program;

(2) Children ((~~who meet disability criteria of~~)) eligible for Supplemental Security Income under Title 16 of the Social Security Act (SSA); and

(3) Children who are in foster care or who are served under subsidized adoption.

"Client" ((~~means~~)) - For the purpose of this chapter, an individual eligible for any medical program, including managed care programs, but who is not enrolled with an MCO or PCCM provider. In this chapter, "client" refers to a person before he or she is enrolled in managed care, while "enrollee" refers to an individual eligible for any medical program who is enrolled in managed care.

"Department" - The department of social and health services (DSHS).

"Emergency medical condition" ((~~means~~)) - A condition meeting the definition in 42 C.F.R. 438.114(a).

"Emergency services" ((~~means~~)) - Services ((~~as~~)) defined in 42 C.F.R. 438.114(a).

"End enrollment" ((~~means~~)) - An enrollee is currently enrolled in managed care, either with an MCO or with a PCCM provider, and ((~~requests to discontinue enrollment and~~)) his or her enrollment is discontinued and he or she returns to the fee-for-service delivery system for one of the reasons outlined in WAC 388-538-130. This is also referred to as "disenrollment."

"Enrollee" ((~~means~~)) - An individual eligible for any medical program who is enrolled in managed care through an MCO or PCCM provider that has a contract with the state.

"Enrollees representative" - An individual with a legal right or written authorization from the enrollee to act on behalf of the enrollee in making decisions.

"Enrollees with special health care needs" ((~~means~~)) - Persons having chronic and disabling conditions, including persons with special health care needs that meet all of the following conditions:

(1) Have a biologic, psychologic, or cognitive basis;

(2) Have lasted or are virtually certain to last for at least one year; and

(3) Produce one or more of the following conditions stemming from a disease:

(a) Significant limitation in areas of physical, cognitive, or emotional function;

(b) Dependency on medical or assistive devices to minimize limitation of function or activities; or

(c) In addition, for children, any of the following:

(i) Significant limitation in social growth or developmental function;

(ii) Need for psychological, educational, medical, or related services over and above the usual for the child's age; or

(iii) Special ongoing treatments, such as medications, special diet, interventions, or accommodations at home or school.

"Exemption" ((~~means~~)) - Department approval of a ((~~client, not currently enrolled in managed care, makes a preenrollment request~~)) client's pre-enrollment request to remain in the fee-for-service delivery system for one of the reasons outlined in WAC 388-538-130.

"Grievance" ((~~means~~)) - An expression of dissatisfaction about any matter other than an action, as "action" is defined in this section.

"Grievance system" ((~~means~~)) - The overall system that includes grievances and appeals handled at the MCO level and access to the ((~~state fair~~)) department's hearing process.

"Health care service" or **"service"** ((~~means~~)) - A service or item provided for the prevention, cure, or treatment of an illness, injury, disease, or condition.

((~~"Healthy Options contract" or "HO contract" means the agreement between DSHS and an MCO to provide prepaid contracted services to enrollees.~~))

"Healthy Options program" or **"HO program"** ((~~means~~)) - The ((~~MAA~~)) department's prepaid managed care health program for Medicaid-eligible clients and clients enrolled in the state children's health insurance program (SCHIP).

"Managed care" ((~~means~~)) - A comprehensive health care delivery system that includes preventive, primary, specialty, and ancillary services. These services are provided through either an MCO or PCCM provider.

"Managed care contract" - The agreement between the department and an MCO to provide prepaid contracted services to enrollees.

"Managed care organization" or **"MCO"** ((~~means~~)) - An organization having a certificate of authority or certificate of registration from the office of insurance commissioner that contracts with ((~~DSHS~~)) the department under a comprehensive risk contract to provide prepaid health care services to eligible ((~~MAA~~)) clients under the department's managed care programs.

"Mandatory enrollment" - The department's requirement that a client enroll in managed care.

"Mandatory service area" ((~~means~~)) - A service area in which eligible clients are required to enroll in an MCO.

"Medicare/Medicaid Integration Program" or **"MMIP"** ((~~means DSHS's~~)) - The department's prepaid managed care program that integrates medical and long-term care services for clients who are sixty-five years of age or older and eligible for Medicare only or eligible for Medicare and Medicaid. Clients eligible for Medicaid only are not eligible for this program.

"Nonparticipating provider" ((~~means a person or entity~~)) - A healthcare provider that does not have a written agreement with an MCO but that provides MCO-contracted health care services to managed care enrollees with the MCO's authorization ((~~of the MCO. The MCO is solely responsible for payment for MCO-contracted health care ser-~~

~~vices that are authorized by the MCO and provided by non-participating providers~~)).

"Participating provider" ((~~means a person or entity~~)) - A healthcare provider with a written agreement with an MCO to provide health care services to the MCO's managed care enrollees. A participating provider must look solely to the MCO for payment for such services.

"Primary care case management" or **"PCCM"** ((~~means~~)) - The health care management activities of a provider that contracts with the department to provide primary health care services and to arrange and coordinate other preventive, specialty, and ancillary health services.

"Primary care provider" or **"PCP"** ((~~means~~)) - A person licensed or certified under Title 18 RCW including, but not limited to, a physician, an advanced registered nurse practitioner (ARNP), or a physician assistant who supervises, coordinates, and provides health services to a client or an enrollee, initiates referrals for specialist and ancillary care, and maintains the client's or enrollee's continuity of care.

"Prior authorization" or **"PA"** ((~~means~~)) A process by which enrollees or providers must request and receive ((~~MAA~~)) department approval for services provided through ((~~MAA's~~)) the department's fee-for-service ((~~program~~)) system, or MCO approval for services provided through the MCO, for certain medical services, equipment, drugs, and supplies, based on medical necessity, before the services are provided to clients, as a precondition for provider reimbursement. Expedited prior authorization and limitation extension are forms of prior authorization. See WAC 388-501-0165.

"Timely" - In relation to the provision of services, means an enrollee has the right to receive medically necessary health care as expeditiously as the enrollee's health condition requires. In relation to authorization of services and grievances and appeals, means ((~~in accordance with~~)) according to the department's managed care program contracts and the ((~~time frames~~)) timeframes stated in this chapter.

"Washington Medicaid Integration Partnership" or **"WMIP"** ((~~means~~)) - The managed care program that is designed to integrate medical, mental health, chemical dependency treatment, and long-term care services into a single coordinated health plan for eligible aged, blind, or disabled clients.

AMENDATORY SECTION (Amending WSR 05-01-066, filed 12/8/04, effective 1/8/05)

WAC 388-538-060 Managed care and choice. (1) ((~~MAA~~)) Except as provided in subsection (2) of this section, the department requires a client to enroll in managed care when that client ((~~meets all of the following conditions~~)):

(a) Is eligible for one of the medical programs for which ((~~clients must enroll in managed care~~)) enrollment is mandatory;

(b) Resides in an area((~~, determined by the medical assistance administration (MAA),~~)) where ((~~clients must~~)) enrollment is mandatory ((~~in managed care~~)); and

(c) Is not exempt from managed care enrollment ((~~as determined by MAA, consistent with WAC 388-538-130, and any related fair hearing has been held and decided; and~~

~~(d) Has not had managed care enrollment ended by MAA~~)) or the department has not ended the client's managed care enrollment, consistent with WAC 388-538-130, and any related hearing has been held and decided.

(2) American Indian/Alaska Native (AI/AN) clients who meet the provisions of 25 U.S.C. 1603 (c)-(d) for federally recognized tribal members and their descendants may choose one of the following:

(a) Enrollment with a managed care organization (MCO) available in their area;

(b) Enrollment with an Indian or tribal primary care case management (PCCM) provider available in their area; or

(c) ((~~MAA's~~)) The department's fee-for-service system.

(3) A client may enroll with an MCO or PCCM provider by calling ((~~MAA's~~)) the department's toll-free enrollment line or by sending a completed enrollment form to ((~~MAA~~)) the department's unit responsible for managed care enrollment as listed on the department's enrollment form.

(a) ((~~Except as provided in subsection (2) of this section for clients who are AI/AN,~~)) A client ((~~required to enroll in managed care~~)) must enroll with an MCO or PCCM provider available in the area where the client lives.

(b) All family members must either enroll with the same MCO or enroll with PCCM providers.

(c) Enrollees may request an MCO or PCCM provider change at any time.

(d) When a client requests enrollment with an MCO or PCCM provider, ((~~MAA~~)) the department enrolls a client effective the earliest possible date given the requirements of ((~~MAA's~~)) the department's enrollment system. ((~~MAA~~)) The department does not enroll clients retrospectively.

(4) ((~~MAA~~)) The department assigns a client who does not choose an MCO or PCCM provider as follows:

(a) If the client has family members enrolled with an MCO, the client is enrolled with that MCO;

(b) If the client does not have family members enrolled with an MCO that is currently under contract with ((~~DSHS~~)) the department, and the client was previously enrolled with the MCO or PCCM provider, and ((~~DSHS~~)) the department can identify the previous enrollment, the client is re-enrolled with the same MCO or PCCM provider;

(c) If a client does not choose an MCO or a PCCM provider, but indicates a preference for a provider to serve as the client's primary care provider (PCP), ((~~MAA~~)) the department attempts to contact the client to complete the required choice. If ((~~MAA~~)) the department is not able to contact the client in a timely manner, ((~~MAA~~)) the department documents the attempted contacts and, using the best information available, assigns the client as follows. If the client's preferred PCP is:

(i) Available with one MCO, ((~~MAA~~)) the department assigns the client in the MCO where the client's PCP provider is available. The MCO is responsible for PCP choice and assignment;

(ii) Available only as a tribal PCCM provider and the client meets the criteria of subsection (2) of this section, ((~~MAA~~)) the department assigns the client to the preferred provider as the client's PCCM provider;

(iii) Available with multiple MCOs or through an MCO and as a PCCM provider, ((~~MAA~~)) the department assigns the client to an MCO as described in (d) of this subsection;

(iv) Not available through any MCO or as a PCCM provider, ((~~MAA~~)) the department assigns the client to an MCO or PCCM provider as described in (d) of this subsection.

(d) If the client cannot be assigned according to (a), (b), or (c) of this subsection, ((~~MAA~~)) the department assigns the client as follows:

(i) If an AI/AN client does not choose an MCO or PCCM provider, ((~~MAA~~)) the department assigns the client to a tribal PCCM provider if that client lives in a zip code served by a tribal PCCM provider. If there is no tribal PCCM provider in the client's area, the client continues to be served by ((~~MAA's~~)) the department's fee-for-service system. A client assigned under this subsection may request to end enrollment at any time.

(ii) If a non-AI/AN client does not choose an MCO ((~~or PCCM~~)) provider, ((~~MAA~~)) the department assigns the client to an MCO ((~~or PCCM provider~~)) available in the area where the client lives. The MCO is responsible for PCP choice and assignment. ((~~An MCO must meet the healthy options (HO) contract's access standards unless the MCO has been granted an exemption by MAA.~~))

(iii) For clients who are new recipients to medical assistance or who have had a break in eligibility of greater than two months, ((~~MAA~~)) the department sends a written notice to each household of one or more clients who are assigned to an MCO or PCCM provider. The assigned client has ten calendar days to contact ((~~MAA~~)) the department to change the MCO or PCCM provider assignment before enrollment is effective. The notice includes the name of the MCO or PCCM provider to which each client has been assigned, the effective date of enrollment, the date by which the client must respond in order to change ((~~MAA's~~)) the assignment, and the toll-free telephone number of either:

(A) The MCO for enrollees assigned to an MCO; or

(B) ((~~MAA~~)) The department for enrollees assigned to a PCCM provider.

(iv) If the client has a break in eligibility of less than two months, the client will be automatically reenrolled with his or her previous MCO or PCCM provider and no notice will be sent.

(5) An MCO enrollee's selection of the enrollee's PCP or the enrollee's assignment to a PCP occurs as follows:

(a) MCO enrollees may choose:

(i) A PCP or clinic that is in the enrollee's MCO and accepting new enrollees; or

(ii) Different PCPs or clinics participating with the ((~~same~~)) enrollee's MCO for different family members.

(b) The MCO assigns a PCP or clinic that meets the access standards set forth in the relevant managed care contract if the enrollee does not choose a PCP or clinic;

(c) MCO enrollees may change PCPs or clinics in an MCO for any reason, with the change becoming effective no later than the beginning of the month following the enrollee's request; or

(d) In accordance with this subsection, MCO enrollees may file a grievance with the MCO and may change plans if the MCO ((~~denies~~)) does not approve an enrollee's request to change PCPs or clinics.

AMENDATORY SECTION (Amending WSR 05-01-066, filed 12/8/04, effective 1/8/05)

WAC 388-538-061 Voluntary enrollment into managed care ((~~provided through the~~)) - Washington Medicaid Integration Partnership (WMIP) or Medicare/Medicaid Integration Program (MMIP). (1) The purpose of this section is to describe the managed care requirements for clients eligible for either the Washington Medicaid Integration Partnership (WMIP) or the Medicare/Medicaid Integration Program (MMIP).

(2) Unless otherwise stated in this section, all of the provisions of chapter 388-538 WAC apply to clients enrolled in WMIP and MMIP.

(3) The following sections of chapter 388-538 WAC do not apply to WMIP enrollees or MMIP enrollees:

(a) WAC 388-538-060. However, WAC 388-538-060(5), describing enrollees' ability to choose their PCP, does apply to WMIP enrollees and MMIP enrollees;

(b) WAC 388-538-063;

(c) WAC 388-538-065;

(d) WAC 388-538-068; and

(e) WAC 388-538-130. However, WAC 388-538-130 (3) and (4), describing the process used when ((~~MAA~~)) the department receives a request from an MCO to remove an enrollee from enrollment in managed care, do apply to WMIP enrollees and MMIP enrollees. Also, WAC 388-538-130(9), describing the MCO's ability to refer enrollees to ((~~MAA's~~)) the department's "Patient Review and Restriction" program, does apply to WMIP enrollees and MMIP enrollees.

(4) The process for enrollment of WMIP and MMIP clients is as follows:

(a) Enrollment in WMIP and MMIP is voluntary, subject to program limitations in subsection (b) and (c) of this section.

(b) For WMIP, ((~~MAA~~)) the department automatically enrolls clients, with the exception of American Indian/Alaska natives and clients eligible for both Medicare and Medicaid, when they:

(i) Are aged, blind, or disabled;

(ii) Are twenty-one years of age or older; and

(iii) Receive categorically needy medical assistance.

(c) For MMIP, clients may enroll when they:

(i) Are sixty-five years of age or older; and

(ii) Receive Medicare and/or Medicaid.

(d) American Indian/Alaska native (AI/AN) clients and clients who are eligible for Medicare and Medicaid who meet the eligibility criteria in (b) or (c) of this subsection may voluntarily enroll or end enrollment in WMIP or MMIP at any time.

(e) ((~~MAA~~)) The department will not enroll a client in WMIP or MMIP, or will end an enrollee's enrollment in WMIP or MMIP when the client has, or becomes eligible for, CHAMPUS/TRICARE or any other third-party health care coverage that would require ((~~exemption or involuntary disenrollment from~~)) the department to either exempt the client

from enrollment in managed care or end the enrollees enrollment in managed care.

(f) A client or enrollee in WMIP or MMIP or the client's or enrollee's representative may end enrollment from the MCO at any time without cause. The client may then reenroll at any time with the MCO. ((~~MAA~~)) The department ends enrollment for clients prospectively to the first of the month following request to end enrollment, except as provided in subsection (g) of this section.

(g) Clients may request that ((~~MAA~~)) the department retroactively end enrollment from WMIP and MMIP. On a case-by-case basis, ((~~MAA~~)) the department may retroactively end enrollment from WMIP and MMIP when, in ((~~MAA's~~)) the department's judgment:

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

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

(5) In addition to the scope of medical care described in WAC 388-538-095, WMIP and MMIP are designed to include the following services:

(a) For WMIP enrollees - mental health, chemical dependency treatment, and long-term care services; and

(b) For MMIP enrollees - long-term care services.

(6) ((~~MAA~~)) The department sends each client written information about covered services when the client is eligible to enroll in WMIP or MMIP, and any time there is a change in covered services. In addition, ((~~MAA~~)) the department requires MCOs to provide new enrollees with written information about covered services. This notice informs the client about the right to ((~~disenroll~~)) end enrollment and how to do so.

AMENDATORY SECTION (Amending WSR 04-15-003, filed 7/7/04, effective 8/7/04)

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

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

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

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

(a) Are American Indian or Alaska Native (AI/AN); and

(b) Meet the provisions of 25 U.S.C. 1603 (c)-(d) for federally recognized tribal members and their descendants.

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

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

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

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

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

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

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

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

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

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

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

(d) ((~~Even if a service is covered by MAA on a fee-for-service basis, it is the MCO, and not MAA, from whom a GAU enrollee must obtain prior authorization before receiving the service; and~~

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

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

(a) Provided by an MCO-contracted provider; or

(b) Authorized by the MCO and provided by nonparticipating providers.

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

(a) Services that are not medically necessary;

(b) Services not included in the medical care services scope of care;

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

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

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

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

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

AMENDATORY SECTION (Amending WSR 05-01-066, filed 12/8/04, effective 1/8/05)

WAC 388-538-065 Medicaid-eligible basic health (BH) enrollees. (1) Certain children and pregnant women who have applied for, or are enrolled in, managed care through basic health (BH) (chapter 70.47 RCW) are eligible for Medicaid under pediatric and maternity expansion provisions of the Social Security Act. The ((~~medical assistance administration (MAA)~~)) department determines Medicaid eligibility for children and pregnant women who enroll through BH.

(2) Eligible children are enrolled in the basic health plus program and eligible pregnant women are enrolled in the maternity benefits program.

(3) The administrative rules and regulations that apply to managed care enrollees also apply to Medicaid-eligible clients enrolled through BH, except as follows:

(a) The process for enrolling in managed care described in WAC 388-538-060(3) does not apply since enrollment is through the health care authority, the state agency that administers BH;

(b) American Indian/Alaska native (AI/AN) clients cannot choose fee-for-service or PCCM as described in WAC 388-538-060(2). They must enroll in a BH-contracted MCO.

(c) If a Medicaid eligible client applying for BH Plus does not choose an MCO prior to the department's eligibility determination, the client is transferred from BH Plus to the department ((~~of social and health services (DSHS)~~)) for assignment to managed care.

(d) The department does not consider the basic health plus and the maternity benefits programs to be third party.

AMENDATORY SECTION (Amending WSR 05-01-066, filed 12/8/04, effective 1/8/05)

WAC 388-538-067 Managed care provided through managed care organizations (MCOs). (1) Managed care organizations (MCOs) may contract with the department ((~~of social and health services (DSHS)~~)) to provide prepaid health care services to eligible clients. The MCOs must meet the qualifications in this section to be eligible to contract with ((~~DSHS~~)) the department. The MCO must:

(a) Have a certificate of registration from the office of the insurance commissioner (OIC) that allows the MCO to provide the services in subsection (1) of this section;

(b) Accept the terms and conditions of ((~~DSHS' HO~~)) the department's managed care contract;

(c) Be able to meet the network and quality standards established by ((~~DSHS~~)) the department; and

(d) Accept the prepaid rates published by ((~~DSHS~~)) the department.

(2) ((~~DSHS~~)) The department reserves the right not to contract with any otherwise qualified MCO.

AMENDATORY SECTION (Amending WSR 02-01-075, filed 12/14/01, effective 1/14/02)

WAC 388-538-068 Managed care provided through primary care case management (PCCM). (((~~(1)~~))) A provider may contract with ((~~DSHS~~)) the department as a primary care case management (PCCM) provider to ((~~provide~~)) coordinate health care services to eligible ((~~medical assistance administration (MAA)~~))) clients under ((~~MAA's~~)) the department's managed care program. The PCCM provider or the individual providers in a PCCM group or clinic must:

(((~~(a)~~))) (1) Have a core provider agreement with ((~~DSHS~~)) the department;

(((~~(b) Hold a current license to practice as a physician, certified nurse midwife, or advanced registered nurse practitioner in the state of Washington;~~)))

(2) Be a recognized urban Indian health center or tribal clinic;

(((~~(c)~~))) (3) Accept the terms and conditions of ((~~DSHS'~~)) the department's PCCM contract;

(((~~(d)~~))) (4) Be able to meet the quality standards established by ((~~DSHS~~)) the department; and

(((~~(e)~~))) (5) Accept PCCM rates published by ((~~DSHS~~)) the department.

(((~~(2) DSHS reserves the right not to contract for PCCM with an otherwise qualified provider.~~)))

AMENDATORY SECTION (Amending WSR 05-01-066, filed 12/8/04, effective 1/8/05)

WAC 388-538-070 Managed care payment. (1) The ((~~medical assistance administration (MAA)~~))) department pays managed care organizations (MCOs) monthly capitated premiums that:

(a) Have been determined using generally accepted actuarial methods;

(b) Are based on historical analysis of financial cost and/or rate information; and

(c) Are paid based on legislative allocations.

(2) ((~~MAA~~)) The department pays primary care case management (PCCM) providers a monthly case management fee according to contracted terms and conditions.

(3) ((~~MAA~~)) The department does not pay providers ((~~on a~~)) under the fee-for-service ((~~basis~~)) system for services that are the MCO's responsibility, even if the MCO has not paid for the service for any reason. The MCO is solely responsible for payment of MCO-contracted health care services((~~:~~

~~(a) Provided by an MCO-contracted provider; or~~

~~(b) That are authorized by the MCO and provided by nonparticipating providers~~)).

(4) ((~~MAA~~)) The department pays an ((~~additional monthly amount, known as an~~)) enhancement rate((~~,~~)) to federally qualified health care centers (FQHC) and rural health clinics (RHC) for each client enrolled with MCOs through the FQHC or RHC. ((~~MCOs may contract with FQHCs and RHCs to provide services. FQHCs and RHCs receive an~~)) The enhancement rate from ((~~MAA on a per member, per month basis~~)) the department is in addition to the negotiated payments ((~~they~~)) FQHCs and RHCs receive from the MCOs for services provided to MCO enrollees.

(5) The department pays MCOs a delivery case rate, separate from the capitation payment, when an enrollee delivers a child.

AMENDATORY SECTION (Amending WSR 05-01-066, filed 12/8/04, effective 1/8/05)

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

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

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

(c) The ((~~medical assistance administration (MAA)~~)) department covers ((~~the~~)) medically necessary((~~, covered~~)) categorically needy services ((~~not included in the MCO contract for MCO enrollees~~)) described in chapter 388-529 WAC that are excluded from coverage in the MCO contract.

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

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

(f) ((~~DSHS~~)) The department sends each client written information about covered services when the client is required to enroll in managed care, and any time there is a change in covered services. This information describes covered services, which services are covered by ((~~MAA~~)) the department, and which services are covered by MCOs. In addition, ((~~DSHS~~)) the department requires MCOs to provide new enrollees with written information about covered services.

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

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

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

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

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

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

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

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

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

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

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

(e) ((~~An enrollee may appeal an MCO action using the MCO's appeal process, as described in WAC 388-538-110. After exhausting the MCO's appeal process, an enrollee may also request a department fair hearing for review of an MCO action as described in WAC 388-538-112~~)) The department requires the MCO to coordinate benefits with other insurers in a manner that does not reduce benefits to the enrollee or result in costs to the enrollee;

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

(g) For enrollees temporarily outside their MCOs service area, the MCO is required to cover enrollees for up to ninety

days for emergency care and medically necessary covered benefits that cannot wait until the enrollees return to their service area.

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

(a) For all managed care enrollees:

(i) Services that are not medically necessary;

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

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

(b) For MCO enrollees:

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

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

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

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

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

(i) The specific service to be provided;

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

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

(A) The service is not medically necessary; or

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

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

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

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

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

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

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

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

AMENDATORY SECTION (Amending WSR 03-18-110, filed 9/2/03, effective 10/3/03)

WAC 388-538-100 Managed care emergency services. (1) A managed care enrollee may obtain emergency services, for emergency medical conditions ((~~in~~)) from any ((~~hospital emergency department~~)) qualified Medicaid provider. ("Emergency services" and "emergency medical condition" are as defined in this chapter.)

(a) The managed care organization (MCO) covers emergency services for MCO enrollees.

(b) ((~~MAA~~)) The department covers emergency services for primary care case management (PCCM) enrollees.

(2) Emergency services for emergency medical conditions do not require prior authorization by the MCO, primary care provider (PCP), PCCM provider, or ((~~MAA~~)) the department.

(3) MCOs must cover all emergency services provided to an enrollee by a provider who is qualified to furnish Medicaid services, without regard to whether the provider is a participating or nonparticipating provider.

(4) An enrollee who requests emergency services is entitled to receive an exam to determine if the enrollee has an emergency medical condition. What constitutes an emergency medical condition may not be limited on the basis of diagnosis or symptoms.

(5) The MCO must cover emergency services provided to an enrollee when:

(a) The enrollee had an emergency medical condition, including cases in which the absence of immediate medical attention would not have had the outcomes specified in the definition of an emergency medical condition; and

(b) The plan provider or other MCO representative instructs the enrollee to seek emergency services.

(6) In any disagreement between a hospital and the MCO about whether the enrollee is stable enough for discharge or transfer, or whether the medical benefits of an unstabilized transfer outweigh the risks, the judgment of the attending physician(s) actually caring for the enrollee at the treating facility prevails.

AMENDATORY SECTION (Amending WSR 03-18-110, filed 9/2/03, effective 10/3/03)

WAC 388-538-110 The grievance system for managed care organizations (MCO). (1) ((~~A managed care enrollee may be enrolled in a managed care organization (MCO) or with a primary care case management (PCCM) provider.~~)) This section contains information about the grievance system for managed care organization (MCO) enrollees, which includes grievances and appeals ((~~as defined in WAC 388-538-050~~)). See WAC 388-538-111 for information about the grievance system for PCCM enrollees, which includes grievances and appeals. ((~~See WAC 388-538-112 for the~~

~~department's fair hearing process for appeals by MCO enrollees.~~))

(2) An MCO enrollee may voice a grievance or appeal an action by an MCO to the MCO either orally or in writing.

(3) ((~~If an MCO fails to meet the time frames in this section concerning any appeal, the MCO must provide the services that are the subject of the appeal.~~

~~(4)~~)) MCOs must maintain records of grievances and appeals and must review the information as part of the MCO's quality strategy.

(((~~(5)~~))) (4) MCOs must provide information describing the MCO's grievance system to all providers and subcontractors ((~~in any contract~~)).

(((~~(6)~~))) (5) Each MCO must have a grievance system in place for enrollees. The system must comply with the requirements of this section and the regulations of the state office of the insurance commissioner (OIC)((~~, insofar as OIC regulations are not in conflict with this chapter. Where such~~)). If a conflict exists between the requirements of this chapter and OIC regulations, the requirements of this chapter take precedence. The MCO grievance system must include all of the following:

(a) A grievance process for complaints about any matter other than an action, as defined in WAC 388-538-050. See subsection (((~~(7)~~))) (6) of this section for this process;

(b) An appeal process for an action, as defined in WAC 388-538-050. See subsection (((~~(8)~~))) (7) of this section for the standard appeal process and subsection (((~~(9)~~))) (8) of this section for the expedited appeal process;

(c) Access to the department's ((~~fair~~)) hearing process for actions as defined in WAC 388-538-050. The department's ((~~fair~~)) hearing process described in chapter 388-02 WAC applies to this chapter. Where conflicts exist, the requirements in this chapter take precedence. See WAC 388-538-112 for the department's ((~~fair~~)) hearing process for MCO enrollees;

(d) Access to an independent review (IR) as described in RCW 48.43.535, for actions as defined in WAC 388-538-050 (see WAC 388-538-112 for additional information about the IR); and

(e) Access to the board of appeals (BOA) for actions as defined in WAC 388-538-050 (also see chapter 388-02 WAC and WAC 388-538-112).

(((~~(7)~~))) (6) The MCO grievance process:

(a) Only an enrollee may file a grievance with an MCO; a provider may not file a grievance on behalf of an enrollee.

(b) To ensure the rights of MCO enrollees are protected, ((~~MAA approves~~)) each MCO's grievance process must be approved by the department.

(c) MCOs must inform enrollees in writing within fifteen days of enrollment about enrollees' rights and how to use the MCO's grievance process, including how to use the department's ((~~fair~~)) hearing process. ((~~MAA~~)) The MCOs must ((~~approve~~)) have department approval for all written information the MCO sends to enrollees.

(d) The MCO must give enrollees any assistance necessary in taking procedural steps for grievances (e.g., interpreter services and toll-free numbers).

(e) The MCO must acknowledge receipt of each grievance either orally or in writing, and each appeal in writing, within five working days.

(f) The MCO must ensure that the individuals who make decisions on grievances are individuals who:

(i) Were not involved in any previous level of review or decision making; and

(ii) If deciding any of the following, are health care professionals who have appropriate clinical expertise in treating the enrollee's condition or disease:

(A) A grievance regarding denial of an expedited resolution of an appeal; or

(B) A grievance involving clinical issues.

(g) The MCO must complete the disposition of a grievance and notice to the affected parties within ninety days of receiving the grievance.

(((~~(8)~~))) (7) The MCO appeal process:

(a) An MCO enrollee, or ((~~a provider acting on behalf of the enrollee and~~)) the enrollee's representative with the enrollee's written consent, may appeal an MCO action. ((~~A provider may not request a department fair hearing on behalf of an enrollee.~~))

(b) To ensure the rights of MCO enrollees are protected, ((~~MAA approves~~)) each MCO's appeal process must be approved by the department.

(c) MCOs must inform enrollees in writing within fifteen days of enrollment about enrollees' rights and how to use the MCO's appeal process and the department's ((~~fair~~)) hearing process. ((~~MAA~~)) The MCOs must ((~~approve~~)) have department approval for all written information the MCO sends to enrollees.

(d) For standard service authorization decisions, an enrollee must file an appeal, either orally or in writing, within ninety calendar days of the date on the MCO's notice of action. This also applies to an enrollee's request for an expedited appeal.

(e) For appeals for termination, suspension, or reduction of previously authorized services, if the enrollee is requesting continuation of services, the enrollee must file an appeal within ten calendar days of the date of the MCO mailing the notice of action. Otherwise, the time frames in subsection (((~~(8)~~))) (7)(d) of this section apply.

(f) The MCO's notice of action must:

(i) Be in writing;

(ii) Be in the enrollee's primary language and be easily understood as required in 42 C.F.R. 438.10 (c) and (d);

(iii) Explain the action the MCO or its contractor has taken or intends to take;

(iv) Explain the reasons for the action;

(v) Explain the enrollee's or the ((~~provider's~~)) enrollee's representative's right to file an MCO appeal;

(vi) Explain the procedures for exercising the enrollee's rights;

(vii) Explain the circumstances under which expedited resolution is available and how to request it (also see subsection (((~~(9)~~))) (8) of this section);

(viii) Explain the enrollee's right to have benefits continue pending resolution of an appeal, how to request that benefits be continued, and the circumstances under which the

enrollee may be required to pay the costs of these services (also see subsection (((~~10~~))) (9) of this section); and

(ix) Be mailed as expeditiously as the enrollee's health condition requires, and as follows:

(A) For denial of payment, at the time of any action affecting the claim. This applies only when the client can be held liable for the costs associated with the action.

(B) For standard service authorization decisions that deny or limit services, not to exceed fourteen calendar days following receipt of the request for service, with a possible extension of up to fourteen additional calendar days if the enrollee or provider requests extension. If the request for extension is granted, the MCO must:

(I) Give the enrollee written notice of the reason for the decision for the extension and inform the enrollee of the right to file a grievance if the enrollee disagrees with that decision; and

(II) Issue and carry out the determination as expeditiously as the enrollee's health condition requires and no later than the date the extension expires.

(C) For termination, suspension, or reduction of previously authorized services, ten days prior to such termination, suspension, or reduction, except if the criteria stated in 42 C.F.R. 431.213 and 431.214 are met. The notice must be mailed by a method which certifies receipt and assures delivery within three calendar days.

(D) For expedited authorization decisions, in cases where the provider indicates or the MCO determines that following the standard time frame could seriously jeopardize the enrollee's life or health or ability to attain, maintain, or regain maximum function, no later than three calendar days after receipt of the request for service.

(g) The MCO must give enrollees any assistance necessary in taking procedural steps for an appeal (e.g., interpreter services and toll-free numbers).

(h) The MCO must acknowledge receipt of each appeal.

(i) The MCO must ensure that the individuals who make decisions on appeals are individuals who:

(i) Were not involved in any previous level of review or decision making; and

(ii) If deciding any of the following, are health care professionals who have appropriate clinical expertise in treating the enrollee's condition or disease:

(A) An appeal of a denial that is based on lack of medical necessity; or

(B) An appeal that involves clinical issues.

(j) The process for appeals must:

(i) Provide that oral inquiries seeking to appeal an action are treated as appeals (to establish the earliest possible filing date for the appeal), and must be confirmed in writing, unless the enrollee or provider requests an expedited resolution. Also see subsection (((~~9~~))) (8) for information on expedited resolutions;

(ii) Provide the enrollee a reasonable opportunity to present evidence, and allegations of fact or law, in person as well as in writing. The MCO must inform the enrollee of the limited time available for this in the case of expedited resolution;

(iii) Provide the enrollee and the enrollee's representative opportunity, before and during the appeals process, to examine the enrollee's case file, including medical records, and any other documents and records considered during the appeal process; and

(iv) Include as parties to the appeal, the enrollee and the enrollee's representative, or the legal representative of the deceased enrollee's estate.

(k) MCOs must resolve each appeal and provide notice, as expeditiously as the enrollee's health condition requires, within the following time frames:

(i) For standard resolution of appeals and notice to the affected parties, no longer than forty-five calendar days from the day the MCO receives the appeal. This time frame may not be extended.

(ii) For expedited resolution of appeals, including notice to the affected parties, no longer than three calendar days after the MCO receives the appeal.

(iii) For appeals for termination, suspension, or reduction of previously authorized services, no longer than forty-five calendar days from the day the MCO receives the appeal.

(l) The notice of the resolution of the appeal must:

(i) Be in writing. For notice of an expedited resolution, the MCO must also make reasonable efforts to provide oral notice (also see subsection (((~~9~~))) (8) of this section).

(ii) Include the results of the resolution process and the date it was completed.

(iii) For appeals not resolved wholly in favor of the enrollee:

(A) Include information on the enrollee's right to request a department ((~~fair~~)) hearing and how to do so (also see WAC 388-538-112);

(B) Include information on the enrollee's right to receive services while the hearing is pending and how to make the request (also see subsection (((~~10~~))) (9) of this section); and

(C) Inform the enrollee that the enrollee may be held liable for the cost of services received while the hearing is pending, if the hearing decision upholds the MCO's action (also see subsection (((~~11~~))) (10) of this section).

(m) If an MCO enrollee does not agree with the MCO's resolution of the appeal, the enrollee may file a request for a department ((~~fair~~)) hearing within the following time frames (see WAC 388-538-112 for the ((~~MAA fair~~)) department's hearing process for MCO enrollees):

(i) For ((~~appeals~~)) hearing requests regarding a standard service, within ninety days of the date of the MCO's notice of the resolution of the appeal.

(ii) For ((~~appeals~~)) hearing requests regarding termination, suspension, or reduction of a previously authorized service, within ten days of the date on the MCO's notice of the resolution of the appeal.

(n) The MCO enrollee must exhaust all levels of resolution and appeal within the MCO's grievance system prior to ((~~filing an appeal (a request for a department fair~~)) requesting a hearing) with ((~~MAA~~)) the department.

(((~~9~~))) (8) The MCO expedited appeal process:

(a) Each MCO must establish and maintain an expedited appeal review process for appeals when the MCO determines (for a request from the enrollee) or the provider indicates (in making the request on the enrollee's behalf or supporting the enrollee's request), that taking the time for a standard resolu-

tion could seriously jeopardize the enrollee's life or health or ability to attain, maintain, or regain maximum function.

(b) ((~~The MCO must make a decision on the enrollee's request for expedited appeal and provide notice, as expeditiously as the enrollee's health condition requires, within three calendar days after the MCO receives the appeal. The MCO must also make reasonable efforts to provide oral notice~~)) When approving an expedited appeal, the MCO will issue a decision as expeditiously as the enrollee's health condition requires, but not later than three business days after receiving the appeal.

(c) The MCO must ensure that punitive action is ((~~neither~~)) not taken against a provider who requests an expedited resolution or supports an enrollee's appeal.

(d) If the MCO denies a request for expedited resolution of an appeal, it must:

(i) Transfer the appeal to the ((~~time frame~~)) timeframe for standard resolution; and

(ii) Make reasonable efforts to give the enrollee prompt oral notice of the denial, and follow up within two ((~~(2)~~)) calendar days with a written notice.

((~~(10)~~)) (9) Continuation of previously authorized services:

(a) The MCO must continue the enrollee's services if all of the following apply:

(i) The enrollee or the provider files the appeal on or before the later of the following:

(A) Unless the criteria in 42 C.F.R. 431.213 and 431.214 are met, within ten calendar days of the MCO mailing the notice of action, which for actions involving services previously authorized, must be delivered by a method which certifies receipt and assures delivery within three calendar days; or

(B) The intended effective date of the MCO's proposed action.

(ii) The appeal involves the termination, suspension, or reduction of a previously authorized course of treatment;

(iii) The services were ordered by an authorized provider;

(iv) The original period covered by the original authorization has not expired; and

(v) The enrollee requests an extension of services.

(b) If, at the enrollee's request, the MCO continues or reinstates the enrollee's services while the appeal is pending, the services must be continued until one of the following occurs:

(i) The enrollee withdraws the appeal;

(ii) Ten calendar days pass after the MCO mails the notice of the resolution of the appeal and the enrollee has not requested a department ((~~fair~~)) hearing (with continuation of services until the department ((~~fair~~)) hearing decision is reached) within the ten days;

(iii) Ten calendar days pass after the state office of administrative hearings (OAH) issues a ((~~fair~~)) hearing decision adverse to the enrollee and the enrollee has not requested an independent review (IR) within the ten days (see WAC 388-538-112);

(iv) Ten calendar days pass after the IR mails a decision adverse to the enrollee and the enrollee has not requested a review with the board of appeals within the ten days (see WAC 388-538-112);

(v) The board of appeals issues a decision adverse to the enrollee (see WAC ((~~388-53-112~~)) 388-538-112); or

(vi) The time period or service limits of a previously authorized service has been met.

(c) If the final resolution of the appeal upholds the MCO's action, the MCO may recover the amount paid for the services provided to the enrollee while the appeal was pending, to the extent that they were provided solely because of the requirement for continuation of services.

((~~(11)~~)) (10) Effect of reversed resolutions of appeals:

(a) If the MCO or OAH reverses a decision to deny, limit, or delay services that were not provided while the appeal was pending, the MCO must authorize or provide the disputed services promptly, and as expeditiously as the enrollee's health condition requires.

(b) If the MCO or OAH reverses a decision to deny authorization of services, and the enrollee received the disputed services while the appeal was pending, the MCO must pay for those services.

AMENDATORY SECTION (Amending WSR 03-18-110, filed 9/2/03, effective 10/3/03)

WAC 388-538-111 Primary care case management (PCCM) grievances and appeals. (1) ((~~A managed care enrollee may be enrolled in a managed care organization (MCO) or with a primary care case management (PCCM) provider.~~)) This section contains information about the grievance system for PCCM enrollees, which includes grievances and appeals. See WAC 388-538-110 for information about the grievance system for MCO enrollees((~~, which includes grievances and appeals. See WAC 388-538-112 for the fair hearing process for appeals by MCO enrollees~~)).

(2) A PCCM enrollee may voice a grievance or file an appeal ((~~an MAA action~~)), either orally or in writing. PCCM enrollees use the ((~~medical assistance administration's (MAA's)~~)) department's grievance and appeal processes.

(3) The grievance process for PCCM enrollees;

(a) A PCCM enrollee may file a grievance with ((~~MAA~~)) the department. A provider may not file a grievance on behalf of a PCCM enrollee.

(b) ((~~MAA~~)) The department provides PCCM enrollees with information equivalent to that described in WAC 388-538-110 (7)(c).

(c) When a PCCM enrollee files a grievance with ((~~MAA~~)) the department, the enrollee is entitled to:

(i) Any reasonable assistance in taking procedural steps for grievances (e.g., interpreter services and toll-free numbers);

(ii) Acknowledgment of ((~~MAA's~~)) the department's receipt of the grievance;

(iii) A review of the grievance. The review must be conducted by ((~~an MAA~~)) a department representative who was not involved in the grievance issue; and

(iv) Disposition of a grievance and notice to the affected parties within ninety days of ((~~MAA~~)) the department receiving the grievance.

(4) The appeal process for PCCM enrollees:

(a) A PCCM enrollee may file an appeal of ((~~an MAA~~)) a department action with ((~~MAA~~)) the department. A provider may not file an appeal on behalf of a PCCM enrollee.

(b) ((~~MAA~~)) The department provides PCCM enrollees with information equivalent to that described in WAC 388-538-110 (8)(c).

(c) The appeal process for PCCM enrollees follows that described in chapter 388-02 WAC. Where a conflict exists, the requirements in this chapter take precedence.

AMENDATORY SECTION (Amending WSR 05-01-066, filed 12/8/04, effective 1/8/05)

WAC 388-538-112 The department of social and health services' (DSHS) ((~~fair~~)) hearing process for enrollee appeals of managed care organization (MCO) actions. (1) The ((~~fair~~)) hearing process described in chapter 388-02 WAC applies to the ((~~fair~~)) hearing process described in this chapter. Where a conflict exists, the requirements in this chapter take precedence.

(2) An MCO enrollee must exhaust all levels of resolution and appeal within the MCO's grievance system prior to ((~~filing an appeal (a request for~~)) requesting a ((~~department fair~~)) hearing((~~)~~)) with ((~~MAA~~)) the department. See WAC 388-538-110 for the MCO grievance system.

(3) If an MCO enrollee does not agree with the MCO's resolution of the enrollee's appeal, the enrollee may file a request for a department ((~~fair~~)) hearing within the following time frames:

(a) For ((~~appeals~~)) hearing requests regarding a standard service, within ninety calendar days of the date of the MCO's notice of the resolution of the appeal.

(b) For ((~~appeals~~)) hearing requests regarding termination, suspension, or reduction of a previously authorized service, ((~~or~~)) and the enrollee is requesting continuation of services, within ten calendar days of the date on the MCO's notice of the resolution of the appeal.

(4) The entire appeal and hearing process, including the MCO appeal process, must be completed within ninety calendar days of the date the MCO enrollee filed the appeal with the MCO, not including the number of days the enrollee took to subsequently file for a department ((~~fair~~)) hearing.

(5) Expedited hearing process:

(a) The office of administrative hearings (OAH) must establish and maintain an expedited hearing process when the enrollee or the enrollee's representative requests an expedited hearing and OAH indicates that the time taken for a standard resolution of the claim could seriously jeopardize the enrollee's life or health and ability to attain, maintain, or regain maximum function.

(b) When approving an expedited hearing, OAH must issue a hearing decision as expeditiously as the enrollee's health condition requires, but not later than three business days after receiving the case file and information from the MCO regarding the action and MCO appeal.

(c) When denying an expedited hearing, OAH gives prompt oral notice to the enrollee followed by written notice within two calendar days of request and transfer the hearing to the timeframe for a standard service.

(6) Parties to the ((~~fair~~)) hearing include the department, the MCO, the enrollee, and the enrollee's representative or the representative of a deceased enrollee's estate.

(((~~6~~))) (7) If an enrollee disagrees with the ((~~fair~~)) hearing decision, then the enrollee may request an independent review (IR) in accordance with RCW 48.43.535.

(((~~7~~))) (8) If there is disagreement with the IR decision, any party may request a review by the department's ((~~of social and health services (DSHS)~~)) board of appeals (BOA) within twenty-one days of the IR decision. The department's BOA issues the final administrative decision.

AMENDATORY SECTION (Amending WSR 05-01-066, filed 12/8/04, effective 1/8/05)

WAC 388-538-120 Enrollee request for a second medical opinion. (1) A **managed care** enrollee has the right to a timely referral for a second opinion upon request when:

(a) The enrollee needs more information about treatment recommended by the provider or managed care organization (MCO); or

(b) The enrollee believes the MCO is not authorizing medically necessary care.

(2) A managed care enrollee has a right to a second opinion from a participating provider. At the MCO's discretion, a clinically appropriate nonparticipating provider who is agreed upon by the MCO and the enrollee may provide the second opinion.

(3) Primary care case management (PCCM) ((~~provider~~)) enrollees have a right to a timely referral for a second opinion by another provider who has a core provider agreement with ((~~medical assistance administration (MAA)~~)) the department.

AMENDATORY SECTION (Amending WSR 03-18-111, filed 9/2/03, effective 10/3/03)

WAC 388-538-130 Exemptions and ending enrollment in managed care. (1) The ((~~medical assistance administration (MAA)~~)) department exempts a client from mandatory enrollment in managed care or ends an enrollee's enrollment in managed care (also referred to as disenrollment) as specified in this section. ((~~Only MAA has authority to exempt a client from enrollment in, or remove an enrollee from, managed care.~~))

(2) A client or enrollee, or the client's or enrollee's representative as defined in RCW 7.70.065, may request ((~~MAA~~)) the department to exempt or end enrollment in managed care as described in this section.

(a) If a client requests exemption prior to the enrollment effective date, the client is not enrolled until ((~~MAA~~)) the department approves or denies the request.

(b) If an enrollee requests to end enrollment, the enrollee remains enrolled pending ((~~MAA's~~)) the department's final decision, unless staying in managed care would adversely affect the enrollee's health status.

(c) The client or enrollee receives timely notice by telephone or in writing when ((~~MAA~~)) the department approves or denies the client's or enrollee's request. ((~~MAA~~)) The department follows a telephone denial by written notification. The written notice contains all of the following:

(i) The action ((~~MAA~~)) the department intends to take;

(ii) The reason(s) for the intended action;

(iii) The specific rule or regulation supporting the action;

(iv) The client's or enrollee's right to request a ((~~fair~~)) hearing; and

(v) A translation into the client's or enrollee's primary language when the client or enrollee has limited English proficiency.

(3) A managed care organization (MCO) or primary care case management (PCCM) provider may request ((~~MAA~~)) the department to end enrollment. The request must be in writing and be sufficient to satisfy ((~~MAA~~)) the department that the enrollee's behavior is inconsistent with the MCO's or PCCM provider's rules and regulations (e.g., intentional misconduct). ((~~MAA~~)) The department does not approve a request to remove an enrollee from managed care when the request is solely due to an adverse change in the enrollee's health or the cost of meeting the enrollee's health care needs. The MCO or PCCM provider's request must include documentation that:

(a) The provider furnished clinically appropriate evaluation(s) to determine whether there is a treatable problem contributing to the enrollee's behavior;

(b) Such evaluation either finds no treatable condition to be contributing, or after evaluation and treatment, the enrollee's behavior continues to prevent the provider from safely or prudently providing medical care to the enrollee; and

(c) The enrollee received written notice of the provider's intent to request the enrollee's removal, unless ((~~MAA~~)) the department has waived the requirement for provider notice because the enrollee's conduct presents the threat of imminent harm to others. The provider's notice must include:

(i) The enrollee's right to use the provider's grievance system as described in WAC 388-538-110 and 388-538-111; and

(ii) The enrollee's right to use the department's ((~~fair~~)) hearing process, after the enrollee has exhausted all grievance and appeals available through the provider's grievance system (see WAC 388-538-110 and 388-538-111 for provider grievance systems, and WAC 388-538-112 for the ((~~fair~~)) hearing process for enrollees).

(4) When ((~~MAA~~)) the department receives a request from an MCO or PCCM provider to remove an enrollee from enrollment in managed care, ((~~MAA~~)) the department attempts to contact the enrollee for the enrollee's perspective. If ((~~MAA~~)) the department approves the request, ((~~MAA~~)) the department sends a notice at least ten days in advance of the effective date that enrollment will end. The notice includes:

(a) The reason ((~~MAA~~)) the department approved ending enrollment; and

(b) Information about the enrollee's ((~~fair~~)) hearing rights.

(5) ((~~MAA~~)) The department will exempt a client from mandatory enrollment or end an enrollee's enrollment in managed care when any of the following apply:

(a) The client or enrollee is receiving foster care placement services from the division of children and family services (DCFS);

(b) The client has or the enrollee becomes eligible for Medicare, basic health (BH), CHAMPUS/TRICARE, or any other ((~~accessible~~)) third-party health care coverage comparable to the department's managed care coverage that would require exemption or ((~~involuntary disenrollment~~)) involuntarily ending enrollment from:

(i) An MCO, in accordance with ((~~MAA's healthy options (HO)~~)) the department's managed care contract; or

(ii) A primary care case management (PCCM) provider, ((~~in accordance with MAA's~~)) according to the department's PCCM contract.

(c) The enrollee is no longer eligible for managed care.

(6) ((~~MAA~~)) The department will grant a client's request for exemption or an enrollee's request to end enrollment when:

(a) The client or enrollee is American Indian/Alaska native (AI/AN) as specified in WAC 388-538-060(2);

(b) The client or enrollee has been identified by ((~~MAA~~)) the department as a child who meets the definition of "children with special health care needs";

(c) The client or enrollee is homeless or is expected to live in temporary housing for less than one hundred twenty days from the date of the request; or

(d) The client or enrollee speaks limited English or is hearing impaired and the client or enrollee can communicate with a provider who communicates in the client's or enrollee's language or in American sign language and is not available through the MCO and the MCO does not have a provider available who can communicate in the client's language and an interpreter is not available.

(7) On a case-by-case basis, ((~~MAA~~)) the department may grant a client's request for exemption or an enrollee's request to end enrollment when, in ((~~MAA's~~)) the department's judgment, the client or enrollee has a documented and verifiable medical condition, and enrollment in managed care could cause an interruption of treatment that could jeopardize the client's or enrollee's life or health or ability to attain, maintain, or regain maximum function.

(8) Upon request, ((~~MAA~~)) the department may exempt the client or end enrollment for the period of time the circumstances or conditions that lead to exemption or ending enrollment are expected to exist. ((~~MAA~~)) The department may periodically review those circumstances or conditions to determine if they continue to exist. If ((~~MAA~~)) the department approves the request for a limited time, the client or enrollee is notified in writing or by telephone of the time limitation, the process for renewing the exemption or the ending of enrollment.

(9) An MCO may refer enrollees to ((~~MAA's~~)) the department's patients requiring regulation (PRR) program ((~~in accordance with~~)) according to WAC 388-501-0135.

AMENDATORY SECTION (Amending WSR 03-18-111, filed 9/2/03, effective 10/3/03)

WAC 388-538-140 Quality of care. (1) ((~~In order~~)) To assure that managed care enrollees receive quality health care services, the ((~~medical assistance administration (MAA)~~)) department requires managed care organizations (MCOs) to comply with quality improvement standards ((~~as stated~~))

detailed in the ((~~medical assistance administration (MAA)~~)) the department's managed care contract ((~~as follows~~)). MCO's must:

(a) Have a clearly defined quality organizational structure and operation, including a fully operational quality assessment, measurement, and improvement program;

(b) Have effective means to detect ((~~both underutilization and overutilization~~)) over and under utilization of services;

(c) ((~~Maintain a grievance system that includes a process for enrollees to file grievances and appeals according to the requirements of WAC 388-538-110;~~

~~(d)~~)) Maintain a system for provider and practitioner credentialing and recredentialing;

(((~~e~~))) (d) Ensure that MCO subcontracts and the delegation of MCO responsibilities are in accordance with ((~~MAA~~)) the department standards and regulations;

(((~~f~~))) (e) Ensure MCO oversight of delegated entities responsible for any delegated activity to include:

(i) A delegation agreement with each entity describing the responsibilities of the MCO and the entity;

(ii) Evaluation of the entity prior to delegation;

(iii) An annual evaluation of the entity; and

(iv) Evaluation or regular reports and follow-up on issues out of compliance with the delegation agreement or the department's managed care contract specifications.

(f) Cooperate with ((~~an MAA-contracted~~)) a department-contracted, qualified independent external review organization (EQRO) conducting review activities as described in 42 C.F.R. 438.358;

(g) Have an effective ((~~means~~)) mechanism to assess the quality and appropriateness of care furnished to enrollees with special health care needs;

(h) Assess and develop individualized treatment plans for enrollees with special health care needs which ensure integration of clinical and non-clinical disciplines and services in the overall plan of care;

(i) Submit annual reports to ((~~MAA, including HEDIS performance measures,~~)) the department on performance measures as specified by ((~~MAA~~)) the department;

(((~~i~~))) (j) Maintain a health information system that:

(i) Collects, analyzes, integrates, and reports data as requested by ((~~MAA~~)) the department;

(ii) Provides information on utilization, grievances and appeals, enrollees ending enrollment for reasons other than the loss of Medicaid eligibility, and other areas as defined by ((~~MAA~~)) the department;

(iii) Collects data on enrollees, providers, and services provided to enrollees through an encounter data system, in a standardized format as specified by ((~~MAA~~)) the department; and

(iv) Ensures data received from providers is adequate and complete by verifying the accuracy and timeliness of reported data and screening the data for completeness, logic, and consistency.

(((~~j~~))) (k) Conduct performance improvement projects designed to achieve significant improvement, sustained over time, in clinical care outcomes and services, and that involve the following:

(i) Measuring performance using objective quality indicators;

(ii) Implementing system changes to achieve improvement in service quality;

(iii) Evaluating the effectiveness of system changes;

(iv) Planning and initiating activities for increasing or sustaining performance improvement;

(v) Reporting each project status and the results as requested by ((~~MAA~~)) the department; and

(vi) Completing each performance improvement project timely so as to generally allow aggregate information to produce new quality of care information every year.

(((~~k~~))) (l) Ensure enrollee access to health care services;

(((~~l~~))) (m) Ensure continuity and coordination of enrollee care; and

((~~(m) Ensure the protection of enrollee rights and the confidentiality of enrollee health information~~)) (n) Maintain and monitor availability of health care services for enrollees.

(2) ((~~MAA~~)) The department may:

(i) Impose intermediate sanctions in accordance with 42 C.F.R. 438.700 and corrective action for substandard rates of clinical performance measures and for deficiencies found in audits and on-site visits;

(ii) Require corrective action for findings for noncompliance with any contractual state or federal requirements; and

(iii) Impose sanctions for noncompliance with any contractual, state, or federal requirements not corrected.

WSR 06-03-120
PERMANENT RULES
DEPARTMENT OF SOCIAL AND HEALTH SERVICES
(Economic Services Administration)

[Filed January 17, 2006, 4:36 p.m., effective February 17, 2006]

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

Purpose: The division of child support (DCS) seeks to clarify its rules regarding when a claim for child support starts as a result of the family receiving Medicaid or medical-only assistance.

Citation of Existing Rules Affected by this Order: Amending WAC 388-14A-1020 What definitions apply to the rules regarding child support enforcement?, 388-14A-2005 When does an application for public assistance automatically become an application for support enforcement services?, 388-14A-2025 What services does the division of child support provide for a nonassistance support enforcement case?, 388-14A-2035 Do I assign my rights to support when I receive public assistance?, 388-14A-2036 What does assigning my rights to support mean?, 388-14A-2040 Do I have to cooperate with the division of child support in establishing or enforcing child support?, and 388-14A-3350 Are there any limits on how much back support the division of child support can seek to establish?

Statutory Authority for Adoption: RCW 74.20A.310.

Other Authority: 45 C.F.R. 302.31, 45 C.F.R. 302.33.

Adopted under notice filed as WSR 05-21-103 on October 18, 2005.

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

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

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

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

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

Date Adopted: January 11, 2006.

Andy Fernando, Manager
Rules and Policies Assistance Unit

AMENDATORY SECTION (Amending WSR 05-14-101, filed 6/30/05, effective 7/31/05)

WAC 388-14A-1020 What definitions apply to the rules regarding child support enforcement? For purposes of this chapter, the following definitions apply:

"Absence of a court order" means that there is no court order setting a support obligation for the noncustodial parent (NCP), or specifically relieving the NCP of a support obligation, for a particular child.

"Absent parent" is a term used for a noncustodial parent.

"Accessible coverage" means health insurance coverage which provides primary care services to the children with reasonable effort by the custodian.

"Accrued debt" means past-due child support which has not been paid.

"Administrative order" means a determination, finding, decree or order for support issued under RCW 74.20A.055, 74.20A.056, or 74.20A.059 or by another state's agency under an administrative process, establishing the existence of a support obligation (including medical support) and ordering the payment of a set or determinable amount of money for current support and/or a support debt. Administrative orders include:

(1) An order entered under chapter 34.05 RCW;

(2) An agreed settlement or consent order entered under WAC 388-14A-3600; and

(3) A support establishment notice which has become final by operation of law.

"Agency" means the Title IV-D provider of a state. In Washington, this is DCS.

"Agreed settlement" is an administrative order that reflects the agreement of the noncustodial parent, the custodial parent and the division of child support. An agreed settlement does not require the approval of an administrative law judge.

"Aid" or **"public assistance"** means cash assistance under the temporary assistance for needy families (TANF) program, the aid for families with dependent children (AFDC) program, federally-funded or state-funded foster care, and includes day care benefits and medical benefits provided to families as an alternative or supplement to TANF.

"Alternate recipient" means a child of the employee or retiree named within a support order as being entitled to coverage under an employer's group health plan.

"Applicant/custodian" means a person who applies for nonassistance support enforcement services on behalf of a child or children residing in their household.

"Applicant/recipient," "applicant," and **"recipient"** means a person who receives public assistance on behalf of a child or children residing in their household.

"Arrears" means the debt amount owed for a period of time before the current month.

"Assistance" means cash assistance under the state program funded under Title IV-A of the federal Social Security Act.

"Birth costs" means medical expenses incurred by the custodial parent or the state for the birth of a child.

"Conference board" means a method used by the division of child support for resolving complaints regarding DCS cases and for granting exceptional or extraordinary relief from debt.

"Consent order" means a support order that reflects the agreement of the noncustodial parent, the custodial parent and the division of child support. A consent order requires the approval of an administrative law judge.

"Court order" means a judgment, decree or order of a Washington state superior court, another state's court of comparable jurisdiction, or a tribal court.

"Current support" or **"current and future support"** means the amount of child support which is owed for each month.

"Custodial parent" means the person, whether a parent or not, with whom a dependent child resides the majority of the time period for which the division of child support seeks to establish or enforce a support obligation.

"Date the state assumes responsibility for the support of a dependent child on whose behalf support is sought" means the date that the TANF or AFDC program grant is effective. For purposes of this chapter, the state remains responsible for the support of a dependent child until public assistance terminates, or support enforcement services end, whichever occurs later.

"Delinquency" means failure to pay current child support when due.

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

"Dependent child" means a person:

(1) Seventeen years of age or younger who is not self-supporting, married, or a member of the United States armed forces;

(2) Eighteen years of age or older for whom a court order requires support payments past age eighteen;

(3) Eighteen years of age or older, but under nineteen years of age, for whom an administrative support order exists if the child is participating full-time in a secondary school program or the same level of vocational or technical training.

"Disposable earnings" means the amount of earnings remaining after the deduction of amounts required by law to be withheld.

"Earnings" means compensation paid or payable for personal service. Earnings include:

(1) Wages or salary;

(2) Commissions and bonuses;

(3) Periodic payments under pension plans, retirement programs, and insurance policies of any type;

(4) Disability payments under Title 51 RCW;

(5) Unemployment compensation under RCW 50.40.020, 50.40.050 and Title 74 RCW;

(6) Gains from capital, labor, or a combination of the two; and

(7) The fair value of nonmonetary compensation received in exchange for personal services.

"Employee" means a person to whom an employer is paying, owes, or anticipates paying earnings in exchange for services performed for the employer.

"Employer" means any person or organization having an employment relationship with any person. This includes:

(1) Partnerships and associations;

(2) Trusts and estates;

(3) Joint stock companies and insurance companies;

(4) Domestic and foreign corporations;

(5) The receiver or trustee in bankruptcy; and

(6) The trustee or legal representative of a deceased person.

"Employment" means personal services of whatever nature, including service in interstate commerce, performed for earnings or under any contract for personal services. Such a contract may be written or oral, express or implied.

"Family" means the person or persons on whose behalf support is sought, which may include a custodial parent and one or more children, or a child or children in foster care placement. The family is sometimes called the assistance unit.

"Family member" means the caretaker relative, the child(ren), and any other person whose needs are considered in determining eligibility for assistance.

"Foreign order" means a court or administrative order entered by a tribunal other than one in the state of Washington.

"Foster care case" means a case referred to the Title IV-D agency by the Title IV-E agency, which is the state division of child and family services (DCFS).

"Fraud," for the purposes of vacating an agreed settlement or consent order, means:

(1) The representation of the existence or the nonexistence of a fact;

(2) The representation's materiality;

(3) The representation's falsity;

(4) The speaker's knowledge that the representation is false;

(5) The speaker's intent that the representation should be acted on by the person to whom it is made;

(6) Ignorance of the falsity on the part of the person to whom it is made;

(7) The latter's:

(a) Reliance on the truth of the representation;

(b) Right to rely on it; and

(c) Subsequent damage.

"Full support enforcement services" means the entire range of services available in a Title IV-D case.

"Good cause" for the purposes of late hearing requests and petitions to vacate orders on default means a substantial reason or legal justification for delay, including but not limited to the grounds listed in civil rule 60. The time periods used in civil rule 60 apply to good cause determinations in this chapter.

"Head of household" means the parent or parents with whom the dependent child or children were residing at the time of placement in foster care.

"Health care costs":

(1) For the purpose of establishing support obligations under RCW 74.20A.055 and 74.20A.056, means medical, dental and optometrical expenses; and

(2) For the purpose of enforcement action under chapters 26.23, 74.20 and 74.20A RCW, including the notice of support debt and the notice of support owed, means medical, dental and optometrical costs stated as a fixed dollar amount by a support order.

"Health insurance" means insurance coverage for all medical services related to an individual's general health and well being. These services include, but are not limited to: Medical/surgical (inpatient, outpatient, physician) care, medical equipment (crutches, wheel chairs, prosthesis, etc.), pharmacy products, optometric care, dental care, orthodontic care, preventive care, mental health care, and physical therapy.

"Hearing" means an adjudicative proceeding authorized by this chapter, or chapters 26.23, 74.20 and 74.20A RCW, conducted under chapter 388-02 WAC and chapter 34.05 RCW.

"I/Me" means the person asking the question which appears as the title of a rule.

"Income" includes:

(1) All gains in real or personal property;

(2) Net proceeds from the sale or exchange of real or personal property;

(3) Earnings;

(4) Interest and dividends;

(5) Proceeds of insurance policies;

(6) Other periodic entitlement to money from any source; and

(7) Any other property subject to withholding for support under the laws of this state.

"Income withholding action" includes all withholding actions which DCS is authorized to take, and includes but is not limited to the following actions:

(1) Asserting liens under RCW 74.20A.060;

(2) Serving and enforcing liens under chapter 74.20A RCW;

(3) Issuing orders to withhold and deliver under chapter 74.20A RCW;

(4) Issuing notices of payroll deduction under chapter 26.23 RCW; and

(5) Obtaining wage assignment orders under RCW 26.18.080.

"Locate" can mean efforts to obtain service of a support establishment notice in the manner prescribed by WAC 388-14A-3105.

"Medical assistance" means medical benefits under Title XIX of the federal Social Security Act provided to families as an alternative or supplement to TANF.

"Medical support" means either or both:

(1) Health care costs stated as a fixed dollar amount in a support order; and

(2) Health insurance coverage for a dependent child.

"National Medical Support Notice" or **"NMSN"** is a federally-mandated form that DCS uses to enforce a health insurance support obligation; the NMSN is a notice of enrollment as described in RCW 26.18.170.

"Noncustodial parent" means the natural parent, adoptive parent, responsible stepparent or person who signed and filed an affidavit acknowledging paternity, from whom the state seeks support for a dependent child. Also called the NCP. A parent is considered to be an NCP when for the majority of the time during the period for which support is sought, the dependent child resided somewhere other than with that parent.

"Other ordinary expense" means an expense incurred by a parent which:

(1) Directly benefits the dependent child; and

(2) Relates to the parent's residential time or visitation with the child.

"Participant" means an employee or retiree who is eligible for coverage under an employer group health plan.

"Past support" means support arrears.

"Paternity testing" means blood testing or genetic tests of blood, tissue or bodily fluids. This is also called genetic testing.

"Payment services only" or **"PSO"** means a case on which the division of child support's activities are limited to recording and distributing child support payments, and maintaining case records. A PSO case is not a IV-D case.

"Permanently assigned arrearages" means those arrears which the state may collect and retain up to the amount of unreimbursed assistance.

"Physical custodian" means custodial parent (CP).

"Plan administrator" means the person or entity which performs those duties specified under 29 USC 1002 (16)(A) for a health plan. If no plan administrator is specifically so designated by the plan's organizational documents, the plan's sponsor is the administrator of the plan. Sometimes an employer acts as its own plan administrator.

"Putative father" includes all men who may possibly be the father of the child or children on whose behalf the application for assistance or support enforcement services is made.

"Reasonable efforts to locate" means any of the following actions performed by the division of child support:

(1) Mailing a support establishment notice to the noncustodial parent in the manner described in WAC 388-14A-3105;

(2) Referral to a sheriff or other server of process, or to a locate service or department employee for locate activities;

(3) Tracing activity such as:

(a) Checking local telephone directories and attempts by telephone or mail to contact the custodial parent, relatives of the noncustodial parent, past or present employers, or the post office;

(b) Contacting state agencies, unions, financial institutions or fraternal organizations;

(c) Searching periodically for identification information recorded by other state agencies, federal agencies, credit bureaus, or other record-keeping agencies or entities; or

(d) Maintaining a case in the division of child support's automated locate program, which is a continuous search process.

(4) Referral to the state or federal parent locator service;

(5) Referral to the attorney general, prosecuting attorney, the IV-D agency of another state, or the Department of the Treasury for specific legal or collection action;

(6) Attempting to confirm the existence of and to obtain a copy of a paternity acknowledgment; or

(7) Conducting other actions reasonably calculated to produce information regarding the NCP's whereabouts.

"Required support obligation for the current month" means the amount set by a superior court order, tribal court order, or administrative order for support which is due in the month in question.

"Resident" means a person physically present in the state of Washington who intends to make their home in this state. A temporary absence from the state does not destroy residency once it is established.

"Residential care" means foster care, either state or federally funded.

"Residential parent" means the custodial parent (CP), or the person with whom the child resides that majority of the time.

"Responsible parent" is a term sometimes used for a noncustodial parent.

"Responsible stepparent" means a stepparent who has established an in loco parentis relationship with the dependent child.

"Retained support" means a debt owed to the division of child support by anyone other than a noncustodial parent.

"Satisfaction of judgment" means payment in full of a court-ordered support obligation, or a determination that such an obligation is no longer enforceable.

"Secretary" means the secretary of the department of social and health services or the secretary's designee.

"State" means a state or political subdivision, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a federally recognized Indian tribe or a foreign country.

"Superior court order" means a judgment, decree or order of a Washington state superior court, or of another state's court of comparable jurisdiction.

"Support debt" means support which was due under a support order but has not been paid. This includes:

(1) Delinquent support;

(2) A debt for the payment of expenses for the reasonable or necessary care, support and maintenance including health care costs, birth costs, child care costs, and special child rearing expenses of a dependent child or other person;

(3) A debt under RCW 74.20A.100 or 74.20A.270; or

(4) Accrued interest, fees, or penalties charged on a support debt, and attorney's fees and other litigation costs awarded in an action under Title IV-D to establish or enforce a support obligation.

"Support enforcement services" means all actions the Title IV-D agency is required to perform under Title IV-D of the Social Security Act and state law.

"Support establishment notice" means a notice and finding of financial responsibility under WAC 388-14A-3115, a notice and finding of parental responsibility under WAC 388-14A-3120, or a notice and finding of medical responsibility under WAC 388-14A-3125.

"Support money" means money paid to satisfy a support obligation, whether it is called child support, spousal support, alimony, maintenance, medical support, or birth costs.

"Support obligation" means the obligation to provide for the necessary care, support and maintenance of a dependent child or other person as required by law, including health insurance coverage, health care costs, birth costs, and child care or special child rearing expenses.

"Temporarily assigned arrearages" means those arrears which accrue prior to the family receiving assistance, for assistance applications dated on or after October 1, 1997.

"Title IV-A" means Title IV-A of the Social Security Act established under Title XX of the Social Security amendments and as incorporated in Title 42 USC.

"Title IV-A agency" means the part of the department of social and health services which carries out the state's responsibilities under the temporary assistance for needy families (TANF) program (and the aid for dependent children (AFDC) program when it existed).

"Title IV-D" means Title IV-D of the Social Security Act established under Title XX of the Social Security amendments and as incorporated in Title 42 USC.

"Title IV-D agency" or **"IV-D agency"** means the division of child support, which is the agency responsible for carrying out the Title IV-D plan in the state of Washington. Also refers to the Washington state support registry (WSSR).

"Title IV-D case" is a case in which the division of child support provides services which qualifies for funding under the Title IV-D plan.

"Title IV-D plan" means the plan established under the conditions of Title IV-D and approved by the secretary, Department of Health and Human Services.

"Title IV-E" means Title IV-E of the Social Security Act established under Title XX of the Social Security amendments and as incorporated in Title 42 U.S.C.

"Title IV-E case" means a foster care case.

"Tribunal" means a state court, tribal court, administrative agency, or quasi-judicial entity authorized to establish, enforce or modify support orders or to determine parentage.

"Unreimbursed assistance" means the cumulative amount of assistance which was paid to the family and which has not been reimbursed by assigned support collections.

"We" means the division of child support, part of the department of social and health services of the state of Washington.

"WSSR" is the Washington state support registry.

"You" means the reader of the rules, a member of the public, or a recipient of support enforcement services.

AMENDATORY SECTION (Amending WSR 01-03-089, filed 1/17/01, effective 2/17/01)

WAC 388-14A-2005 When does an application for public assistance automatically become an application for support enforcement services? (1) When a custodial parent (CP) or physical custodian (also called the CP) applies for or receives cash assistance on behalf of a minor child, the family authorizes the division of child support (DCS) to provide full support enforcement services to the family.

(2) These services continue until the support enforcement case is closed under WAC 388-14A-2080.

(3) The CP's public assistance application is an assignment of support rights.

(4) An application for Medicaid, medical assistance or medical benefits under Title XIX of the federal Social Security Act is an assignment of the medical support rights of anyone receiving those benefits, and the CP authorizes DCS to provide support enforcement services to the family as follows:

(a) DCS provides full support enforcement services as provided under subsection (1) above for a family receiving cash assistance, or under WAC 388-14A-2000 (2)(d) to a family receiving Medicaid-only benefits;

(b) As set forth in WAC 388-14A-2000(3), DCS provides only payment processing, records maintenance, paternity establishment, medical support establishment and medical support enforcement services when a recipient of Medicaid-only benefits declines full support enforcement services in writing.

(5) WAC 388-14A-2036 describes the assignment of support rights.

((~~(5)~~)) (6) If the community services office grants the CP good cause not to cooperate under WAC 388-422-0020, DCS does not provide services. See WAC 388-14A-2065.

AMENDATORY SECTION (Amending WSR 01-03-089, filed 1/17/01, effective 2/17/01)

WAC 388-14A-2025 What services does the division of child support provide for a nonassistance support enforcement case? (1) The division of child support (DCS) provides full support enforcement services for every IV-D case.

(2) DCS provides either full or limited nonassistance support enforcement services for recipients of Medicaid-only benefits as provided in WAC 388-14A-2005(4).

(3) Some cases do not receive full support enforcement services. Nonassistance cases where DCS provides payment processing services are called payment services only (PSO) cases.

((~~(3)~~)) (4) In a PSO case, DCS provides only records maintenance and payment processing services if the payee under a support order does not submit an application for support enforcement services and the:

(a) Order directs support payments to DCS or to the Washington state support registry (WSSR); and

(b) The clerk of the court submitted the order under RCW 26.23.050.

(((~~4~~))) (5) DCS continues to provide services without an application after a:

(a) Public assistance recipient stops receiving cash assistance; or

(b) Recipient of Medicaid-only benefits becomes ineligible for Medicaid-only benefits, unless the recipient declines support enforcement services or requests additional services.

(((~~5~~))) (6) If you receive services as a former recipient of assistance, as described in subsection (((~~4~~))) (5), you must cooperate with DCS in the same way as when you received a grant.

AMENDATORY SECTION (Amending WSR 01-03-089, filed 1/17/01, effective 2/17/01)

WAC 388-14A-2035 Do I assign my rights to support when I receive public assistance? (1) When you receive public assistance you assign your rights to support to the state. This section applies to all applicants and recipients of cash assistance under the state program funded under Title IV-A of the federal Social Security Act.

(2) As a condition of eligibility for assistance, a family member must assign to the state the right to collect and keep, subject to the limitation in subsection (3), any support owing to the family member or to any other person for whom the family member has applied for or is receiving assistance.

(3) Amounts assigned under this section may not exceed the lesser of the total amount of assistance paid to the family or the total amount of the assigned support obligation.

(4) When you receive Medicaid or medical benefits, you assign your rights to medical support to the state. This applies to all recipients of medical assistance under the state program funded under Title XIX of the federal Social Security Act.

AMENDATORY SECTION (Amending WSR 01-03-089, filed 1/17/01, effective 2/17/01)

WAC 388-14A-2036 What does assigning my rights to support mean? (1) As a condition of eligibility for assistance, a family member must assign to the state the right to collect and keep, subject to the limitation in WAC 388-14A-2035(3), any support owing to the family member or to any other person for whom the family member has applied for or is receiving assistance.

(2) While your family receives assistance, all support collected is retained by the state to reimburse the total amount of assistance which has been paid to your family.

(3) After your family terminates from assistance, certain accrued arrears remain assigned to the state in accordance with the following rules:

(a) For assistance applications dated prior to October 1, 1997, you permanently assign to the state all rights to support which accrued before the application date and which will accrue prior to the date your family terminates from assistance.

(b) For assistance applications dated on or after October 1, 1997, and before October 1, 2000:

(i) You permanently assign to the state all rights to support which accrue while your family receives assistance; and

(ii) You temporarily assign to the state all rights to support which accrued before the application date, until October 1, 2000, or when your family terminates from assistance, whichever date is later. After this date, if any remaining arrears are collected by federal income tax refund offset, the state retains such amounts, up to the amount of unreimbursed assistance.

(c) For assistance applications dated on or after October 1, 2000:

(i) You permanently assign to the state all rights to support which accrue while the family receives assistance; and

(ii) You temporarily assign to the state all rights to support which accrued before the application date, until the date your family terminates from assistance. After this date, if any remaining arrears are collected by federal income tax refund offset, the state retains such amounts, up to the amount of unreimbursed assistance.

(4) When you assign your medical support rights to the state, you authorize the state on behalf of yourself and the children in your care to enforce the noncustodial parent's full duty to provide medical support.

AMENDATORY SECTION (Amending WSR 03-20-072, filed 9/29/03, effective 10/30/03)

WAC 388-14A-2040 Do I have to cooperate with the division of child support in establishing or enforcing child support? (1) You must cooperate with the division of child support (DCS) when you receive public assistance unless the department determines there is good cause not to cooperate under WAC 388-422-0020. For purposes of this section and WAC 388-14A-2075, cooperating with DCS includes cooperating with those acting on behalf of DCS (its "representatives"), namely the prosecuting attorney, the attorney general, or a private attorney paid per RCW 74.20.350. In cases where paternity is at issue, the custodial parent (CP) of a child who receives assistance must cooperate whether or not the parent receives assistance.

(2) Cooperation means giving information, attending interviews, attending hearings, or taking actions to help DCS establish and collect child support. This information and assistance is necessary for DCS to:

(a) Identify and locate the responsible parent;

(b) Establish the paternity of the child(ren) on assistance in the CP's care; and

(c) Establish or collect support payments or resources such as property due the CP or the child(ren).

(3) The CP must also cooperate by sending to DCS any child support received by the CP while on assistance, as required by RCW 74.20A.275 (3)(c). If the client keeps these payments, known as retained support, the CP must sign an agreement to repay under RCW 74.20A.275, and the CP must honor that agreement.

(4) The cooperation requirements of subsections (1) and (2) above, but not subsection (3), apply to a recipient of Medicaid-only assistance.

AMENDATORY SECTION (Amending WSR 05-14-099, filed 6/30/05, effective 7/31/05)

WAC 388-14A-3350 Are there any limits on how much back support the division of child support can seek to establish? (1) When no public assistance is being paid to the custodial parent (CP) and the children, the division of child support (DCS) starts the claim for support as of the date:

(a) DCS receives the application for nonassistance services if the CP applies directly to DCS for services; or

(b) Another state or Indian tribe received the application for nonassistance services or the actual date the other state or tribe requests that child support start, whichever is later, if the other state or Indian tribe requests DCS to establish a support order.

(2) When the children are receiving Medicaid-only benefits, DCS starts the claim for support as of the date the Medicaid benefits began. See WAC 388-14A-2005(4) to determine whether DCS seeks to establish medical support only for a particular case.

(3) This section does not limit in any way the right of the court to order payment for back support as provided in RCW 26.26.130 and 26.26.134 if the case requires paternity establishment.

(((~~(3)~~))) (4) When another state or an Indian tribe is paying public assistance to the CP and children, DCS starts the claim for support as of the date specified by the other state or tribe.

(((~~(4)~~))) (5) For the notice and finding of parental responsibility, WAC 388-14A-3120(9) limits the back support obligation.

(((~~(5)~~))) (6) When the state of Washington is paying public assistance to the CP and/or the children, the following rules apply:

(a) For support obligations owed for months on or after September 1, 1979, DCS must exercise reasonable efforts to locate the noncustodial parent (NCP);

(b) DCS serves a notice and finding of financial or parental responsibility within sixty days of the date the state assumes responsibility for the support of a dependent child on whose behalf support is sought;

(c) If DCS does not serve the notice within sixty days, DCS loses the right to reimbursement of public assistance payments made after the sixtieth day and before the notice is served;

(d) DCS does not lose the right to reimbursement of public assistance payments for any period of time:

(i) During which DCS exercised reasonable efforts to locate the NCP; or

(ii) For sixty days after the date on which DCS received an acknowledgment of paternity for the child for whom the state has assumed responsibility, and paternity has not been established.

(((~~(6)~~))) (7) The limitation in subsection (((~~(5)~~))) (6) does not apply to:

(a) Cases in which the physical custodian is claiming good cause for not cooperating with the department; and

(b) Cases where parentage is an issue and:

(i) Has not been established by superior court order; or

(ii) Is not the subject of a presumption under RCW 26.26.320.

(((~~(7)~~))) (8) DCS considers a prorated share of each monthly public assistance payment as paid on each day of the month.

WSR 06-04-009
PERMANENT RULES
STATE BOARD OF HEALTH

[Filed January 20, 2006, 7:29 a.m., effective February 20, 2006]

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

Purpose: The purpose is to revise WAC 246-650-010, 246-650-020, and 246-650-030, newborn screening, to add cystic fibrosis to the definitions (WAC 246-650-010) and to the panel of required screening tests for all newborns (WAC 246-650-020) and to provide a timeline for implementation of screening for cystic fibrosis (WAC 246-650-030). Screening will be conducted by the department of health using the same dried blood spot specimen currently submitted by hospitals for screening for the nine conditions currently specified in WAC 246-650-020.

Citation of Existing Rules Affected by this Order: Amending WAC 246-650-010, 246-650-020, and 246-650-030.

Statutory Authority for Adoption: Chapters 70.83, 43.20 RCW.

Adopted under notice filed as WSR 05-22-126 on November 2, 2005.

A final cost-benefit analysis is available by contacting Ala Mofidi, 101 Israel Road, Olympia, WA 98504, phone (360) 236-4055, fax (360) 586-7424, e-mail ala.mofidi@doh.wa.gov.

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

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

Number of Sections Adopted on the Agency's Own Initiative: New 0, Amended 3, Repealed 0.

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

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

Date Adopted: December 7, 2005.

Craig McLaughlin
Executive Director

AMENDATORY SECTION (Amending WSR 03-24-026, filed 11/24/03, effective 12/25/03)

WAC 246-650-010 Definitions. For the purposes of this chapter:

(1) "Board" means the Washington state board of health.

(2) "Biotinidase deficiency" means a deficiency of an enzyme (biotinidase) that facilitates the body's recycling of

biotin. The result is biotin deficiency, which if undetected and untreated, may result in severe neurological damage or death.

(3) "Congenital adrenal hyperplasia" means a severe disorder of adrenal steroid metabolism which may result in death of an infant during the neonatal period if undetected and untreated.

(4) "Congenital hypothyroidism" means a disorder of thyroid function during the neonatal period causing impaired mental functioning if undetected and untreated.

(5) "Cystic fibrosis" means a life-shortening disease caused by mutations in the gene encoding the cystic fibrosis transmembrane conductance regulator (CFTR), a transmembrane protein involved in ion transport. Affected individuals suffer from chronic, progressive pulmonary disease and nutritional deficits. Early detection and enrollment in a comprehensive care system provides improved outcomes and avoids the significant nutritional and growth deficits that are evident when diagnosed later.

(6) "Department" means the Washington state department of health.

(((~~(6)~~))) (7) "Galactosemia" means a deficiency of enzymes that help the body convert the simple sugar galactose into glucose resulting in a buildup of galactose and galactose-1-PO_4 in the blood. If undetected and untreated, accumulated galactose-1-PO_4 may cause significant tissue and organ damage often leading to sepsis and death.

(((~~(7)~~))) (8) "Hemoglobinopathy" means a hereditary blood disorder caused by genetic alteration of hemoglobin which results in characteristic clinical and laboratory abnormalities and which leads to developmental impairment or physical disabilities.

(9) "Homocystinuria" means deficiency of enzymes necessary to break down or recycle the amino acid homocysteine resulting in a buildup of methionine and homocysteine. If undetected and untreated may cause thromboembolism, mental and physical disabilities.

(((~~(8)~~))) (10) "Maple syrup urine disease" (MSUD) means deficiency of enzymes necessary to breakdown the branch chained amino acids leucine, isoleucine, and valine resulting in a buildup of these and metabolic intermediates in the blood. If undetected and untreated may result in mental and physical retardation or death.

(((~~(9)~~))) (11) "Medium chain acyl-coA dehydrogenase deficiency" (MCADD) means deficiency of an enzyme (medium chain acyl-coA dehydrogenase) necessary to breakdown medium chain length fatty acids. If undetected and untreated, fasting, infection or stress may trigger acute hypoglycemia leading to physical and neurological damage or death.

(((~~(10)~~))) (12) "Newborn" means an infant born in a hospital in the state of Washington prior to discharge from the hospital of birth or transfer.

(((~~(11)~~))) (13) "Newborn screening specimen/information form" means the information form provided by the department including the filter paper portion and associated dried blood spots. A specimen/information form containing patient information is "Health care information" as defined by the Uniform Healthcare Information Act, RCW 70.02.010(6).

(((~~(12) "Phenylketonuria" (PKU) means a deficiency of an enzyme necessary to convert the amino acid phenylalanine into tyrosine resulting in a buildup of phenylalanine in the blood. If undetected and untreated may cause severely impaired mental functioning.~~

~~(13) "Hemoglobinopathy" means a hereditary blood disorder caused by genetic alteration of hemoglobin which results in characteristic clinical and laboratory abnormalities and which leads to developmental impairment or physical disabilities.~~)))

(14) "Phenylketonuria" (PKU) means a deficiency of an enzyme necessary to convert the amino acid phenylalanine into tyrosine resulting in a buildup of phenylalanine in the blood. If undetected and untreated may cause severely impaired mental functioning.

(15) "Significant screening test result" means a laboratory test result indicating a suspicion of abnormality and requiring further diagnostic evaluation of the involved infant for the specific disorder.

AMENDATORY SECTION (Amending WSR 03-24-026, filed 11/24/03, effective 12/25/03)

WAC 246-650-020 Performance of screening tests. (1) Hospitals providing birth and delivery services or neonatal care to infants shall:

(a) Inform parents or responsible parties, by providing a departmental information pamphlet or by other means, of:

(i) The purpose of screening newborns for congenital disorders,

(ii) Disorders of concern as listed in WAC 246-650-020(2),

(iii) The requirement for newborn screening, and

(iv) The legal right of parents or responsible parties to refuse testing because of religious tenets or practices as specified in RCW 70.83.020, and

(v) The specimen storage, retention and access requirements specified in WAC 246-650-050.

(b) Obtain a blood specimen for laboratory testing as specified by the department from each newborn prior to discharge from the hospital or, if not yet discharged, no later than five days of age.

(c) Use department-approved newborn screening specimen/information forms and directions for obtaining specimens.

(d) Enter all identifying and related information required on the specimen/information form following directions of the department.

(e) In the event a parent or responsible party refuses to allow newborn screening, obtain signatures from parents or responsible parties on the department specimen/information form.

(f) Forward the specimen/information form with dried blood spots or signed refusal to the Washington state public health laboratory no later than the day after collection or refusal signature.

(2) Upon receipt of specimens, the department shall:

(a) Perform appropriate screening tests for:

(i) ((~~Phenylketonuria~~)) Biotinidase deficiency, congenital hypothyroidism, congenital adrenal hyperplasia, ((~~and~~

~~hemoglobinopathies,~~)) galactosemia, homocystinuria, hemoglobinopathies, maple syrup urine disease, medium chain acyl-coA dehydrogenase deficiency, and phenylketonuria;

(ii) ((~~Biotinidase deficiency, galactosemia, homocystinuria, maple syrup urine disease and medium chain acyl-coA dehydrogenase deficiency~~)) Cystic fibrosis according to the schedule in WAC 246-650-030;

(b) Report significant screening test results to the infant's attending physician or family if an attending physician cannot be identified; and

(c) Offer diagnostic and treatment resources of the department to physicians attending infants with presumptive positive screening tests within limits determined by the department.

AMENDATORY SECTION (Amending WSR 03-24-026, filed 11/24/03, effective 12/25/03)

WAC 246-650-030 Implementation of screening to detect ((~~biotinidase deficiency, galactosemia, homocystinuria, maple syrup urine disease and medium chain acyl-coA dehydrogenase deficiency~~)) cystic fibrosis. The department shall implement screening ((~~tests for biotinidase deficiency, galactosemia, homocystinuria, maple syrup urine disease and medium chain acyl-coA dehydrogenase deficiency beginning in January 2004. Screening for these disorders shall be fully implemented~~)) to detect cystic fibrosis as quickly as feasible and not later than June ((~~2004~~)) 2006.

WSR 06-04-015
PERMANENT RULES
DEPARTMENT OF FISH AND WILDLIFE

[Order 06-08—Filed January 22, 2006, 11:54 a.m., effective February 22, 2006]

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

Purpose: Establish emerging commercial fishery for wild shellfish on nonstate tidelands.

Statutory Authority for Adoption: RCW 77.12.047.

Adopted under notice filed as WSR 06-01-019 on December 12, 2005.

Changes Other than Editing from Proposed to Adopted Version: WAC 220-88D-010, after "this chapter is to" delete "establish" and insert "license and provide catch reporting requirements for"; after "on nonstate lands" change "as" to "in"; after "means shellfish" delete "that are not 'private sector cultured aquatic products,' as defined in chapter 15.85 RCW" and insert "identified in WAC 220-88D-050, that rule distinguishes between the harvest of wild shellfish stocks subject to this chapter and private sector cultured aquatic products not subject to this chapter";

WAC 220-88D-020 [220-88D-030], at end of subsection (1) add "Both the permit and the license are required in order to commercially harvest under this chapter."; insert new subsection (2) to read "The trial fishery permit must be obtained for each site to be harvested. Each harvest site description will be the same as that used for obtaining certification of approval issued by the state department of health. The trial fishery permit must be renewed annually at the same time the site is recertified by the state department of health."; insert new subsection (3) to read "The commercial harvester is covered by a single license for harvesting activity undertaken at any permitted site. The license is effective for one year and must be renewed annually."; renumber remaining subsection.

WAC 220-88D-030 [220-88D-040], in subsection (1) delete "nonstate lands commercial" and after "following" insert "for each site"; in subsection (1)(b), change "shellfish growing area" to "harvest site" and after "certificate" delete "of approval"; change (1)(c) and (1)(d) to (2) and (3); renumber (2) as (4) and after "permit holder" change "complete" to "fulfill" and after "following" insert "requirements"; renumber (3) and (4) as (5) and (6).

WAC 220-88D-050, retitle as "Identification of wild stocks of clams, mussels or oysters—Reporting requirements for the commercial harvest of wild clams, mussels or oysters from nonstate aquatic lands—Conversion to private sector cultured aquatic products"; delete all verbiage in this section as replaced with the following:

(1) Based upon RCW 15.85.020(3), the following shellfish are distinguished from private sector cultured aquatic products and are identified as wild stocks that are regulated under this chapter:

(a) All clams, mussels, or oysters that were not propagated, farmed, or cultivated under the active supervision and management of a private sector aquatic farmer; and

(b) All clams, mussels, or oysters that were set naturally prior to the time an aquatic farm was established and placed under the active supervision and management of a private sector aquatic farmer.

(2) Examples of harvested wild stocks of shellfish include, but are not limited to, the following:

(a) Any harvest of clams, mussels, or oysters from a site that is not registered as an aquatic farm unless there is some ability to demonstrate that the shellfish was propagated, farmed, or cultivated under the active supervision of an aquatic farmer;

(b) Any harvest of clams, mussels, or oysters that were naturally set prior to the time an aquatic farm was established at the site and placed under the active supervision and management of an aquatic farmer; and

(c) Shellfish that is harvested from a newly registered aquatic farm during the period when the shellfish is presumed to come from a wild stock as specified in subsection (5) of this section.

(3) The sale of wild stocks of clams, mussels, and oysters must be reported through the use of shellfish receiving tickets. The failure to report the sale of shellfish with a fish receiving ticket when it is required is unlawful activity and constitutes a violation of WAC 220-69-215 and RCW 77.15.-630. Any person selling wild stocks of clams, mussels, and oysters must sell the harvest to a licensed Washington wholesale fish dealer, who is then required to complete the fish ticket. Alternatively, if the person harvesting the clams, mussels, or oysters sells this shellfish at retail or arranges for the harvested shellfish to be transported out of state, they must be a licensed wholesale dealer and must complete a fish receiving ticket for each day's sales or for each shipment.

(4) Wild stock sales may not be reported on aquatic farm quarterly production reports. Only private sector cultured aquatic products may be reported on quarterly production reports.

(5) The following shellfish are presumed to be wild shellfish that are subject to these regulations:

(a) All mussels, oysters, and clams other than geoducks that are commercially harvested from the nonstate lands within the first twelve months after a complete application for the aquatic farm registration is filed; and

(b) All geoducks commercially harvested from the nonstate lands within the first thirty-six months after a complete application for the aquatic farm registration is filed.

The presumption that shellfish harvested from a newly registered aquatic farm during these time periods are from wild stocks may be overcome by a showing that the harvested shellfish were actually propagated, farmed, or cultivated under the active supervision of an aquatic farmer. After twelve or thirty-six months, respectively, all shellfish produced from a registered aquatic farm will be presumed to be private sector cultured aquatic products, and must be reported on quarterly aquatic farm reports. If a person does not commercially harvest mussels, oysters, or claims other than geoducks for the first twelve months after the aquatic farm registration, or does not commercially harvest geoducks for the first thirty-six months after registration, there is no requirement to obtain an emerging commercial fishery license or trial fishery permit.

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

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

Number of Sections Adopted on the Agency's Own Initiative: New 5, Amended 2, Repealed 0.

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

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

Date Adopted: January 13, 2006.

Susan Yeager
for Ron Ozment, Chair
Fish and Wildlife Commission

AMENDATORY SECTION (Amending Order 94-23, filed 5/19/94, effective 6/19/94)

WAC 220-52-018 Clams—Gear. It shall be unlawful to take, dig for or possess clams, geoducks, or mussels taken for commercial purposes from any of the tidelands in the state of Washington except with a pick, mattock, fork or shovel operated by hand, except ((~~that~~)):

(1) Permits for the use of mechanical clam digging devices to take clams other than geoducks may be obtained from the director of fisheries subject to the following conditions:

(((~~(1)~~))) (a) Any or all types of mechanical devices used in the taking or harvesting of shellfish must be approved by the director of fisheries.

(((~~(2)~~))) (b) A separate permit shall be required for each and every device and the permit shall be attached to the specific unit at all times.

(((~~(3)~~))) (c) All types of clams to be taken for commercial use must be of legal size and in season during the proposed operations unless otherwise provided in specially authorized permits for the transplanting of seed to growing areas or for research purposes.

(((~~(4)~~))) (d) The holder of a permit to take shellfish from tidelands by mechanical means shall limit operations to privately owned or leased land.

(((~~(5)~~))) (e) The taking of clams from bottoms under navigable water below the level of mean lower low water by any mechanical device shall be prohibited except as authorized by the director of fisheries. Within the enclosed bays and channels of Puget Sound, Strait of Juan de Fuca, Grays Harbor and Willapa Harbor, the operators of all mechanical devices shall confine their operations to bottoms leased from the Washington department of natural resources, subject to the approval of the director of fisheries. The harvesting of shellfish from bottoms of the Pacific Ocean westward from the western shores of the state shall not be carried out in waters less than two fathoms deep at mean lower low water. In said waters more than two fathoms deep the director of fisheries may reserve all or certain areas thereof and prevent the taking of shellfish in any quantity from such reserves established on the ocean bottoms.

(((~~(6)~~))) (f) Noncompliance with any part of these regulations or with special requirements of individual permits will result in immediate cancellation of and/or subsequent nonrenewal of all permits held by the operator.

(((~~(7)~~))) (g) Applications must be made on the forms provided by the department of fisheries and permits must be in the possession of the operator before digging commences.

(((~~(8)~~))) (h) All permits to take or harvest shellfish by mechanical means shall expire on December 31 of the year of issue.

(((~~(9)~~))) (i) All mechanical clam harvesting machines must have approved instrumentation that will provide deck readout of water pressure.

(((~~(10)~~))) (j) All clam harvest machines operating on intertidal grounds where less than ten percent of the substrate material is above 500 microns in size must be equipped with a propeller guard suitable for reducing the average propeller wash velocity at the end of the guard to approximately twenty-five percent of the average propeller wash velocity at the propeller. The propeller guard must also be positioned to provide an upward deflection to propeller wash.

(((~~(11)~~))) (k) Clam harvest machines operating in fine substrate material where less than ten percent of the substrate material is above 500 microns in size, shall have a maximum harvest head width of 3 feet (overall) and the maximum pump volume as specified by the department of fisheries commensurate with the basic hydraulic relationship of 828 gpm at 30

pounds per square inch, pressure to be measured at the pump discharge.

(((~~(12)~~))) (l) Clam harvest machines operating in coarser substrate material where more than ten percent of the substrate material is above 500 microns in size, shall have a maximum harvest head width of 4 feet (overall) and a maximum pump volume as specified by the department of fisheries commensurate with a basic hydraulic relationship of 1,252 gpm at 45 pounds per square inch, pressure to be measured at the pump discharge.

(((~~(13)~~))) (m) All clam harvest machine operators must submit accurate performance data showing revolutions per minute, gallons per minute, and output pressure for the water pump on their machine. In addition, they shall furnish the number and sizes of the hydraulic jets on the machines. If needed, the operator shall thereafter modify the machine (install a sealed pressure relief valve) as specified by the department of fisheries to conform with values set forth in either WAC 220-52-018 (11) or (12) of this section. Thereafter, it shall be illegal to make unauthorized changes to the clam harvester water pump or the hydraulic jets. Exact description of the pump volume, maximum pressure and number and size of the hydraulic jet for each harvester machine shall be included in the department of fisheries' clam harvest permit.

(((~~(14)~~))) (n) All clam harvest machines shall be equipped with a 3/4-inch pipe thread tap and valve that will allow rapid coupling of a pressure gauge for periodic testing by enforcement personnel.

(((~~(15)~~))) (o) Each mechanical clam harvester must have controls so arranged and situated near the operator which will allow the operator to immediately cut off the flow of water to the jet manifold without affecting the capability of the vessel to maneuver.

(((~~(16)~~))) (p) Licensing: A hardshell clam mechanical harvester fishery license is the license required to operate the mechanical harvester gear provided for in this section.

(2) Aquatic farmers may harvest geoducks that are private sector cultured aquatic product by means of water pumps and nozzles.

(3) Persons may harvest nonstate tideland wild geoducks under a nonstate lands commercial wild clam, mussel and oyster trial fishery permit by means of water pumps and nozzles.

AMENDATORY SECTION (Amending Order 00-264 [03-176], filed 12/29/00 [8/6/03], effective 1/29/01 [9/6/03])

WAC 220-52-020 Clams—Commercial harvest. It shall be unlawful to take, dig for or possess clams except razor clams, cockles, borers or mussels taken for commercial purposes from the tidelands of the state of Washington except from registered aquaculture farms or from nonstate tidelands under a nonstate lands commercial wild clam, mussel and oyster trial fishery permit.

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

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

NEW SECTION

WAC 220-88D-010 Emerging commercial fishery—Commercial wild clams, mussels, and oyster shellfish fishery on nonstate tidelands and bedlands. The purpose of this chapter is to license and provide catch reporting requirements for the commercial harvest of wild clams, mussels, and oysters on nonstate lands in an emerging commercial fishery. For purposes of this chapter, "wild" or "wild stocks of" clams, mussels, and oysters means shellfish identified in WAC 220-88D-050. That rule distinguishes between the harvest of wild shellfish stocks subject to this chapter and private sector cultured aquatic products not subject to this chapter. These terms, and all provisions of this chapter pertaining to "wild" or "wild stocks of" clams, mussels, and oysters, or to "private sector cultured aquatic product," are for state resource management, catch reporting, and enforcement purposes only. They are neither intended to be, nor should be characterized as, any determination or evidence of whether "wild" or "wild stocks of" clams, mussels, and oysters (or any portion thereof) are naturally occurring, are subject to treaty sharing, or are part of natural or artificial shellfish beds as those concepts and terms are used and defined in *United States v. Washington,* 157 F.3d 630 (9th Cir. 1998), the Shellfish Implementation Plan of *United States v. Washington,* C70-9213, Subproceeding 89-3 (W.D. Wash, rev. April 8, 2002), and other applicable court orders relating to shellfish.

NEW SECTION

WAC 220-88D-020 Designation of the commercial wild clams, mussels, and oyster harvest on nonstate lands as an emerging commercial fishery. The director designates the commercial harvest of wild clams, mussels, and oysters from nonstate tidelands and bedlands as an emerging commercial fishery for which use of a vessel is not required.

NEW SECTION

WAC 220-88D-030 Eligibility to participate in the nonstate lands commercial wild clams, mussels, and oyster shellfish fishery. (1) Persons having an ownership interest or contractual right to take shellfish from nonstate owned tidelands or bedlands and who intend to commercially harvest wild stocks of clams, mussels, or oysters are eligible to obtain a nonstate lands commercial wild clam, mussel, and oyster trial fishery permit and to purchase an emerging commercial fishery license. Both the permit and the license are required in order to commercially harvest under this chapter.

(2) The trial fishery permit must be obtained for each site to be harvested. Each harvest site description will be the same as that used for obtaining certification of approval issued by the state department of health. The trial fishery permit must be renewed annually at the same time the site is recertified by the state department of health.

(3) The commercial harvester is covered by a single license for harvesting activity undertaken at any permitted site. The license is effective for one year and must be renewed annually.

(4) "Commercial harvest" of wild clams, mussels, and oysters includes both harvest for sale or barter and harvest of

the presumptive commercial quantities defined in RCW 69.30.010.

NEW SECTION

WAC 220-88D-040 Nonstate lands commercial wild clams, mussels, and oysters—Application requirements—Notification requirements—Incidental take prohibited. (1) A person making application for a wild clam, mussel, and oyster trial fishery permit must provide the following for each site:

(a) Documentation of ownership interest in or contractual right to harvest from the lands from which the wild clams, mussels, or oysters are to be harvested.

(b) A harvest site certificate issued by the state department of health for the lands from which the wild clams, mussels, or oysters are to be harvested.

(2) A copy of the application for a nonstate lands commercial wild clam, mussel, and oyster trial fishery permit will be provided to the affected tribes by the department.

(3) If a person registers nonstate lands as an aquatic farm, a copy of the aquatic farm registration will be provided to the affected tribes by the department.

(4) Prior to conducting harvest activities under a nonstate lands commercial wild clam, mussel, and oyster trial fishery permit, the permit holder must fulfill the following requirements:

(a) Provide a copy of the notice required to be given to affected tribes under the Stipulation and Order Amending Shellfish Implementation Plan, United States v. Washington, Case No. C70-9214, W.D.Wa., if such notice is required.

(b) Clearly and visibly mark with stakes and/or buoys the property boundaries of the nonstate lands to be harvested, using standard marking methods.

(c) Failure to comply with the requirements of this subsection invalidates the emerging commercial fishery license issued for the harvest of wild clams, mussels, and oysters.

(5) A nonstate lands commercial wild clam, mussel, and oyster trial fishery permit allows harvest only of clams, mussels, and oysters, and it is unlawful to harvest any other shellfish or any fin fish.

(6) It is unlawful to commercially harvest wild clams, mussels, or oysters without a valid emerging commercial fishery license and a nonstate lands commercial wild clam, mussel, and oyster trial fishery permit valid for the lands from which harvest is occurring.

NEW SECTION

WAC 220-88D-050 Identification of wild stocks of clams, mussels, or oysters—Reporting requirements for the commercial harvest of wild clams, mussels, or oysters from nonstate aquatic lands—Conversion to private sector cultured aquatic products. (1) Based upon RCW 15.85.020(3), the following shellfish are distinguished from private sector cultured aquatic products and are identified as wild stocks that are regulated under this chapter:

(a) All clams, mussels, or oysters that were not propagated, farmed, or cultivated under the active supervision and management of a private sector aquatic farmer; and

(b) All clams, mussels, or oysters that were set naturally prior to the time an aquatic farm was established and placed under the active supervision and management of a private sector aquatic farmer.

(2) Examples of harvested wild stocks of shellfish include, but are not limited to, the following:

(a) Any harvest of clams, mussels, or oysters from a site that is not registered as an aquatic farm unless there is some ability to demonstrate that the shellfish was propagated, farmed, or cultivated under the active supervision of an aquatic farmer;

(b) Any harvest of clams, mussels, or oysters that were naturally set prior to the time an aquatic farm was established at the site and placed under the active supervision and management of an aquatic farmer; and

(c) Shellfish that is harvested from a newly registered aquatic farm during a period when the shellfish is presumed to come from a wild stock as specified in subsection (5) of this section.

(3) The sale of wild stocks of clams, mussels, and oysters must be reported through the use of shellfish receiving tickets. The failure to report the sale of shellfish with a fish receiving ticket when it is required is unlawful activity and constitutes a violation of WAC 220-69-215 and RCW 77.15.-630. Any person selling wild stocks of clams, mussels, and oysters must sell the harvest to a licensed Washington wholesale fish dealer, who is then required to complete the fish ticket. Alternatively, if the person harvesting the clams, mussels, or oysters sells this shellfish at retail or arranges for the harvested shellfish to be transported out-of-state, they must be a licensed wholesale dealer and must complete a fish receiving ticket for each day's sales or for each shipment.

(4) Wild stock sales may not be reported on aquatic farm quarterly production reports. Only private sector cultured aquatic products may be reported on quarterly production reports.

(5) The following shellfish are presumed to be wild shellfish that are subject to these regulations:

(a) All mussels, oysters, and clams other than geoducks that are commercially harvested from the nonstate lands within the first twelve months after a complete application for the aquatic farm registration is filed; and

(b) All geoducks commercially harvested from the nonstate lands within the first thirty-six months after a complete application for the aquatic farm registration is filed.

The presumption that shellfish harvested from a newly registered aquatic farm during these time periods are from wild stocks may be overcome by a showing that the harvested shellfish were actually propagated, farmed, or cultivated under the active supervision of an aquatic farmer. After twelve or thirty-six months, respectively, all shellfish produced from a registered aquatic farm will be presumed to be private sector cultured aquatic products, and must be reported on quarterly aquatic farm reports. If a person does not commercially harvest mussels, oysters, or clams other than geoducks for the first twelve months after the aquatic farm registration, or does not commercially harvest geoducks for the first thirty-six months after registration, there is no requirement to obtain an emerging commercial fishery license or trial fishery permit.

WSR 06-04-021
PERMANENT RULES
DEPARTMENT OF
SOCIAL AND HEALTH SERVICES
(Health and Recovery Services Administration)
[Filed January 23, 2006, 4:23 p.m., effective February 23, 2006]

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

Purpose: The proposed changes are technical corrections. The rule text is being reorganized to make it clearer that an SSI-related person who is not found eligible for Medicaid under this rule may be eligible under the SSI-related rules found in chapter 388-575 WAC.

Citation of Existing Rules Affected by this Order: Amending WAC 388-408-0055.

Statutory Authority for Adoption: RCW 74.04.050, 74.04.057, 74.08.090, and 74.09.530.

Adopted under notice filed as WSR 05-15-079 on July 14, 2005.

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

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

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

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

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

Date Adopted: January 17, 2006.

Andy Fernando, Manager
Rules and Policies Assistance Unit

AMENDATORY SECTION (Amending WSR 02-17-030, filed 8/12/02, effective 9/12/02)

WAC 388-408-0055 Medical assistance units. (1) ((~~A~~)) One or more medical assistance units (MAU) is ((~~determined~~)) established for individuals living in the same household based on the ((~~basis of~~)) type of medical program, each individual's relationship to other family members, and the individual's financial responsibility for the other family members.

(2) Financial responsibility applies only to spouses and to parents, as follows:

(a) Married persons, living together are financially responsible for each other;

(b) ((~~Parents~~)) Persons who meet the definition of a natural, adoptive, or step-parent described in WAC 388-454-0010 are financially responsible for their unmarried, minor children living in the same household; and

(c) ((~~A parent's financial responsibility is limited when their minor child is receiving inpatient chemical dependency or mental health treatment. Only the income a parent chooses to contribute to the child is considered available when:~~

~~(i) The treatment is expected to last ninety days or more;~~

~~(ii) The child is in court-ordered out-of-home care in accordance with chapter 13.34 RCW; or~~

~~(iii) The department determines the parents are not exercising responsibility for the care and control of the child.~~))

(((~~d~~))) Minor children are not financially responsible for their parents or for their siblings.

(((~~(2) Certain situations require the establishment of~~))) (3) When determining eligibility for family, pregnancy, or children's medical programs, separate MAUs are required for ((~~some~~)) family members living in the same household((~~. Separate MAUs are established for~~)) in the following situations:

(a) A pregnant minor, regardless of whether she lives with her parent(s);

(b) A child with earned or unearned income;

(c) A child with resources which make((~~s~~)) another family member ineligible for medical assistance;

(d) A child of unmarried parents when both parents reside with the child;

(e) Each unmarried parent of a child in common, plus any of their children who are not in separate MAUs;

(f) A caretaker relative that is not financially responsible for the support of the child;

(((~~(g) SSI recipients or SSI-related persons from the non-SSI related family members;~~

~~(h) The purpose of applying medical income standards for an:~~

~~(i) SSI-related applicant whose spouse is not relatable to SSI or is not applying for SSI-related medical; and~~

~~(ii) Ineligible spouse of an SSI-recipient.~~))

(4) For a family with multiple MAUs established based on the criteria described in subsection (3) of this section, a parent's:

(a) Income up to one hundred percent of the Federal Poverty Level (FPL) is allocated to the parent and other members of the parent's MAU. The excess is allocated to their children in separate MAUs.

(b) Resources are allocated equally to the parent and all persons in the parent's household for whom the parent is financially responsible. This includes family members in separate MAUs.

(5) The exceptions to the income allocations described in subsection (4) of this section are as follows:

(((~~(3)~~))) (a) Only the parent's income actually contributed to a pregnant minor is considered income to the minor.

(b) A parent's financial responsibility is limited when the minor child is receiving inpatient chemical dependency or mental health treatment. Only the income a parent chooses to contribute to the child is considered available when:

(i) The treatment is expected to last ninety days or more;

(ii) The child is in court-ordered, out-of-home care in accordance with chapter 13.34 RCW; or

(iii) The department determines the parents are not exercising responsibility for the care and control of the child.

(((~~(4) A parent's income up to one hundred percent of the Federal Poverty Level (FPL) is allocated to the parent and other members of the parent's MAU. The excess is allocated among their children in separate MAUs.~~

~~(5) A parent's resources are allocated equally among the parent and all persons in the parent's household for whom the parent is financially responsible. This includes family members in separate MAUs~~)) (6) When determining eligibility for an SSI-related medical program, a separate MAU is required for:

(a) SSI recipients;

(b) An SSI-related person who has not been found eligible for family medical under this chapter; or

(c) The purpose of applying medical income standards for an:

(i) SSI-related applicant whose spouse is not relatable to SSI or is not applying for SSI-related medical; and

(ii) Ineligible spouse of an SSI recipient.

(7) For a person in a separate MAU, based on the criteria described in subsection (6) of this section, the income and resource allocations described in subsection (4) of this section are not used. The SSI-related individual's eligibility is determined using the allocations or deeming rules in chapter 388-475 WAC.

(((~~(6)~~))) (8) Countable income for medical programs ((~~is described in WAC 388-450-0150 and~~)):

(a) For SSI individuals is described in chapter 388-475 WAC; or

(b) For family medical, pregnancy medical, and children's medical is described in WAC 388-450-0210.

WSR 06-04-022
PERMANENT RULES
DEPARTMENT OF LICENSING

[Filed January 23, 2006, 4:49 p.m., effective February 23, 2006]

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

Purpose: Clarify language; allow examination applicants to pay exam costs directly to the National Association of State Boards of Geology (ASBOG) for the examinations that we contract with ASBOG to administer; and allow for a suspension in renewal fees until July 1, 2008, but still allow the board to be self-supporting.

Citation of Existing Rules Affected by this Order: Amending WAC 308-15-030 How do I apply for a geologist license?, 308-15-050 What is the examination process to be licensed as a geologist?, and 308-15-150 Fees.

Statutory Authority for Adoption: RCW 18.220.040 Directors authority, 18-220-050 Boards authority.

Adopted under notice filed as WSR 05-24-031 on November 30, 2005.

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

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

Number of Sections Adopted on the Agency's Own Initiative: New 0, Amended 3, Repealed 0.

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

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

Date Adopted: January 23, 2006.

Andrea C. Archer
Assistant Director

AMENDATORY SECTION (Amending WSR 05-01-174, filed 12/21/04, effective 1/21/05)

WAC 308-15-030 How do I apply for a geologist license? (1) Review the available options for licensure:

(a) Examination in WAC 308-15-050; and

(b) Reciprocity in WAC 308-15-060.

(2) Complete and submit your application according to the directions in the geologist application packet, which is available on the geologist web site and upon request from the board office.

(3) Verify you meet minimum educational requirements by having your official sealed transcripts sent directly to the board office from your college or university. Transcripts from schools outside the United States or Canada must be evaluated by a board-approved evaluation service. The evaluation service must send the original evaluation and a copy of the transcripts directly to the board office.

(4) Solicit personal references and verifications of experience in the format and on the forms specified in the application instructions. Verifications must be sent to the board directly from the originating source.

(5) If applying for a license by reciprocity, solicit verification of your current license or certification and your examination scores on the form provided in the application packet. Verification must be sent directly to the board from the issuing jurisdiction.

(6) If applying for a specialty license, submit a project list on the forms provided in the application packet to show you meet the minimum requirements of professional specialty practice of a character satisfactory to the board.

(7) If requested by the board, submit one or more reports you contributed to or solely prepared.

(8) If applying for a license by examination, your complete application, as described in subsection (9) of this section, must be received by the board at least ((~~sixty~~)) ninety calendar days before the date of the examination.

(9) An application is not complete and will not be considered until all of the following are received by the board:

(a) Application, signed and dated, and without omissions;

(b) Application fee and, if applying for a specialty by examination, the examination fee specified in WAC 308-15-150;

(c) Transcripts sent directly from the colleges or universities;

(d) Personal references sent directly from the originators;

(e) Verification of experience sent directly from the verifiers;

(f) If applying by reciprocity, verification of exam scores and license or certification in another jurisdiction;

(g) If applying for a specialty license, project list; and

(h) Other documentation requested by the board.

AMENDATORY SECTION (Amending WSR 05-01-174, filed 12/21/04, effective 1/21/05)

WAC 308-15-050 What is the examination process to be licensed as a geologist? You must take and pass the ASBOG examination. The examination currently consists of two parts: Fundamentals of Geology and Practice of Geology. Each part of the examination is four hours long. Information on the examination is available on the ASBOG web site.

(1) **Applying for the examination:** You may either:

(a) Apply to take the Fundamentals of Geology exam after you meet the minimum educational requirements for licensure, and the Practice of Geology exam after you meet the experience requirements outlined in WAC 308-15-040.

(i) To apply to take the Fundamentals of Geology exam, you must provide the board with an application; a certified copy of your transcripts, sent directly from your college or university; and the application ((~~and examination~~)) fee((~~s~~)) listed in WAC 308-15-150. You do not need to submit employment and experience verification forms or personal references.

(ii) After you meet the minimum experience requirements, you may apply for the Practice of Geology examination by submitting the remaining application documents and ((~~applicable examination~~)) application fee; or

(b) Apply to take both parts of the ASBOG examination after you meet all other licensure requirements outlined in WAC 308-15-040 by submitting a completed license application packet and ((~~applicable examination and license~~)) application fee((~~s~~)).

(2) **Fees:** You must submit the ((~~applicable~~)) application fee((~~s~~)) with your application prior to the application deadline. ((~~If you do not qualify to take the examination, only your examination fee will be refunded.~~)) Fees are listed in WAC 308-15-150. Following approval of your application you must submit your examination fees directly to ASBOG prior to the deadline specified by ASBOG.

(3) **Special accommodations:** If you have a disability, the board will provide accommodations consistent with the Americans with Disabilities Act. You must request special accommodations at least ninety days before the examination date.

(4) **Notification of scoring:** The board will notify you by mail of your examination score within ninety days of taking the examination.

(5) **Failing the examination:**

((~~(a) You may request that your examination be manually graded by submitting a written request and the fee specified in WAC 308-15-150.~~

~~(b)~~)) You may apply to retake the examination by submitting a written request and the administrative fee((~~s~~)) for reexamination specified in WAC 308-15-150. You must submit the examination fee directly to ASBOG by the deadline specified by ASBOG.

AMENDATORY SECTION (Amending WSR 05-01-174, filed 12/21/04, effective 1/21/05)

WAC 308-15-150 Fees. (1) **Suspension of fees.** Effective March 1, 2006, the listed fees shown in subsection (2) of this section are suspended and replaced with the following:

Renewal Fees	
Annual renewal fee for geologist	$20.00
Annual renewal for each specialty	$25.00
Annual renewal for geologist, with late fee (*if paid ninety days or more after due date*)	$40.00
Annual renewal fee for each specialty, with late fee (*if paid ninety days or more after due date*)	$50.00

The fees set forth in this section shall revert back to the fee amounts shown in WAC 308-15-150 on July 1, 2008.

(2) **Fees.**

Type of Fee	**Amount**
Application fees - includes initial license	
Application fee for geologist((~~,~~)) (applying by examination)	$100.00
Application fee for each specialty((~~,~~)) (applying by examination)	$100.00
Application fee for geologist((~~,~~)) (applying by reciprocity)	$200.00
Application fee for each specialty((~~,~~)) (applying by reciprocity)	$150.00
Examination fees	
((~~Fundamentals of Geology (vendor charge)~~	~~$125.00~~
~~Practice of Geology (vendor charge)~~	~~$150.00~~))
Fees for the fundamentals of geology and practice of geology examinations are submitted directly to ASBOG	
Administration fee for reexamination	$65.00
((~~Late fee (if scheduled less than thirty days before examination date - vendor charge)~~	~~$25.00~~
~~Manual regrade (vendor charge)~~	~~$50.00~~))
Specialty examination (hydrogeologist or engineering geologist exam)	$300.00
((~~Administrative fee for regrade~~	~~$15.00~~))
Renewal fees	
Annual renewal fee for geologist	$100.00
Annual renewal fee for each specialty	$85.00
Annual renewal for geologist, with late fee (*if paid ninety days or more after due date*)	$200.00

Type of Fee	Amount
Annual renewal for each specialty, with late fee (*if paid ninety days or more after due date*)	$170.00
Miscellaneous fees	
Duplicate license or wall certificate . . .	$25.00
Certification of license records to other jurisdictions.	$45.00
Proctor examination for another jurisdiction	$100.00

WSR 06-04-025
PERMANENT RULES
DEPARTMENT OF LABOR AND INDUSTRIES

[Filed January 24, 2006, 12:11 p.m., effective February 24, 2006]

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

Purpose: This rule making will repeal chapter 296-08 WAC, Practice and procedure. However, WAC 296-08-025 Attorney's fees, will be incorporated into existing chapter 296-14 WAC, Industrial insurance. There are no anticipated effects as, with the exception of WAC 296-08-025, the rules have not been used for years.

Citation of Existing Rules Affected by this Order: Repealing chapter 296-08 WAC; and amending chapter 296-14 WAC.

Statutory Authority for Adoption: Chapters 51.04, 51.08, 51.12, 51.24, and 51.32 RCW.

Adopted under notice filed as WSR 05-23-142 on November 22, 2005.

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

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

Number of Sections Adopted on the Agency's Own Initiative: New 1, Amended 0, Repealed 43.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 1, Amended 0, Repealed 43.

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

Date Adopted: January 24, 2006.

Gary Weeks
Director

REPEALER

The following chapter of the Washington Administrative Code is repealed:

WAC 296-08-001	Effective date and validity.
WAC 296-08-010	Appearance and practice before agency—Who may appear.
WAC 296-08-020	Appearance and practice before agency—Appearance in certain proceedings may be limited to attorneys.
WAC 296-08-025	Attorney's fees.
WAC 296-08-030	Appearance and practice before agency—Solicitation of business unethical.
WAC 296-08-040	Appearance and practice before agency—Standards of ethical conduct.
WAC 296-08-050	Appearance and practice before agency—Appearance by former employee of agency or former member of attorney general's staff.
WAC 296-08-060	Appearance and practice before agency—Former employee as expert witness.
WAC 296-08-070	Computation of time.
WAC 296-08-080	Notice and opportunity for hearing in contested cases.
WAC 296-08-090	Service of process—By whom served.
WAC 296-08-100	Service of process—Upon whom served.
WAC 296-08-110	Service of process—Service upon parties.
WAC 296-08-120	Service of process—Methods of service.
WAC 296-08-130	Service of process—When service complete.
WAC 296-08-140	Service of process—Filing with agency.
WAC 296-08-150	Subpoenas—Where provided by law—Form.
WAC 296-08-160	Subpoenas—Issuance to parties.
WAC 296-08-170	Subpoenas—Service.
WAC 296-08-180	Subpoenas—Fees.
WAC 296-08-190	Subpoenas—Proof of service.
WAC 296-08-200	Subpoenas—Quashing.
WAC 296-08-210	Subpoenas—Enforcement.
WAC 296-08-220	Subpoenas—Geographical scope.

WAC 296-08-370	Official notice—Matters of law.
WAC 296-08-380	Official notice—Material facts.
WAC 296-08-390	Presumptions.
WAC 296-08-400	Stipulations and admissions of record.
WAC 296-08-410	Form and content of decisions in contested cases.
WAC 296-08-420	Definition of issues before hearing.
WAC 296-08-430	Prehearing conference rule—Authorized.
WAC 296-08-440	Prehearing conference rule—Record of conference action.
WAC 296-08-450	Submission of documentary evidence in advance.
WAC 296-08-460	Excerpts from documentary evidence.
WAC 296-08-470	Expert or opinion testimony and testimony based on economic and statistical data—Number and qualifications of witnesses.
WAC 296-08-480	Expert or opinion testimony and testimony based on economic and statistical data—Written sworn statements.
WAC 296-08-490	Expert or opinion testimony and testimony based on economic and statistical data—Supporting data.
WAC 296-08-500	Expert or opinion testimony and testimony based on economic and statistical data—Effect of noncompliance with WAC 296-08-470 or 296-08-480.
WAC 296-08-510	Continuances.
WAC 296-08-520	Rules of evidence—Admissibility criteria.
WAC 296-08-530	Rules of evidence—Tentative admission—Exclusion—Discontinuance—Objections.
WAC 296-08-540	Petitions for rule making, amendment or repeal.
WAC 296-08-550	Petitions for rule making, amendment or repeal—Requisites.
WAC 296-08-560	Petitions for rule making, amendment or repeal—Agency must consider.
WAC 296-08-570	Petitions for rule making, amendment or repeal—Notice of disposition.
WAC 296-08-580	Declaratory rulings.
WAC 296-08-590	Forms.

NEW SECTION

WAC 296-14-955 Attorney's fees. (1) The department of labor and industries (hereinafter department) shall fix a reasonable attorney fee to be paid by the worker, crime victim, or beneficiary for services rendered with the department if written application therefor is made by the attorney, worker, crime victim, or beneficiary, as provided in RCW 51.52.120.

(a) Fees will be set only for services rendered prior to the notice of appeal;

(b) On closed claims, fees will only be set if written application is received by the department within one year from the claim closure date as indicated on the department order.

(c) If such application for fixing of a fee is made by the attorney, it shall set forth therein the monetary amount which the attorney considers reasonable for all services rendered with the department, the reason such fee is considered to be reasonable, and a detailed breakdown of the time spent by the attorney in representing the injured worker.

(d) In all instances, the department shall afford to all parties affected a minimum of ten days in which to submit comment and material information which may be helpful to the department in setting a fair and reasonable fee.

(e) The department will provide copies of information sent to the department to the attorney, worker, crime victim, or beneficiary upon request.

(f) Informal contact may be made with the parties to determine the feasibility of reaching an agreement on the amount of the fees.

(g) Additional information necessary to reach a decision may be requested by the department.

(2) *Fee fixing criteria.* All attorney fees fixed by the department where application therefor has been made shall be established in accordance with the following general principles:

(a) Only one fee shall be fixed for legal services in any one claim regardless of the number of attorneys representing the worker, crime victim, or beneficiary, except that in cases of multiple beneficiaries represented by one or multiple attorneys the department has the discretion to set more than one attorney fee if so requested.

(b) The department shall defer fixing a fee until such time as information, which it deems sufficient upon which to base a fee, is available.

(c) A fee shall be fixed only in those cases where the attorney's services are instrumental in securing additional benefits to the worker, crime victim, or beneficiary.

(d) Where increased compensation is obtained, the fee may be fixed without regard to any medical benefits secured.

(e) In setting all fees, the following factors shall be carefully considered and weighed:

(i) Nature of the claim.

(ii) Novelty and complexity of the issues presented or other unusual circumstances.

(iii) Time and labor expended.

(iv) Skill and diligence in resolving the claim.

(v) Extent and nature of the relief.

(vi) The prevalent practice of charging contingency fees in the department.

(vii) The worker's or crime victim's circumstance and the remedial social purposes of the Industrial Insurance Act and of the Crime Victims Compensation Act, which are intended to provide sure and adequate relief to injured workers and crime victims and their families.

(3) The manager of the claims consultant division of the department is the director's designee to process all petitions to set attorney's fees and to issue orders setting those fees for services rendered by attorneys in securing industrial insurance benefits. The supervisor of the crime victims section of the department is the director's designee to process all petitions to set attorney's fees and to issue orders setting those fees for services rendered by attorneys in securing crime victims benefits.

WSR 06-04-026
PERMANENT RULES
DEPARTMENT OF LICENSING

[Filed January 24, 2006, 2:22 p.m., effective February 24, 2006]

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

Purpose: The purpose of this change in the rule is to clarify language for undercover and confidential vehicle and vessel license application procedures. The change to the existing rules is to clarify language and add to the vehicle rule the inclusion of trailers, snowmobiles and other off road vehicles.

Citation of Existing Rules Affected by this Order: Amending WAC 308-96A-080 and 308-93-241.

Statutory Authority for Adoption: RCW 46.08.066 and 88.02.035.

Adopted under notice filed as WSR 05-23-018 on November 7, 2005.

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

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

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

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 2, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 2, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: January 24, 2006.

Sharon L. Whitehead
for Liz Luce
Director

AMENDATORY SECTION (Amending WSR 02-22-004, filed 10/24/02, effective 11/24/02)

WAC 308-93-241 Undercover and confidential vessel registration—Application procedures. (1) **What are undercover and confidential vessel registrations?** ((~~Undercover and confidential registrations are nonexempt~~)) They are vessel registrations and decals assigned only to vessels owned or operated by government agencies as identified in RCW 88.02.035.

(2) **When is an undercover or confidential vessel registration issued?** An undercover or confidential vessel registration is issued to government agencies when the vessel is being used in confidential, investigative, or undercover work.

(3) **How are undercover and confidential vessels registered?** ((~~Government owned or operated vessels may be registered in one of the following ways:~~

~~(a) If registered with an undercover vessel registration number, the record will show fictitious names and addresses on all department records subject to public disclosure; or~~

~~(b) If registered with a confidential vessel registration number, the record will show the government agency name and address on all department records subject to public disclosure.~~

~~(3) Is a government agency responsible for ensuring safeguards to select a fictitious name and address for undercover vessel registrations? Yes, government agency's must certify on the application that precautions have been taken to ensure that the use of citizens' names and legitimate licensed Washington businesses has not been used.~~

~~(4)~~)) (a) An undercover vessel registration record will show fictitious names and addresses on all department records subject to public disclosure.

(b) A confidential vessel registration record will show the government agency name and address on all department records subject to public disclosure.

(4) **Who is responsible for verifying that only fictitious names and addresses are used for undercover vessel registrations?** The individual signing the application.

(5) **How does a government agency apply for an undercover or confidential vessel registration?** ((~~A government agency requesting an undercover/confidential vessel registration must provide:~~))

(a) A completed application form approved by the department ((~~and~~)) needs to be signed by the government agency head or designated contact person. ((~~The agency must indicate on the application form which type of registration is needed (undercover or confidential);~~))

(b) A copy of the current ((~~certificate of ownership~~)) title, registration ((~~certificate~~)) or other documents approved by the department ((~~showing~~)) of licensing that proves the vessel is owned or operated by the government agency.

AMENDATORY SECTION (Amending WSR 02-21-118, filed 10/23/02, effective 11/23/02)

WAC 308-96A-080 Undercover and confidential license plates—Application procedures. (1) **What are undercover and confidential license plates?**

(((~~(a) An undercover license plate is issued to local, state, and federal government agencies for law enforcement purposes only to be used in confidential, investigative, or undercover work, confidential public health work, and confidential public assistance fraud or support investigations.~~

~~(b) A confidential license plate is issued to any elected state official for use on official business. Confidential plates are also issued when necessary for the personal security of any other public officer or public employee for the conduct of official business for the period of time that the personal security of such state official, public officer, or other public employee may require.~~

~~Undercover and confidential license plates are standard issue license plates assigned only to vehicles owned or operated by government agencies as identified in RCW 46.08.066.~~)) They are standard issue license plates assigned only to vehicles owned or operated by government agencies as identified in RCW 46.08.066. These vehicles include, but are not limited to, off road vehicles, trailers, and snowmobiles.

(2) ((~~How are undercover and confidential vehicles registered? Government owned or operated vehicles may be registered in one of the following ways:~~

~~(a) If registered with an undercover license plate, the record will show fictitious names and addresses on all department records subject to public disclosure; or~~

~~(b) If registered with a confidential license plate, the record will show the government agency name and address on all department records subject to public disclosure.~~)) **When is an undercover or confidential license plate issued?** An undercover or confidential license plate is issued to government agencies when being used in confidential, investigative, or undercover work.

(3) ((~~Is a government agency responsible for ensuring that safeguards are used to select a fictitious name and address for undercover vehicle registrations? Yes, government agencies shall certify on the application that precautions have been taken to ensure that names and legitimate licensed Washington businesses have not been used.~~)) **When are undercover and confidential license plates used?**

(a) These plates are used for official business by government agencies or any state elected official.

(b) For the personal security of any other public officer, or public employee, for use on an unmarked publicly owned or controlled vehicle for the conduct of business for the period of time required.

(4) ((~~How does a government agency apply for undercover or confidential license plates? A government agency requesting undercover or confidential license plates shall provide:~~

~~(a) A completed application form approved by the department and signed by the government agency head or designated contact person. The agency shall indicate on the application form which type of registration is requested (undercover or confidential).~~

~~(b) A copy of the current certificate of ownership, registration certificate or other documents approved by the department showing the vehicle is owned or operated by the government agency.~~)) **How are undercover and confidential vehicles registered?**

(a) An undercover license plate record will show fictitious names and addresses on all department records subject to public disclosure.

(b) A confidential license plate record will show the government agency name and address on all department records subject to public disclosure.

(5) **Who is responsible for verifying that only fictitious names and addresses are used for undercover vehicle registrations?** The individual signing the application.

(6) **How does a government agency apply for undercover or confidential license plates?**

(a) A completed application form approved by the department needs to be signed by the government agency head or designated contact person.

(b) A copy of the current title, registration or other documents approved by the department of licensing that proves the vehicle is owned or operated by the government agency.

WSR 06-04-033
PERMANENT RULES
DEPARTMENT OF REVENUE

[Filed January 26, 2006, 10:31 a.m., effective February 26, 2006]

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

Purpose: WAC 458-20-144 (Rule 144) explains the B&O and retail sales tax reporting responsibilities of persons engaged in printing activities. Effective July 1, 2005, the department adopted revisions to Rule 144 on an emergency basis to reflect chapter 514, Laws of 2005, which provides a B&O tax deduction and retail sales and use tax exemptions for delivery charges made for the delivery of direct mail if the charges are separately stated. This rule-making action incorporates the provisions of chapter 514 into the permanent Rule 144.

Citation of Existing Rules Affected by this Order: Amending WAC 458-20-144 Printing industry.

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

Adopted under notice filed as WSR 05-23-105 on November 17, 2005.

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

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

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

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

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Mak-

ing: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 1, Repealed 0.

Date Adopted: January 26, 2006.

Janis P. Bianchi, Manager
Interpretations and
Technical Advice Unit

AMENDATORY SECTION (Amending WSR 05-03-052, filed 1/11/05, effective 7/1/05)

WAC 458-20-144 Printing industry. (1) **Introduction.** This ((~~rule~~)) section discusses the taxability of the printing industry. For information on the taxability of mailing bureau services, refer to WAC 458-20-141, Duplicating industry and mailing bureaus.

Chapter 514, Laws of 2005, changed the taxability of delivery charges associated with direct mail. Refer to subsection (4) of this section for further information.

(2) **Definition.** The phrase "printing industry" includes letterpress, offset-lithography, and gravure processes as well as multigraph, mimeograph, autotyping, addressographing and similar activities.

(3) **Business and occupation tax.** Printers are subject to the business and occupation tax under the printing and publishing classification upon the gross income of the business.

(4) **Retail sales tax.** The printing or imprinting of advertising circulars, books, briefs, envelopes, folders, posters, racing forms, tickets, and other printed matter, whether upon special order or upon materials furnished either directly or indirectly by the customer is a retail sale and subject to the retail sales tax, providing the customer either consumes, or distributes such articles free of charge, and does not resell such articles in the regular course of business. The retail sales tax is computed upon the total charge for printing, and the printer may not deduct the cost of labor, author's alterations, or other service charges in performing the printing, even though such charges may be stated or shown separately on invoices.

RCW 82.04.070 and 82.08.010, respectively, define "gross proceeds of sales" and "selling price." These definitions provide that there is no deduction for "delivery costs." RCW 82.08.010 further provides that there is no deduction for "delivery charges," a term also defined by the statute to include postage. ((~~If a printer purchases stamps, applies metered postage using its meter account, or applies its permit imprint, and also charges the customer for the postage, the charge is included in the measure of B&O and/or retail sales tax, unless excluded by another provision of chapters 82.04 and 82.08 RCW. See also WAC 458-20-111 for information about nontaxable advances and reimbursements.~~)) Effective May 17, 2005, chapter 514, Laws of 2005, provides a B&O tax deduction and retail sales and use tax exemption from the measure of tax for amounts derived from delivery charges for direct mail when the delivery charges are separately stated on an invoice or similar billing invoice provided to the buyer.

"Direct mail" means printed material delivered or distributed by United States mail or other delivery service to a mass audience or to addressees on a mailing list provided by the purchaser or at the direction of the purchaser when the cost of the items are not billed directly to the recipients. "Direct mail" includes tangible personal property supplied directly or indirectly by the purchaser to the direct mail seller for inclusion in the package containing the printed material. "Direct mail" does not include multiple items of printed material delivered to a single address. RCW 82.08.010 and chapter 514, Laws of 2005.

"Delivery charges" means charges by the seller of personal property or services for preparation and delivery to a location designated by the purchaser of personal property or services including, but not limited to, transportation, shipping, postage, handling, crating, and packing. RCW 82.08.-010.

Sales of printed matter to advertising agencies who purchase for their own use or for the use of their clients, and not for resale in the regular course of business, are sales for consumption and subject to the retail sales tax.

Sales of tickets to theater owners, amusement operators, transportation companies and others are sales for consumption and subject to the retail sales tax. Such tickets are not resold by the theater owners or amusement proprietors as tangible personal property but are used merely as a receipt to the patrons for payment and as evidence of the right to admission or transportation.

Sales of school annuals and similar publications by printers to school districts, private schools or student organizations therein are subject to the retail sales tax.

Sales by printers of books, envelopes, folders, posters, racing forms, stationery, tickets and other printed matter to dealers for resale in the regular course of business are wholesale sales and are not subject to the retail sales tax.

Charges made by bookbinders or printers for imprinting, binding or rebinding of materials for consumers are subject to the retail sales tax.

Sales to printers of equipment, supplies and materials which do not become a component part or ingredient of the finished printed matter sold or which are put to "intervening use" before being resold are subject to the retail sales tax. This includes, among others, sales of fuel, furniture, lubricants, machinery, type, lead, slugs and mats.

Sales to printers of paper stock and ink which become a part of the printed matter sold are sales for resale and are not subject to retail sales tax.

(5) **Commissions and discounts.** There is a general trade practice in the printing industry of making allowances to advertising agencies of a certain percentage of the gross charge made for printed matter ordered by the agency either in its own name or in the name of the advertiser. This allowance may be a "commission" or may be a "discount."

A "commission" paid by a seller constitutes an expense of doing business and is not deductible from the measure of tax under either business and occupation tax or retail sales tax. On the other hand, a "discount" is a deduction from an established selling price allowed to buyers, and a bona fide discount is deductible under both these classifications.

In order that there may be a definite understanding, printers, advertising agencies and advertisers are advised that tax liability in such cases is as follows:

(a) The allowance taken by an advertising agency will be deductible as a discount in the computation of the printer's

liability only in the event that the printer bills the charge on a net basis; i.e., less the discount.

(b) Where the printer bills the gross charge to the agency, and the advertiser pays the sales tax measured by the gross charge, no deduction will be allowed, irrespective of the fact that in payment of the account the printer actually receives from the agency the net amount only; i.e., the gross billing, less the commission retained by the agency. In all cases the commission received is taxable to the agency.

WSR 06-04-046
PERMANENT RULES
DEPARTMENT OF SOCIAL AND HEALTH SERVICES
(Health and Recovery Services Administration)

[Filed January 26, 2006, 4:22 p.m., effective February 26, 2006]

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

Purpose: The department is amending these rules to reconcile SSI-related medical program resource eligibility rules with federal law.

Citation of Existing Rules Affected by this Order: Amending WAC 388-475-0550, 388-475-0700, 388-475-0800, 388-475-0820, and 388-475-0860.

Statutory Authority for Adoption: RCW 74.04.050, 74.04.057, 74.08.090, and 74.09.500.

Other Authority: Social Security Act as amended by P.L. 108-203.

Adopted under notice filed as WSR 05-19-126 on September 20, 2005.

Changes Other than Editing from Proposed to Adopted Version: In WAC 388-475-0700 (7)(d), changed wording to read: "Meet eligibility for an MN waiver program. See WAC 388-515-1540 and 388-515-1550." In WAC 388-475-0860(27), changed wording to read: "Any interest or dividend is excluded as income, except for the community spouse of an institutionalized individual."

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 5, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

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

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

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

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 5, Repealed 0.

Date Adopted: January 18, 2006.

Andy Fernando, Manager
Rules and Policies Assistance Unit

AMENDATORY SECTION (Amending WSR 04-09-004, filed 4/7/04, effective 6/1/04)

WAC 388-475-0550 SSI-related medical—All other excluded resources. All resources described in this section are excluded resources for SSI-related medical programs. Unless otherwise stated, interest earned on the resource amount is counted as unearned income.

(1) Resources necessary for a client who is blind or disabled to fulfill a department approved self-sufficiency plan.

(2) Retroactive payments from SSI or RSDI, including benefits a client receives under the interim assistance reimbursement agreement with the Social Security Administration, are excluded for ((~~six~~)) nine months following the month of receipt. This exclusion applies to:

(a) Payments received by the client, spouse, or any other person financially responsible for the client;

(b) SSI payments for benefits due for the month(s) before the month of continuing payment;

(c) RSDI payments for benefits due for a month that is two or more months before the month of continuing payment; and

(d) Proceeds from these payments as long as they are held as cash, or in a checking or savings account. The funds may be commingled with other funds, but must remain identifiable from the other funds for this exclusion to apply. This exclusion does not apply once the payments have been converted to any other type of resource.

(3) All resources specifically excluded by federal law, such as those described in subsections (4) through (11) as long as such funds are identifiable.

(4) Payments made under Title II of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.

(5) Payments made to Native Americans as listed in 20 CFR 416.1182, Appendix to subpart K, section IV, paragraphs (b) and (c), and in 20 CFR 416.1236.

(6) The following Native American/Alaska Native funds are excluded resources:

(a) Resources received from a Native Corporation under the Alaska Native Claims Settlement Act, including:

(i) Shares of stock held in a regional or village corporation;

(ii) Cash or dividends on stock received from the Native Corporation up to two thousand dollars per person per year;

(iii) Stock issued by a native corporation as a dividend or distribution on stock;

(iv) A partnership interest;

(v) Land or an interest in land; and

(vi) An interest in a settlement trust.

(b) All funds contained in a restricted Individual Indian Money (IIM) account.

(7) Restitution payment and any interest earned from this payment to persons of Japanese or Aleut ancestry who were relocated and interned during war time under the Civil Liberties Act of 1988 and the Aleutian and Pribilof Islands Restitution Act.

(8) Funds received from the Agent Orange Settlement Fund or any other funds established to settle Agent Orange liability claims.

(9) Payments or interest accrued on payments received under the Radiation Exposure Compensation Act received by the injured person, the surviving spouse, children, grandchildren, or grandparents.

(10) Payments from:

(a) The Dutch government under the Netherlands' Act on Benefits for Victims of Persecution (WUV).

(b) The Victims of Nazi Persecution Act of 1994 to survivors of the Holocaust.

(c) Susan Walker vs. Bayer Corporation, et al., 96-C-5024 (N.D. Ill.) (May 8, 1997) settlement funds.

(d) Ricky Rey Hemophilia Relief Fund Act of 1998 P.L. 105-369.

(11) The unspent social insurance payments received due to wage credits granted under sections 500 through 506 of the Austrian General Social Insurance Act.

(12) Earned income tax credit refunds and payments are excluded as resources ((~~during the month of receipt and the following month~~)) for nine months after the month of receipt.

(13) Payments from a state administered victim's compensation program for a period of nine calendar months after the month of receipt.

(14) Cash or in-kind items received as a settlement for the purpose of repairing or replacing a specific excluded resource are excluded:

(a) For nine months. This includes relocation assistance provided by state or local government.

(b) Up to a maximum of thirty months, when:

(i) The client intends to repair or replace the excluded resource; and

(ii) Circumstances beyond the control of the settlement recipient prevented the repair or replacement of the excluded resource within the first or second nine months of receipt of the settlement.

(c) For an indefinite period, if the settlement is from federal relocation assistance.

(d) Permanently, if the settlement is assistance received under the Disaster Relief and Emergency Assistance Act or other assistance provided under a federal statute because of a catastrophe which is declared to be a major disaster by the President of the United States, or is comparable assistance received from a State or local government or from a disaster assistance organization. Interest earned on this assistance is also excluded from resources. Any cash or in-kind items received as a settlement and excluded under this subsection are considered as available resources when not used within the allowable time periods.

(15) Insurance proceeds or other assets recovered by a Holocaust survivor as defined in WAC 388-470-0026(4).

(16) Pension funds owned by an ineligible spouse. Pension funds are defined as funds held in a(n):

(a) Individual retirement account (IRA) as described by the IRS code; or

(b) Work-related pension plan (including plans for self-employed individuals, known as Keogh plans).

(17) Cash payments received from a medical or social service agency to pay for medical or social services are excluded for one calendar month following the month of receipt.

(18) SSA- or DVR-approved plans for achieving self-support (PASS) accounts, allowing blind or disabled individuals to set aside resources necessary for the achievement of the plan's goals, are excluded.

(19) Food and nutrition programs with federal involvement. This includes Washington Basic Food, school reduced and free meals and milk programs and WIC.

(20) Gifts to, or for the benefit of, a person under eighteen years old who has a life-threatening condition, from an organization described in section 501 (c)(3) of the Internal Revenue Code of 1986 which is exempt from taxation under section 501(a) of that Code, as follows:

(a) In-kind gifts that are not converted to cash; or

(b) Cash gifts up to a total of two thousand dollars in a calendar year.

((~~(22)~~)) (21) Veteran's payments made to, or on behalf of, natural children of Vietnam veterans regardless of their age or marital status, for any disability resulting from spina bifida suffered by these children.

((~~(23)~~)) (22) The following are among assets that are not considered resources and as such are neither excluded nor counted:

(a) Home energy assistance/support and maintenance assistance;

(b) Retroactive in-home supportive services payments to ineligible spouses and parents; and

(c) Gifts of domestic travel tickets. For a more complete list please see POMS @ http://policy.ssa.gov/poms.nsf/lnx/0501130050.

AMENDATORY SECTION (Amending WSR 04-09-004, filed 4/7/04, effective 6/1/04)

WAC 388-475-0700 SSI-related medical—Income eligibility. (1) In order to be eligible, a client is required do everything necessary to obtain any income to which they are entitled including (but not limited to):

(a) Annuities,

(b) Pensions,

(c) Unemployment compensation,

(d) Retirement, and

(e) Disability benefits; even if their receipt makes the client ineligible for department services, unless the client can provide evidence showing good reason for not obtaining the benefits.

The department does not count this income until the client begins to receive it.

(2) Income is budgeted prospectively for all medical programs.

(3) Anticipated nonrecurring lump sum payments other than retroactive SSI/SSDI payments are considered income in the month received, subject to reporting requirements in WAC 388-418-0007(4). Any unspent portion is considered a resource the first of the following month.

(4) The department follows income and resource methodologies of the Supplemental Security Income (SSI) program defined in federal law when determining eligibility for SSI-related medical or Medicare Savings programs unless the department adopts rules that are less restrictive than those of the SSI program.

(5) Exceptions to the SSI income methodology:

(a) Lump sum payments from a retroactive SSDI benefit, when reduced by the amount of SSI received during the period covered by the payment, are not counted as income;

(b) Unspent retroactive lump sum money from SSI or SSDI is excluded as a resource for ((~~six~~)) nine months following receipt of the lump sum; and

(c) Both the principal and interest portions of payments from a sales contract, that meet the definition in WAC 388-475-0350(10), are unearned income.

(6) To be eligible for categorically needy (CN) SSI-related medical coverage, a client's countable income cannot exceed the CN program standard described in:

(a) WAC 388-478-0065 through 388-478-0085 for noninstitutional medical unless living in an alternate living facility; or

(b) WAC 388-513-1305(2) for noninstitutional CN benefits while living in an alternate living facility; or

(c) WAC 388-513-1315 for institutional and waiver services medical benefits.

(7) To be eligible for SSI-related medical coverage provided under the medically needy (MN) program, a client must:

(a) Have countable income at or below the MN program standard as described in WAC 388-478-0070; or

(b) Satisfy spenddown requirements described in WAC 388-519-0110((~~, or~~));

(c) Meet the requirements for noninstitutional MN benefits while living in an alternate living facility (ALF). See WAC 388-513-1305(3) ((~~and 388-515-1540~~)); or

(d) Meet eligibility for the MN waiver program. See WAC 388-515-1540 and 388-515-1550.

AMENDATORY SECTION (Amending WSR 04-09-005, filed 4/7/04, effective 6/1/04)

WAC 388-475-0800 SSI-related medical—General income exclusions. The department excludes, or does not consider, the following when determining a client's eligibility for SSI-related medical programs:

(1) The first twenty dollars per month of unearned income. If there is less than twenty dollars of unearned income in a month, the remainder is excluded from earned income in that month.

(a) The twenty-dollar limit is the same, whether applying it for a couple or for a single person.

(b) The disregard does not apply to income paid totally or partially by the federal government or a nongovernmental agency on the basis of an eligible person's needs.

(c) The twenty dollars disregard is applied after all exclusions have been taken from income.

(2) Income that is not reasonably anticipated or is received infrequently or irregularly, whether for a single person or each person in a couple when it is:

(a) Earned and does not exceed a total of ((~~ten~~)) thirty dollars per ((~~month~~)) calendar quarter; or

(b) Unearned and does not exceed a total of ((~~twenty~~)) sixty dollars per ((~~month~~)) calendar quarter;

(c) Increases in a client's burial funds that were established on or after November 1, 1982 if the increases are the result of:

(i) Interest earned on excluded burial funds; or

(ii) Appreciation in the value of an excluded burial arrangement that was left to accumulate and become part of separately identified burial funds.

(3) Essential expenses necessary for a client to receive compensation (e.g., necessary legal fees in order to get a settlement);

(4) Receipts, which are not considered income, when they are for:

(a) Replacement or repair of an exempt resource;

(b) Prepayment or repayment of medical care paid by a health insurance policy or medical service program; or

(c) Payments made under a credit life or credit disability policy.

(5) The fee a guardian or representative payee charges as reimbursement for providing services, when such services are a requirement for the client to receive payment of the income.

(6) Funds representing shared household costs.

(7) Crime victim's compensation.

(8) The value of a common transportation ticket, given as a gift, that is used for transportation and not converted to cash.

(9) Gifts that are not for food, clothing or shelter, and gifts of home produce used for personal consumption.

(10) The department does not consider in-kind income received from someone other than a person legally responsible for the individual unless it is earned. Therefore, the following in-kind payments are not counted when determining eligibility for SSI-related medical programs.

(a) In-kind payments for services paid by a client's employer if:

(i) The service is not provided in the course of an employer's trade or business; or

(ii) It is in the form of food and/or shelter that is:

(A) On the employer's business premises;

(B) For the employer's convenience; and

(C) If shelter, acceptance by the employee is a condition of employment.

(b) In-kind payments made to people in the following categories:

(i) Agricultural employees;

(ii) Domestic employees;

(iii) Members of the Uniformed Services;

(iv) Persons who work from home to produce specific products for the employer from materials supplied by the employer.

AMENDATORY SECTION (Amending WSR 04-09-005, filed 4/7/04, effective 6/1/04)

WAC 388-475-0820 SSI-related medical—Child-related income exclusions. (1) The department excludes an allowance from a person's earned and/or unearned income for a child living in the home when:

(a) The minor child lives with an SSI-related parent; and

(b) The minor child is not receiving a needs-based cash payment such as TANF or SSI; and

(c) The SSI-related parent is single; or

(d) The SSI-related parent lives with a spouse who has no income; and

(e) The individual applying for or receiving SSI-related medical benefits is the adult parent. The maximum allowance is one-half the Federal Benefit Rate (FBR) for each child. The child's countable income, if any, is subtracted from the maximum child's allowance((~~. One third of the child support received for the child is excluded from the child's income~~)) before determining this allowance.

(2) Foster care payments received for a child who is not SSI-eligible and who is living in the household, placed there by a licensed, nonprofit or public child placement or child-care agency are excluded from income regardless of whether the person requesting or receiving SSI-related medical is the adult foster parent or the child who was placed.

(3) Adoption support payments, received by an adult for a child in the household that are designated for the child's needs, are excluded as income. Adoption support payments that are not specifically designated for the child's needs are not excluded and are considered unearned income to the adult.

(4) ((~~Up to one thousand three hundred seventy dollars per month of a child's~~)) Earned income((~~, but not more than five thousand five hundred twenty dollars per year,~~)) of a person under age twenty-two is excluded if ((~~the child~~)) that person is a student.

(5) Child support payments received from an absent parent for a child living in the home are considered the income of the child.

(6) One-third of child support payments received for a child are excluded from the child's income.

(7) Any portion of a grant, scholarship, ((~~or~~)) fellowship, or gift used ((~~to pay~~)) for tuition, fees and/or other necessary educational expenses at any educational institution is excluded from income for nine months after the month of receipt.

(((~~(7)~~))) (8) Gifts to, or for the benefit of, a person under eighteen years old who has a life-threatening condition, from an organization described in section 501 (c)(3) of the Internal Revenue Code of 1986 which is exempt from taxation under section 501(a) of that Code, is excluded as follows:

(a) In-kind gifts that are not converted to cash; or

(b) Cash gifts up to a total of two thousand dollars in a calendar year.

(((~~(8)~~))) (9) Veteran's payments made to, or on behalf of, natural children of Vietnam veterans regardless of their age or marital status, for any disability resulting from spina bifida suffered by these children are excluded from income.

(((~~(9)~~))) (10) Unless it is specifically contributed to the client, all earned income of an ineligible or nonapplying person under the age of twenty-one who is a student:

(a) Attending a school, college, or university; or

(b) Pursuing a vocational or technical training program designed to prepare the student for gainful employment.

AMENDATORY SECTION (Amending WSR 04-09-005, filed 4/7/04, effective 6/1/04)

WAC 388-475-0860 SSI-related medical—Income exclusions under federal statute or other state laws. The Social Security Act and other federal statutes or state laws list income that the department excludes when determining eligibility for SSI-related medical programs. These exclusions include, but are not limited to:

(1) Income tax refunds;

(2) Federal earned income tax credit (EITC) payments for nine months after the month of receipt;

(3) Compensation provided to volunteers in the Corporation for National and Community Service (CNCS), formerly known as ACTION programs established by the Domestic Volunteer Service Act of 1973. P.L. 93-113;

(4) Assistance to a person (other than wages or salaries) under the Older Americans Act of 1965, as amended by section 102 (h)(1) of Pub. L. 95-478 (92 Stat. 1515, 42 U.S.C. 3020a);

(5) Federal, state and local government payments including assistance provided in cash or in-kind under any government program that provides medical or social services;

(6) Certain cash or in-kind payments a client receives from a governmental or nongovernmental medical or social service agency to pay for medical or social services;

(7) Value of food provided through a federal or nonprofit food program such as WIC, donated food program, school lunch program;

(8) Assistance based on need, including:

(a) Any federal SSI income or state supplement payment (SSP) based on financial need;

(b) Food stamps;

(c) GA-U;

(d) CEAP;

(e) TANF; and

(f) Bureau of Indian Affairs (BIA) general assistance.

(9) Housing assistance from a federal program such as HUD if paid under:

(a) United States Housing Act of 1937 (section 1437 et seq. of 42 U.S.C.);

(b) National Housing Act (section 1701 et seq. of 12 U.S.C.);

(c) Section 101 of the Housing and Urban Development Act of 1965 (section 1701s of 12 U.S.C., section 1451 of 42 U.S.C.);

(d) Title V of the Housing Act of 1949 (section 1471 et seq. of 42 U.S.C.); or

(e) Section 202(h) of the Housing Act of 1959;

(f) Weatherization provided to low-income homeowners by programs that consider income in the eligibility determinations;

(10) Energy assistance payments including:

(a) Those to prevent fuel cutoffs, and

(b) To promote energy efficiency.

(11) Income from employment and training programs as specified in WAC 388-450-0045.

(12) Foster Grandparents program;

(13) Title IV-E and state foster care maintenance payments if the foster child is not included in the assistance unit;

(14) The value of any childcare provided or arranged (or any payment for such care or reimbursement for costs incurred for such care) under the Child Care and Development Block Grant Act, as amended by section 8(b) of P.L. 102-586 (106 Stat. 5035).

(15) Educational assistance as specified in WAC 388-450-0035.

(16) Up to two thousand dollars per year derived from an individual's interest in Indian trust or restricted land.

(17) Native American benefits and payments as specified in WAC 388-450-0040 and other Native American payments excluded by federal statute. For a complete list of these payments, see 20 CFR 416, Subpart K, Appendix, IV.

(18) Payments from Susan Walker v. Bayer Corporation, et al., 96-c-5024 (N.D. Ill) (May 8, 1997) settlement funds;

(19) Payments from Ricky Ray Hemophilia Relief Fund Act of 1998, P.L. 105-369;

(20) Disaster assistance paid under Federal Disaster Relief P.L. 100-387 and Emergency Assistance Act, P.L. 93-288 amended by P.L. 100-707 and for farmers P.L. 100-387;

(21) Payments to certain survivors of the Holocaust as victims of Nazi persecution; payments excluded pursuant to section 1(a) of the Victims of Nazi Persecution Act of 1994, P.L. 103-286 (108 Stat. 1450);

(22) Payments made under section 500 through 506 of the Austrian General Social Insurance Act;

(23) Payments made under the Netherlands' Act on Benefits for Victims of Persecution (WUV);

(24) Restitution payments and interest earned to Japanese Americans or their survivors, and Aleuts interned during World War II, established by P.L. 100-383;

(25) Payments made from the Agent Orange Settlement Funds or any other funds to settle Agent Orange liability claims established by P.L. 101-201;

(26) Payments made under section six of the Radiation Exposure Compensation Act established by P.L. 101-426;

(27) Any interest ((~~earned from payments described in subsections (1) through (26) is counted as unearned income, unless otherwise excluded by law~~)) or dividend is excluded as income, except for the community spouse of an institutionalized individual.

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

WSR 06-04-047
PERMANENT RULES
DEPARTMENT OF SOCIAL AND HEALTH SERVICES
(Health and Recovery Services Administration)

[Filed January 26, 2006, 4:26 p.m., effective February 26, 2006]

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

Purpose: To comply with federal regulations as clarified by the federal Centers for Medicare and Medicaid (CMS), the department is amending the eligibility criteria for the alien emergency medical (AEM) program. Clients who meet COPES/nursing facility level of care will no longer automatically qualify for the AEM program. Also, personal care services, waiver services, and nursing facility services will no longer be covered under AEM.

Citation of Existing Rules Affected by this Order: Amending WAC 388-438-0110.

Statutory Authority for Adoption: RCW 74.04.050, 74.04.057, 74.08.090, 74.09.500, and 74.09.530.

Adopted under notice filed as WSR 05-22-067 on October 31, 2005.

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

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

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

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

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

Date Adopted: January 18, 2006.

Andy Fernando, Manager
Rules and Policies Assistance Unit

AMENDATORY SECTION (Amending WSR 04-15-057, filed 7/13/04, effective 8/13/04)

WAC 388-438-0110 The alien emergency medical (AEM) program. (1) The alien emergency medical (AEM) program is a required federally funded program. It is for aliens who are ineligible for other Medicaid programs, due to the citizenship or alien status requirements described in WAC 388-424-0010.

(2) Except for the social security number, citizenship, or alien status requirements, an alien must meet categorical Medicaid eligibility requirements as described in:

(a) WAC 388-505-0110, for an SSI-related person;

(b) WAC 388-505-0220, for family medical programs;

(c) WAC 388-505-0210, for a child under the age of nineteen; or

(d) WAC 388-523-0100, for medical extensions.

(3) When an alien has monthly income that exceeds the CN medical standards, the department will consider AEM medically needy coverage for children or for adults who are age sixty-five or over or who meet SSI disability criteria. See WAC 388-519-0100.

(4) To qualify for the AEM program, the alien must meet one of the criteria described in subsection (2) of this section and have((~~:~~

~~(a) A~~)) a qualifying emergency medical condition as described in WAC 388-500-0005((~~; or~~

~~(b) Been approved by the department for, and receiving, nursing facility or COPES level of care~~)).

(5) The alien's date of arrival in the United States is not used when determining eligibility for the AEM program.

(6) The department does not deem a sponsor's income and resources as available to the client when determining eligibility for the AEM program. The department counts only the income and resources a sponsor makes available to the client.

(7) Under the AEM program, a person receives CN scope of care, as described in WAC 388-529-0100. Covered services are limited to those medical services necessary for treatment of the person's emergency medical condition. The following services are not covered:

(a) Organ transplants and related services;

(b) Prenatal care, except labor and delivery; ((~~and~~))

(c) School-based services;

(d) Personal care services;

(e) Waiver services; and

(f) Nursing facility services, unless they are approved by the department's medical consultant.

(8) When a person's income exceeds the CN income standard as described in subsection (3) of this section, the person has spend down liability and MN scope of care. MN scope of care is described in WAC 388-529-0100. The medical service limitations and exclusions described in subsection (7) ((~~are~~)) also ((~~excluded~~)) apply under the MN program.

(9) A person determined eligible for the AEM program is certified for three months. The number of three-month certification periods is not limited, but, the person must continue to meet eligibility criteria in subsection (2) and (4) of this section.

(10) A person is not eligible for the AEM program if they entered the state specifically to obtain medical care.

WSR 06-04-053
PERMANENT RULES
DEPARTMENT OF FINANCIAL INSTITUTIONS

[Filed January 27, 2006, 11:47 a.m., effective February 27, 2006]

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

Purpose: The proposed rules modernize and clarify existing rules and add changes required by the Consumer Loan Act amendment that occurred in 2001 and 2002.

In summary, the rules:

- Add definitions necessary to incorporate the statutory changes and other amendments;
- Clarify what loans are subject to the act;
- Clarify the transactions covered by the Consumer Loan Act versus those covered by the Mortgage Broker Practices Act;
- Expand the documentary requirements for license application;
- Eliminate the licensing requirement for providing certain back office services;
- Clarify the coverage requirements for the surety bond;
- Clarify the grounds for denying, conditioning, suspending, and revoking a license;
- Clarify use of a name other than the name on the license;
- Provide for sanctions for failure to file the annual assessments and worksheet when due;
- Clarify the calculation of the annual fee;
- Provide for additional reporting for significant events;
- Clarify the federal and state acts applicable to lending and brokering loans under the Consumer Loan Act;
- Clarify the authority to maintain electronic records; and
- Expand the prohibited business practices.

The following rules were repealed: WAC 208-620-020 License application, 208-620-030 Surety bond, 208-620-040 Bond substitute in lieu of surety bond, 208-620-050 Interstate operations, 208-620-060 Registered agent and agent's office for out-of-state licensees, 208-620-070 Change of registered agent or agent's office for out-of-state licensees, 208-620-080 Resignation of registered agent, 208-620-090 Service on out-of-state licensee, 208-620-100 Records, 208-620-110 The note, 208-620-120 Contents of disclosure statement to borrower, 208-620-130 Restrictions as to charges, 208-620-140 Open-end loans—Increase in interest—Notice to borrower, 208-620-150 Open-end loans—Periodic statements, 208-620-160 Advertising—Restrictions and requirements, 208-620-170 Knowledge of the law and regulations, 208-620-180 Examinations, 208-620-190 Schedule of fees, 208-620-191 Fee increase, 208-620-192 Waiver of fees, 208-620-200 Change of place of business, 208-620-210 Other business in same office, and 208-620-220 Annual report and annual fee—Due date—Late penalties.

Citation of Existing Rules Affected by this Order: Repeals the current chapter 208-620 WAC except the definitional section, amending WAC 208-620-010.

Statutory Authority for Adoption: RCW 31.04.165.

Other Authority: RCW 31.04.015, 31.04.045, 31.04.075, 31.04.085, 31.04.093, 31.04.102, 31.04.115, 31.04.145, 31.04.155, and 31.04.175.

Adopted under notice filed as WSR 06-01-094 on December 20, 2005.

Changes Other than Editing from Proposed to Adopted Version: Added a definition of borrower from statute; defined telephone sales rule; clarified a required fee; clarified what a license entailed; clarified what is included for assessment purposes; clarified when worksheets and assessments need to be paid after a business is closed; and clarified when the licensee needs to notify department when business is closed.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 51, Amended 1, Repealed 0.

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

Number of Sections Adopted on the Agency's Own Initiative: New 3, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 32, Amended 1, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 51, Amended 1, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: January 27, 2006.

Scott Jarvis
Director

AMENDATORY SECTION (Amending WSR 96-04-013, filed 1/26/96, effective 2/26/96)

WAC 208-620-010 Definitions. The definitions set forth in this section apply throughout this chapter unless the context clearly requires a different meaning.

"Act" means the Consumer Loan Act, chapter 31.04 RCW.

((~~"Add-on method" means the method of precomputing interest payable on a loan by adding the interest to be earned to the principal balance. This total, plus any charges allowed under this chapter, is stated as the loan amount, without further provision for the payment of interest except for failure to pay according to loan terms.~~))

"Affiliate" means any person who controls, is controlled by, or is under common control with another.

"Annual percentage interest rate" means the rate of interest specified in the note.

"Annual percentage rate" has the same meaning as defined in Regulation Z, 12 C.F.R. Section 226 et seq.

"Bank Secrecy Act" means the Bank Secrecy Act (BSA), 31 U.S.C. 1051 et seq. and 31 C.F.R. Section 103.

"Bond substitute" means unimpaired capital, surplus and qualified long-term subordinated debt.

"Borrower" means any natural person who consults with or retains a licensee or person subject to this chapter in an effort to obtain or seek information about obtaining a loan, regardless of whether that person actually obtains such a loan.

"Common ownership" exists if an entity or entities possess an ownership or equity interest of five percent or more in another entity.

"Department" means the department of financial institutions.

"Depository Institutions Deregulatory and Monetary Control Act" means the Depository Institutions Deregulatory and Monetary Control Act of 1980 (DIDMCA), 12 U.S.C. § 1735f-7a.

"Director" means the director of the department of financial institutions or his or her designated representative.

"Equal Credit Opportunity Act" means the Equal Credit Opportunity Act (ECOA), 15 U.S.C. section 1691 and Regulation B, 12 C.F.R. Section 202.

"Fair Credit Reporting Act" means the Fair Credit Reporting Act (FCRA), 15 U.S.C. Section 1681 et seq.

"Fair Debt Collection Practices Act" means the Fair Debt Collection Practices Act, 15 U.S.C. sections 1692 through 1692o.

"Federal Trade Commission Act" means the Federal Trade Commission Act, 15 U.S.C. section 45(a).

"Filing" means filing, recording, releasing or reconveying mortgages, deeds of trust, security agreements or others documents, or transferring certificates of title to vehicles.

"Gramm-Leach-Bliley Act" means the Gramm-Leach-Bliley Act (GLBA), 15 U.S.C. sections 6801 through 6809 and 6821 through 6827.

"Home Mortgage Disclosure Act" means the Home Mortgage Disclosure Act (HMDA), 12 U.S.C. sections 2801 through 2810 and 12 C.F.R. Section 203.

"Insurance" means life insurance, disability insurance, property insurance, insurance covering involuntary unemployment and such other insurance as may be authorized by the insurance commissioner in accordance with Title 48 RCW.

"Lender" means any person that extends money to a borrower with the expectation of being repaid.

"License" means a license issued under the authority of this chapter with respect to a single place of business.

"Licensee" means a person who holds one or more current licenses.

"Live check" means a loan solicited through the mail in the form of a check, which, when endorsed by the payee, binds the payee to the terms of the loan agreement contained on the check.

"Loan" means a sum of money lent at interest and includes both open-end and closed-end transactions.

"Long-term subordinated debt" means for the purposes required in RCW 31.04.045 outstanding promissory notes or other evidence of debt with initial maturity of at least seven years and remaining maturity of at least two years.

"Material litigation" means proceedings that differ from the ordinary routine litigation incidental to the business. Litigation is ordinary routine litigation if it ordinarily results from the business and does not deviate from the normal business litigation. Litigation involving five percent of the licensee's assets or litigation involving the government would constitute material litigation.

"Out-of-state licensee" means any licensee that does not maintain a physical presence within the state.

"Person" includes individuals, partnerships, associations, trusts, corporations, and all other legal entities.

"Principal" means either (1) any person who controls, directly or indirectly through one or more intermediaries, a ten percent or greater interest in a partnership, company, association or corporation; or (2) the owner of a sole proprietorship.

"Principal amount" means the loan amount advanced to or for the direct benefit of the borrower.

"Principal balance" means the principal amount plus any allowable origination fee.

"RCW" means the *Revised Code of Washington.*

"Real Estate Settlement Procedures Act" means the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. Sections 2601 et seq., and Regulation X, 24 C.F.R. Sections 3500 et seq.

"Records" mean books, accounts, papers, records and files, no matter in what format they are kept, which are used in conducting business under the act.

"Senior officer" means an officer of a consumer loan company at the vice-president level or above.

"Simple interest method" means the method of computing interest payable on a loan by applying the annual percentage interest rate or its periodic equivalent to the unpaid balance of the principal amount outstanding for the time outstanding. Each payment shall first be applied to any unpaid penalties, fees, or charges, then to accumulated interest, and

last to the unpaid balance of the principal amount until paid in full. In using such method, interest shall not be payable in advance or compounded.

"State" means the state of Washington.

"Subsidiary" means a person that is controlled by another.

"Telemarketing and Consumer Fraud and Abuse Act" means the Telemarketing and Consumer Fraud and Abuse Act, 15 U.S.C. § 6101 to 6108.

"Telephone Sales Rule" means the rules promulgated in 16 C.F.R. Part 310.

"Third-party service provider" means any person other than the licensee who provides goods or services to the licensee in connection with the preparation of the borrower's loan and includes, but is not limited to, credit reporting agencies, title companies, appraisers, structural and pest inspectors, or escrow companies.

"Truth in Lending Act" means the Truth in Lending Act (TILA), 15 U.S.C. Sections 1601 et seq., and Regulation Z, 12 C.F.R. Sections 226 et seq.

LICENSING

NEW SECTION

WAC 208-620-230 Do I need to apply for a consumer loan license if I am lending money in the state of Washington? In order to make credit available to high-risk borrowers the act authorizes interest rates up to twenty-five percent for certain types of loans, subject to the requirements of the act. If you are in the business of making secured or unsecured loans of money or credit at rates above those allowed under chapter 19.52 RCW, the Usury Act, and you do not qualify for an exception under RCW 31.04.025, you must hold a license to avoid noncompliance with the Usury Act. The current allowable rate under RCW 19.52.020 is twelve percent or less but that rate may change.

NEW SECTION

WAC 208-620-235 Is there a maximum rate of interest allowed under the act? The legislature authorized interest rates up to twenty-five percent for loans made under the act in order to make credit available to high risk borrowers.

NEW SECTION

WAC 208-620-240 Once I am licensed, does the act apply to all loans I make or only those above twelve percent? All loans you make as a licensee are subject to the authority and restrictions of the act including the provisions relating to the calculation of the annual fee.

NEW SECTION

WAC 208-620-245 Does the Consumer Loan Act allow me to make one or two loans subject to the act without being licensed? The act applies to all loans made by licensees and does not provide an exemption for a de minimus number of loans. If you are not licensed, the act does not apply to your transactions. See WAC 208-620-230.

NEW SECTION

WAC 208-620-250 If my out-of-state company applies for a license under the Consumer Loan Act do we have to have a branch in the state of Washington? You are not required to maintain a physical presence in this state to get a license but any location doing business under the act, wherever located, must be licensed.

NEW SECTION

WAC 208-620-260 If I get licensed under the Consumer Loan Act, can I broker loans in the state of Washington? (1) As a consumer loan licensee, you may broker loans in the state of Washington provided that those loans are brokered under either the Consumer Loan Act or the Mortgage Broker Practices Act.

(2) If you broker loans under the Consumer Loan Act, those loans are subject to WAC 208-620-240 and must be counted in the calculation of the annual assessment.

(3) If you broker loans under the Mortgage Broker Practices Act, chapter 19.146 RCW, you must comply with that act.

NEW SECTION

WAC 208-620-270 Can I make a loan subject to the act without first getting a license? If you make a loan that is subject to the act, you must either get a license or risk violating the Usury Act which limits the rate of interest a lender can charge Washington state residents. Further, if you make a loan without a consumer loan license and the loan is secured by residential real estate, you risk violating the Mortgage Broker Practices Act, chapter 19.146 RCW.

NEW SECTION

WAC 208-620-280 How do I apply for a consumer loan license? (1) **Application.** An applicant for a consumer loan company license must complete a consumer loan license application form and include all of the following:

(a) In regard to each principal, officer or member of the board of directors:

(i) The names, addresses, occupation and prior employment history including a statement of their experience and qualifications;

(ii) A description of any material litigation in which they are involved;

(iii) A signed authorization for a background investigation on a form provided by the department;

(iv) A complete set of fingerprints taken by an authorized law enforcement officer, if requested; and

(v) An independent credit report obtained from a recognized credit reporting agency, if requested;

(b) A current financial statement as of the most recent quarter end, prepared in accordance with generally accepted accounting principles. The statement does not have to be audited but must include a statement of assets and liabilities and a profit and loss statement;

(c) A current, dated organizational chart for the applicant with names and titles of all officers, managers and supervisory personnel;

(d) A current, dated organizational chart identifying the holding companies, affiliates, and subsidiaries of the applicant and percentage owned or controlled;

(e) A certificate of existence/authorization obtained from the Washington secretary of state;

(f) A valid surety bond in the amount specified in WAC 208-620-320;

(g) For out-of-state licensees, the name, address, phone number, and fax number of its registered agent;

(h) The location of its records;

(i) A description of any current material civil litigation involving the company or any of the officers, directors or owners; and

(j) The fee required under WAC 208-620-290.

(2) **Completion of an application.** An application is not considered to be complete unless:

(a) All documents and other information requested by the department have been submitted in a completed form; and

(b) There are no unresolved complaints filed with the department or other outstanding regulatory or law enforcement issues concerning the applicant and its principals, officers and directors.

(3) **Responsible applicants.** Each of the principals, officers and directors of the entity that is applying for a license is deemed responsible for the information submitted as part of the application.

NEW SECTION

WAC 208-620-285 If my application is incomplete when I file it with the department, what will happen? For purposes of efficiency, the department may reject an incomplete application. The department may return the submission to the applicant along with an explanation of the items needed to complete the application.

NEW SECTION

WAC 208-620-290 What fees will I be charged for my application for a consumer loan license? (1) **Application fees.** The director will charge the applicant or licensee $95.55 per hour for review of its application and attendant investigation for the following:

(a) New consumer loan company license;

(b) New branch office license;

(c) Notice of change of control; or

(d) Opinions rendered regarding interpretations of statutes and rules.

(2) **Licenses.** The licensee will be charged $106.71 for the issuance of the following licenses:

(a) New or replacement main office licenses; or

(b) New or replacement branch licenses.

NEW SECTION

WAC 208-620-300 If I want to open more than one office, do I have to file an application for each location? A licensee must complete a consumer loan license application for each consumer loan company branch office, loan servicing location or direct solicitation location, and provide evidence of surety bond coverage for any additional branch. The director may require that all or some of the information provided in the original application be updated.

NEW SECTION

WAC 208-620-310 Is it necessary to license an office that is only providing underwriting and other back-office services? A location that is solely providing underwriting and other back-office services on Washington loans and has only incidental contact with the borrower, is not required to be licensed.

NEW SECTION

WAC 208-620-320 What is the amount of the bond required for my consumer loan license? (1) **Loans not secured by real estate.** For licensees making loans not secured by real property, the penal sum of the bond is one hundred thousand dollars for each office up to five locations. For each additional branch office over five, the amount of the bond must be increased by ten thousand dollars.

(2) **Loans secured by real estate.** For a licensee making loans secured by real property, the penal sum of the bond is four hundred thousand dollars for the first location and one hundred thousand dollars for each branch office up to five licensed locations. For each additional branch office over five, the amount of the bond must be increased by ten thousand dollars. For example:

Number of Offices	Penal Sum of Bond - Licensee making non real estate loans	Penal Sum of Bond - Licensee making real estate loans
1	$100,000	$400,000
2	$200,000	$500,000
3	$300,000	$600,000
4	$400,000	$700,000
5	$500,000	$800,000
6	$510,000	$810,000
7	$520,000	$820,000
8	$530,000	$830,000
9	$540,000	$840,000
10	$550,000	$850,000

NEW SECTION

WAC 208-620-330 Does the surety bond need to reflect coverage for licensee and its W-2 employees and independent contractors? The surety bond needs to cover both the licensee and all types of employees working for the licensee. If a licensee has independent contractors, exclusive or otherwise, the bond needs to cover them, as well as employees of the licensee.

NEW SECTION

WAC 208-620-340 Do I have any alternative to maintaining a surety bond? Bond substitute.

(1) **Washington business corporation.** A licensee that is a Washington business corporation may maintain a bond substitute, as defined in WAC 208-620-010, in lieu of a surety bond.

(2) **Amount of the bond substitute.** The licensee must maintain unimpaired capital in an amount so that the aggregate sum of the licensee's debt, including outstanding promissory notes or other evidences of debt, does not at any time exceed three times the amount of its bond substitute.

(3) **Long-term subordinated debt.** Long-term subordinated debt, as defined in WAC 208-620-010, may be excluded from the licensee's debt for purposes of calculating the bond substitute only if any claim by the subordinate debtholder on the licensee's assets is junior to claims by the state or a consumer under the act. The licensee must file with the director a subordination agreement in favor of the state.

(4) **Bad debts and uncollectible judgments.** A licensee that maintains a bond substitute may not consider bad debts and uncollectible judgments as assets for purposes of calculating the bond substitute. A bad debt is any debt owed to the licensee upon which any payment is six months or more past due. An uncollectible judgment is any judgment which is more than two years old and which has not been paid.

(5) **Review of requirements.** The director may evaluate the documentation submitted by the licensee or other documentation requested by the director to determine whether the bond substitute meets the requirements of RCW 31.04.045 (3).

NEW SECTION

WAC 208-620-350 If I qualify to use a bond substitute in lieu of a surety bond, what documentation do I have to provide to the department? (1) **Semiannual financial statements required.** A licensee that maintains a bond substitute must submit semiannually to the director year-to-date financial statements prepared in accordance with generally accepted accounting principles, including at a minimum a statement of assets and liabilities and a profit and loss statement.

(2) **More frequent financial reporting.** The director may require that financial reports be submitted more frequently if past financial reports have been prepared incorrectly or were misleading or if there is substantial risk that the licensee will violate the bond substitute standard.

(3) **Additional information to be filed.** The director may require other documents, agreements and information deemed necessary to properly evaluate and ensure that the licensee remains in compliance with this section.

(4) **Failure to file financial statements as required.** The director may require a licensee that fails to file its financial statements under subsection (1) of this section to obtain a surety bond within thirty days of that failure. Failure to obtain the bond as required may result in suspension or revocation of the licensee's license.

NEW SECTION

WAC 208-620-360 What if I choose the bond substitute alternative and my unimpaired capital falls below the minimum? (1) **Failure to maintain sufficient unimpaired capital.** A licensee that does not maintain a sufficient bond substitute shall notify the director within ten days as required by WAC 208-620-490. The licensee must then obtain and file with the director a surety bond in the amount required by WAC 208-620-320 within twenty days after receiving notice from the director. A licensee that files a surety bond under this section must maintain the surety bond for five years after the date of noncompliance. During this five-year period, the director will not accept a bond substitute.

(2) **Failure to obtain a surety bond.** Failure to file a surety bond as required in this section may result in suspension or revocation of the licensee's license(s).

NEW SECTION

WAC 208-620-370 What are the grounds for denying or conditioning my license application? The director may deny or condition approval of a license application if the applicant or any principal, officer, or board director of the applicant:

(1) **Failing to pay.** Fails to pay a fee due the department;

(2) **Failing to demonstrate financial responsibility or fitness.** Fails to demonstrate financial responsibility, experience, character, and general fitness to operate a business honestly, fairly, and efficiently within the purposes of the Consumer Loan Act. The director may find that the person has failed to make the demonstration if, among other things:

(a) The person is or has been subject to an injunction or an administrative action issued pursuant to the Consumer Loan Act, the Consumer Protection Act, the Mortgage Broker Practices Act, the Insurance Code, the Securities Act, or similar laws in this or another state; or

(b) An independent credit report issued by a recognized credit reporting agency indicates that the person has a history of unpaid debts; or

(c) The person is the subject of a criminal felony indictment, or a criminal misdemeanor charge involving dishonesty or financial misconduct; or

(d) The person is insolvent in the sense that the value of the applicant's or licensee's liabilities exceeds its assets or in the sense that the applicant or licensee cannot meet its obligations as they mature;

(3) **Misrepresentations or omissions.** Has omitted or concealed a material fact from the department or has misrepresented a material fact to the department;

(4) **Prior business conduct.** Has been found to have committed an act of misrepresentation or fraud in any aspect of the conduct of the lending or brokering business or profession;

(5) **Failure to complete the application.** Has failed to complete its application as defined in WAC 208-620-280, within a reasonable time after being notified that the department considers the file abandoned for failure to provide requested information or documentation.

NEW SECTION

WAC 208-620-380 Are there any additional requirements for out-of-state licensees? (1) **All locations must be licensed.** Any person that conducts business under the act with Washington residents must obtain a license for all locations from which business is conducted, including out-of-state locations, with the exception of those office locations providing only underwriting and back office services under WAC 208-620-310.

(2) **Keeping records out-of-state.** The director may approve the maintenance of a licensee's records at an out-of-state location. The licensee must request approval in writing and must agree to provide the director access to the records and pay the hourly rate plus travel costs pursuant to WAC 208-620-590. Agreement to allow access to the records is a condition of licensing of an out-of-state location.

(3) **Service on out-of-state licensee.** An out-of-state licensee's registered agent in Washington is the licensee's agent for service of process, notice, or demand.

NEW SECTION

WAC 208-620-390 If I am offering loans by mail or internet to Washington residents, do I have to license those locations? Any person that conducts business under the act with Washington residents must obtain a license for all locations including those that offer loans by mail or internet.

NEW SECTION

WAC 208-620-395 Do I need to display my license in my place of business? Yes. The main office and branch office license must be conspicuously displayed at the licensed location.

NEW SECTION

WAC 208-620-400 Can I share an office with another business? (1) A licensee may conduct its business in a licensed location in which other persons are engaged in business.

(2) If the licensee has effective control over the person sharing space, or the person sharing space with the licensee has effective control over the licensee or is under common control with the other by a third person or is a corporation related to another corporation as parent to subsidiary and one refers business incident to or a part of a real estate settlement service to the other, the licensee must comply with RESPA Sec. 3500.15, including required disclosures and prohibitions on referral fees.

NEW SECTION

WAC 208-620-410 May I sell other types of products from my licensed location? A licensee may engage in the sale of incidental products on the premises of the licensed location only after receiving approval from the director. For the purpose of this section "incidental" means products or services not related to the original loan, including, but not limited to, warranties, insurance, and prepaid legal services. The cost of the products may, at the consumer's option, be paid from the proceeds of the loan and included in the principal balance provided that:

(1) The purchase of the product is not a factor in the approval of credit and this fact is clearly disclosed in writing to the consumer; and

(2) The consumer gives the licensee written permission to purchase the product after receiving disclosure of the terms and cost.

NEW SECTION

WAC 208-620-420 May I transact business in a name other than the name on my license? No. A licensee may transact business such as making a loan or providing applicable disclosures only under the name on the license. A licensee may apply to the department to add a trade name to its license but it may not use the DBA (doing business as) alone to transact business.

NEW SECTION

WAC 208-620-425 May I transfer my license? No. A license is given to a specific entity with specific individuals at a specific location. If all or part of the business is transferred or sold to another person, the licensee is required to notify the department prior to transfer so the department can determine if the new person is qualified to own all or part of the business.

LICENSEE REPORT REQUIREMENTS

NEW SECTION

WAC 208-620-430 What are my annual filing requirements as a consumer loan licensee? (1) **Annual report due March 1st.** Each year a licensee is required to file a consolidated annual report on a form provided by the department and pay a fee based upon the amount of business conducted during the prior calendar year under the act. The director will notify each licensee at its official address of the method to calculate the annual fee due along with a worksheet for such purpose and the consolidated annual report form. The licensee will calculate the annual fee on the worksheet. The licensee must deliver its completed consolidated annual report, worksheet and annual fee to the department by March 1st of the following year.

(2) **Late penalties.** A licensee that fails to submit the required annual report and worksheet by the March 1st due date is subject to a penalty of fifty dollars per report for each day of delay. For example, if the department receives the consolidated annual report and worksheet on March 4th, the licensee would have to pay an additional three hundred dollars as a late penalty.

(3) **Failure to file.** If a licensee fails to pay its annual assessment and file a worksheet by April 1st the director may file a claim against the licensee's surety bond for failing to faithfully conform to and abide by the Consumer Loan Act. The department may make a claim on the licensee's surety

bond for the late penalties under subsection (2) of this section and the greater of:

(a) The assessment paid the previous year;

(b) The average annual assessment paid in the previous two years; or

(c) Fifteen hundred dollars.

NEW SECTION

WAC 208-620-440 How do I calculate my annual fee? (1) **Calculation of the annual fee.** Each licensee will pay an annual assessment fee based on the "adjusted total loan value" as defined in subsection (2) of this section. The amount of the annual assessment fee is determined by multiplying the adjusted total loan value of the loans in the year being assessed by .000180271.

(2) **All loans counted in fee calculation.** The "adjusted total loan value" is the sum of:

(a) The total unpaid balance of all loans as of year end, both under and over twelve percent interest, made or brokered under the act to Washington residents that were retained, brokered or purchased by the licensee; and

(b) The total unpaid balance of all loans as of year end, both under and over twelve percent, made or brokered under the act to Washington residents that were sold by the licensee with servicing retained (if any); and

(c) The total amount of all loans as of year end, both under and over twelve percent interest, made or brokered under the act to Washington residents that were sold by the licensee during the previous calendar year with servicing released (if any).

NEW SECTION

WAC 208-620-460 Must I file my annual report even if I go out of business during the year? (1) A licensee that ceases operations during the year must file the consolidated annual report and pay the annual assessment required in WAC 208-620-430 within thirty days of closure.

(2) Failure to file within thirty days of closure will trigger bond claim as described in WAC 208-620-430(3).

NEW SECTION

WAC 208-620-470 Do I need to notify the department if I move the location of my office? Before doing business under the act from a new location, either a main office or a branch office, a licensee must file an amendment for a change of address and obtain approval from the director.

NEW SECTION

WAC 208-620-475 Must I notify the department if I cease doing business in this state if I am doing business in other states? You must either notify the department within twenty days after you cease doing business in the state of Washington or continue to file your annual report and worksheet each year. In order to end your filing responsibilities, you must file a Consumer Loan Closure Form along with your final annual report and worksheet, any fees owed, and return your license certificate.

NEW SECTION

WAC 208-620-480 What are my reporting responsibilities if my company files for bankruptcy? (1) **Chapter 7 bankruptcy.** A licensee that files for chapter 7 bankruptcy must notify the director within ten days, surrender its license(s) and deliver the consolidated annual report and worksheet for the period in business that year within sixty days of filing bankruptcy.

(2) **Chapter 11 bankruptcy.** A licensee that files for chapter 11 bankruptcy must notify the director within ten days.

NEW SECTION

WAC 208-620-490 What are my reporting responsibilities when something of significance happens to my business? (1) **Prior notification required.** A licensee must notify the director in writing ten days prior to a change of the licensee's:

(a) Principal place of business or any of its branch offices;

(b) Name or legal status (e.g., from sole proprietor to corporation, etc.);

(c) Name and mailing address of the out-of-state licensee's registered agent;

(d) Legal or trade name; or

(e) A change of ownership control of ten percent or more.

(2) **Post notification within ten days.** A licensee must notify the director in writing within ten days after an occurrence of any of the following:

(a) Change in mailing address, telephone number, fax number, or e-mail address;

(b) Cancellation or expiration of its Washington state master business license;

(c) Change in its standing with the state of Washington secretary of state, including the resignation or change of the registered agent;

(d) Failure to maintain the appropriate unimpaired capital under WAC 208-620-340; or

(e) Receipt of notification of cancellation of the licensee's surety bond.

(3) **Post notification within twenty days.** A licensee must notify the director in writing within twenty days after the occurrence of any of the following developments:

(a) Receipt of notification of the institution of license revocation procedures in any state against the licensee;

(b) The filing of a felony indictment or information related to lending or brokering activities of the licensee, or any officer, board director, or principal of the licensee or an indictment or information involving dishonesty of the licensee, or any officer, board director, or principal of the licensee;

(c) The licensee, or any officer, director, or principal of the licensee is convicted of a felony, or a gross misdemeanor involving lending, brokering or financial misconduct; or

(d) The filing of any material litigation against the licensee.

NEW SECTION

WAC 208-620-500 What are my reporting requirements if I want to close one or more of my branch offices? (1) **Closing a branch office.** If you close a branch office, you must notify the department using the Consumer Loan Office Closure Form and return the original license.

(2) **Closing the business.** If you are going to close your business, you must notify the department using the Consumer Loan Office Closure Form, along with the annual report and worksheet, any fees due and return the original licenses.

DISCLOSURE AND OTHER OBLIGATIONS

NEW SECTION

WAC 208-620-505 In addition to the Consumer Loan Act, what other laws do I have to comply with? You must ensure you are in compliance with all federal and state laws and regulations that apply to lending or brokering loans when applicable to the transaction including the Truth in Lending Act, the Equal Credit Opportunity Act, the Home Mortgage Disclosure Act, the Bank Secrecy Act, the Real Estate Settlement Procedures Act, the Gramm-Leach-Bliley Act, the Fair Debt Collection Practices Act, the Fair Credit Reporting Act, the Federal Trade Commission Act, the Telemarketing and Consumer Fraud and Abuse Act, the Washington State Fair Housing Act, and the Federal Trade Commission Telephone Sales Rule, 16 C.F.R. Part 310.

NEW SECTION

WAC 208-620-510 What are my disclosure obligations to consumers under the Consumer Loan Act? (1) **Content requirements.** In addition to complying with the applicable disclosure requirements in the federal and state statues referred to in WAC 208-620-505 if the loan will be secured by a lien on real property, you must also provide the borrower or potential borrower an estimate of the annual percentage rate on the loan and a disclosure of whether or not the loan contains a prepayment penalty within three days of receipt of a loan application.

(2) **Proof of delivery.** The licensee must be able to prove that the disclosures under subsection (1) of this section were provided within the required time frames. In most cases, proof of mailing is sufficient evidence of delivery. If the licensee has an established system of disclosure tracking that includes a disclosure and correspondence log, checklists, and a reasonable system for determining if a borrower did receive the documents, the licensee will be presumed to be in compliance.

(3) Each licensee shall maintain in its files sufficient information to show compliance with state and federal law.

NEW SECTION

WAC 208-620-512 If I pull a credit report on a consumer who has identified a specific property on a purchase and sales agreement or contract, or is refinancing a specific property, is that enough to trigger the required disclosures under RESPA and TILA? Yes. At that point, you have collected enough information on behalf of the consumer for you to anticipate a credit decision under Regulation X, 24 C.F.R. Sections 3500 et seq. and you must provide the consumers with all required disclosures.

POWERS AND RESTRICTIONS

NEW SECTION

WAC 208-620-515 What authority do I have as a licensee? (1) As a licensee you may:

(a) Lend money at a rate that does not exceed twenty-five percent per annum as determined by the simple interest method of calculating interest owed;

(b) In connection with the making of a loan, charge the borrower a nonrefundable, prepaid, loan origination fee not to exceed four percent of the first twenty thousand dollars and two percent thereafter of the principal amount of the loan advanced to or for the direct benefit of the borrower, which fee may be included in the principal balance of the loan;

(c) In connection with the making of a loan secured by real estate, when the borrower actually obtains a loan, agree with the borrower to pay a fee to a mortgage broker that is not owned by the licensee or under common ownership with the licensee and that performed services in connection with the origination of the loan. A licensee may not receive compensation as a mortgage broker in connection with any loan made by the licensee;

(d) The powers listed in (a), (b), and (c) of this subsection apply only to junior lien mortgage loans, lenders that are not "creditors" under the Depository Institutions Deregulatory and Monetary Control Act when making first lien mortgage loans and nonmortgage loans.

(2) Agree with the borrower for the payment of fees to third parties other than the licensee who provide goods or services to the licensee in connection with the preparation of the borrower's loan, including, but not limited to, credit reporting agencies, title companies, appraisers, structural and pest inspectors, and escrow companies, when such fees are actually paid by the licensee to a third party for such services or purposes and may include such fees in the amount of the loan. However, no charge may be collected unless a loan is made, except for reasonable fees actually and properly incurred in connection with the appraisal of property by a qualified, independent, professional, third-party appraiser selected by the borrower and approved by the lender or in the absence of borrower selection, selected by the lender.

(3) Charge and collect a penalty of ten cents or less on each dollar of any installment payment delinquent ten days or more.

(4) Collect from the debtor reasonable attorneys' fees, actual expenses, and costs incurred in connection with the collection of a delinquent debt, a repossession, or a foreclosure when a debt is referred for collection to an attorney who is not a salaried employee of the licensee.

(5) Make open-end loans as provided in the act.

(6) In accordance with Title 48 RCW, sell insurance covering real and personal property, covering the life or disability or both of the borrower, and covering the involuntary unemployment of the borrower.

RECORDKEEPING

NEW SECTION

WAC 208-620-520 How long do I have to maintain my records under the Consumer Loan Act? (1) **General records.** Each licensee must preserve the books, accounts, records, papers, documents, files, and other information relevant to a loan for a minimum of twenty-five months after making the final entry on that loan at a location approved by the director.

(2) **Advertising records.** A licensee must maintain a copy of all advertising for a period of twenty-five months at a location approved by the director. Such copies shall include newspaper and print advertising, scripts of radio and television advertising, telemarketing scripts, all direct mail advertising, and any advertising distributed directly by delivery, facsimile or computer network.

NEW SECTION

WAC 208-620-530 Can I maintain my records electronically? (1) **Records must be available.** The records required to be maintained by RCW 31.04.145 may be maintained by means of electronic display equipment if such equipment is made available upon request to the director or his or her representatives for purposes of examination or investigation.

(2) The hardware or software needed to display the record must be maintained during the required retention period under WAC 208-620-520(1).

(3) **Hard copy upon request.** A licensee must provide the records in hard copy upon request of the director.

NEW SECTION

WAC 208-620-540 Do I need to account separately for payments from borrowers for third party service providers? A licensee must separately account for all deposits and disbursements made by or for borrowers for third party service providers. The funds may not be used for the benefit of the licensee or any person not entitled to such benefit.

RESTRICTIONS, PROHIBITIONS AND GROUNDS FOR REVOCATION

NEW SECTION

WAC 208-620-550 What business practices are prohibited? Under RCW 31.04.027, the following constitute an "unfair or deceptive" act or practice:

(1) **Disclosure of payoff amount.** Failure to provide the exact pay-off amount as of a certain date five or fewer business days after being requested in writing to do so by a borrower of record or their authorized representative;

(2) **Recognition of payment delivery.** Failure to record a borrower's payment as received on the day it is delivered to any of the licensee's locations during its regular working hours;

(3) **Charging a fee for best efforts.** Soliciting or entering into a contract with a borrower that provides in substance that the licensee may earn a fee or commission through its "best efforts" to obtain a loan even though no loan is actually obtained for the borrower;

(4) **False advertising of rates and fees.** Soliciting, advertising, or entering into a contract for specific interest rates, points, or other financing terms unless the terms are actually available at the time;

(5) **False filing.** Negligently making any false statement or willfully making any omission of material fact in connection with any application or any information filed by a licensee in connection with any application, examination or investigation conducted by the department;

(6) **Influencing appraisers.** Making any payment, directly or indirectly, or withholding or threatening to withhold any payment, to any appraiser of a property, for the purposes of influencing the independent judgment of the appraiser with respect to the value of the property;

(7) **Documents with blanks.** Allowing a borrower to leave blanks on a document that is signed by the borrower;

(8) **False advertising.** Soliciting business using advertising that includes:

(a) An envelope or stationery that contains an official-looking emblem, such as an eagle or a crest, or that is otherwise designed to resemble an official government mailing, such as a mailing from the Internal Revenue Service or the U.S. Department of the Treasury;

(b) An envelope or stationery containing warnings or notices citing codes or form numbers made to appear like government codes or form numbers that are not required to be shown on the mailing by the U.S. Postal Service;

(c) Any suggestion or representation that the licensee is, or is affiliated with, a state or federal agency, municipality, bank, savings bank, trust company, savings and loan association, building and loan association, credit union, or other entity that it does not actually represent;

(d) Any suggestion or representation that the solicitation is from an entity other than the licensee;

(e) Any suggestion or representation that the information about a consumer's current loan was provided by any source other than the source disclosed pursuant to WAC 208-620-630;

(9) **Inclusion of taxes and insurance.** Failing to clearly disclose to a borrower whether the payment advertised or offered for a real estate loan includes amounts for taxes, insurance or other products sold to the borrower;

(10) **Force placed insurance.** Purchasing insurance on an asset secured by a loan without first attempting to contact the borrower by mailing one or more notices to the last known address of the borrower in order to verify that the asset is not otherwise insured;

(11) **Filing an inappropriate lien.** Willfully filing a lien on property without a legal basis to do so;

(12) **Threats and coercion.** Coercing, intimidating, or threatening borrowers in any way with the intent of forcing them to complete a loan transaction;

(13) Failure to reconvey title to collateral, if any, within thirty business days when the loan is paid in full unless conditions exist that make compliance unreasonable.

NEW SECTION

WAC 208-620-560 What restrictions are there for charging fees other than the loan origination fee? (1) **Filing fees.** A licensee cannot charge or collect any funds from the borrower for the cost of filing, as defined in WAC 208-620-010, or for any other fees paid or to be paid to public officials, unless such charges are paid or are to be paid within one hundred eighty days by the licensee to public officials or other third parties for such filing. Any fee a licensee collects for releasing or reconveying the security for the obligation must be paid to an unrelated third party.

(2) **Dishonored check fees.** A licensee may not charge or collect a fee in excess of twenty-five dollars for a check returned unpaid by the bank drawn upon. Only one fee may be collected with respect to a particular check even if it has been redeposited and returned more than once.

(3) **Fees for third-party services.** A licensee may not charge or collect any fee to be paid to a third-party service provider, as defined in WAC 208-620-010, in excess of the actual costs paid or to be paid. A licensee may charge the borrower for costs of allowable third-party services as provided by RCW 31.04.105(3) at the time of application for the loan or at any time thereafter except as prohibited.

(4) **Credit and noncredit insurance.**

(a) Except for the transaction described in (b) of this subsection, a licensee may include the premiums for credit and noncredit insurance in the principal amount of the loan, provided that purchase of the insurance is not required to obtain a loan and that this fact is disclosed to the borrower in writing and the borrower's confirmation is obtained by signature on the disclosure form.

(b) A licensee may not sell single premium credit insurance to a borrower at the inception of coverage unless the sale is in compliance with chapter 48.18 RCW.

(5) **Fees on existing loans.** Unless otherwise preempted under the Depository Institutions Deregulatory and Monetary Control Act, if a licensee makes a new loan or increases a credit line within one hundred twenty days after originating a previous loan or credit line to the same borrower, the origination fee on the new loan or increased credit line shall be limited as follows:

(a) The licensee may charge an origination fee only on that part of the new loan not used to pay the amount due on the previous loan;

(b) The licensee may charge an origination fee only on the difference between the amount of the existing credit line and the increased credit line;

(c) The limits in (a) and (b) of this subsection do not apply if the licensee refunds the origination fee on the existing loan or credit line.

(6) **Administrative fees.** A licensee may not collect a document preparation fee, a processing fee or a courier fee unless paid to an unrelated third party and agreed to in advance by the borrower.

(7) **Prepayment penalty.** A licensee may not collect a prepayment penalty on the following loans:

(a) Any nonmortgage loan made at rates authorized by the act; or

(b) Any junior lien mortgage loan made at rates authorized by the act; or

(c) Any loan made by a licensee that is not a "creditor" under DIDMCA.

NEW SECTION

WAC 208-620-570 What are the grounds for suspending or revoking a license? The director may suspend or revoke a license if the licensee, or any principal, officer, or board director of the licensee:

(1) **Failing to pay.** Fails to pay a fee due the department;

(2) **Injunction or administrative action.** Is or has been subject to an injunction or a civil or administrative action issued pursuant to the Consumer Loan Act, the Consumer Protection Act, the Mortgage Broker Practices Act or similar laws of this state or another state;

(3) **Substantial unpaid debt.** Has accumulated substantial unpaid debt;

(4) **Violation of lending laws.** Has been found in violation of another state's lending laws, securities laws, real estate laws or insurance laws resulting in substantial license limitations or significant fines;

(5) **Criminal charges.** The person is the subject of a criminal felony charge, or a criminal misdemeanor charge involving dishonesty or financial misconduct;

(6) **Bond canceled.** Has had its surety bond canceled or revoked for cause;

(7) **Deterioration of business.** Has allowed the licensed consumer loan business to deteriorate into a condition which would result in denial of a new application for a license;

(8) **Aiding unlicensed practice.** Has aided or abetted an unlicensed person to practice in violation of the Consumer Loan Act or the Mortgage Broker Practices Act;

(9) **Incompetence resulting in injury.** Has demonstrated incompetence or negligence that results in financial harm to a person or that creates an unreasonable risk that a person may be harmed;

(10) **Insolvency.** Is insolvent in the sense that the value of the licensee's liabilities exceeds its assets or in the sense that the applicant or licensee cannot meet its obligations as they mature;

(11) **Failure to comply.** Has failed to comply with an order, directive, subpoena, or requirement of the director, or his or her designee, or with an assurance of discontinuance entered into with the director, or his or her designee;

(12) **Misrepresentation or fraud.** Has performed an act of misrepresentation or fraud in any aspect of the conduct of the lending or brokering business or profession;

(13) **Failure to cooperate.** Has failed to cooperate with the director, or his or her designee, including without limitation by:

(a) Not furnishing any records requested by the director for purposes of conducting a lawful investigation for disciplinary actions or denial, suspension, or revocation of a license; or

(b) Not furnishing any records requested by the director for purposes of conducting a lawful investigation into a complaint against the licensee filed with the department, or providing a full and complete written explanation of the circumstances of the complaint upon request by the director;

(14) **Interference with investigation.** Has interfered with a lawful investigation or disciplinary proceeding by willful misrepresentation of facts before the director or the director's designee, or by the use of threats or harassment against a client, witness, employee of the licensee, or representative of the director for the purpose of preventing them from discovering evidence for, or providing evidence in, any disciplinary proceeding or other legal action.

EXAMINATIONS

NEW SECTION

WAC 208-620-580 As a licensee, will my business be subject to periodic examinations? Each consumer loan company can expect to be visited periodically by the department's examiners. The director or designee may examine, wherever located, the records used in the business of every licensee and of every person who is engaged in the consumer loan business, whether the person acts or claims to act as principal or agent, or under or without the authority of this chapter. For that purpose the director or designee shall have free access, at reasonable times during business hours, to the offices and places of business and all books and records of the business.

NEW SECTION

WAC 208-620-590 How much will I be charged for my periodic examinations and when will the payment be due? (1) **Hourly charge for examinations.** A licensee will be charged $69.01 per hour for regular and special examinations of the licensee's records.

(2) A licensee that makes loans pursuant to the act from out-of-state locations, maintains records outside the state or services loans pursuant to the act outside the state will be charged the hourly rate plus travel costs.

(3) **Billing for the examinations.** The director will submit an invoice for the charges following the completion of any applicable examination. The charges must be paid within thirty days after the invoice is submitted to the licensee.

NEW SECTION

WAC 208-620-600 How often will the department visit my business to examine my records? There is no set schedule to examine each licensee. Licensees will be examined on a flexible schedule based upon the potential risk of the business to the public.

INVESTIGATIONS

NEW SECTION

WAC 208-620-610 What authority does the department have to investigate violations of the Consumer Loan Act? (1) **Testimony.** The director or designees may require the attendance of and examine under oath all persons whose testimony may be required about the loans or the business or the subject matter of any investigation, examination, or hearing.

(2) **Production of records or copies.** The director or designee may require the production of books, accounts, papers, records, files, and any other information deemed relevant to the inquiry. The director may require the production of original books, accounts, papers, records, files, and other information; may require that such original books, accounts, papers, records, files, and other information be copied; or may make copies himself or herself or by designee of such original books, accounts, papers, records, files, or other information.

(3) **Subpoena authority.** If a licensee or person does not attend and testify, or does not produce the requested books, accounts, papers, records, files, or other information, then the director or designated persons may issue a subpoena or subpoena duces tecum requiring attendance or compelling production of the books, accounts, papers, records, files, or other information.

ADVERTISING RESTRICTIONS

NEW SECTION

WAC 208-620-620 How do I have to identify my business when I advertise? You must either identify the business using your Washington consumer loan license number or use the whole name on your Washington license.

NEW SECTION

WAC 208-620-630 If I send out a letter referring to a consumer's existing loan, what source information must I disclose? When an advertisement includes information about a consumer's current loan that did not come from a solicitation, application, or loan made or purchased by the licensee, the licensee shall provide to the consumer the name of the source from which this information was obtained.

NEW SECTION

WAC 208-620-640 What are the requirements when I advertise any loan subject to the Consumer Loan Act? You must comply with all the applicable advertising requirements under the federal statutes and regulations including the Truth in Lending Act, the Real Estate Settlement Procedures Act, the Federal Trade Act, the Telemarketing and Consumer Fraud and Abuse Act, and the Equal Credit Opportunity Act and you must conspicuously disclose the annual percentage rate implied by the rate of interest that you are advertising.

MISCELLANEOUS

NEW SECTION

WAC 208-620-650 Will the director waive fees charged under the Consumer Loan Act? The director or designee may waive any or all of the fees and assessments under this chapter when he or she determines that:

(1) The financial services regulation account exceeds the projected minimum fund balance level approved by the office of financial management;

(2) That the waiver is fiscally prudent; and

(3) Good cause is shown by the applicant for the waiver.

REPEALER

The following sections of the Washington Administrative Code are repealed:

WAC 208-620-020	License application.
WAC 208-620-030	Surety bond.
WAC 208-620-040	Bond substitute in lieu of surety bond.
WAC 208-620-050	Interstate operations.
WAC 208-620-060	Registered agent and agent's office for out-of-state licensees.
WAC 208-620-070	Change of registered agent or agent's office for out-of-state licensees.
WAC 208-620-080	Resignation of registered agent.
WAC 208-620-090	Service on out-of-state licensee.
WAC 208-620-100	Records.
WAC 208-620-110	The note.
WAC 208-620-120	Contents of disclosure statement to borrower.
WAC 208-620-130	Restrictions as to charges.
WAC 208-620-140	Open-end loans—Increase in interest—Notice to borrower.
WAC 208-620-150	Open-end loans—Periodic statements.
WAC 208-620-160	Advertising—Restrictions and requirements.
WAC 208-620-170	Knowledge of the law and regulations.
WAC 208-620-180	Examinations.
WAC 208-620-190	Schedule of fees.
WAC 208-620-191	Fee increase.
WAC 208-620-192	Waiver of fees.
WAC 208-620-200	Change of place of business.
WAC 208-620-210	Other business in same office.
WAC 208-620-220	Annual report and annual fee—Due date—Late penalties.

WSR 06-04-058
PERMANENT RULES
DEPARTMENT OF RETIREMENT SYSTEMS

[Filed January 27, 2006, 1:58 p.m., effective February 27, 2006]

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

Purpose: To amend WAC 415-501-485 to more accurately reflect the IRS code and eliminate chances for misinterpretation.

Citation of Existing Rules Affected by this Order: Amending WAC 415-501-485.

Statutory Authority for Adoption: RCW 41.50.780(10).

Adopted under notice filed as WSR 06-01-048 on December 16, 2005.

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

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

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

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

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

Date Adopted: January 26, 2006.

Sandra J. Matheson
Director

AMENDATORY SECTION (Amending WSR 04-22-053, filed 10/29/04, effective 11/29/04)

WAC 415-501-485 How do I obtain a distribution? Distribution from the plan is governed by Internal Revenue Code Sections 401 (a)(9) and 457(d); the treasury regulations interpreting these sections; and these rules to the extent they are not inconsistent with the Internal Revenue Code. The options for distribution are set forth in the *DCP Distribution Booklet*. The booklet will be mailed to you when your employer notifies the department of your termination of employment.

(1) **Date of distribution.** You may choose the date on which to begin distribution from your deferred compensation account, subject to the requirements in (a) through (c) of this subsection. The department must receive a properly completed distribution form from you at least thirty days prior to the date distribution is to begin.

(a) **Earliest date.** You may not begin distribution prior to your termination of employment, with the following exceptions:

(i) A distribution for an unforeseeable emergency under WAC 415-501-510;

(ii) A voluntary in-service distribution under subsection (4) of this section; or

(iii) A distribution from funds that were rolled into the deferred compensation account.

(b) **Latest date.** You must begin distribution on or before April 1st of the calendar year following the latter of:

(i) The calendar year in which you reach age seventy and one-half; or

(ii) The calendar year in which you retire.

(c) If you do not make a timely choice of distribution date, the department will begin distribution according to the minimum distribution requirements in IRC Section 401 (a)(9).

(2) **Method of distribution.** You must choose a distribution method (amount and frequency) from the payment options outlined in the *DCP Distribution Booklet.* Payment options include a lump sum payment, periodic payments, or an annuity purchase.

(a) Periodic payments must be at least fifty dollars per month (if paid monthly) or six hundred dollars per year.

(b) Beginning at age seventy and one-half or when you terminate employment, whichever comes later, payment must be in an amount to satisfy minimum distribution requirements in IRC Section 401 (a)(9).

(3) **Voluntary in-service distribution.** You may choose to withdraw the total amount payable to you under the plan while you are employed if the following three requirements are met:

(a) ((~~The total amount payable to you~~)) Your entire account value does not exceed five thousand dollars;

(b) You have not previously received an in-service distribution; and

(c) Your deferrals have been suspended during the preceding two-year period ending on the date of the in-service distribution.

(4) **Unforeseeable emergencies.** See WAC 415-501-510.

(5) **Rehire.** If you terminate and then return to employment for an eligible employer, you may reenroll in the plan. The department will stop your distribution, if applicable, and void any choices of distribution date and method made prior to reenrollment.

WSR 06-04-059
PERMANENT RULES
DEPARTMENT OF RETIREMENT SYSTEMS

[Filed January 27, 2006, 2:00 p.m., effective February 27, 2006]

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

Purpose: To correct technical errors and rewrite rules for clarity.

Citation of Existing Rules Affected by this Order: Amending WAC 415-108-443, 415-108-470, and 415-108-800.

Statutory Authority for Adoption: RCW 41.40.020 and 41.50.050(5).

Adopted under notice filed as WSR 06-01-049 on December 16, 2005.

Changes Other than Editing from Proposed to Adopted Version: The term "compensation earnable" has been changed to "reportable compensation" in WAC 415-108-443 and 415-108-470. The term "reportable compensation," as defined in WAC 415-108-010(7) means, "compensation earnable as that term is defined in RCW 41.40.010(8)." This change in terminology does not change the affect of the rules.

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

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

Number of Sections Adopted on the Agency's Own Initiative: New 0, Amended 3, Repealed 0.

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

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

Date Adopted: January 26, 2006.

Sandra J. Matheson
Director

AMENDATORY SECTION (Amending WSR 03-06-042, filed 2/27/03, effective 4/1/03)

WAC 415-108-443 PERS reportable compensation table. The following table ((~~will help you determine~~)) indicates whether certain types of payments are reportable compensation under PERS Plan((~~s~~)) 1, 2, or 3((~~. Be sure to read the referenced rule to ensure that you have correctly identified the payment in question. The department determines reportable compensation based upon the nature of the payment, not the name applied to it. See WAC 415-108-445~~)) and provides a cross-reference to the specific WAC.

Type of Payment	PERS 1 Reportable Compensation?	PERS 2 or 3 Reportable Compensation?
Annual Leave Cash Outs	Yes - WAC 415-108-456	No - WAC 415-108-456
Assault Pay (State Emp.)	Yes - WAC 415-108-468	Yes - WAC 415-108-468
Base Rate	Yes - WAC 415-108-451	Yes - WAC 415-108-451
Car Allowances	No - WAC 415-108-485[1]	No - WAC 415-108-485[1]
Cafeteria Plans	Yes - WAC 415-108-455	Yes - WAC 415-108-455
Deferred Wages	Yes - WAC 415-108-459	Yes - WAC 415-108-459

Type of Payment	PERS 1 Reportable Compensation?	PERS 2 or 3 Reportable Compensation?
Disability Payments	No - WAC 415-108-477	No - WAC 415-108-477
Disability: Salary lost while on disability leave	Yes - WAC 415-108-468 RCW 41.40.038	Yes - WAC 415-108-468 RCW 41.40.038
Employer Provided Vehicle	No - WAC 415-108-480[2]	No - WAC 415-108-480
Employer taxes/contributions	No - WAC 415-108-459	No - WAC 415-108-459
Fringe Benefits, including insurance	No - WAC 415-108-475	No - WAC 415-108-475
Illegal Payments	No - WAC 415-108-482	No - WAC 415-108-482
Legislative Leave	Yes - WAC 415-108-464	Yes - WAC 415-108-464
Longevity/Education Attainment Pay	Yes - WAC 415-108-451	Yes - WAC 415-108-451
Nonmoney Maintenance	Yes - WAC 415-108-470[3]	No - WAC 415-108-470
Optional Payments	No - WAC 415-108-483	No - WAC 415-108-483
Payments in Lieu of Excluded Items	No - WAC 415-108-463	No - WAC 415-108-463
Performance Bonuses	Yes - WAC 415-108-453	Yes - WAC 415-108-453

[1]A portion of the value of an employer car allowance may be reportable compensation. See WAC 415-108-485.

[2]A portion of the value of an employer provided vehicle may be reportable compensation in Plan 1 only. See WAC 415-108-480.

[3]A portion of the value of nonmoney maintenance provided may be reportable compensation in Plan 1 only. See WAC 415-108-470.

Type of Payment	PERS 1 Reportable Compensation?	PERS 2 or 3 Reportable Compensation?
Retroactive Salary Increase	Yes - WAC 415-108-457	Yes - WAC 415-108-457
Reimbursements	No - WAC 415-108-484	No - WAC 415-108-484
Reinstatement Payments	Yes - WAC 415-108-467	Yes - WAC 415-108-467
Retirement or Termination Bonuses	No - WAC 415-108-487	No - WAC 415-108-487
Severance Pay - Earned Over Time	Yes - WAC 415-108-458	No - WAC 415-108-458
Severance Pay - Not Earned Over Time	No - WAC 415-108-488	No - WAC 415-108-488
Shared Leave - State Emp.	Yes - WAC 415-108-468	Yes - WAC 415-108-468
Shared Leave - Local Government Employees	No - WAC 415-108-468	No - WAC 415-108-468
Sick Leave Cash Outs - State Employees	No - WAC 415-108-456	No - WAC 415-108-456
Sick Leave Cash Out - Local Government Employees	Yes - WAC 415-108-456	No - WAC 415-108-456
Standby Pay	Yes - WAC 415-108-469	Yes - WAC 415-108-469
Time Off with Pay	Yes - WAC 415-108-456 WAC 415-108-465	Yes - WAC 415-108-456 WAC 415-108-465
Union Leave[4]	Yes - WAC 415-108-466	Yes - WAC 415-108-466
Workers' Compensation	No - WAC 415-108-479	No - WAC 415-108-479

[4]Only specific types of union leave are reportable compensation. See WAC 415-108-466.

AMENDATORY SECTION (Amending WSR 95-22-006, filed 10/18/95, effective 11/18/95)

WAC 415-108-470 Nonmoney maintenance. Are payments from my employer in any form other than money ((~~considered~~)) reportable compensation ((~~earnable~~))?

(1) ((~~PERS Plan I members.~~

(a) If your employer provides you with materials in lieu of reimbursement for your business expenses, the value of the materials is not compensation earnable.

(i) The value of employer-provided materials is not compensation earnable if you use the materials solely in connection with your employer's business.

~~(ii) "Materials" includes, but is not limited to, living quarters, food, board, equipment, clothing, laundry, transportation, fuel, and utilities.~~

~~Example: An employer provides an employee with uniforms which the employee must wear in performing services for his employer. Because the uniforms are to be used solely in connection with the employer's business, they do not qualify as nonmoney maintenance compensation. Therefore, the value of the uniforms is not compensation earnable.~~

~~(b) The department presumes that your employer provides you materials solely in lieu of reimbursement for business expenses. Unless you or your employer can show by corroborating evidence that your employer provided you materials in whole or in part as payment for your personal expenses, as opposed to business expenses, the value of the materials is not compensation earnable.~~

~~(c) If your employer provides you with materials for your personal use, the value of that use is nonmoney maintenance compensation and is included in your earnable compensation.~~

~~(i) "Nonmoney maintenance compensation" means the fair market value of any form of materials other than cash legally furnished by your employer to you or your dependents for personal use.~~

~~(ii) Nonmoney maintenance does not include any form of payment other than cash that is excludable from taxation under provisions of the Internal Revenue Code. This applies regardless of whether you or your employer reported the compensation to the Internal Revenue Service as taxable income.~~

~~(d) Your use of employer-provided materials will qualify as nonmoney maintenance compensation if your employer substantiates that they were provided to you as payment for personal services. In order for employer provided materials to qualify as nonmoney maintenance compensation, your employer must:~~

~~(i) Establish and regularly update a written schedule reflecting the monthly fair market value of each item of employer-provided materials claimed as nonmoney maintenance compensation. Typically, the fair market value would be the cost of the item if it were acquired in a purchase or lease transaction;~~

~~(ii) Report the fair market value of employer-provided materials as nonmoney maintenance compensation to the department as compensation earnable. If you pay any amount to your employer in order to own or use the materials, your employer must report as compensation earnable the amount by which the fair market value of the materials exceeds the amount of your payment;~~

~~(iii) Substantiate by adequate records or by other sufficient corroborating evidence the following:~~

~~(A) That the fair market value of each item of nonmoney maintenance compensation as reported to the department is accurate;~~

~~(B) That each item of nonmoney maintenance compensation is provided to you for your personal use as payment for your services to the employer; and~~

~~(C) That each item of nonmoney maintenance compensation is includable in your taxable income for federal income tax purposes.~~

~~Example: An employer leases an apartment for $700.00 per month. The employer charges an employee $300.00 per month to use the apartment for temporary living quarters. Because the employee uses the apartment for personal, rather than business, purposes, the amount by which the lease value exceeds the employee's payment is nonmoney maintenance compensation. The employer must report $400.00 per month to the department as compensation earnable for the employee.~~

~~(e) How to corroborate that your use of employer-provided materials qualifies as nonmoney maintenance compensation. In addition to the records required under (d) of this subsection, you may provide the department with any oral or written evidence which you or your employer believe corroborates that your use of employer-provided materials qualifies as compensation earnable. However, oral evidence alone has considerably less value than written evidence. Written evidence prepared at or near the time your employer provides you with the item of compensation is generally much stronger than oral evidence or written evidence created years later.~~

~~(2) PERS Plan II members. If you are a PERS Plan II member, you are not entitled to count the value of any nonmoney maintenance compensation you receive from your employer as compensation earnable.~~)) Nonmoney maintenance compensation, as defined in this section:

(a) Is reportable compensation to the extent authorized by this section, for Plan 1 members; and

(b) Is not reportable compensation for Plan 2 and 3 members.

(2) Nonmoney maintenance compensation is compensation legally provided to you in a form other than money. For example, nonmoney maintenance compensation may include the provision of materials such as living quarters, food, board, equipment, clothing, laundry, transportation, fuel, and utilities. To be considered nonmoney maintenance compensation, the materials must be provided for your personal use and/or the personal use of your dependents, not for a business use. The materials are not nonmoney maintenance compensation if:

(a) You use them solely in connection with your employer's business; or

(b) They are provided in lieu of reimbursement for your business expenses.

(3) To prove that the provision of materials constitutes nonmoney maintenance compensation:

(a) Your employer must substantiate by adequate records or other sufficient corroborating evidence that the materials were provided to you for your personal use as payment for your services to the employer.

(b) Your employer must substantiate that the fair market value of the materials provided is includable in your taxable income for federal income tax purposes.

(c) You may provide corroborating evidence to the department. Written documentation prepared at or near the time the materials were provided is generally preferred.

(d) In the absence of clear proof, the department will presume that employer-provided materials were not nonmoney maintenance compensation.

(4) Your employer must report nonmoney maintenance compensation to the department. The amount reported as compensation is the fair market value of materials legally provided by your employer. To substantiate the value of nonmoney maintenance compensation:

(a) Your employer must establish and regularly update a written schedule reflecting the monthly fair market value of the materials provided. Typically, the fair market value would be the cost of the item if it were acquired in a purchase or lease transaction. Your employer must be able to substantiate the accuracy of this schedule with adequate records.

(b) If you pay any amount to your employer in order to own or use the materials, your employer must report the amount by which the fair market value exceeds the amount of your payment.

Example: Your employer leases an apartment for $700.00 per month and charges you $300.00 per month to use the apartment for temporary living quarters. Because you use the apartment for personal, rather than business purposes, the amount by which the lease value exceeds your payment is nonmoney maintenance compensation. $400.00 per month is reportable compensation.

AMENDATORY SECTION (Amending WSR 02-02-060, filed 12/28/01, effective 1/1/02)

WAC 415-108-800 When ((~~does a member of the public employees' retirement system (PERS)~~)) do I enter retirement status? As a member of PERS, you enter((~~s~~)) retirement status when ((~~he or she~~)) you:

(1) ((~~Has~~)) Have separated from service as defined in RCW 41.40.010(((~~41~~))) (42);

(2) ((~~Has~~)) Have no written or oral agreement to return to employment ((~~prior to entering "retiree status"~~)); and

(3) ((~~Has~~)) Have applied for retirement, the accrual date has been determined under RCW 41.40.193, 41.40.680, or 41.40.801, and ((~~the~~)) your benefit begins to accrue.

Example: Sally is eligible for retirement on July 1st. She submits an application on June 1st with a July 1st retirement date. Her last day of employment is June 30th and she does not have an agreement to return to work.

Sally's retirement date (accrual date) is July 1st and the benefit begins to accrue. The first retirement payment will be paid at the end of July. Sally entered "retiree status" effective July 1st.

WSR 06-04-065
PERMANENT RULES
DEPARTMENT OF FISH AND WILDLIFE

[Order 06-12—Filed January 30, 2006, 11:55 a.m., effective March 2, 2006]

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

Purpose: Adopting WAC 232-12-421 Hunt or possess big game without an access permit, 232-12-422 Hunt or possess a wild animal or wild bird without an access permit, and 232-12-423 Public hunting defined and access contracts.

Statutory Authority for Adoption: RCW 77.12.047.

Adopted under notice filed as WSR 05-24-081 on December 5, 2005.

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

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

Number of Sections Adopted on the Agency's Own Initiative: New 3, Amended 0, Repealed 0.

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

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

Date Adopted: January 20, 2006.

Nancy Burkhart
for Ron Ozment, Chair
Fish and Wildlife Commission

NEW SECTION

WAC 232-12-421 Hunt or possess big game without an access permit. (1) It is unlawful to hunt for big game or possess big game taken on property in an access contract between the landowner or land manager and the department, unless:

(a) The hunter possesses a valid access permit provided on a standard form by the department, and issued to the hunter by the landowner, land manager, or the department in addition to all other required hunting licenses and permits; or

(b) The property is in a contract between the department and the landowner that does not restrict persons from hunting and does not require an access permit.

(2) Each big game animal possessed in violation of this section shall be treated as a separate offense under RCW 77.15.030.

(3) Violation of this section is punishable under RCW 77.15.410, unlawful recreational hunting of big game in the second degree, unless the hunting for or possession of big game constitutes unlawful recreational hunting of big game in the first degree.

NEW SECTION

WAC 232-12-422 Hunt or possess a wild animal or wild bird without an access permit. (1) It is unlawful to hunt for a wild bird or wild animal, except big game, or possess any wild bird or wild animal, except big game, taken on property in an access contract between the landowner or land manager and the department, unless:

(a) The hunter possesses a valid access permit provided on a standard form by the department, and issued to the hunter by the landowner, land manager, or the department in addition to all other required hunting licenses and permits; or

(b) The property is in a contract between the department and the landowner that does not restrict persons from hunting and does not require an access permit.

(2) Violation of this section is punishable under RCW 77.15.400 or 77.15.430.

NEW SECTION

WAC 232-12-423 Public hunting defined and access contracts. "Public hunting" generally means that land is open to hunting for all licensed hunters.

(1) For the purpose of defining the term "public hunting" for payment of crop damage in RCW 77.36.060, "public hunting" has been allowed by the landowner when:

(a) The landowner opens the property on which the damage is claimed under RCW 77.36.040, for general access to all licensed hunters; or

(b) The landowner had entered into and complied with an access contract with the department covering the land(s) on which the damage is claimed under RCW 77.36.040, for the hunting season prior to the occurrence of the damage.

(2) Access contracts shall require that:

(a) The land is open to general access to all licensed hunters; or

(b) The landowner allows the department to select the hunters who are authorized to access the land; or

(c) The landowner and the department share selection of the hunters authorized to hunt on the landowner's land consistent with applicable commission policy or rule.

WSR 06-04-066
PERMANENT RULES
DEPARTMENT OF FISH AND WILDLIFE

[Order 06-09—Filed January 30, 2006, 11:54 a.m., effective March 2, 2006]

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

Purpose: Adopting WAC 232-28-295 Landowner hunting permits and 232-28-294 Multiple season big game permits; amending WAC 232-28-293 Landowner raffle hunts, 232-12-014 Wildlife classified as endangered species and 232-12-011 Wildlife classified as protected shall not be hunted or fished; and repealing WAC 232-28-271 Private lands wildlife management area hunting seasons, rules and boundary descriptions.

Citation of Existing Rules Affected by this Order: Repealing WAC 232-28-271; and amending WAC 232-28-293, 232-12-014, and 232-12-011.

Statutory Authority for Adoption: RCW 77.12.047, 77.12.020.

Adopted under notice filed as WSR 05-24-094 on December 5, 2005, and WSR 05-24-082 on December 7, 2005.

Changes Other than Editing from Proposed to Adopted Version: **WAC 232-28-295 Landowner hunting permits, changes, if any, from the text of the proposed rule and reasons for difference:**

- After the title "Buckrun:", add the following language to more clearly identify the location of the property and clarify the expectations for hunters and property management:

"Buckrun is located in Grant County, near the town of Wilson Creek. A legal description of the property has been filed with the county and is in the contract between Buckrun and the department.

Hunting on Buckrun is managed for a quality experience by scheduling hunt dates and keeping the number of hunters in the field low. Hunters with limited flexibility for hunt dates may experience scheduling problems. Hunters can generally expect one (1) day hunts during the permit seasons with written authorization from the Buckrun manager. All hunters must check in and out on hunt day. Schedule hunts in advance by calling (509) 345-2577."

- The subtitle following the previous narrative should read: "2006 Buckrun Landowner Hunting Permits."
- In the paragraph that follows the subtitle "2006 Buckrun Landowner Hunting Permits" after the second sentence add: "No access fee will be charged for the raffle permit winners." This makes it clear that access fees will not be charged for the raffle permits.
- In the same paragraph, delete the last sentence and replace it with: "Contact the manager at (509) 345-2577 for additional information." This removes the individual's name.
- After further discussions with the Buckrun managers, the permit numbers and restrictions have been modified. Replace the original permit table with the following:

Hunt Name	Quota Number	Season	Special Restrictions	Area
Buckrun	10	Sept. 1-Oct. 13	Antlerless Only	Buckrun
Buckrun	15	Oct. 23-Dec. 31	Antlerless Only	Buckrun
Buckrun	13	Sept. 1-Oct. 13	3 pt. Max. buck* or antlerless	Buckrun
Buckrun	13	Oct. 23-Dec. 31	3 pt. Max. buck* or antlerless	Buckrun
Buckrun	4	Sept. 1-Dec. 31	any deer	Buckrun
Buckrun Raffle	2	Sept. 1-Dec. 31	any deer (3 day guided hunt)	Buckrun

- Change the subtitle "Buckrun Special Hunting Permits" to "2006 Buckrun Special Hunting Permits" to better describe the year that the permits are valid.
- The paragraph and table following the subtitle: "2006 Buckrun Special Hunting Permits" should read as follows to reflect further discussions and agreements with the Buckrun manager.

"Hunters apply to the Washington department of fish and wildlife for these permits. Only hunters possessing a modern firearm deer tag are eligible for Buckrun Special Permits.

Hunters can generally expect one day hunts during the permit season with written authorization from the Buckrun manager. All hunters must check in and out on hunt day. Schedule hunts in advance by calling 509-345-2577."

Hunt Name	Permit Number	Season	Special Restrictions	Area
Buckrun A	10	Sept. 1-Oct. 13	Antlerless Only Youth hunters	Buckrun
Buckrun B	10	Sept. 1-Oct. 13	Antlerless Only Disabled hunters	Buckrun
Buckrun C	5	Oct. 23-Dec. 31	Antlerless Only Senior hunters (65+)	Buckrun
Buckrun D	4	Sept. 1-Oct. 13	3 pt. max. buck* or antlerless	Buckrun
Buckrun E	4	Oct. 23-Dec. 31	3 pt. max. buck* or antlerless	Buckrun

* 3 point maximum buck – a legal buck must have no more than 3 antler points on either antler (i.e., 1x1, 1x2, 1x3, 2x2, 2x3, and 3x3 are legal). All antler points must be at least one (1) inch long. Antler points EXCLUDE eye guards.

WAC 232-28-293 Landowner raffle hunts, changes, if any, from the text of the proposed rule and reasons for difference:

Under subsection number 4 the text should read:

4. The landowner deer or elk raffle hunt winners may purchase an additional deer or elk hunting license and obtain a second transport tag ((~~if desired~~)) for use on the contracted lands if approved and authorized by the cooperating private landowner.

This change clarifies where the second license may be used and allows the landowners the option of not using the second license and tag incentive.

WAC 232-28-294 Multiple season beg [big] game permits, changes, if any, from the text of the proposed rule and reasons for difference:

- After subsection number 3, a new section should be added that reads:

4. Permit holders are required to follow all rules and restrictions for general season hunters within the game management unit or area hunted.

This change clarifies that the permit hunters must abide by all general season rules established for a particular area or unit.

- In the table at the bottom of the page under "Dates," add the words "and regulations."
- In the table at the bottom of the page under "Legal Animal," the first row should say "Any legal buck consistent with the game management unit or area restrictions." The second row should say "Any legal bull consistent with the game management unit or area restrictions."

These changes make it clear that the permit holders are restricted to harvesting the same bucks or bulls as general season hunters.

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

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

Number of Sections Adopted on the Agency's Own Initiative: New 2, Amended 3, Repealed 1.

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

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

Date Adopted: January 13, 2006.

Nancy Burkhart

for Ron Ozment, Chair

Fish and Wildlife Commission

NEW SECTION

WAC 232-28-295 Landowner hunting permits. A landowner may enter into a contract with the department and establish boundaries and other requirements for hunter access consistent with commission policy.

Hunters must possess both an access permit from the landowner and a hunting permit from the department when hunting on lands and for species covered under contract.

Buckrun

Buckrun is located in Grant County, near the town of Wilson Creek. A legal description of the property has been filed with the county and is in the contract between Buckrun and the department.

Hunting on Buckrun is managed for a quality experience by scheduling hunt dates and keeping the number of hunters in the field low. Hunters with limited flexibility for hunt dates may experience scheduling problems. Hunters can generally expect one day hunts during the permit seasons with written authorization from the Buckrun manager. All hunters must check in and out on hunt day. Schedule hunts in advance by calling 509-345-2577.

Mule and Whitetail Deer

2006 Buckrun Landowner Hunting Permits

The manager of Buckrun will distribute these hunting permits. An access fee may be charged in order to utilize these permits. No access fee will be charged for the raffle permit winners. Only hunters possessing a modern firearm deer tag are eligible for permits on Buckrun properties. Contact the manager at 509-345-2577 for additional information.

Hunt Name	Quota	Access Season	Special Restrictions	Boundary Description
Buckrun	10	Sept. 1 - Oct. 13	Antlerless only	Buckrun
Buckrun	15	Oct. 23 - Dec. 31	Antlerless only	Buckrun
Buckrun	13	Sept. 1 - Oct. 13	3 pt. max. buck* or antlerless	Buckrun
Buckrun	13	Oct. 23 - Dec. 31	3 pt. max. buck* or antlerless	Buckrun
Buckrun	4	Sept. 1 - Dec. 31	Any deer	Buckrun
Buckrun Raffle	2	Sept. 1 - Dec. 31	Any deer (3 day guided hunt)	Buckrun

Mule and Whitetail Deer

2006 Buckrun Special Hunting Permits

Hunters apply to Washington department of fish and wildlife for these permits. Only hunters possessing a modern firearm deer tag are eligible for Buckrun special permits. Hunters can generally expect one day hunts during the permit season with written authorization from the Buckrun manager. All hunters must check in and out on hunt day. Schedule hunts in advance by calling 509-345-2577.

Hunt Name	Permit Number	Permit Season	Special Restrictions	Boundary Description
Buckrun A	10	Sept. 1 - Oct. 13	Antlerless only youth hunters	Buckrun
Buckrun B	10	Sept. 1 - Oct. 13	Antlerless only disabled hunters	Buckrun
Buckrun C	5	Oct. 23 - Dec. 31	Antlerless only senior hunters (65+)	Buckrun
Buckrun D	4	Sept. 1 - Oct. 13	3 pt. max. buck* or antlerless	Buckrun
Buckrun E	4	Oct. 23 - Dec. 31	3 pt. max. buck* or antlerless	Buckrun

*3 Pt. maximum - A legal buck must have no more than 3 antler points on either antler (i.e., 1x1, 1x2, 1x3, 2x2, 2x3, 3x3 are legal). All antler points must be at least one inch long. Antler points EXCLUDE eye guards.

NEW SECTION

WAC 232-28-294 Multiple season big game permits. The commission may, by rule, offer permits for hunters to hunt deer or elk during more than one general season.

An annual drawing will be conducted by the department for multiple season permits.

(1) Multiple season big game hunting permit applications:

(a) To apply for multiple season big game hunting season permits for deer or elk, applicants must purchase and submit a permit application.

(b) No refunds or exchanges for applications will be made for persons applying for multiple season big game hunting season permits after the drawing has been held.

(c) An applicant may purchase only one application for a multiple season big game hunting season permit for each species.

(d) Permits will be randomly drawn by computer selection.

(e) Incomplete applications will not be accepted.

(f) The department will establish application and drawing dates.

(2) The bag limit for this permit is one deer or elk.

(3) Multiple season permits:

(a) Hunters who are drawn will be required to purchase their original deer or elk license, corresponding to their permit, and the multiple season big game permit.

(b) Successful applicants must purchase their multiple season permit within thirty days of the drawing notification date. If they have not purchased the multiple season permit by the deadline, the next person drawn will be offered the permit.

(c) The permits are not transferable.

(4) Permit holders are required to follow all rules and restrictions for general season hunters within the game management unit or area hunted.

Number of Permits	Dates	Game Management Units (GMUs)	Legal Animal
Multiple Season Deer Permits			
1500	Sept. 1 - December 31 within established general seasons and regulations for deer by the commission	Statewide in those GMUs with general seasons for archery, muzzleloader, or modern firearm hunters	Any legal buck consistent with the game management unit or area restrictions

Number of Permits	Dates	Game Management Units (GMUs)	Legal Animal
Multiple Season Elk Permits			
500	Sept. 1 - December 31 within established general seasons and regulations for elk by the commission	Statewide in those GMUs with general seasons for archery, muzzleloader, or modern firearm hunters	Any legal bull consistent with the game management unit or area restrictions

AMENDATORY SECTION (Amending Order 01-69, filed 4/26/01, effective 5/27/01)

WAC 232-28-293 ((~~PLWMA~~)) Landowner raffle hunts. The commission, in consultation with the director and by agreement with ((~~a~~)) cooperating private ((~~lands wildlife management area (PLWMA)~~)) landowners, may authorize hunts for big game animals through raffle.

1. The ((~~PLWMA~~)) manager of property under contract with WDFW will conduct the landowner raffle drawing. Raffle tickets will be sold for not more than $25.00 each.

2. Any person may purchase ((~~PLWMA~~)) landowner raffle tickets in addition to WDFW raffle tickets and participate in auctions and special hunting season permit drawings.

3. The ((~~PLWMA~~)) landowner raffle winners must possess the appropriate hunting license and transport tag prior to participating in the ((~~PLWMA~~)) landowner raffle hunt.

4. The ((~~PLWMA~~)) landowner deer or elk raffle hunt winners may purchase an additional deer or elk hunting license and obtain a second transport tag ((~~if desired~~)) for use on the contracted lands if approved and authorized by the cooperating private landowner.

5. If an additional deer or elk hunting license and transport tag are acquired by a raffle winner, the additional transport tag can only be used on the ((~~PLWMA~~)) contracted lands during the raffle hunt.

6. ((~~The additional deer or elk hunting license and transport tag must be issued by the Olympia department headquarters licensing division.~~

~~7.~~)) Hunting licenses or transport tags obtained pursuant to a raffle may not be resold or reassigned.

((~~8.~~)) 7. The ((~~PLWMA~~)) manager of property under contract with WDFW who is conducting an authorized raffle will provide an annual report to the department of fish and wildlife prior to December 31. The report will include information on how the event was administered, where and when it occurred, who the winners were, the cost of tickets, and the number of tickets sold.

((~~9.~~)) 8. Anyone may participate in ((~~PLWMA~~)) landowner raffles.

AMENDATORY SECTION (Amending Order 02-98, filed 5/10/02, effective 6/10/02)

WAC 232-12-011 Wildlife classified as protected shall not be hunted or fished. Protected wildlife are designated into three subcategories: Threatened, sensitive, and other.

(1) Threatened species are any wildlife species native to the state of Washington that are likely to become endangered within the foreseeable future throughout a significant portion of their range within the state without cooperative management or removal of threats. Protected wildlife designated as threatened include:

Common Name	Scientific Name
western gray squirrel	*Sciurus griseus*
Steller (northern) sea lion	*Eumetopias jubatus*
North American lynx	*Lynx canadensis*
((~~Aleutian Canada goose~~	~~*Branta Canadensis leucopareia*~~))
bald eagle	*Haliaeetus leucocephalus*
ferruginous hawk	*Buteo regalis*
marbled murrelet	*Brachyramphus marmoratus*
green sea turtle	*Chelonia mydas*
loggerhead sea turtle	*Caretta caretta*
sage grouse	*Centrocercus urophasianus*
sharp-tailed grouse	*Phasianus columbianus*
Mazama pocket gopher	*Thomomys mazama*

(2) Sensitive species are any wildlife species native to the state of Washington that are vulnerable or declining and are likely to become endangered or threatened in a significant portion of their range within the state without cooperative management or removal of threats. Protected wildlife designated as sensitive include:

Common Name	Scientific Name
Gray whale	*Eschrichtius gibbosus*
Common Loon	*Gavia immer*
Peregrine Falcon	*Falco peregrinus*
Larch Mountain salamander	*Plethodon larselli*
Pygmy whitefish	*Prosopium coulteri*
Margined sculpin	*Cottus marginatus*
Olympic mudminnow	*Novumbra hubbsi*

(3) Other protected wildlife include:

Common Name	Scientific Name
cony or pika	*Ochotona princeps*
least chipmunk	*Tamius minimus*
yellow-pine chipmunk	*Tamius amoenus*
Townsend's chipmunk	*Tamius townsendii*
red-tailed chipmunk	*Tamius ruficaudus*
hoary marmot	*Marmota caligata*
Olympic marmot	*Marmota olympus*

Common Name	Scientific Name
Cascade golden-mantled ground squirrel	*Spermophilus saturatus*
golden-mantled ground squirrel	*Spermophilus lateralis*
Washington ground squirrel	*Spermophilus washingtoni*
red squirrel	*Tamiasciurus hudsonicus*
Douglas squirrel	*Tamiasciurus douglasii*
northern flying squirrel	*Glaucomys sabrinus*
wolverine	*Gulo gulo*
painted turtle	*Chrysemys picta*
California mountain kingsnake	*Lampropeltis zonata;*

All birds not classified as game birds, predatory birds or endangered species, or designated as threatened species or sensitive species; all bats, except when found in or immediately adjacent to a dwelling or other occupied building; mammals of the order *Cetacea,* including whales, porpoises, and mammals of the order *Pinnipedia* not otherwise classified as endangered species, or designated as threatened species or sensitive species. This section shall not apply to hair seals and sea lions which are threatening to damage or are damaging commercial fishing gear being utilized in a lawful manner or when said mammals are damaging or threatening to damage commercial fish being lawfully taken with commercial gear.

AMENDATORY SECTION (Amending Order 04-98, filed 5/12/04, effective 6/12/04)

WAC 232-12-014 Wildlife classified as endangered species. Endangered species include:

Common Name	Scientific Name
pygmy rabbit	*Brachylagus idahoensis*
fisher	*Martes pennanti*
gray wolf	*Canis lupus*
grizzly bear	*Ursus arctos*
sea otter	*Enhydra lutris*
killer whale	*Orcinus orca*
sei whale	*Balaenoptera borealis*
fin whale	*Balaenoptera physalus*
blue whale	*Balaenoptera musculus*
humpback whale	*Megaptera novaeangliae*
black right whale	*Balaena glacialis*
sperm whale	*Physeter macrocephalus*
Columbian white-tailed deer	*Odocoileus virginianus leucurus*
woodland caribou	*Rangifer tarandus caribou*
American white pelican	*Pelecanus erythrorhynchos*
brown pelican	*Pelecanus occidentalis*
sandhill crane	*Grus canadensis*
snowy plover	*charadrius alexandrinus*
upland sandpiper	*Bartramia longicauda*
spotted owl	*Strix occidentalis*
western pond turtle	*Clemmys marmorata*
leatherback sea turtle	*Dermochelys coriacea*
mardon skipper	*Polites mardon*
Oregon silverspot butterfly	*Speyeria zerene hippolyta*
Oregon spotted frog	*Rana pretiosa*
northern leopard frog	*Rana pipiens*
Taylor's checkerspot	*Euphydryas editha taylori*
Streaked horned lark	*Eremophila alpestris strigata*

REPEALER

The following section of the Washington Administrative Code is repealed:

WAC 232-28-271	Private lands wildlife management area hunting seasons, rules and boundary descriptions.

WSR 06-04-070

PERMANENT RULES

DEPARTMENT OF SOCIAL AND HEALTH SERVICES

(Economic Services Administration)

[Filed January 30, 2006, 4:27 p.m., effective April 1, 2006]

Effective Date of Rule: April 1, 2006.

Purpose: To amend WAC 388-450-0200 Will the medical expenses of elderly persons or individuals with disabilities in my assistance unit be used as an income deduction for Basic Food?, in order to indicate the time limit pertaining to certain Basic Food income deductions allowable for persons who have the Medicare prescription drug discount card and transitional assistance program, as specified by food and nutrition service, United States Department of Agriculture for compliance with requirements contained in the Medicare Prescription Drug, Improvement, and Modernization Act of 2003.

Citation of Existing Rules Affected by this Order: Amending WAC 388-450-0200.

Statutory Authority for Adoption: RCW 74.04.050, 74.04.055, 74.04.057, 74.04.510, 74.08.090.

Adopted under notice filed as WSR 06-01-088 on December 20, 2005.

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

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

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

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

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

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

Date Adopted: January 26, 2006.

Andy Fernando, Manager
Rules and Policies Assistance Unit

AMENDATORY SECTION (Amending WSR 05-05-025, filed 2/8/05, effective 3/11/05)

WAC 388-450-0200 Will the medical expenses of elderly persons or individuals with disabilities in my assistance unit be used as an income deduction for Basic Food? (1) If your basic food assistance unit (AU) includes an elderly person or individual with a disability as defined in WAC 388-400-0040, your AU may be eligible for an income deduction for that person's out-of-pocket medical expenses, and certain expenses allowable for Medicare prescription drug card holders certified prior to June 1, 2006. We allow the deduction for medical expenses over thirty-five dollars each month.

(2) You can use an out-of-pocket medical expense toward this deduction if the expense covers services, supplies, medication, or other medically needed items prescribed by a state-licensed practitioner or other state-certified, qualified, health professional. Examples of expenses you can use for this deduction include those for:

(a) Medical, psychiatric, naturopathic physician, dental, or chiropractic care;

(b) Prescribed alternative therapy such as massage or acupuncture;

(c) Prescription drugs;

(d) Over the counter drugs;

(e) Eye glasses;

(f) Medical supplies other than special diets;

(g) Medical equipment or medically needed changes to your home;

(h) Shipping and handling charges for an allowable medical item. This includes shipping and handling charges for items purchased through mail order or the internet;

(i) Long distance calls to a medical provider;

(j) Hospital and outpatient treatment including:

(i) Nursing care; or

(ii) Nursing home care including payments made for a person who was an assistance unit member at the time of placement.

(k) Health insurance premiums paid by the person including:

(i) Medicare premiums; and

(ii) Insurance deductibles and co-payments.

(l) Out-of-pocket expenses used to meet a spenddown as defined in WAC 388-519-0010. We do not allow your entire spenddown obligation as a deduction. We allow the expense as a deduction as it is estimated to occur or as the expense becomes due;

(m) Dentures, hearing aids, and prosthetics;

(n) Cost to obtain and care for a seeing eye, hearing, or other specially trained service animal. This includes the cost of food and veterinarian bills. We do not allow the expense of food for a service animal as a deduction if you receive ongoing additional requirements under WAC 388-473-0040 to pay for this need;

(o) Reasonable costs of transportation and lodging to obtain medical treatment or services; and

(p) Attendant care necessary due to age, infirmity, or illness. If your AU provides most of the attendant's meals, we allow an additional deduction equal to a one-person allotment.

(3) There are two types of deductions for out-of-pocket expenses:

(a) One-time expenses are expenses that cannot be estimated to occur on a regular basis. You can choose to have us:

(i) Allow the one-time expense as a deduction when it is billed or due;

(ii) Average the expense through the remainder of your certification period; or

(iii) If your AU has a twenty-four-month certification period, you can choose to use the expense as a one-time deduction, average the expense for the first twelve months of your certification period, or average it for the remainder of our certification period.

(b) Recurring expenses are expenses that happen on a regular basis. We estimate your monthly expenses for the certification period.

(4) If the elderly person or individual with a disability in your AU has an active Medicare prescription drug card prior to June 1, 2006:

(a) Allow any out-of-pocket expenses that meet the criteria in subsections (2) and (3) above;

(b) Add a standard twenty-three dollars to these expenses; and

(c) Allow an additional fifty dollar monthly deduction to account for the 2004 and 2005 prescription subsidies:

(i) For twenty-four consecutive months if the client applied before January 2005; or

(ii) For the average number of months resulting from dividing the total subsidy amount by fifty dollars if the client applies in January 2005 or later.

(d) Allow the deductions in (b) and (c) of this subsection even if the AU has no out-of-pocket expenses.

(5) AU members with an active Medicare prescription drug card prior to June 1, 2006 have the option of using their verified pre-card out-of-pocket expenses when this amount is greater than using the standards in subsection (4).

(6) We do not allow a medical expense as an income deduction if:

(a) The expense was paid before you applied for benefits or in a previous certification period;

(b) The expense was paid or will be paid by someone else;

(c) The expense was paid or will be paid by the department or another agency;

(d) The expense is covered by medical insurance;

(e) We previously allowed the expense, and you did not pay it. We do not allow the expense again even if it is part of a repayment agreement;

(f) You included the expense in a repayment agreement after failing to meet a previous agreement for the same expense; or

(g) You claim the expense after you have been denied for presumptive SSI; and you are not considered disabled by any other criteria.

WSR 06-04-071
PERMANENT RULES
DEPARTMENT OF SOCIAL AND HEALTH SERVICES
(Economic Services Administration)

[Filed January 30, 2006, 4:31 p.m., effective March 2, 2006]

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

Purpose: To amend WAC 388-450-0055 How does money from other agencies or organizations count against my benefits?, to more clearly explain the department policy on the treatment on needs-based assistance payments from other agencies when determining eligibility for cash, medical, and food assistance programs.

Citation of Existing Rules Affected by this Order: Amending WAC 388-450-0055.

Statutory Authority for Adoption: RCW 74.04.050, 74.04.055, 74.04.057, 74.08.090.

Adopted under notice filed as WSR 06-01-087 on December 20, 2005.

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

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

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

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

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

Date Adopted: January 26, 2006.

Andy Fernando, Manager
Rules and Policies Assistance Unit

AMENDATORY SECTION (Amending WSR 02-14-022, filed 6/21/02, effective 6/22/02)

WAC 388-450-0055 How does ((~~money~~)) needs-based assistance from other agencies or organizations count against my benefits? (1) For cash assistance and medical programs for children, pregnant women, and families:

(a) We do not count ((~~money~~)) needs-based assistance payments given to you by other agencies or organizations if the ((~~money~~)) assistance is given to you for reasons other than ongoing living expenses which do not duplicate the purpose of cash assistance programs. Ongoing living expenses include the following items:

(i) Clothing;

(ii) Food;

(iii) Household supplies;

(iv) Medical supplies (nonprescription);

(v) Personal care Items;

(iv) Shelter;

(vii) Transportation; and

(viii) Utilities (e.g., lights, cooking fuel, the cost of heating or heating fuel).

(b) If the ((~~money~~)) needs-based assistance given to you is supposed to be used for ongoing living expenses, then it duplicates the purpose of cash assistance programs. We count the amount remaining after we subtract the difference between the need standard and the payment standard for your family size as described in chapter 388-478 WAC.

(c) "Needs-based" means eligibility is based on an asset test of income and resources relative to the Federal Poverty Level (FPL). This definition excludes such incomes as retirement benefits or unemployment compensation which are not needs-based.

(2) For food assistance:

(a) We do not count money given to you if:

(i) It is given to you by a private, nonprofit, charitable agency or organization; and

(ii) The amount of money you get is no more than three hundred dollars in any one of the following calendar quarters:

(A) January - February - March,

(B) April - May - June,

(C) July - August - September,

(D) October - November - December.

(b) We count the entire amount if the requirements in (a) of this subsection are not met.

(3) For cash assistance, food assistance, and medical programs for children, pregnant women, and families, if we do count the ((~~money~~)) needs-based assistance you get, we treat it as unearned income under WAC 388-450-0025.

WSR 06-04-079
PERMANENT RULES
ATTORNEY GENERAL'S OFFICE

[Filed January 31, 2006, 10:39 a.m., effective March 3, 2006]

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

Purpose: The purpose of the model rules is to provide information to records requestors and state and local agencies about "best practices" for complying with the Public Records Act, RCW 42.17.250-[42.17].348. The anticipated effect of the model rules is to streamline compliance, standardize best practices throughout the state, and reduce litigation by establishing a culture of compliance among agencies and a culture of cooperation among requestors.

Statutory Authority for Adoption: Section 4, chapter 483, Laws of 2005, amending RCW 42.17.348.

Adopted under notice filed as WSR 05-23-166 on November 23, 2005.

Changes Other than Editing from Proposed to Adopted Version: As more fully described in the concise explanatory statement, the following nonediting changes were made:

Section of Final Rule	Change from Proposed Rule
WAC 44-14-00004	Adding dual citations to current statute and recodified statute (effective July 1, 2006) throughout the model rules.
WAC 44-14-040(3)	Revises provision to urge requestors to contact agency if there is no response after five days.
WAC 44-14-04003(2)	Clarifies how the "fullest assistance" and "most timely possible action" principles of the act apply to the processing of requests.
WAC 44-14-04003(10) (as renumbered) WAC 44-14-04004(3)	Clarifies that instead of agency needing to "obtain" additional time to fulfill a request, an "unjustified" failure of the agency to provide records within its reasonable estimate is a denial of access.
WAC 44-14-04003 (4) and (12)	Moves part of section on failure to provide an initial response from the rule to the comments and adds citation to case.
WAC 44-14-04003(5)	Adds that if an agency creates a new record it should obtain the consent of the requestor to ensure that the requestor was not requesting the underlying documents instead of the agency-created new document.
WAC 44-14-04003(9)	Clarifies that an agency need not "obtain" additional time from the requestor to fully respond and adds that an "unjustified" failure to fully respond by the expiration of a reasonable estimate is a denial of access to the record.
WAC 44-14-04004(1)	Eliminates statement implying that even when a record is immediately available, an agency may take the full five business days to provide it.
WAC 44-14-04004(2)	Adds that an agency must mail a copy of requested records when the requestor pays for the copies and the cost of mailing.
WAC 44-14-04004 (4)(b)(i)	Changes the example of redacting only exempt portions of a record from an attorney-client memorandum to victim identities in a police report.
WAC 44-14-04006(1)	Adds that a closing letter for a small request may not be necessary.
WAC 44-14-050 WAC 44-14-05001 WAC 44-14-05002 WAC 44-14-070(2) WAC 44-14-07003	Eliminates electronic records section (and related sections in costs section); this topic will be the subject of further rule making.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 42, Amended 0, Repealed 0.

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

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

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

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

Date Adopted: January 31, 2006.

Rob McKenna
Attorney General

Chapter 44-14 WAC

PUBLIC RECORDS ACT—MODEL RULES

INTRODUCTORY COMMENTS

NEW SECTION

WAC 44-14-00001 Statutory authority and purpose. The legislature directed the attorney general to adopt advisory model rules on public records compliance and to revise them from time to time. RCW 42.17.348 (2) and (3)/42.56.570 (2) and (3). The purpose of the model rules is to provide information to records requestors and state and local agencies about "best practices" for complying with the Public Records Act, RCW 42.17.250/42.56.040 through 42.17.348/42.56.570 ("act"). The overall goal of the model rules is to establish a culture of compliance among agencies and a culture of cooperation among requestors by standardiz-

ing best practices throughout the state. The attorney general encourages state and local agencies to adopt the model rules (but not necessarily the comments) by regulation or ordinance.

The act applies to all state agencies and local units of government. The model rules use the term "agency" to refer to either a state or local agency. Upon adoption, each agency would change that term to name itself (such as changing references from "name of agency" to "city"). To assist state and local agencies considering adopting the model rules, an electronic version of the rules is available on the attorney general's web site, www.atg.wa.gov/records/modelrules.

The model rules are the product of an extensive outreach project. The attorney general held thirteen public forums all across the state to obtain the views of requestors and agencies. Many requestors and agencies also provided detailed written comments that are contained in the rule-making file. The model rules reflect many of the points and concerns presented in those forums.

The model rules provide one approach (or, in some cases, alternate approaches) to processing public records requests. Agencies vary enormously in size, resources, and complexity of requests received. Any "one-size-fits-all" approach in the model rules, therefore, may not be best for requestors and agencies.

NEW SECTION

WAC 44-14-00002 Format of model rules. We are publishing the model rules with comments. The comments have five-digit WAC numbers such as WAC 44-14-04001. The model rules themselves have three-digit WAC numbers such as WAC 44-14-040.

The comments are designed to explain the basis and rationale for the rules themselves as well as provide broader context and legal guidance. To do so, the comments contain many citations to statutes, cases, and formal attorney general's opinions.

NEW SECTION

WAC 44-14-00003 Model rules and comments are nonbinding. The model rules, and the comments accompanying them, are advisory only and do not bind any agency. Accordingly, many of the comments to the model rules use the word "should" or "may" to describe what an agency or requestor is encouraged to do. The use of the words "should" or "may" are permissive, not mandatory, and are not intended to create any legal duty.

While the model rules and comments are nonbinding, they should be carefully considered by requestors and agencies. The model rules and comments were adopted after extensive statewide hearings and voluminous comments from a wide variety of interested parties.

NEW SECTION

WAC 44-14-00004 Recodification of the act. On July 1, 2006, the act will be recodified. Chapter 274, Laws of 2005. The act will be known as the "Public Records Act" and will be codified in chapter 42.56 RCW. The exemptions in the act are recodified and grouped together by topic. The recodification does not change substantive law. The model rules provide dual citations to the current act, chapter 42.17 RCW, and the newly codified act, chapter 42.56 RCW (for example, RCW 42.17.340/42.56.550).

NEW SECTION

WAC 44-14-00005 Training is critical. The act is complicated, and compliance requires training. Training can be the difference between a satisfied requestor and expensive litigation. The attorney general's office strongly encourages agencies to provide thorough and ongoing training to agency staff on public records compliance. All agency employees should receive basic training on public records compliance and records retention; public records officers should receive more intensive training.

NEW SECTION

WAC 44-14-00006 Additional resources. Several web sites provide information on the act. The attorney general office's web site on public records is www.atg.wa.gov/records/deskbook.shtml. The municipal research service center, an entity serving local governments, provides a public records handbook at www.mrsc.org/Publications/prdpub04.pdf. A requestor's organization, the Washington Coalition for Open Government, has materials on its site at www.washingtoncog.org.

The Washington State Bar Association is publishing a twenty-two-chapter deskbook on public records in 2006. It will be available for purchase at www.wsba.org.

AUTHORITY AND PURPOSE

NEW SECTION

WAC 44-14-010 Authority and purpose. (1) RCW 42.17.260(1)/42.56.070(1) requires each agency to make available for inspection and copying nonexempt "public records" in accordance with published rules. The act defines "public record" to include any "writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained" by the agency. RCW 42.17.260(2)/42.56.070(2) requires each agency to set forth "for informational purposes" every law, in addition to the Public Records Act, that exempts or prohibits the disclosure of public records held by that agency.

(2) The purpose of these rules is to establish the procedures (name of agency) will follow in order to provide full access to public records. These rules provide information to persons wishing to request access to public records of the (name of agency) and establish processes for both requestors and (name of agency) staff that are designed to best assist members of the public in obtaining such access.

(3) The purpose of the act is to provide the public full access to information concerning the conduct of government, mindful of individuals' privacy rights and the desirability of the efficient administration of government. The act and these rules will be interpreted in favor of disclosure. In carrying

out its responsibilities under the act, the (name of agency) will be guided by the provisions of the act describing its purposes and interpretation.

Comments to WAC 44-14-010

NEW SECTION

WAC 44-14-01001 Scope of coverage of Public Records Act. The act applies to an "agency." RCW 42.17.260(1)/42.56.070(1). "'Agency' includes all state agencies and all local agencies. 'State agency' includes every state office, department, division, bureau, board, commission, or other state agency. 'Local agency' includes every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency." RCW 42.17.020(2).

Court files and judges' files are not subject to the act.[1] Access to these records is governed by court rules and common law. The model rules, therefore, do not address access to court records.

An entity which is not an "agency" can still be subject to the act when it is the functional equivalent of an agency. Courts have applied a four-factor, case-by-case test. The factors are:

(1) Whether the entity performs a government function;

(2) The level of government funding;

(3) The extent of government involvement or regulation; and

(4) Whether the entity was created by the government. Op. Att'y Gen. 2 (2002).[2]

Some agencies, most notably counties, are a collection of separate quasi-autonomous departments which are governed by different elected officials (such as a county assessor and prosecuting attorney). However, the act defines the county as a whole as an "agency" subject to the act. RCW 42.17.020 (2). An agency should coordinate responses to records requests across departmental lines. RCW 42.17.253(1) (agency's public records officer must "oversee the agency's compliance" with act).

Notes: [1] *Nast v. Michels*, 107 Wn.2d 300, 730 P.2d 54 (1986).

[2] *See also Telford v. Thurston County Bd. of Comm'rs*, 95 Wn. App. 149, 162, 974 P.2d 886, *review denied*, 138 Wn.2d 1015, 989 P.2d 1143 (1999); Op. Att'y Gen. 5 (1991).

NEW SECTION

WAC 44-14-01002 Requirement that agencies adopt reasonable regulations for public records requests. The act provides: "Agencies shall adopt and enforce reasonable rules and regulations…to provide full public access to public records, to protect public records from damage or disorganization, and to prevent excessive interference with other essential functions of the agency…. Such rules and regulations shall provide for the fullest assistance to inquirers and the most timely possible action on requests for information." RCW 42.17.290/42.56.100. Therefore, an agency must adopt "reasonable" regulations providing for the "fullest assistance" to requestors and the "most timely possible action on requests."

At the same time, an agency's regulations must "protect public records from damage or disorganization" and "prevent excessive interference" with other essential agency functions. Another provision of the act states that providing public records should not "unreasonably disrupt the operations of the agency." RCW 42.17.270/42.56.080. This provision allows an agency to take reasonable precautions to prevent a requestor from being unreasonably disruptive or disrespectful to agency staff.

NEW SECTION

WAC 44-14-01003 Construction and application of act. The act declares: "The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created." RCW 42.17.251/42.56.030. The act further provides: "…mindful of the right of individuals to privacy and of the desirability of the efficient administration of government, full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society." RCW 42.17.010(11). The act further provides: "Courts shall take into account the policy of (the act) that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others." RCW 42.17.340(3)/42.56.550(3).

Because the purpose of the act is to allow people to be informed about governmental decisions (and therefore help keep government accountable) while at the same time being "mindful of the right of individuals to privacy," it should not be used to obtain records containing purely personal information that has absolutely no bearing on the conduct of government.

The act emphasizes three separate times that it must be liberally construed to effect its purpose, which is the disclosure of nonexempt public records. RCW 42.17.010, 42.17.251/42.56.030, 42.17.920.[1] The act places the burden on the agency of proving a record is not subject to disclosure or that its estimate of time to provide a full response is "reasonable." RCW 42.17.340 (1) and (2)/42.56.550 (1) and (2). The act also encourages disclosure by awarding a requestor reasonable attorneys fees, costs, and a daily penalty if the agency fails to meet its burden of proving the record is not subject to disclosure or its estimate is not "reasonable." RCW 42.17.340(4)/42.56.550(4).

An additional incentive for disclosure is RCW 42.17.258, which provides: "No public agency, public official, public employee, or custodian shall be liable, nor shall a cause of action exist, for any loss or damage based upon the release of a public record if the public agency, public official, public employee, or custodian acted in good faith in attempting to comply" with the act.

Note: [1]*See King County v. Sheehan*, 114 Wn. App. 325, 338, 57 P.3d 307 (2002) (referring to the three legislative intent provisions of the act as "the thrice-repeated legislative mandate that exemptions under the Public Records Act are to be narrowly construed.").

AGENCY DESCRIPTION—CONTACT INFORMATION—PUBLIC RECORDS OFFICER

NEW SECTION

WAC 44-14-020 Agency description—Contact information—Public records officer. (1) The (name of agency) (describe services provided by agency). The (name of agency's) central office is located at (describe). The (name of agency) has field offices at (describe, if applicable).

(2) Any person wishing to request access to public records of (agency), or seeking assistance in making such a request should contact the public records officer of the (name of agency):

Public Records Officer
(Agency)
(Address)
(Telephone number)
(fax number)
(e-mail)

Information is also available at the (name of agency's) web site at (web site address).

(3) The public records officer will oversee compliance with the act but another (name of agency) staff member may process the request. Therefore, these rules will refer to the public records officer "or designee." The public records officer or designee and the (name of agency) will provide the "fullest assistance" to requestors; create and maintain for use by the public and (name of agency) officials an index to public records of the (name of agency, if applicable); ensure that public records are protected from damage or disorganization; and prevent fulfilling public records requests from causing excessive interference with essential functions of the (name of agency).

Comments to WAC 44-14-020

NEW SECTION

WAC 44-14-02001 Agency must publish its procedures. An agency must publish its public records policies, organizational information, and methods for requestors to obtain public records. RCW 42.17.250(1)/42.56.040(1).[1] A state agency must publish its procedures in the Washington Administrative Code and a local agency must prominently display and make them available at the central office of such local agency. RCW 42.17.250(1)/42.56.040(1). An agency should post its public records rules on its web site. An agency cannot invoke a procedure if it did not publish or display it as required (unless the party had actual and timely notice of its contents). RCW 42.17.250(2)/42.56.040(2).

Note: [1]*See, e.g.*, WAC 44-06-030 (attorney general office's organizational and public records methods statement).

NEW SECTION

WAC 44-14-02002 Public records officers. An agency must appoint a public records officer whose responsibility is to serve as a "point of contact" for members of the public seeking public records. RCW 42.17.253(1). The purpose of this requirement is to provide the public with one point of contact within the agency to make a request. A state agency must provide the public records officer's name and contact information by publishing it in the state register. A state agency is encouraged to provide the public records officer's contact information on its web site. A local agency must publish the public records officer's name and contact information in a way reasonably calculated to provide notice to the public such as posting it on the agency's web site. RCW 42.17.253 (3).

The public records officer is not required to personally fulfill requests for public records. A request can be fulfilled by an agency employee other than the public records officer. If the request is made to the public records officer, but should actually be fulfilled by others in the agency, the public records officer should route the request to the appropriate person or persons in the agency for processing. An agency is not required to hire a new staff member to be the public records officer.

AVAILABILITY OF PUBLIC RECORDS

NEW SECTION

WAC 44-14-030 Availability of public records. (1) **Hours for inspection of records.** Public records are available for inspection and copying during normal business hours of the (name of agency), (provide hours, e.g., Monday through Friday, 8:00 a.m. to 5:00 p.m., excluding legal holidays). Records must be inspected at the offices of the (name of agency).

(2) **Records index.** (*If agency keeps an index.*) An index of public records is available for use by members of the public, including (describe contents). The index may be accessed on-line at (web site address). (If there are multiple indices, describe each and its availability.)

(*If agency is local agency opting out of the index requirement.*) The (name of agency) finds that maintaining an index is unduly burdensome and would interfere with agency operations. The requirement would unduly burden or interfere with (name of agency) operations in the following ways (specify reasons).

(3) **Organization of records.** The (name of agency) will maintain its records in a reasonably organized manner. The (name of agency) will take reasonable actions to protect records from damage and disorganization. A requestor shall not take (name of agency) records from (name of agency) offices without the permission of the public records officer or designee. A variety of records is available on the (name of agency) web site at (web site address). Requestors are encouraged to view the documents available on the web site prior to submitting a records request.

(4) **Making a request for public records.**

(a) Any person wishing to inspect or copy public records of the (name of agency) should make the request in writing

on the (name of agency's) request form, or by letter, fax, or e-mail addressed to the public records officer and including the following information:

• Name of requestor;

• Address of requestor;

• Other contact information, including telephone number and any e-mail address;

• Identification of the public records adequate for the public records officer or designee to locate the records; and

• The date and time of day of the request.

(b) If the requestor wishes to have copies of the records made instead of simply inspecting them, he or she should so indicate and make arrangements to pay for copies of the records or a deposit. Pursuant to section (insert section), standard photocopies will be provided at (amount) cents per page.

(c) A form is available for use by requestors at the office of the public records officer and on-line at (web site address).

(d) The public records officer or designee may accept requests for public records that contain the above information by telephone or in person. If the public records officer or designee accepts such a request, he or she will confirm receipt of the information and the substance of the request in writing.

Comments to WAC 44-14-030

NEW SECTION

WAC 44-14-03001 "Public record" defined. Courts use a three-part test to determine if a record is a "public record." The document must be: A "writing," containing information "relating to the conduct of government" or the performance of any governmental or proprietary function, "prepared, owned, used, or retained" by an agency.[1]

(1) **Writing.** A "public record" can be any writing "regardless of physical form or characteristics." RCW 42.17.020(41). "Writing" is defined very broadly as: "… handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation, including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated." RCW 42.17.020(48). An e-mail is a "writing."

(2) **Relating to the conduct of government.** To be a "public record," a document must relate to the "conduct of government or the performance of any governmental or proprietary function." RCW 42.17.020(41). Almost all records held by an agency relate to the conduct of government; however, some do not. A purely personal record having absolutely no relation to the conduct of government is not a "public record." Even though a purely personal record might not be a "public record," a record of its existence might be. For example, a record showing the existence of a purely personal e-mail sent by an agency employee on an agency computer would probably be a "public record," even if the contents of the e-mail itself were not.[2]

(3) **"Prepared, owned, used, or retained."** A "public record" is a record "prepared, owned, used, or retained" by an agency. RCW 42.17.020(41).

A record can be "used" by an agency even if the agency does not actually possess the record. If an agency uses a record in its decision-making process it is a "public record."[3] For example, if an agency considered technical specifications of a public works project and returned the specifications to the contractor in another state, the specifications would be a "public record" because the agency "used" the document in its decision-making process.[4] The agency could be required to obtain the public record, unless doing so would be impossible. An agency cannot send its only copy of a record to a third party for the sole purpose of avoiding disclosure.[5]

Sometimes agency employees work on agency business from home computers. These home computer records (including e-mail) were "used" by the agency and relate to the "conduct of government" so they are "public records." RCW 42.17.020(41). However, the act does not authorize unbridled searches of agency property.[6] If agency property is not subject to unbridled searches, then neither is the home computer of an agency employee. Yet, because the home computer documents relating to agency business are "public records," they are subject to disclosure (unless exempt). Agencies should instruct employees that all public records, regardless of where they were created, should eventually be stored on agency computers. Agencies should ask employees to keep agency-related documents on home computers in separate folders and to routinely blind carbon copy ("bcc") work e-mails back to the employee's agency e-mail account. If the agency receives a request for records that are solely on employees' home computers, the agency should direct the employee to forward any responsive documents back to the agency, and the agency should process the request as it would if the records were on the agency's computers.

Notes:

[1] *Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 748, 958 P.2d 260 (1998). For records held by the secretary of the senate or chief clerk of the house of representatives, a "public record" is a "legislative record" as defined in RCW 40.14.100. RCW 42.17.020 (41).

[2] *Tiberino v. Spokane County Prosecutor*, 103 Wn. App. 680, 691, 13 P.3d 1104 (2000).

[3] *Concerned Ratepayers v. Public Utility Dist. No. 1*, 138 Wn.2d 950, 958-61, 983 P.2d 635 (1999).

[4] *Id.*

[5] *See* Op. Att'y Gen. 11 (1989), at 4, n.2 ("We do not wish to encourage agencies to avoid the provisions of the public disclosure act by transferring public records to private parties. If a record otherwise meeting the statutory definition were transferred into private hands solely to prevent its public disclosure, we expect courts would take appropriate steps to require the agency to make disclosure or to sanction the responsible public officers.")

[6] *See Hangartner v. City of Seattle*, 151 Wn.2d 439, 448, 90 P.3d 26 (2004).

NEW SECTION

WAC 44-14-03002 Times for inspection and copying of records. An agency must make records available for

inspection and copying during the "customary office hours of the agency." RCW 42.17.280/42.56.090. If the agency is very small and does not have customary office hours of at least thirty hours per week, the records must be available from 9:00 a.m. to noon, and 1:00 p.m. to 4:00 p.m. The agency and requestor can make mutually agreeable arrangements for the times of inspection and copying.

NEW SECTION

WAC 44-14-03003 Index of records. State and local agencies are required by RCW 42.17.260/42.56.070 to provide an index for certain categories of records. An agency is not required to index every record it creates. Since agencies maintain records in a wide variety of ways, agency indices will also vary. An agency cannot use, rely on, or cite to as precedent a public record unless it was indexed or made available to the parties affected by it. RCW 42.17.260(6)/42.56.070(6). An agency should post its index on its web site.

The index requirements differ for state and local agencies.

A state agency must index only two categories of records:

(1) All records, if any, issued before July 1, 1990 for which the agency has maintained an index; and

(2) Final orders, declaratory orders, interpretive statements, and statements of policy issued after June 30, 1990. RCW 42.17.260(5)/42.56.070(5).

A state agency must adopt a rule governing its index.

A local agency may opt out of the indexing requirement if it issues a formal order specifying the reasons why doing so would "unduly burden or interfere with agency operations." RCW 42.17.260 (4)(a)/42.56.070 (4)(a). To lawfully opt out of the index requirement, a local agency must actually issue an order or adopt an ordinance specifying the reasons it cannot maintain an index.

The index requirements of the act were enacted in 1972 when agencies had far fewer records and an index was easier to maintain. However, technology allows agencies to map out, archive, and then electronically search for electronic documents. Agency resources vary greatly so not every agency can afford to utilize this technology. However, agencies should explore the feasibility of electronic indexing and retrieval to assist both the agency and requestor in locating public records.

NEW SECTION

WAC 44-14-03004 Organization of records. An agency must "protect public records from damage or disorganization." RCW 42.17.290/42.56.100. An agency owns public records (subject to the public's right, as defined in the act, to inspect or copy nonexempt records) and must maintain custody of them. RCW 40.14.020; chapter 434-615 WAC. Therefore, an agency should not allow a requestor to take original agency records out of the agency's office. An agency may send original records to a reputable commercial copying center to fulfill a records request if the agency takes reasonable precautions to protect the records. See WAC 44-14-07001(5).

The legislature encourages agencies to electronically store and provide public records:

Broad public access to state and local government records and information has potential for expanding citizen access to that information and for providing government services. Electronic methods of locating and transferring information can improve linkages between and among citizens . . . and governments. . . .

It is the intent of the legislature to encourage state and local governments to develop, store, and manage their public records and information in electronic formats to meet their missions and objectives. Further, it is the intent of the legislature for state and local governments to set priorities for making public records widely available electronically to the public.

RCW 43.105.250. An agency could fulfill its obligation to provide "access" to a public record by providing a requestor with a link to an agency web site containing an electronic copy of that record. Agencies are encouraged to do so. For those without access to the internet, an agency could provide a computer terminal at its office.

NEW SECTION

WAC 44-14-03005 Retention of records. An agency is not required to retain every record it ever created or used. The state and local records committees approve a general retention schedule for state and local agency records that applies to records that are common to most agencies.[1] Individual agencies seek approval from the state or local records committee for retention schedules that are specific to their agency, or that, because of particular needs of the agency, must be kept longer than provided in the general records retention schedule. The retention schedules for state and local agencies are available at www.secstate.wa.gov/archives/gs.aspx.

Retention schedules vary based on the content of the record. For example, documents with no value such as internal meeting scheduling e-mails can be destroyed when no longer needed, but documents such as periodic accounting reports must be kept for a period of years. Because different kinds of records must be retained for different periods of time, an agency is prohibited from automatically deleting all e-mails after a short period of time (such as thirty days). While many of the e-mails could be destroyed when no longer needed, many others must be retained for several years. Indiscriminate automatic deletion of all e-mails after a short period may prevent an agency from complying with its retention duties and could complicate performance of its duties under the Public Records Act. An agency should have a retention policy in which employees save retainable documents and delete nonretainable ones. An agency is strongly encouraged to train employees on retention schedules.

The lawful destruction of public records is governed by retention schedules. The unlawful destruction of public records can be a crime. RCW 40.16.010 and 40.16.020.

An agency is prohibited from destroying a public record, even if it is about to be lawfully destroyed under a retention schedule, if a public records request has been made for that

record. RCW 42.17.290/42.56.100. Additional retention requirements might apply if the records may be relevant to actual or anticipated litigation. The agency is required to retain the record until the record request has been resolved. An exception exists for certain portions of a state employee's personnel file. RCW 42.17.295/42.56.110.

Note: [1]An agency can be found to violate the act and be subject to the attorneys' fees and penalty provision if it prematurely destroys a requested record. *See Yacobellis v. City of Bellingham*, 55 Wn. App. 706, 780 P.2d 272 (1989).

NEW SECTION

WAC 44-14-03006 Form of requests. There is no statutorily required format for a valid public records request.[1] A request can be sent in by mail. RCW 42.17.290/42.56.100. A request can also be made by e-mail, fax, or orally. A request should be made to the agency's public records officer. An agency may prescribe means of requests in its rules. RCW 42.17.250/42.56.040 and 42.17.260(1)/42.56.070(1); RCW 34.05.220 (state agencies). An agency is encouraged to make its public records request form available on its web site.

A number of agencies routinely accept oral public records requests (for example, asking to look at a building permit). Some agencies find oral requests to be the best way to provide certain kinds of records. However, for some requests such as larger ones, oral requests may be allowed but are problematic. An oral request does not memorialize the exact records sought and therefore prevents a requestor or agency from later proving what was included in the request. Furthermore, as described in WAC 44-14-04002(1), a requestor must provide the agency with reasonable notice that the request is for the disclosure of public records; oral requests, especially to agency staff other than the public records officer or designee, may not provide the agency with the required reasonable notice. Therefore, requestors are strongly encouraged to make written requests. If an agency receives an oral request, the agency staff person receiving it should immediately reduce it to writing and then verify in writing with the requestor that it correctly memorializes the request.

An agency should have a public records request form. An agency request form should ask the requestor whether he or she seeks to inspect the records, receive a copy of them, or to inspect the records first and then consider selecting records to copy. An agency request form should recite that inspection of records is free and provide the per-page charge for standard photocopies.

An agency request form should require the requestor to provide contact information so the agency can communicate with the requestor to, for example, clarify the request, inform the requestor that the records are available, or provide an explanation of an exemption. Contact information such as a name, phone number, and address or e-mail should be provided. Requestors should provide an e-mail address because it is an efficient means of communication and creates a written record of the communications between them and the agency. An agency should not require a requestor to provide a driver's license number, date of birth, or photo identification. This information is not necessary for the agency to contact the requestor and requiring it might intimidate some requestors.

An agency may ask a requestor to prioritize the records he or she is requesting so that the agency is able to provide the most important records first. An agency is not required to ask for prioritization, and a requestor is not required to provide it.

An agency cannot require the requestor to disclose the purpose of the request with two exceptions. RCW 42.17.270/42.56.080. First, if the request is for a list of individuals, an agency may ask the requestor if he or she intends to use the records for a commercial purpose.[2] An agency should specify on its request form that the agency is not authorized to provide public records consisting of a list of individuals for a commercial use. RCW 42.17.260(9)/42.56.070(9).

Second, an agency may seek information sufficient to allow it to determine if another statute prohibits disclosure. For example, some statutes allow an agency to disclose a record only to a claimant for benefits or his or her representative. In such cases, an agency is authorized to ask the requestor if he or she fits this criterion.

An agency is not authorized to require a requestor to indemnify the agency. Op. Att'y Gen. 12 (1988).[3]

Notes: [1]*Hangartner v. City of Seattle*, 151 Wn.2d 439, 447, 90 P.3d 26 (2004) ("there is no official format for a valid PDA request.").

[2]Op. Att'y Gen. 12 (1988), at 11; Op. Att'y Gen. 2 (1998), at 4.

[3]RCW 42.17.258/42.56.060 provides: "No public agency, public official, public employee, or custodian shall be liable, nor shall a cause of action exist, for any loss or damage based upon the release of a public record if the public agency, public official, public employee, or custodian acted in good faith in attempting to comply with the provisions of this chapter." Therefore, an agency has little need for an indemnification clause. Requiring a requestor to indemnify an agency inhibits some requestors from exercising their right to request public records. Op. Att'y Gen. 12 (1988), at 11.

PROCESSING OF PUBLIC RECORDS REQUESTS—GENERAL

NEW SECTION

WAC 44-14-040 Processing of public records requests—general. (1) **Providing "fullest assistance."** The (name of agency) is charged by statute with adopting rules which provide for how it will "provide full access to public records," "protect records from damage or disorganization," "prevent excessive interference with other essential functions of the agency," provide "fullest assistance" to requestors, and provide the "most timely possible action" on public records requests. The public records officer or designee will process requests in the order allowing the most requests to be processed in the most efficient manner.

(2) **Acknowledging receipt of request.** Within five business days of receipt of the request, the public records officer will do one or more of the following:

(a) Make the records available for inspection or copying;

(b) If copies are requested and payment of a deposit for the copies, if any, is made or terms of payment are agreed upon, send the copies to the requestor;

(c) Provide a reasonable estimate of when records will be available; or

(d) If the request is unclear or does not sufficiently identify the requested records, request clarification from the requestor. Such clarification may be requested and provided by telephone. The public records officer or designee may revise the estimate of when records will be available; or

(e) Deny the request.

(3) **Consequences of failure to respond.** If the (name of agency) does not respond in writing within five business days of receipt of the request for disclosure, the requestor should consider contacting the public records officer to determine the reason for the failure to respond.

(4) **Protecting rights of others.** In the event that the requested records contain information that may affect rights of others and may be exempt from disclosure, the public records officer may, prior to providing the records, give notice to such others whose rights may be affected by the disclosure. Such notice should be given so as to make it possible for those other persons to contact the requestor and ask him or her to revise the request, or, if necessary, seek an order from a court to prevent or limit the disclosure. The notice to the affected persons will include a copy of the request.

(5) **Records exempt from disclosure.** Some records are exempt from disclosure, in whole or in part. If the (name of agency) believes that a record is exempt from disclosure and should be withheld, the public records officer will state the specific exemption and provide a brief explanation of why the record or a portion of the record is being withheld. If only a portion of a record is exempt from disclosure, but the remainder is not exempt, the public records officer will redact the exempt portions, provide the nonexempt portions, and indicate to the requestor why portions of the record are being redacted.

(6) **Inspection of records.**

(a) Consistent with other demands, the (name of agency) shall promptly provide space to inspect public records. No member of the public may remove a document from the viewing area or disassemble or alter any document. The requestor shall indicate which documents he or she wishes the agency to copy.

(b) The requestor must claim or review the assembled records within thirty days of the (name of agency's) notification to him or her that the records are available for inspection or copying. The agency will notify the requestor in writing of this requirement and inform the requestor that he or she should contact the agency to make arrangements to claim or review the records. If the requestor or a representative of the requestor fails to claim or review the records within the thirty-day period or make other arrangements, the (name of agency) may close the request and refile the assembled records. Other public records requests can be processed ahead of a subsequent request by the same person for the same or almost identical records, which can be processed as a new request.

(7) **Providing copies of records.** After inspection is complete, the public records officer or designee shall make the requested copies or arrange for copying.

(8) **Providing records in installments.** When the request is for a large number of records, the public records officer or designee will provide access for inspection and copying in installments, if he or she reasonably determines that it would be practical to provide the records in that way. If, within thirty days, the requestor fails to inspect the entire set of records or one or more of the installments, the public records officer or designee may stop searching for the remaining records and close the request.

(9) **Completion of inspection.** When the inspection of the requested records is complete and all requested copies are provided, the public records officer or designee will indicate that the (name of agency) has completed a diligent search for the requested records and made any located nonexempt records available for inspection.

(10) **Closing withdrawn or abandoned request.** When the requestor either withdraws the request or fails to fulfill his or her obligations to inspect the records or pay the deposit or final payment for the requested copies, the public records officer will close the request and indicate to the requestor that the (name of agency) has closed the request.

(11) **Later discovered documents.** If, after the (name of agency) has informed the requestor that it has provided all available records, the (name of agency) becomes aware of additional responsive documents existing at the time of the request, it will promptly inform the requestor of the additional documents and provide them on an expedited basis.

Comments on WAC 44-14-040

NEW SECTION

WAC 44-14-04001 Introduction. Both requestors and agencies have responsibilities under the act. The public records process can function properly only when both parties perform their respective responsibilities. An agency has a duty to promptly provide access to all nonexempt public records.[1] A requestor has a duty to request identifiable records, inspect the assembled records or pay for the copies, and be respectful to agency staff.[2]

Requestors should keep in mind that all agencies have essential functions in addition to providing public records. Agencies also have greatly differing resources. The act recognizes that agency public records procedures should prevent "excessive interference" with the other "essential functions" of the agency. RCW 42.17.290/42.56.100. Therefore, while providing public records is an essential function of an agency, it is not required to abandon its other, nonpublic records functions. Agencies without a full-time public records officer may assign staff part-time to fulfill records requests, provided the agency is providing the "fullest assistance" and the "most timely possible" action on the request. The proper level of staffing for public records requests will vary among agencies, considering the complexity and number of requests to that agency, agency resources, and the agency's other functions.

The burden of proof is on an agency to prove its estimate of time to provide a full response is "reasonable." RCW 42.17.340(2)/42.56.550(2). An agency should be prepared to explain how it arrived at its estimate of time and why the estimate is reasonable.

Agencies are encouraged to use technology to provide public records more quickly and, if possible, less expensively. An agency is allowed, of course, to do more for the requestor than is required by the letter of the act. Doing so often saves the agency time and money in the long run, improves relations with the public, and prevents litigation. For example, agencies are encouraged to post many nonexempt records of broad public interest on the internet. This may result in fewer requests for public records. See RCW 43.105.270 (state agencies encouraged to post frequently sought documents on the internet).

Notes: [1] RCW 42.17.260(1)/42.56.070(1) (agency "shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions" listed in the act or other statute).

[2] *See* RCW 42.17.270/42.56.080 ("identifiable record" requirement); RCW 42.17.300/42.56.120 (claim or review requirement); RCW 42.17.290/42.56.100 (agency may prevent excessive interference with other essential agency functions).

NEW SECTION

WAC 44-14-04002 Obligations of requestors. (1) **Reasonable notice that request is for public records.** A requestor must give an agency reasonable notice that the request is being made pursuant to the act. Requestors are encouraged to cite or name the act but are not required to do so.[1] A request using the terms "public records," "public disclosure," "FOIA," or "Freedom of Information Act" (the terms commonly used for federal records requests) should provide an agency with reasonable notice in most cases. A requestor should not submit a "stealth" request, which is buried in another document in an attempt to trick the agency into not responding.

(2) **Identifiable record.** A requestor must request an "identifiable record" or "class of records" before an agency must respond to it. RCW 42.17.270/42.56.080 and 42.17.340 (1)/42.56.550(1). An "identifiable record" is one that agency staff can reasonably locate.[2] The act does not allow a requestor to search through agency files for records which cannot be reasonably identified or described to the agency.[3] However, a requestor is not required to identify the exact record he or she seeks. For example, if a requestor requested an agency's "2001 budget," but the agency only had a 2000-2002 budget, the requestor made a request for an identifiable record.[4]

An "identifiable record" is not a request for "information" in general.[5] For example, asking "what policies" an agency has for handling discrimination complaints is merely a request for "information."[6] A request to inspect or copy an agency's policies and procedures for handling discrimination complaints would be a request for an "identifiable record."

Public records requests are not interrogatories. An agency is not required to conduct legal research for a requestor.[7] A request for "any law that allows the county to impose taxes on me" is not a request for an identifiable record. Conversely, a request for "all records discussing the passage of this year's tax increase on real property" is a request for an "identifiable record."

When a request uses an inexact phrase such as all records "relating to" a topic (such as "all records relating to the property tax increase"), the agency may interpret the request to be for records which directly and fairly address the topic. When an agency receives a "relating to" or similar request, it should seek clarification of the request from the requestor.

(3) **"Overbroad" requests.** An agency cannot "deny a request for identifiable public records based solely on the basis that the request is overbroad." RCW 42.17.270/42.56.080. However, if such a request is not for identifiable records or otherwise is not proper, the request can still be denied. When confronted with a request that is unclear, an agency should seek clarification.

Notes: [1] *Wood v. Lowe*, 102 Wn. App. 872, 10 P.3d 494 (2000).

[2] *Bonamy v. City of Seattle*, 92 Wn. App. 403, 410, 960 P.2d 447 (1998), *review denied*, 137 Wn.2d 1012, 978 P.2d 1099 (1999) ("identifiable record" requirement is satisfied when there is a "reasonable description" of the record "enabling the government employee to locate the requested records.").

[3] *Limstrom v. Ladenburg*, 136 Wn.2d 595, 604, n.3, 963 P.2d 869 (1998), *appeal after remand*, 110 Wn. App. 133, 39 P.3d 351 (2002).

[4] *Violante v. King County Fire Dist. No. 20*, 114 Wn. App. 565, 571, n.4, 59 P.3d 109 (2002).

[5] *Bonamy*, 92 Wn. App. at 409.

[6] *Id*.

[7] *See Limstrom*, 136 Wn.2d at 604, n.3 (act does not require "an agency to go outside its own records and resources to try to identify or locate the record requested."); *Bonamy*, 92 Wn. App. at 409 (act "does not require agencies to research or explain public records, but only to make those records accessible to the public.").

NEW SECTION

WAC 44-14-04003 Responsibilities of agencies in processing requests. (1) **Similar treatment and purpose of the request.** The act provides: "Agencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request" (except to determine if the request is for a commercial use or would violate another statute prohibiting disclosure). RCW 42.17.270/42.56.080.[1] The act also requires an agency to take the "most timely possible action on requests" and make records "promptly available." RCW 42.17.290/42.56.100 and 42.17.270/42.56.080. However, treating requestors similarly does not mean that agencies must process requests strictly in the order received because this might not be providing the "most timely possible action" for all requests. A relatively simple request need not wait for a long period of time while a much larger request is being fulfilled. Agencies are encouraged to be flexible and process as many requests as possible even if they are out of order.[3]

An agency cannot require a requestor to state the purpose of the request (with limited exceptions). RCW 42.17.270/42.56.080. However, in an effort to better understand the request and provide all responsive records, the agency can inquire about the purpose of the request. The requestor is not required to answer the agency's inquiry (with limited exceptions as previously noted).

(2) **Provide "fullest assistance" and "most timely possible action."** The act requires agencies to adopt and enforce

reasonable rules to provide for the "fullest assistance" to a requestor. RCW 42.17.290/42.56.100. The "fullest assistance" principle should guide agencies when processing requests. In general, an agency should devote sufficient staff time to processing records requests, consistent with the act's requirement that fulfilling requests should not be an "excessive interference" with the agency's "other essential functions." RCW 42.17.290/42.56.100. The agency should recognize that fulfilling public records requests is one of the agency's duties, along with its others.

The act also requires agencies to adopt and enforce rules to provide for the "most timely possible action on requests." RCW 42.17.290/42.56.100. This principle should guide agencies when processing requests. It should be noted that this provision requires the most timely "possible" action on requests. This recognizes that an agency is not always capable of fulfilling a request as quickly as the requestor would like.

(3) **Communicate with requestor.** Communication is usually the key to a smooth public records process for both requestors and agencies. Clear requests for a small number of records usually do not require predelivery communication with the requestor. However, when an agency receives a large or unclear request, the agency should communicate with the requestor to clarify the request. If the request is modified orally, the public records officer or designee should memorialize the communication in writing.

For large requests, the agency may ask the requestor to prioritize the request so that he or she receives the most important records first. If feasible, the agency should provide periodic updates to the requestor of the progress of the request. Similarly, the requestor should periodically communicate with the agency and promptly answer any clarification questions. Sometimes a requestor finds the records he or she is seeking at the beginning of a request. If so, the requestor should communicate with the agency that the requested records have been provided and that he or she is canceling the remainder of the request. If the requestor's cancellation communication is not in writing, the agency should confirm it in writing.

(4) **Failure to provide initial response within five business days.** Within five business days of receiving a request, an agency must provide an initial response to requestor. The initial response must do one of four things:

(a) Provide the record;

(b) Acknowledge that the agency has received the request and provide a reasonable estimate of the time it will require to fully respond;

(c) Seek a clarification of the request; or

(d) Deny the request. RCW 42.17.320/42.56.520. An agency's failure to provide an initial response is arguably a violation of the act.[2]

(5) **No duty to create records.** An agency is not obligated to create a new record to satisfy a records request.[4] However, sometimes it is easier for an agency to create a record responsive to the request rather than collecting and making available voluminous records that contain small pieces of the information sought by the requestor or find itself in a controversy about whether the request requires the creation of a new record. The decision to create a new record is left to the discretion of the agency. If the agency is considering creating a new record instead of disclosing the underlying records, it should obtain the consent of the requestor to ensure that the requestor is not actually seeking the underlying records.

(6) **Provide a reasonable estimate of the time to fully respond.** Unless it is providing the records or claiming an exemption from disclosure within the five-business day period, an agency must provide a reasonable estimate of the time it will take to fully respond to the request. RCW 42.17.320/42.56.520. Fully responding can mean processing the request (assembling records, redacting, preparing a withholding index, or notifying third parties named in the records who might seek an injunction against disclosure) or determining if the records are exempt from disclosure.

An estimate must be "reasonable." The act provides a requestor a quick and simple method of challenging the reasonableness of an agency's estimate. RCW 42.17.340(2)/42.56.550(2). See WAC 44-14-08004 (5)(b). The burden of proof is on the agency to prove its estimate is "reasonable." RCW 42.17.340(2)/42.56.550(2).

To provide a "reasonable" estimate, an agency should not use the same estimate for every request. An agency should roughly calculate the time it will take to respond to the request and send estimates of varying lengths, as appropriate. Some very large requests can legitimately take months or longer to fully provide. There is no standard amount of time for fulfilling a request so reasonable estimates should vary.

Some agencies send form letters with thirty-day estimates to all requestors, no matter the size or complexity of the request. Form letter thirty-day estimates are rarely "reasonable" because an agency, which has the burden of proof, could find it difficult to prove that every single request it receives would take the same thirty-day period.

In order to avoid unnecessary litigation over the reasonableness of an estimate, an agency should briefly explain to the requestor the basis for the estimate in the initial response. The explanation need not be elaborate but should allow the requestor to make a threshold determination of whether he or she should question that estimate further or has a basis to seek judicial review of the reasonableness of the estimate.

An agency should either fulfill the request within the estimated time or, if warranted, communicate with the requestor about clarifications or the need for a revised estimate. An agency should not ignore a request and then continuously send extended estimates. Routine extensions with little or no action to fulfill the request would show that the previous estimates probably were not "reasonable." Extended estimates are appropriate when the circumstances have changed (such as an increase in other requests or discovering that the request will require extensive redaction). An estimate can be revised when appropriate, but unwarranted serial extensions have the effect of denying a requestor access to public records.

(7) **Seek clarification of a request or additional time.** An agency may seek a clarification of an "unclear" request. RCW 42.17.320/42.56.520. An agency can only seek a clarification when the request is objectively "unclear." Seeking a "clarification" of an objectively clear request delays access to public records.

If the requestor fails to clarify an unclear request, the agency need not respond to it further. RCW 42.17.320/42.56.520. If the requestor does not respond to the agency's request for a clarification within thirty days of the agency's request, the agency may consider the request abandoned. If the agency considers the request abandoned, it should send a closing letter to the requestor.

An agency may take additional time to provide the records or deny the request if it is awaiting a clarification. RCW 42.17.320/42.56.520. After providing the initial response and perhaps even beginning to assemble the records, an agency might discover it needs to clarify a request and is allowed to do so. A clarification could also affect a reasonable estimate.

(8) **Preserving requested records.** If a requested record is scheduled shortly for destruction, and the agency receives a public records request for it, the record cannot be destroyed until the request is resolved. RCW 42.17.290/42.56.100.[5] Once a request has been closed, the agency can destroy the requested records in accordance with its retention schedule.

(9) **Searching for records.** An agency must conduct an objectively reasonable search for responsive records. A requestor is not required to "ferret out" records on his or her own.[6] A reasonable agency search usually begins with the public records officer for the agency or a records coordinator for a department of the agency deciding where the records are likely to be and who is likely to know where they are. One of the most important parts of an adequate search is to decide how wide the search will be. If the agency is small, it might be appropriate to initially ask all agency employees if they have responsive records. If the agency is larger, the agency may choose to initially ask only the staff of the department or departments of an agency most likely to have the records. For example, a request for records showing or discussing payments on a public works project might initially be directed to all staff in the finance and public works departments if those departments are deemed most likely to have the responsive documents, even though other departments may have copies or alternative versions of the same documents. Meanwhile, other departments that may have documents should be instructed to preserve their records in case they are later deemed to be necessary to respond to the request. The agency could notify the requestor which departments are being surveyed for the documents so the requestor may suggest other departments. It is better to be over inclusive rather than under inclusive when deciding which staff should be contacted, but not everyone in an agency needs to be asked if there is no reason to believe he or she has responsive records. An e-mail to staff selected as most likely to have responsive records is usually sufficient. Such an e-mail also allows an agency to document whom it asked for records.

Agency policies should require staff to promptly respond to inquiries about responsive records from the public records officer.

After records which are deemed responsive are located, an agency should take reasonable steps to narrow down the number of records to those which are responsive. In some cases, an agency might find it helpful to consult with the requestor on the scope of the documents to be assembled. An agency cannot "bury" a requestor with nonresponsive documents. However, an agency is allowed to provide arguably, but not clearly, responsive records to allow the requestor to select the ones he or she wants, particularly if the requestor is unable or unwilling to help narrow the scope of the documents.

(10) **Expiration of reasonable estimate.** An agency should provide a record within the time provided in its reasonable estimate or communicate with the requestor that additional time is required to fulfill the request based on specified criteria. Unjustified failure to provide the record by the expiration of the estimate is a denial of access to the record.

(11) **Notice to affected third parties.** Sometimes an agency decides it must release all or a part of a public record affecting a third party. The third party can file an action to obtain an injunction to prevent an agency from disclosing it, but the third party must prove the record or portion of it is exempt from disclosure.[7] RCW 42.17.330/42.56.540. Before sending a notice, an agency should have a reasonable belief that the record is arguably exempt. Notices to affected third parties when the records could not reasonably be considered exempt might have the effect of unreasonably delaying the requestor's access to a disclosable record.

The act provides that before releasing a record an agency may, at its "option," provide notice to a person named in a public record or to whom the record specifically pertains (unless notice is required by law). RCW 42.17.330/42.56.-540. This would include all of those whose identity could reasonably be ascertained in the record and who might have a reason to seek to prevent the release of the record. An agency has wide discretion to decide whom to notify or not notify. First, an agency has the "option" to notify or not (unless notice is required by law). RCW 42.17.330/42.56.540. Second, if it acted in good faith, an agency cannot be held liable for its failure to notify enough people under the act. RCW 42.17.258/42.56.060. However, if an agency had a contractual obligation to provide notice of a request but failed to do so, the agency might lose the immunity provided by RCW 42.17.258/42.56.060 because breaching the agreement probably is not a "good faith" attempt to comply with the act.

The practice of many agencies is to give ten days' notice. Many agencies expressly indicate the deadline date to avoid any confusion. More notice might be appropriate in some cases, such as when numerous notices are required, but every additional day of notice is another day the potentially disclosable record is being withheld. When it provides a notice, the agency should include the notice period in the "reasonable estimate" it provides to a requestor.

The notice informs the third party that release will occur on the stated date unless he or she obtains an order from a court enjoining release. The requestor has an interest in any legal action to prevent the disclosure of the records he or she requested. Therefore, the agency's notice should inform the third party that he or she should name the requestor as a party to any action to enjoin disclosure. If an injunctive action is filed, the third party or agency should name the requestor as a party or, at a minimum, must inform the requestor of the action to allow the requestor to intervene.

(12) **Later discovered records.** If the agency becomes aware of the existence of records responsive to a request

which were not provided, the agency should notify the requestor in writing and provide a brief explanation of the circumstances.

Notes: [1]*See also* Op. Att'y Gen. 2 (1998).

[2]*See Smith v. Okanogan County*, 100 Wn. App. 7, 13, 994 P.2d 857 (2000) ("When an agency fails to respond as provided in RCW 42.17.320 (42.56.520), it violates the act and the individual requesting the public record is entitled to a statutory penalty.").

[3]While an agency can fulfill requests out of order, an agency is not allowed to ignore a large request while it is exclusively fulfilling smaller requests. The agency should strike a balance between fulfilling small and large requests.

[4]*Smith*, 100 Wn. App. at 14.

[5]An exception is some state-agency employee personnel records. RCW 42.17.295/42.56.110.

[6]*Daines v. Spokane County*, 111 Wn. App. 342, 349, 44 P.3d 909 (2002) ("an applicant need not exhaust his or her own ingenuity to 'ferret out' records through some combination of 'intuition and diligent research'").

[7]The agency holding the record can also file a RCW 42.17.330/42.56.540 injunctive action to establish that it is not required to release the record or portion of it.

NEW SECTION

WAC 44-14-04004 Responsibilities of agency in providing records. (1) **General.** An agency may simply provide the records or make them available within the five-business day period of the initial response. When it does so, an agency should also provide the requestor a written cover letter or e-mail briefly describing the records provided and informing the requestor that the request has been closed. This assists the agency in later proving that it provided the specified records on a certain date and told the requestor that the request had been closed. However, a cover letter or e-mail might not be practical in some circumstances, such as when the agency provides a small number of records or fulfills routine requests.

An agency can, of course, provide the records sooner than five business days. Providing the "fullest assistance" to a requestor would mean providing a readily available record as soon as possible. For example, an agency might routinely prepare a premeeting packet of documents three days in advance of a city council meeting. The packet is readily available so the agency should provide it to a requestor on the same day of the request so he or she can have it for the council meeting.

(2) **Means of providing access.** An agency must make nonexempt public records "available" for inspection or provide a copy. RCW 42.17.270/42.56.080. An agency is only required to make records "available" and has no duty to explain the meaning of public records.[1] Making records available is often called "access."

Access to a public record can be provided by allowing inspection of the record, providing a copy, or posting the record on the agency's web site and assisting the requestor in finding it (if necessary). An agency must mail a copy of records if requested and if the requestor pays the actual cost of postage and the mailing container.[2] The requestor can specify which method of access (or combination, such as inspection and then copying) he or she prefers. Different processes apply to requests for inspection versus copying (such as copy charges) so an agency should clarify with a requestor whether he or she seeks to inspect or copy a public record.

An agency can provide access to a public record by posting it on its web site. If requested, an agency should provide reasonable assistance to a requestor in finding a public record posted on its web site. If the requestor does not have internet access, the agency may provide access to the record by allowing the requestor to view the record on a specific computer terminal at the agency open to the public. An agency is not required to do so. Despite the availability of the record on the agency's web site, a requestor can still make a public records request and inspect the record or obtain a copy of it by paying the appropriate per-page copying charge.

(3) **Providing records in installments.** The act now provides that an agency must provide records "if applicable, on a partial or installment basis as records that are part of a larger set of requested records are assembled or made ready for inspection or disclosure." RCW 42.17.270/42.56.080. The purpose of this provision is to allow requestors to obtain records in installments as they are assembled and to allow agencies to provide records in logical batches. The provision is also designed to allow an agency to only assemble the first installment and then see if the requestor claims or reviews it before assembling the next installments.

Not all requests should be provided in installments. For example, a request for a small number of documents which are located at nearly the same time should be provided all at once. Installments are useful for large requests when, for example, an agency can provide the first box of records as an installment. An agency has wide discretion to determine when providing records in installments is "applicable." However, an agency cannot use installments to delay access by, for example, calling a small number of documents an "installment" and sending out separate notifications for each one. The agency must provide the "fullest assistance" and the "most timely possible action on requests" when processing requests. RCW 42.17.290/42.56.100.

(4) **Failure to provide records.** A "denial" of a request can occur when an agency:

Does not have the record;

Fails to respond to a request;

Claims an exemption of the entire record or a portion of it; or

Without justification, fails to provide the record after the reasonable estimate expires.

(a) **When the agency does not have the record.** An agency is only required to provide access to public records it has or has used.[3] An agency is not required to create a public record in response to a request.

An agency must only provide access to public records in existence at the time of the request. An agency is not obligated to supplement responses. Therefore, if a public record is created or comes into the possession of the agency after the request is received by the agency, it is not responsive to the request and need not be provided. A requestor must make a new request to obtain subsequently created public records.

Sometimes more than one agency holds the same record. When more than one agency holds a record, and a requestor makes a request to the first agency, the first agency cannot respond to the request by telling the requestor to obtain the

record from the second agency. Instead, an agency must provide access to a record it holds regardless of its availability from another agency.[4]

An agency is not required to provide access to records that were not requested. An agency does not "deny" a request when it does not provide records that are outside the scope of the request because they were never asked for.

(b) **Claiming exemptions.**

(i) **Redactions.** If a portion of a record is exempt from disclosure, but the remainder is not, an agency generally is required to redact (black out) the exempt portion and then provide the remainder. RCW 42.17.310(2)/42.56.210(2). There are a few exceptions.[5] Withholding an entire record where only a portion of it is exempt violates the act.[6] Some records are almost entirely exempt but small portions remain nonexempt. For example, information revealing the identity of a crime victim is exempt from disclosure. RCW 42.17.310 (1)(e)/42.56.210 (1)(e). If a requestor requested a police report in a case in which charges have been filed, the agency must redact the victim's identifying information but provide the rest of the report.

Statistical information "not descriptive of any readily identifiable person or persons" is generally not subject to redaction or withholding. RCW 42.17.310(2)/42.56.210(2). For example, if a statute exempted the identity of a person who had been assessed a particular kind of penalty, and an agency record showed the amount of penalties assessed against various persons, the agency must provide the record with the names of the persons redacted but with the penalty amounts remaining.

Originals should not be redacted. For paper records, an agency should redact materials by first copying the record and then either using a black marker on the copy or covering the exempt portions with copying tape, and then making a copy. It is often a good practice to keep the initial copies which were redacted in case there is a need to make additional copies for disclosure or to show what was redacted.

(ii) **Brief explanation of withholding.** When an agency claims an exemption for an entire record or portion of one, it must inform the requestor of the statutory exemption and provide a brief explanation of how the exemption applies to the record or portion withheld. RCW 42.17.310(4)/42.56.210 (4). The brief explanation should cite the statute the agency claims grants an exemption from disclosure. The brief explanation should provide enough information for a requestor to make a threshold determination of whether the claimed exemption is proper. Nonspecific claims of exemption such as "proprietary" or "privacy" are insufficient.

One way to properly provide a brief explanation of the withheld record or redaction is for the agency to provide a withholding index. It identifies the type of record, its date and number of pages, and the author or recipient of the record (unless their identity is exempt).[7] The withholding index need not be elaborate but should allow a requestor to make a threshold determination of whether the agency has properly invoked the exemption.

(5) **Notifying requestor that records are available.** If the requestor sought to inspect the records, the agency should notify him or her that the entire request or an installment is available for inspection and ask the requestor to contact the agency to arrange for a mutually agreeable time for inspection.[8] The notification should recite that if the requestor fails to inspect or copy the records or make other arrangements within thirty days of the date of the notification that the agency will close the request and refile the records. An agency might consider on a case-by-case basis sending the notification by certified mail to document that the requestor received it.

If the requestor sought copies, the agency should notify him or her of the projected costs and whether a copying deposit is required before the copies will be made. The notification can be oral to provide the most timely possible response.

(6) **Documenting compliance.** An agency should have a process to identify which records were provided to a requestor and the date of production. In some cases, an agency may wish to number-stamp or number-label paper records provided to a requestor to document which records were provided. The agency could also keep a copy of the numbered records so either the agency or requestor can later determine which records were or were not provided. However, the agency should balance the benefits of stamping or labeling the documents and making extra copies against the costs and burdens of doing so.

If memorializing which specific documents were offered for inspection is impractical, an agency might consider documenting which records were provided for inspection by making an index or list of the files or records made available for inspection.

Notes:

[1] *Bonamy v. City of Seattle*, 92 Wn. App. 403, 409, 960 P.2d 447 (1998), *review denied*, 137 Wn.2d 1012, 978 P.2d 1099 (1999).

[2] *Am. Civil Liberties Union v. Blaine Sch. Dist. No. 503*, 86 Wn. App. 688, 695, 937 P.2d 1176 (1997).

[3] *Sperr v. City of Spokane*, 123 Wn. App. 132, 136-37, 96 P.3d 1012 (2004).

[4] *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 132, 580 P.2d 246 (1978).

[5] The two main exceptions to the redaction requirement are state "tax information" (RCW 82.32.330 (1)(c)) and law enforcement case files in active cases (*Newman v. King County*, 133 Wn.2d 565, 574, 947 P.2d 712 (1997). Neither of these two kinds of records must be redacted but rather may be withheld in their entirety.

[6] *Seattle Fire Fighters Union Local No. 27 v. Hollister*, 48 Wn. App. 129, 132, 737 P.2d 1302 (1987).

[7] *Progressive Animal Welfare Soc'y. v. Univ. of Wash.*, 125 Wn.2d 243, 271, n.18, 884 P.2d 592 (1994) ("*PAWS II*").

[8] For smaller requests, the agency might simply provide them with the initial response or earlier so no notification is necessary.

NEW SECTION

WAC 44-14-04005 Inspection of records. (1) **Obligation of requestor to claim or review records.** After the agency notifies the requestor that the records or an installment of them are ready for inspection or copying, the requestor must claim or review the records or the installment. RCW 42.17.300/42.56.120. If the requestor cannot claim or review the records him or herself, a representative may do so within the thirty-day period. Other arrangements can be mutually agreed to between the requestor and the agency.

If a requestor fails to claim or review the records or an installment after the expiration of thirty days, an agency is authorized to stop assembling the remainder of the records or making copies. RCW 42.17.300/42.56.120. If the request is abandoned, the agency is no longer bound by the records retention requirements of the act prohibiting the scheduled destruction of a requested record. RCW 42.17.290/42.56.-100.

If a requestor fails to claim or review the records or any installment of them within the thirty-day notification period, the agency may close the request and refile the records. If a requestor who has failed to claim or review the records then requests the same or almost identical records again, the agency, which has the flexibility to prioritize its responses to be most efficient to all requestors, can process the repeat request for the now-refiled records as a new request after other pending requests.

(2) **Time, place, and conditions for inspection.** Inspection should occur at a time mutually agreed (within reason) by the agency and requestor. An agency should not limit the time for inspection to times in which the requestor is unavailable. Requestors cannot dictate unusual times for inspection. The agency is only required to allow inspection during the agency's customary office hours. RCW 42.17.280/42.56.-090. Often an agency will provide the records in a conference room or other office area.

The inspection of records cannot create "excessive interference" with the other "essential functions" of the agency. RCW 42.17.290/42.56.100. Similarly, copying records at agency facilities cannot "unreasonably disrupt" the operations of the agency. RCW 42.17.270/42.56.080.

An agency may have an agency employee observe the inspection or copying of records by the requestor to ensure they are not destroyed or disorganized. RCW 42.17.290/42.56.100. A requestor cannot alter, mark on, or destroy an original record during inspection. To select a paper record for copying during an inspection, a requestor must use a nonpermanent method such as a removable adhesive note or paper clip.

Inspection times can be broken down into reasonable segments such as half days. However, inspection times cannot be broken down into unreasonable segments to either harass the agency or delay access to the timely inspection of records.

Note: [1]*See, e.g.*, WAC 296-06-120 (department of labor and industries provides thirty days to claim or review records).

NEW SECTION

WAC 44-14-04006 Closing request and documenting compliance. (1) **Fulfilling request and closing letter.** A records request has been fulfilled and can be closed when a requestor has inspected all the requested records, all copies have been provided, a web link has been provided (with assistance from the agency in finding it, if necessary), an unclear request has not been clarified, a request or installment has not been claimed or reviewed, or the requestor cancels the request. An agency should provide a closing letter stating the scope of the request and memorializing the outcome of the request. A closing letter may not be necessary for smaller requests. The outcome described in the closing letter might be that the requestor inspected records, copies were provided (with the number range of the stamped or labeled records, if applicable), the agency sent the requestor the web link, the requestor failed to clarify the request, the requestor failed to claim or review the records within thirty days, or the requestor canceled the request. The closing letter should also ask the requestor to promptly contact the agency if he or she believes additional responsive records have not been provided.

(2) **Returning assembled records.** An agency is not required to keep assembled records set aside indefinitely. This would "unreasonably disrupt" the operations of the agency. RCW 42.17.270/42.56.080. After a request has been closed, an agency should return the assembled records to their original locations. Once returned, the records are no longer subject to the prohibition on destroying records scheduled for destruction under the agency's retention schedule. RCW 42.17.290/42.56.100.

(3) **Retain copy of records provided.** In some cases, it may be wise for the agency to keep a separate copy of the records it copied and provided in response to a request. This allows the agency to document what was provided. A growing number of requests are for a copy of the records provided to another requestor, which can easily be fulfilled if the agency retains a copy of the records provided to the first requestor. The copy of the records provided should be retained for a period of time consistent with the agency's retention schedules for records related to disclosure of documents.

NEW SECTION

WAC 44-14-04007 Later-discovered records. An agency has no obligation to search for records responsive to a closed request. Sometimes an agency discovers responsive records after a request has been closed. An agency should provide the later-discovered records to the requestor.

NEW SECTION

WAC 44-14-050 Reserved.

EXEMPTIONS

NEW SECTION

WAC 44-14-060 Exemptions. (1) The Public Records Act provides that a number of types of documents are exempt from public inspection and copying. In addition, documents are exempt from disclosure if any "other statute" exempts or prohibits disclosure. Requestors should be aware of the following exemptions, outside the Public Records Act, that restrict the availability of some documents held by (name of agency) for inspection and copying:

(List other laws)

(2) The (agency) is prohibited by statute from disclosing lists of individuals for commercial purposes.

Comments to WAC 44-14-060

NEW SECTION

WAC 44-14-06001 Agency must publish list of applicable exemptions. An agency must publish and maintain a list of the "other statute" exemptions from disclosure (that is, those exemptions found outside the Public Records Act) that it believes potentially exempt records it holds from disclosure. RCW 42.17.260(2)/42.56.070(2). The list is "for informational purposes" only and an agency's failure to list an exemption "shall not affect the efficacy of any exemption." RCW 42.17.260(2)/42.56.070(2). A list of possible "other statute" exemptions is posted on the web site of the Municipal Research Service Center at www.mrsc.org/Publications/prdpub04.pdf (scroll to Appendix C).

NEW SECTION

WAC 44-14-06002 Summary of exemptions. (1) **General.** The act and other statutes contain hundreds of exemptions from disclosure and dozens of court cases interpret them. A full treatment of all exemptions is beyond the scope of the model rules. Instead, these comments to the model rules provide general guidance on exemptions and summarize a few of the most frequently invoked exemptions. However, the scope of exemptions is determined exclusively by statute and case law; the comments to the model rules merely provide guidance on a few of the most common issues.

An exemption from disclosure will be narrowly construed in favor of disclosure. RCW 42.17.251/42.56.030. An exemption from disclosure must specifically exempt a record or portion of a record from disclosure. RCW 42.17.260(1)/42.56.070(1). An exemption will not be inferred.[1]

An agency cannot define the scope of a statutory exemption through rule making or policy.[2] An agency agreement or promise not to disclose a record cannot make a disclosable record exempt from disclosure. RCW 42.17.260(1)/42.56.070(1).[3] Any agency contract regarding the disclosure of records should recite that the act controls.

An agency must describe why each withheld record or redacted portion of a record is exempt from disclosure. RCW 42.17.310(4)/42.56.210(4). One way to describe why a record was withheld or redacted is by using a withholding index.

After invoking an exemption in its response, an agency may revise its original claim of exemption in a response to a motion to show cause.[4]

Exemptions are "permissive rather than mandatory." Op. Att'y Gen. 1 (1980), at 5. Therefore, an agency has the discretion to provide an exempt record. However, in contrast to a waivable "exemption," an agency cannot provide a record when a statute makes it "confidential" or otherwise prohibits disclosure. For example, the Health Care Information Act generally prohibits the disclosure of medical information without the patient's consent. RCW 70.02.020(1). If a statute classifies information as "confidential" or otherwise prohibits disclosure, an agency has no discretion to release a record or the confidential portion of it.[5] Some statutes provide civil and criminal penalties for the release of particular "confidential" records. See RCW 82.32.330(5) (release of certain state tax information a misdemeanor).

(2) **"Privacy" exemption.** There is no general "privacy" exemption. Op. Att'y Gen. 12 (1988).[6] However, a few specific exemptions incorporate privacy as one of the elements of the exemption. For example, personal information in agency employee files is exempt to the extent that disclosure would violate the employee's right to "privacy." RCW 42.17.310 (1)(b)/42.56.210 (1)(b). "Privacy" is then one of the elements, in addition to the others in RCW 42.17.310 (1)(b)/42.56.210 (1)(b), that an agency or a third party resisting disclosure must prove.

"Privacy" is defined in RCW 42.17.255/42.56.050 as the disclosure of information that "(1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public." This is a two-part test requiring the party seeking to prevent disclosure to prove both elements.[7]

Because "privacy" is not a stand-alone exemption, an agency cannot claim RCW 42.17.255/42.56.050 as an exemption.[8]

(3) **Attorney-client privilege.** The attorney-client privilege statute, RCW 5.60.060 (2)(a), is an "other statute" exemption from disclosure.[9] In addition, RCW 42.17.310 (1)(j)/42.56.210 (1)(j) exempts attorney work-product involving a "controversy," which means completed, existing, or reasonably anticipated litigation involving the agency.[10] The exact boundaries of the attorney-client privilege and work-product doctrine is beyond the scope of these comments. However, in general, the attorney-client privilege covers records reflecting communications transmitted in confidence between a public official or employee of a public agency acting in the performance of his or her duties and an attorney serving in the capacity of legal advisor for the purpose of rendering or obtaining legal advice, and records prepared by the attorney in furtherance of the rendition of legal advice. The attorney-client privilege does not exempt records merely because they reflect communications in meetings where legal counsel was present or because a record or copy of a record was provided to legal counsel if the other elements of the privilege are not met.[11] A guidance document prepared by the attorney general's office on the attorney-client privilege and work-product doctrine is available at www.atg.wa.gov/records/modelrules.

(4) **Deliberative process exemption.** RCW 42.17.310 (1)(i)/42.56.210 (1)(i) exempts "Preliminary drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated or recommended" except if the record is cited by the agency.

In order to rely on this exemption, an agency must show that the records contain predecisional opinions or recommendations of subordinates expressed as part of a deliberative process; that disclosure would be injurious to the deliberative or consultative function of the process; that disclosure would inhibit the flow of recommendations, observations, and opinions; and finally, that the materials covered by the exemption reflect policy recommendations and opinions and not the raw factual data on which a decision is based.[12] Courts have held that this exemption is "severely limited" by its purpose, which is to protect the free flow of opinions by policy makers.[13] It applies only to those portions of a record containing

recommendations, opinions, and proposed policies; it does not apply to factual data contained in the record.[14] The exemption does not apply to records or portions of records concerning the implementation of policy or the factual basis for the policy.[15] The exemption does not apply merely because a record is called a "draft" or stamped "draft." Recommendations that are actually implemented lose their protection from disclosure after they have been adopted by the agency.[16]

(5) **"Overbroad" exemption.** There is no "overbroad" exemption. RCW 42.17.270/42.56.080. See WAC 44-14-04002(3).

(6) **Commercial use exemption.** The act does not allow an agency to provide access to "lists of individuals requested for commercial purposes." RCW 42.17.260(9)/42.56.070(9). An agency may require a requestor to sign a declaration that he or she will not put a list of individuals in the record to use for a commercial purpose.[17] This authority is limited to a list of individuals, not a list of companies.[18] A requestor who signs a declaration promising not to use a list of individuals for a commercial purpose, but who then violates this declaration, could arguably be charged with the crime of false swearing. RCW 9A.72.040.[19]

(7) **Trade secrets.** Many agencies hold sensitive proprietary information of businesses they regulate. For example, an agency might require an applicant for a regulatory approval to submit designs for a product it produces. A record is exempt from disclosure if it constitutes a "trade secret" under the Uniform Trade Secrets Act, chapter 19.108 RCW.[20] However, the definition of a "trade secret" can be very complex and often the facts showing why the record is or is not a trade secret are only known by the potential holder of the trade secret who submitted the record in question.

When an agency receives a request for a record that might be a trade secret, often it does not have enough information to determine whether the record arguably qualifies as a "trade secret." An agency is allowed additional time under the act to determine if an exemption might apply. RCW 42.17.320/42.56.520.

When an agency cannot determine whether a requested record contains a "trade secret," usually it should communicate with the requestor that the agency is providing the potential holder of the trade secret an opportunity to object to the disclosure. The agency should then contact the potential holder of the trade secret in question and state that the record will be released in a certain amount of time unless the holder files a court action seeking an injunction prohibiting the agency from disclosing the record under RCW 42.17.330/42.56.540. Alternatively, the agency can ask the potential holder of the trade secret for an explanation of why it contends the record is a trade secret, and state that if the record is not a trade secret or otherwise exempt from disclosure that the agency intends to release it. The agency should inform the potential holder of a trade secret that its explanation will be shared with the requestor. The explanation can assist the agency in determining whether it will claim the trade secret exemption. If the agency concludes that the record is arguably not exempt, it should provide a notice of intent to disclose unless the potential holder of the trade secret obtains an injunction preventing disclosure under RCW 42.17.330/42.56.540.

As a general matter, many agencies do not assert the trade secret exemption on behalf of the potential holder of the trade secret but rather allow the potential holder to seek an injunction.

Notes:

[1]*Progressive Animal Welfare Soc'y. v. Univ. of Wash.*, 125 Wn.2d 243, 262, 884 P.2d 592 (1994) ("*PAWS II*").

[2]*Servais v. Port of Bellingham*, 127 Wn.2d 820, 834, 904 P.2d 1124 (1995).

[3]*Spokane Police Guild v. Liquor Control Bd.*, 112 Wn.2d 30, 40, 769 P.2d 283 (1989); *Van Buren v. Miller*, 22 Wn. App. 836, 845, 592 P.2d 671, *review denied*, 92 Wn.2d 1021 (1979).

[4]*PAWS II*, 125 Wn.2d at 253.

[5]Op. Att'y Gen. 7 (1986).

[6]*See* RCW 42.17.255/42.56.050 ("privacy" linked to rights of privacy "specified in (the act) as express exemptions").

[7]*King County v. Sheehan*, 114 Wn. App. 325, 344, 57 P.3d 307 (2002).

[8]Op. Att'y Gen. 12 (1988), at 3 ("The legislature clearly repudiated the notion that agencies could withhold records based solely on general concerns about privacy.").

[9]*Hangartner v. City of Seattle*, 151 Wn.2d 439, 453, 90 P.3d 26 (2004).

[10]*Dawson v. Daly*, 120 Wn.2d 782, 791, 845 P.2d 995 (1993).

[11]This summary comes from the attorney general's proposed definition of the privilege in the first version of House Bill No. 1758 (2005).

[12]*PAWS II*, 125 Wn.2d at 256.

[13]*Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 133, 580 P.2d 246 (1978); *PAWS II*, 125 Wn.2d at 256.

[14]*PAWS II*, 125 Wn.2d at 256.

[15]*Cowles Pub. Co. v. City of Spokane*, 69 Wn. App. 678, 685, 849 P.2d 1271 (1993).

[16]*Dawson*, 120 Wn.2d at 793.

[17]Op. Att'y Gen. 12 (1988). However, a list of individuals applying for professional licensing or examination may be provided to professional associations recognized by the licensing or examination board. RCW 42.17.260(9)/42.56.070(9).

[18]Op. Att'y Gen. 2 (1998).

[19]RCW 9A.72.040 provides: "(1) A person is guilty of false swearing if he makes a false statement, which he knows to be false, under an oath required or authorized by law. (2) False swearing is a gross misdemeanor." RCW 42.17.270/42.56.080 authorizes an agency to determine if a requestor will use a list of individuals for commercial purpose. *See* Op. Att'y Gen. 12 (1988), at 10-11 (agency could require requestor to sign affidavit of noncommercial use).

[20]*PAWS II*, 125 Wn.2d at 262.

COSTS OF PROVIDING COPIES OF PUBLIC RECORDS

NEW SECTION

WAC 44-14-070 Costs of providing copies of public records. (1) **Costs for paper copies.** There is no fee for inspecting public records. A requestor may obtain standard black and white photocopies for (amount) cents per page and color copies for (amount) cents per page.

(If agency decides to charge more than fifteen cents per page, use the following language:) The (name of agency) charges (amount) per page for a standard black and white

photocopy of a record selected by a requestor. A statement of the factors and the manner used to determine this charge is available from the public records officer.

Before beginning to make the copies, the public records officer or designee may require a deposit of up to ten percent of the estimated costs of copying all the records selected by the requestor. The public records officer or designee may also require the payment of the remainder of the copying costs before providing all the records, or the payment of the costs of copying an installment before providing that installment. The (name of agency) will not charge sales tax when it makes copies of public records.

(2) **Costs for electronic records.** The cost of electronic copies of records shall be (amount) for information on a floppy disk and (amount) for information on a CD-ROM.

(3) **Costs of mailing.** The (name of agency) may also charge actual costs of mailing, including the cost of the shipping container.

(4) **Payment.** Payment may be made by cash, check, or money order to the (name of agency).

Comments to WAC 44-14-070

NEW SECTION

WAC 44-14-07001 General rules for charging for copies. (1) **No fees for costs of inspection.** An agency cannot charge a fee for locating public records or for preparing the records for inspection or copying. RCW 42.17.300/42.56.120.[1] An agency cannot charge a "redaction fee" for the staff time necessary to prepare the records for inspection, for the copying required to redact records before they are inspected, or an archive fee for getting the records from offsite. Op. Att'y Gen. 6 (1991). These are the costs of making the records available for inspection or copying and cannot be charged to the requestor.

(2) **Standard photocopy charges.** Standard photocopies are black and white 8x11 paper copies. An agency can choose to calculate its copying charges for standard photocopies or to opt for a default copying charge of no more than fifteen cents per page.

If it attempts to charge more than the fifteen cents per page maximum for photocopies, an agency must establish a statement of the "actual cost" of the copies it provides, which must include a "statement of the factors and the manner used to the determine the actual per page cost." RCW 42.17.260 (7)/42.56.070(7). An agency may include the costs "directly incident" to providing the copies such as paper, copying equipment, and staff time to make the copies. RCW 42.17.-260 (7)(a)/42.56.070 (7)(a).[2] An agency failing to properly establish a copying charge in excess of the default fifteen cents per page maximum is limited to the default amount. RCW 42.17.260 (7)(a) and (b)/42.56.070 (7)(a) and (b) and 42.17.300/42.56.120.

If it charges more than the default rate of fifteen cents per page, an agency must provide its calculations and the reasoning for its charges. RCW 42.17.260(7)/42.56.070(7) and 42.17.300/42.56.120.[3] A price list with no analysis is insufficient. An agency's calculations and reasoning need not be elaborate but should be detailed enough to allow a requestor or court to determine if the agency has properly calculated its copying charges. An agency should generally compare its copying charges to those of commercial copying centers.

If an agency opts for the default copying charge of fifteen cents per page, it need not calculate its actual costs. RCW 42.17.260(8)/42.56.070(8).

(3) **Charges for copies other than standard photocopies.** Nonstandard copies include color copies, engineering drawings, and photographs. An agency can charge its actual costs for nonstandard photocopies. RCW 42.17.300/42.56.120. For example, when an agency provides records in an electronic format by putting the records on a disk, it may charge its actual costs for the disk. The agency can provide a requestor with documentation for its actual costs by providing a catalog or price list from a vendor.

(4) **Copying charges apply to copies selected by requestor.** Often a requestor will seek to inspect a large number of records but only select a smaller group of them for copying. Copy charges can only be charged for the records selected by the requestor. RCW 42.17.300/42.56.120 (charges allowed for "providing" copies to requestor).

The requestor should specify whether he or she seeks inspection or copying. The agency should inform the requestor that inspection is free. This can be noted on the agency's request form. If the requestor seeks copies, then the agency should inform the requestor of the copying charges for the request. An agency should not assemble a large number of records, fail to inform the requestor that inspection is free, and then attempt to charge for copying all the records.

Sometimes a requestor will choose to pay for the copying of a large batch of records without inspecting them. This is allowed, provided that the requestor is informed that inspection is free. Informing the requestor on a request form that inspection is free is sufficient.

(5) **Use of outside vendor.** An agency is not required to copy records at its own facilities. An agency can send the project to a commercial copying center and bill the requestor for the amount charged by the vendor. An agency is encouraged to do so when an outside vendor can make copies more quickly and less expensively than an agency. An agency can arrange with the requestor for him or her to pay the vendor directly. An agency cannot charge the default fifteen cents per page rate when its "actual cost" at a copying vendor is less. The default rate is only for agency-produced copies. RCW 42.17.300/42.56.120.

(6) **Sales tax.** An agency cannot charge sales tax on copies it makes at its own facilities. RCW 82.12.02525.

(7) **Costs of mailing.** If a requestor asks an agency to mail copies, the agency may charge for the actual cost of postage and the shipping container (such as an envelope). RCW 42.17.260 (7)(a)/42.56.070 (7)(a).

Notes: [1]*See also* Op. Att'y Gen. 6 (1991).

[2]The costs of staff time is allowed only for making copies. An agency cannot charge for staff time for locating records or other noncopying functions. *See* RCW 42.17.300/42.56.120 ("No fee shall be charged for locating public documents and making them available for copying.").

[3]*See also* Op. Att'y Gen. 6 (1991) (agency must "justify" its copy charges).

NEW SECTION

WAC 44-14-07003 Charges for electronic records. Reserved.

NEW SECTION

WAC 44-14-07004 Other statutes govern copying of particular records. The act generally governs copying charges for public records, but several specific statutes govern charges for particular kinds of records. RCW 42.17.305/42.56.130. The following nonexhaustive list provides some examples: RCW 46.52.085 (charges for traffic accident reports), RCW 10.97.100 (copies of criminal histories), RCW 3.62.060 and 3.62.065 (charges for certain records of municipal courts), and RCW 70.58.107 (charges for birth certificates).

NEW SECTION

WAC 44-14-07005 Waiver of copying charges. An agency has the discretion to waive copying charges. For administrative convenience, many agencies waive copying charges for small requests. For example, the attorney general's office does not charge copying fees if the request is for twenty-five or fewer standard photocopies.

NEW SECTION

WAC 44-14-07006 Requiring partial payment. (1) **Copying deposit.** An agency may charge a deposit of up to ten percent of the estimated copying costs of an entire request before beginning to copy the records. RCW 42.17.300/42.56.120.[1] The estimate must be reasonable. An agency can require the payment of the deposit before copying an installment of the records or the entire request. The deposit applies to the records selected for copying by the requestor, not all the records made available for inspection. An agency is not required to charge a deposit. An agency might find a deposit burdensome for small requests where the deposit might be only a few dollars. Any unused deposit must be refunded to the requestor.

When copying is completed, the agency can require the payment of the remainder of the copying charges before providing the records. For example, a requestor makes a request for records that comprise one box of paper documents. The requestor selects the entire box for copying. The agency estimates that the box contains three thousand pages of records. The agency charges ten cents per page so the cost would be three hundred dollars. The agency obtains a ten percent deposit of thirty dollars and then begins to copy the records. The total number of pages turns out to be two thousand nine hundred so the total cost is two hundred ninety dollars. The thirty dollar deposit is credited to the two hundred ninety dollars. The agency requires payment of the remaining two hundred sixty dollars before providing the records to the requestor.

(2) **Copying charges for each installment.** If an agency provides records in installments, the agency may charge and collect all applicable copying fees (not just the ten percent deposit) for each installment. RCW 42.17.300/42.56.120. The agency may agree to provide an installment without first receiving payment for that installment.

Note: [1]*See* RCW 42.17.300/42.56.120 (ten percent deposit for "a request").

REVIEW OF DENIALS OF PUBLIC RECORDS

NEW SECTION

WAC 44-14-080 Review of denials of public records. (1) **Petition for internal administrative review of denial of access.** Any person who objects to the initial denial or partial denial of a records request may petition in writing (including e-mail) to the public records officer for a review of that decision. The petition shall include a copy of or reasonably identify the written statement by the public records officer or designee denying the request.

(2) **Consideration of petition for review.** The public records officer shall promptly provide the petition and any other relevant information to (public records officer's supervisor or other agency official designated by the agency to conduct the review). That person will immediately consider the petition and either affirm or reverse the denial within two business days following the (agency's) receipt of the petition, or within such other time as (name of agency) and the requestor mutually agree to.

(3) **(Applicable to state agencies only.) Review by the attorney general's office.** Pursuant to RCW 42.17.325/42.56.530, if the (name of state agency) denies a requestor access to public records because it claims the record is exempt in whole or in part from disclosure, the requestor may request the attorney general's office to review the matter. The attorney general has adopted rules on such requests in WAC 44-06-160.

(4) **Judicial review.** Any person may obtain court review of denials of public records requests pursuant to RCW 42.17.340/42.56.550 at the conclusion of two business days after the initial denial regardless of any internal administrative appeal.

Comments to WAC 44-14-080

NEW SECTION

WAC 44-14-08001 Agency internal procedure for review of denials of requests. The act requires an agency to "establish mechanisms for the most prompt possible review of decisions denying" records requests. RCW 42.17.320/42.56.520. An agency internal review of a denial need not be elaborate. It could be reviewed by the public records officer's supervisor, or other person designated by the agency. The act deems agency review to be complete two business days after the initial denial, after which the requestor may obtain judicial review. Large requests or requests involving many redactions may take longer than two business days for the agency to review. In such a case, the requestor could agree to a longer internal review period.

NEW SECTION

WAC 44-14-08002 Attorney general's office review of denials by state agencies. The attorney general's office is authorized to review a state agency's claim of exemption and provide a written opinion. RCW 42.17.325/42.56.530. This only applies to state agencies and a claim of exemption. See WAC 44-06-160. A requestor may initiate such a review by sending a request for review to Public Records Review, Office of the Attorney General, P.O. Box 40100, Olympia, Washington 98504-0100 or publicrecords@atg.wa.gov.

NEW SECTION

WAC 44-14-08003 Alternative dispute resolution. Requestors and agencies are encouraged to resolve public records disputes through alternative dispute resolution mechanisms such as mediation and arbitration. No mechanisms for formal alternative dispute resolution currently exist in the act but parties are encouraged to resolve their disputes without litigation.

NEW SECTION

WAC 44-14-08004 Judicial review. (1) **Seeking judicial review.** The act provides that an agency's decision to deny a request is final for purposes of judicial review two business days after the initial denial of the request. RCW 42.17.320/42.56.520.[1] Therefore, the statute allows a requestor to seek judicial review two business days after the initial denial whether or not he or she has exhausted the internal agency review process.[2] An agency should not have an internal review process that implies that a requestor cannot seek judicial review until internal reviews are complete because RCW 42.17.320/42.56.520 allows judicial review two business days after the initial denial.

The act provides a speedy remedy for a requestor to obtain a court hearing on whether the agency has violated the act. RCW 42.17.340 (1) and (2)/42.56.550 (1) and (2). The purpose of the quick judicial procedure is to allow requestors to expeditiously find out if they are entitled to obtain public records.[3] To speed up the court process, a public records case may be decided merely on the "motion" of a requestor and "solely on affidavits." RCW 42.17.340 (1) and (3)/42.56.550 (1) and (3).

(2) **Statute of limitations.** The statute of limitations for an action under the act is one year after the agency's claim of exemption or the last production of a record on a partial or installment basis. RCW 42.17.340(6)/42.56.550(6).

(3) **Procedure.** To initiate court review of a public records case, a requestor can file a "motion to show cause" which directs the agency to appear before the court and show any cause why the agency did not violate the act. RCW 42.17.340 (1) and (2)/42.56.550 (1) and (2).[4] The case must be filed in the superior court in the county in which the record is maintained. RCW 42.17.340 (1) and (2)/42.56.550 (1) and (2). In a case against a county, the case may be filed in the superior court of that county, or in the superior court of either of the two nearest adjoining counties. RCW 42.17.340(5)/42.56.550(5). The show-cause procedure is designed so that a nonattorney requestor can obtain judicial review himself or herself without hiring an attorney. A requestor can file a motion for summary judgment to adjudicate the case.[5] However, most cases are decided on a motion to show cause.[6]

(4) **Burden of proof.** The burden is on an agency to demonstrate that it complied with the act. RCW 42.17.340 (1) and (2)/42.56.550 (1) and (2).

(5) **Types of cases subject to judicial review.** The act provides three mechanisms for court review of a public records dispute.

(a) **Denial of record.** The first kind of judicial review is when a requestor's request has been denied by an agency. RCW 42.17.340(1)/42.56.550(1). This is the most common kind of case.

(b) **"Reasonable estimate."** The second form of judicial review is when a requestor challenges an agency's "reasonable estimate" of the time to provide a full response. RCW 42.17.340(2)/42.56.550(2).

(c) **Injunctive action to prevent disclosure.** The third mechanism of judicial review is an injunctive action to restrain the disclosure of public records. RCW 42.17.330/42.56.540. An action under this statute can be initiated by the agency, a person named in the disputed record, or a person to whom the record "specifically pertains." The party seeking to prevent disclosure has the burden of proving the record is exempt from disclosure.[7] The party seeking to prevent disclosure must prove both the necessary elements of an injunction and that a specific exemption prevents disclosure.[8]

(6) **"In camera" review by court.** The act authorizes a court to review withheld records or portions of records "in camera." RCW 42.17.340(3)/42.56.550(3). "In camera" means a confidential review by the judge alone in his or her chambers. Courts are encouraged to conduct an in camera review because it is often the only way to determine if an exemption has been properly claimed.[9]

An agency should prepare an in camera index of each withheld record or portion of a record to assist the judge's in camera review. This is a second index, in addition to a withholding index provided to the requestor. The in camera index should number each withheld record or redacted portion of the record, provide the unredacted record or portion to the judge with a reference to the index number, and provide a brief explanation of each claimed exemption corresponding to the numbering system. The agency's brief explanation should not be as detailed as a legal brief because the opposing party will not have an opportunity to review it and respond. The agency's legal briefing should be done in the normal course of pleadings, with the opposing party having an opportunity to respond.

The in camera index and disputed records or unredacted portions of records should be filed under seal. The judge should explain his or her ruling on each withheld record or redacted portion by referring to the numbering system in the in camera index. If the trial court's decision is appealed, the in camera index and its attachments should be made part of the record on appeal and filed under seal in the appellate court.

(7) **Attorneys' fees, costs, and penalties to prevailing requestor.** The act requires an agency to pay a prevailing requestor's reasonable attorneys' fees, costs, and a daily penalty. RCW 42.17.340(4)/42.56.550(4). Only a requestor can

be awarded attorneys' fees, costs, or a daily penalty under the act; an agency or a third party resisting disclosure cannot.[10] A requestor is the "prevailing" party when he or she obtains a judgment in his or her favor, the suit was reasonably necessary to obtain the record, or a wrongfully withheld record was provided for another reason.[11] In an injunctive action under RCW 42.17.330/42.56.540, the prevailing requestor cannot be awarded attorneys' fees, costs, or a daily penalty against an agency if the agency took the position that the record was subject to disclosure.[12]

The purpose of the act's attorneys' fees, costs, and daily penalty provisions is to reimburse the requestor for vindicating the public's right to obtain public records, to make it financially feasible for requestors to do so, and to deter agencies from improperly withholding records.[13] However, a court is only authorized to award "reasonable" attorneys' fees. RCW 42.17.340(4)/42.56.550(4). A court has discretion to award attorneys' fees based on an assessment of reasonable hourly rates and which work was necessary to obtain the favorable result.[14]

The award of "costs" under the act is for all of a requestor's nonattorney-fee costs and is broader than the court costs awarded to prevailing parties in other kinds of cases.[15]

A daily penalty of between five dollars to one hundred dollars must be awarded to a prevailing requestor, regardless of an agency's "good faith."[16] An agency's "bad faith" can warrant a penalty on the higher end of this scale.[17] The penalty is per day, not per-record per-day.[18]

Notes:

[1]*Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 253, 884 P.2d 592 (1994) ("*PAWS II*") (RCW 42.17.320/42.56.520 "provides that, regardless of internal review, initial decisions become final for purposes of judicial review after two business days.").

[2]*See, e.g.*, WAC 44-06-120 (attorney general's office internal review procedure specifying that review is final when the agency renders a decision on the appeal, or the close of the second business day after it receives the appeal, "whichever occurs first").

[3]*Spokane Research & Def. Fund v. City of Spokane*, 121 Wn. App. 584, 591, 89 P.3d 319 (2004), *reversed on other grounds*, 155 Wn.2d 89, 117 P.3d 1117 (2005) ("The purpose of the PDA is to ensure speedy disclosure of public records. The statute sets forth a simple procedure to achieve this.").

[4]*See generally Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 117 P.3d 1117 (2005).

[5]*Id.* at 106.

[6]*Wood v. Thurston County*, 117 Wn. App. 22, 27, 68 P.3d 1084 (2003).

[7]*Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wn.2d 735, 744, 958 P.2d 260 (1998).

[8]*PAWS II*, 125 Wn.2d at 257-58.

[9]*Spokane Research & Def. Fund v. City of Spokane*, 96 Wn. App. 568, 577 & 588, 983 P.2d 676 (1999), *review denied*, 140 Wn.2d 1001, 999 P.2d 1259 (2000).

[10]RCW 42.17.340(4)/42.56.550(4) (providing award only for "person" prevailing against "agency"); *Tiberino v. Spokane County Prosecutor*, 103 Wn. App. 680, 691-92, 13 P.3d 1104 (2000) (third party resisting disclosure not entitled to award).

[11]*Violante v. King County Fire Dist. No. 20*, 114 Wn. App. 565, 571, 59 P.3d 109 (2002); *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 104, 117 P.3d 1117 (2005).

[12]*Confederated Tribes*, 135 Wn.2d at 757.

[13]*Am. Civil Liberties Union v. Blaine Sch. Dist. No. 503*, 95 Wn. App. 106, 115, 975 P.2d 536 (1999) ("*ACLU II*") ("permitting a liberal recovery of costs is consistent with the policy behind the act by making it financially feasible for private citizens to enforce the public's right to access to public records.").

[14]*Id.* at 118.

[15]*Id.* at 115.

[16]*American Civil Liberties Union v. Blaine School Dist. No. 503*, 86 Wn. App. 688, 698-99, 937 P.2d 1176 (1997) ("*ACLU I*").

[17]*Id.*

[18]*Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 436, 98 P.3d 463 (2004).

WSR 06-04-088

PERMANENT RULES

DEPARTMENT OF SOCIAL AND HEALTH SERVICES

(Aging and Disability Services Administration)

[Filed January 31, 2006, 4:18 p.m., effective March 2, 2006]

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

Purpose: Chapter 388-826 WAC governs the program management of the voluntary placement program (VPP). The division of developmental disabilities is amending one section of the current rules and adding new rules to include the DDD VPP foster care assessment process and the rate structure. New rules include WAC 388-826-0130 through 388-826-0170. For clarity, WAC 388-826-0100, 388-826-0105, 388-826-0110, 388-826-0115, 388-826-0120 and 388-826-0125, were recodified to WAC 388-826-200, 388-826-0210, 388-826-0220, 388-826-0230, 388-826-0240, and 388-826-0250 respectively. See WSR 06-01-107.

Citation of Existing Rules Affected by this Order: Amending WAC 388-826-0085.

Statutory Authority for Adoption: RCW 71A.12.030, 74.13.350.

Other Authority: Title 71A RCW.

Adopted under notice filed as WSR 06-01-096 on December 21, 2005.

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

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

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

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 5, Amended 1, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 5, Amended 1, Repealed 0.

Date Adopted: January 25, 2006.

Andy Fernando, Manager
Rules and Policies Assistance Unit

AMENDATORY SECTION (Amending WSR 02-22-057, filed 10/31/02, effective 12/1/02)

WAC 388-826-0085 ((~~Are~~)) What other DDD services are available for a child through the voluntary placement program? (1) When a parent signs a voluntary placement agreement and the child ((~~enters~~)) is placed in the VPP outside the parental home, the child will no longer be eligible for services from the family support opportunity program, or the Medicaid Personal Care program. ((~~A parent will not be able to obtain other DDD services when the parent's child is in the VPP. The DDD VPP services will be authorized and obtained through the VPP. Some services will be similar to other DDD services, but they will not be paid for out of any other program, as long as the child is receiving services in the VPP~~))

(2) Children living with their parents may receive personal care services provided under chapter 388-71 WAC.

(3) If the child is covered under the DDD Core waiver as described in chapter 388-845 WAC, the child will receive the services identified on the Plan of Care.

NEW SECTION

WAC 388-826-0130 How is the foster care rate determined in VPP? (1) The basic foster care room and board rate is published by children's administration each year. See WAC 388-25-0120.

(2) The foster care assessment is completed annually by DDD to determine the amount of any specialized rate that will be paid to the foster parent in addition to the basic rate.

(3) The department administers the assessment with the foster parent. Based on information given by the foster parent and information gathered by the department, the standardized assessment will determine a score and assign a level.

(4) Algorithms determine the score corresponding to the care needs for each child. Each level is assigned a rate. The rate will be paid to the foster parent caring for the child.

NEW SECTION

WAC 388-826-0140 What areas are covered in the foster care assessment? (1) Areas covered in the foster care assessment include:

(a) Behaviors;

(b) Physical needs; and

(c) Therapeutic assistance and other activities requiring the assistance of the foster parent.

(2) These activities are beyond those needed by a typically developing child.

NEW SECTION

WAC 388-826-0150 What happens if the level assigned to the child changes? The care needs of all children in foster care will be reassessed annually or more often if a major life change occurs.

(1) A "major life change" is an unexpected, documented change in a child's medical or psychological condition that affects the level of care required.

(2) If the assessed level changes and results in a rate change, the foster parent will receive at least thirty days written notice of the rate change. The notice will include the date that the rate change takes effect.

NEW SECTION

WAC 388-826-0160 What limitations exist on administrative hearings regarding foster care payments in VPP? The foster care provider and the parents are not entitled to request an administrative hearing to dispute the established foster care rates.

NEW SECTION

WAC 388-826-0170 How are rates for licensed staffed residential homes determined in VPP? Rates for licensed staffed residential homes are determined by the department after review of the needs of the child, the proposal from the licensed staffed residential agency and the proposed staffing schedule.

WSR 06-04-089
PERMANENT RULES
DEPARTMENT OF SOCIAL AND HEALTH SERVICES
(Health and Recovery Services Administration)

[Filed January 31, 2006, 4:20 p.m., effective March 2, 2006]

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

Purpose: The department is amending this rule to clarify that the department uses both the encounter data and fee-for-service data to set prospective department-weighted costs-to-charges (DWCC) rates.

Citation of Existing Rules Affected by this Order: Amending WAC 388-550-2598.

Statutory Authority for Adoption: RCW 74.04.050, 74.08.090, 74.09.5225.

Adopted under notice filed as WSR 06-01-097 on December 21, 2005.

A final cost-benefit analysis is available by contacting Larry Linn, DSHS Health and Recovery Services Administration, P.O. Box 45510, Olympia, WA 98504-5510, phone (360) 725-1856, fax (360) 753-9152, e-mail linnld@dshs.wa.gov. (The preliminary cost-benefit analysis is unchanged and will be final.)

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

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

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

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

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

Date Adopted: January 25, 2006.

Andy Fernando, Manager
Rules and Policies Assistance Unit

AMENDATORY SECTION (Amending WSR 05-01-026, filed 12/3/04, effective 1/3/05)

WAC 388-550-2598 Critical access hospitals (CAHs). (1) The ((~~medical assistance administration (MAA)~~)) department reimburses eligible critical access hospitals (CAHs) for inpatient and outpatient hospital services provided to fee-for-service medical assistance clients on a cost basis, using departmental weighted costs-to-charges (DWCC) ratios and a retrospective cost settlement process.

(2) For inpatient and outpatient hospital services provided to clients enrolled in a managed care plan, DWCC rates for each CAH are incorporated into the calculations for the managed care capitated premiums. ((~~MAA~~)) The department considers managed care DWCC rates to be cost. Cost settlements are not performed for managed care claims.

(3) The following definitions and abbreviations and those found in WAC 388-500-0005 and 388-550-1050 apply to this section:

(a) "CAH," see "critical access hospital."

(b) "CAH HFY" see "CAH hospital fiscal year."

(c) "CAH hospital fiscal year" means each individual hospital's fiscal year.

(d) "Cost settlement" means a reconciliation of the fee-for-service interim CAH payments with a CAH's actual costs determined after the end of the CAH's HFY.

(e) "Critical access hospital (CAH)" means a hospital that is approved by the department of health (DOH) for inclusion in DOH's critical access hospital program.

(f) "Departmental weighted costs-to-charges (DWCC) rate" means a rate ((~~MAA~~)) the department uses to determine a CAH payment. See subsection (8) for how ((~~MAA~~)) the department calculates a DWCC rate.

(g) "DWCC rate" see "departmental weighted costs-to-charges (DWCC) rate."

(h) "Interim CAH payment" means the actual payment the department makes for claims submitted by a CAH for services provided during its current hospital fiscal year, using the appropriate DWCC rate, as determined by ((~~MAA~~)) the department.

(4) To be reimbursed as a CAH by ((~~MAA~~)) the department, a hospital must be approved by the department of health (DOH) for inclusion in DOH's critical access hospital program. The hospital must provide proof of CAH status to ((~~MAA~~)) the department upon request. CAHs reimbursed under the CAH program must meet the general applicable requirements in chapter 388-502 WAC. For information on audits and the audit appeal process, see WAC 388-502-0240.

(5) A CAH must have and follow written procedures that provide a resolution to complaints and grievances.

(6) To ensure quality of care:

(a) A CAH is responsible to investigate any reports of substandard care or violations of the facility's medical staff bylaws; and

(b) A complaint or grievance regarding substandard conditions or care may be investigated by any one or more of the following:

(i) Department of health (DOH); or

(ii) Other agencies with review authority for ((~~MAA~~)) department programs.

(7) ((~~MAA~~)) The department may conduct a postpay or on-site review of any CAH.

(8) ((~~MAA~~)) The department prospectively calculates fee-for-service and managed care inpatient and outpatient DWCC rates separately for each CAH. To calculate prospective interim inpatient and outpatient DWCC rates for each hospital currently in the CAH program, ((~~MAA~~)) the department:

(a) Obtains from each CAH its estimated aggregate charge master change for its next HFY;

(b) Obtains from the Medicare HCFA-2552 Cost Report the CAH initially submits for cost settlement of its most recently completed HFY:

(i) The costs-to-charges ratio of each respective service cost center; and

(ii) Total costs, charges, and number of patient days of each respective accommodation cost center.

(c) Obtains from the Medicaid Management Information System (MMIS) the following fee-for-service summary claims data submitted by each CAH for services provided during the same HFY identified in (b) of this subsection:

(i) Medical assistance program codes;

(ii) Inpatient and outpatient claim types;

(iii) Procedure codes, revenue codes, or diagnosis-related group (DRG) codes;

(iv) Allowed charges and third party liability/client and ((~~MAA~~)) department paid amounts; and

(v) ((~~Number of claims; and~~

~~(vi)~~)) Units of service.

(d) Obtains from the managed care encounter data the following data submitted by each CAH for services provided during the same HFY identified in (b) of this section:

(i) Medical assistance program codes;

(ii) Inpatient and outpatient claim types;

(iii) Procedure codes, revenue codes, or diagnosis-related group (DRG) codes; and

(iv) Allowed charges.

(e) Separates the inpatient claims data and outpatient claims data;

((~~(e)~~)) (f) Obtains the cost center allowed charges by classifying inpatient and outpatient allowed charges from (c) and (d) of this subsection billed by a CAH (using any one of, or a combination of, procedure codes, revenue codes, or DRG codes) into the related cost center in the CAH's Medicare HCFA-2552 cost report the CAH initially submits to ((~~MAA~~)) the department;

((~~(f)~~)) (g) Determines the ((~~MAA~~)) departmental-weighted costs for each cost center by multiplying the cost

center's allowed charges from (c) of this subsection for the appropriate inpatient or outpatient claim type by the related service cost center ratio;

(((~~g~~))) (h) Sums all allowed charges from (e) of this subsection;

(((~~h~~))) (i) Sums all departmental-weighted costs for inpatient and outpatient claims from (((~~f~~))) (g) of this subsection;

(((~~i~~))) (j) Multiplies each hospital's total ((~~MAA~~)) departmental-weighted costs from (h) of this subsection by the Medicare Market Basket inflation rate. The Medicare Market Basket inflation rate is published and updated periodically by the Centers for Medicare and Medicaid Services (CMS);

(((~~j~~))) (k) Multiplies each hospital's total allowed charges from (((~~g~~))) (h) of this subsection by the CAH estimated charge master change from (a) of this subsection. If the charge master change factor is not available from the hospital, ((~~MAA~~)) the department will apply a reasonable alternative factor; and

(((~~k~~))) (l) Determines the DWCC inpatient and outpatient rates by dividing the total appropriate ((~~MAA~~)) departmental-weighted costs from (((~~h~~))) 9i) of this subsection by the total appropriate allowed charges from (((~~g~~))) (h) of this subsection.

(9) For a currently enrolled hospital provider that is new to the CAH program, the basis for calculating DWCC rates for inpatient and outpatient hospital claims for:

(a) Fee-for-service clients is:

(i) The hospital's most recently submitted Medicare cost report, and

(ii) The appropriate MMIS summary claims data for that hospital fiscal year (HFY).

(b) Managed care clients is:

(i) The hospital's most recently submitted Medicare cost report; and

(ii) The appropriate managed care encounter data for that HFY.

(10) For a newly licensed hospital that is also a CAH, ((~~MAA~~)) the department uses the current state-wide average DWCC rates for the initial prospective DWCC rates.

(11) For a CAH that comes under new ownership, ((~~MAA~~)) the department uses the prior owner's DWCC rates.

(12) ((~~To calculate prospective managed care inpatient and outpatient DWCC rates, MAA uses the methodology outlined in subsection (8) of this section, except that managed care encounter data are used rather than MMIS fee-for-service summary claims data.~~)) In addition to the prospective managed care inpatient and outpatient DWCC rates, ((~~MAA~~)) the department:

(a) Incorporates the DWCC rates into the calculations for the managed care capitated premiums that will be paid to the managed care plans; and

(b) Requires all managed care plans having contract relationships with CAHs to pay the inpatient and outpatient DWCC rates applicable to managed care claims. For purposes of this section, ((~~MAA~~)) the department considers the DWCC rates used to reimburse CAHs for care given to clients enrolled in a managed care plan to be cost. Cost settlements are not performed for managed care claims.

(13) For fee-for-service claims only, ((~~MAA~~)) the department performs an interim retrospective cost settlement for each CAH after the end of the CAH's HFY, using Medicare cost report data and claims data from the MMIS related to fee-for-service claims. Specifically, ((~~MAA~~)) the department:

(a) Compares actual ((~~MAA~~)) department total interim CAH payments to the departmental-weighted CAH fee-for-service costs for the period being cost settled; and

(b) Pays the hospital the difference between CAH costs and interim CAH payments if actual CAH costs are determined to exceed the total interim CAH payments for that period. ((~~MAA~~)) The department recoups from the hospital the difference between CAH costs and interim CAH payments if actual CAH costs are determined to be less than total interim CAH payments.

(14) ((~~MAA~~)) The department performs finalized cost settlements using the same methodology as outlined in subsection (13) of this section, except that ((~~MAA~~)) the department uses the hospital's settled Medicare cost report instead of the initial cost report. Whenever a CAH's Medicare cost report is settled by the Medicare fiscal intermediary, the CAH must send the settled cost report to ((~~MAA~~)) the department to be used in a final cost settlement.