EXPEDITED RULE MAKING

CR-105 (June 2004)
(Implements RCW 34.05.353)
EXPEDITED RULE MAKING ONLY

Agency: Department of Revenue

Title of rule and other identifying information: WAC 458-20-15503 *Digital products.*

NOTICE

THIS RULE IS BEING PROPOSED UNDER AN EXPEDITED RULE-MAKING PROCESS THAT WILL ELIMINATE THE NEED FOR THE AGENCY TO HOLD PUBLIC HEARINGS, PREPARE A SMALL BUSINESS ECONOMIC IMPACT STATEMENT, OR PROVIDE RESPONSES TO THE CRITERIA FOR A SIGNIFICANT LEGISLATIVE RULE. IF YOU OBJECT TO THIS USE OF THE EXPEDITED RULE-MAKING PROCESS, YOU MUST EXPRESS YOUR OBJECTIONS IN WRITING AND THEY MUST BE SENT TO

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AND RECEIVED BY: February 1, 2016

Purpose of the proposal and its anticipated effects, including any changes in existing rules: Proposal incorporates changes from SSB 5275, Sec. 310 (Chapter 86, Laws of 2015) concerning recordkeeping and examination requirements. Clarifying language was also added throughout by changing "section" to "rule."

Copies of draft rules are available for viewing and printing on our website at Rules Agenda

Reasons supporting proposal: Proposal incorporates the legislative changes from SSB 5275, 2015 Regular Session (Chapter 86, Laws of 2015).

Statutory authority for adoption:
RCW 82.32.300 and 82.01.060(2)

Statute being implemented:
RCW 82.32.070

Is rule necessary because of a:

Federal Law?	☐ Yes	☒ No
Federal Court Decision?	☐ Yes	☒ No
State Court Decision?	☐ Yes	☒ No

If yes, CITATION:

Date
November 30, 2015

Name
Kevin Dixon

Signature

Title
Rules Coordinator

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Name of proponent: Department of Revenue

☐ Private
☐ Public
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Agency comments or recommendations, if any, as to statutory language, implementation, enforcement, and fiscal matters: None.

This rule draft is being proposed under an expedited rule-making process that does not require the agency to hold public hearings. Under no circumstances is this proposed rule to be used as a basis for determining tax liability or eligibility for a tax deduction, exemption, or credit.

AMENDATORY SECTION (Amending WSR 14-13-092, filed 6/17/14, effective 7/18/14)

WAC 458-20-15503 Digital products. This rule provides a structured approach for determining tax liability for digital products and digital codes. For purposes of this rule, a digital product includes digital goods or digital automated services, which are described in detail below. The sale or use of digital products and digital codes is generally subject to retail sales or use tax unless purchased for resale or some other exemption applies.

This rule is organized into six parts. Each part addresses a question or topic relevant to the determination of whether a person is selling or purchasing a digital product or digital code and, if so, what are the tax consequences that follow from such activity. In this respect this rule is intended to function similar to the decision tree provided in ETA 9003.2010.

1. Part 1: Are the products or services transferred electronically? If yes, go to Part 2.

2. Part 2: Does the product or service meet the general definitions of digital product or digital code? If yes, go to Part 3.

3. Part 3: Are there applicable exclusions from the general definitions of the digital product or digital code? If no, go to Part 4.

4. Part 4: Are the sales of the digital product or digital code sourced to Washington? If yes, go to Part 5.

5. Part 5: Are there applicable retail sales or use tax exemptions for the purchase or use of the digital product or digital code? If no, the transaction is likely taxable in Washington.

6. Part 6: Miscellaneous provisions.

Examples included in this rule identify a number of facts and then state a general conclusion; they should be used only as a general guide. The tax consequences of all situations must be determined after a review of all the facts and circumstances. Additionally, each fact pattern in each example is self contained (e.g., "stands on its own") unless otherwise indicated by reference to another example. Examples concluding that sales tax applies to the transaction assume that no exclusions or exemptions apply, and the sale is sourced to Washington.

Part 1. Are the Products or Services Transferred Electronically?

(101) **Introduction.** Products or services must be transferred electronically in order to be digital products. If a product is transferred by means of a tangible storage media (e.g., compact disc, magnetic tape, hard drive, etc.), it is not a digital product. Digital codes need not be transferred electronically in order to be digital codes, but may be obtained by any means, including tangible storage media.

(102) **Transferred electronically.** Means the purchaser obtains the product by means other than tangible storage media. Generally, this means the product is transferred using the public internet, a private network, or some combination. However, it is not necessary that the product be delivered to the purchaser. As long as the purchaser may access the product, it will be considered to have been electronically transferred to the purchaser. For example, whether a digital movie is downloaded by the user or streamed by the user, it is considered to be "transferred electronically." Alternatively, the same movie purchased on tangible media (e.g., DVD, etc.) is the purchase of tangible per-

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sonal property and is not considered to be either the sale of a digital product or transferred electronically.

Part 2. Does the Product or Service Meet the General Definition of Digital Product or Digital Code?

(201) **Introduction.** The term "digital product" means (1) digital goods and (2) digital automated services. Digital products transferred to an end user are generally subject to retail sales or use tax regardless of whether the purchaser's right of use is permanent, less than permanent (e.g., 24-hour period), or the purchaser is obligated to make continued payments as a condition of the sale (e.g., "subscriptions").

(202) **Digital goods.** Means sounds, images, data, facts, or information, or any combination thereof, transferred electronically, with certain exclusions discussed in Part 3 of this rule. The term "digital goods" includes within it the specific term "specified digital products" (as required by the Streamline Sales and Use Tax Agreement). The sale of a digital good is generally subject to retail sales tax and retailing business and occupation (B&O) tax.

(a) **Specified digital products.** Means electronically transferred digital audio-visual works, digital audio works, and digital books.

(i) **Digital audio works.** These are products that result from the fixation of a series of musical, spoken, or other sounds. Digital audio works include ringtones, recorded or live music, readings of books or other written materials, speeches, and other sound recordings. For example, a music file in MP3 format accessed or downloaded through the internet is a digital audio work.

(A) A "ringtone" is a digitized sound file that is downloaded onto a communication device (e.g., mobile phone) and may be used to alert the user to an incoming communication such as a call or text message.

(B) A ringtone does not include "ring-back tones" or other digital audio files that are not stored on the purchaser's communication device. In other words a ring-back tone is not a "specified digital product." A ring-back tone may be a digital automated service or a digital good depending on the facts. See analysis for digital automated services in subsection (203) of this ((~~section~~)) rule.

(ii) **Digital audio visual works.** These products are a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any. Digital audio visual works include movies, music videos, videos of live events, and news and entertainment programs. For example, a movie downloaded or accessed via the internet is a digital audio visual work.

(iii) **Digital books.** These are books in a digital format that are generally recognized in the ordinary and usual sense as books. A digital book does not include periodicals, magazines, newspapers, chat rooms, or weblogs. For example, a cookbook in a PDF format downloaded or accessed through the internet is a digital book.

(b) **Other digital goods.** The following list illustrates the types of products that are also digital goods in addition to the subclass of "specified digital products" discussed above. This list is merely illustrative and not exhaustive:

(i) A digital schematic of a lawnmower engine transferred electronically.

(ii) A digital car history report transferred electronically.

(iii) A digital picture transferred electronically.

(iv) Digital periodicals or magazines transferred electronically.

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(v) A digital presentation that includes still photos and accompanying audio content transferred electronically.

(c) **Digital goods prior to July 26, 2009.** The mere accessing or streaming of a digital good was not a retail sale before July 26, 2009. Instead, accessing or streaming a digital good was subject to the service and other activities B&O tax. The sale of a digital good to a customer who downloaded the digital good was a retail sale. See Part 6, subsection (604) of this ((~~section~~)) rule for a discussion of tax amnesty for past periods.

(203) **Digital automated services.** Means services transferred electronically that use one or more software applications. The sale of a digital automated service is generally subject to retail sales tax and retailing B&O tax.

(a) **Digital automated services may include.** One or more software applications either prewritten or custom, as well as components that are similar to stand-alone digital goods. For example, an online information service may contain data, facts, or information the use of which is facilitated by one or more software applications that provide search capabilities and other functionality. Thus, digital automated services will include software and may include elements similar to stand alone digital goods, which operate together in an integrated fashion to provide an electronically transferred service.

Example 1. BFC provides an online service that facilitates apartment building management. The online service lists and advertises apartment vacancies, screens applicants, routes maintenance requests, and accepts and processes rental payments. In this example the software based service facilitates and automates various administrative functions and coordinates third-party services for apartment renting. The service is a digital automated service the sale of which is generally subject to retail sales tax and retailing B&O tax.

Example 2. QPR provides a service that uses one or more software applications to "crawl the internet" in order to identify, gather, and categorize digital information according to specified criteria. In this example software facilitates the gathering, identifying and categorizing of information acquired from the internet. The service is a digital automated service the sale of which is generally subject to retail sales tax and retailing B&O tax.

(i) **Distinguishing a digital good from digital automated services.** A digital good is not a service involving one or more software applications. A digital good consists solely of images, sounds, data, facts, information or any combination thereof. Clear examples of digital goods are digital books, digital music, digital video files, and raw data.

Example 3. XYZ provides an online service that uses one or more software applications to facilitate the use of news and information with features such as: Research history, natural and boolean searching, industry chat forums, chart creation, document and word flagging, and information organizing folders. In this example software features facilitate the search of the news or information. XYZ's service is a digital automated service the sale of which is subject to retail sales tax and retailing B&O tax.

Example 4. Company sells digital music files (i.e., digital goods) on its web site. In order to locate specific digital music files customers may use a free software based search function that is integrated into Company's web site. Customers may also find the digital music file they are seeking by clicking on a series of links to get to the desired music file. Company's software based search func-

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tion associated with the sale of the digital music file does not transform the sale of the digital music file into a digital automated service. Company is selling a digital good (i.e., music file) subject to retail sales tax and retailing B&O tax.

(ii) **Distinguishing remote access prewritten software from digital automated services.** Remote access prewritten software (defined in RCW 82.04.050 (6)(b)) is solely prewritten software that is made remotely accessible from the vendor's server or other third-party server for a customer. To the extent that components similar to digital goods and/or additional services are supplied with the prewritten software the sale may be the sale of a digital automated service (see also Part 3, subsection (303)(h) of this ((~~section~~)) rule).

Example 5. CFC provides an online gaming service that allows subscribers to play a game with other subscribers in a real time multiplayer environment using software accessed via the internet. In this example the gaming software is combined with additional capabilities that enable a real time multiplayer environment that is not otherwise available. The service is a digital automated service, the sale of which is generally subject to retail sales tax and retailing B&O tax.

Example 6. Company sells prewritten word processing software that is accessed by customers but hosted on Company's computers. The software includes access to clip-art image files that can be inserted into documents created with the remotely accessed prewritten word processing software. Company is selling remote access prewritten software and not a digital automated service or digital goods. The clip art made available with the software does not transform the remotely accessed prewritten software into a digital automated service or a digital good. Company is selling remote access prewritten software subject to retail sales tax and retailing B&O tax.

(b) **Digital automated service prior to July 26, 2009.** The sale of a digital automated service to consumers was not a retail sale before July 26, 2009. Generally, income earned from such sales was subject to B&O tax under the service and other activities classification.

(204) **Digital codes.** These are codes that provide a purchaser with the right to obtain one or more digital products, if all of the digital products to be obtained through the use of the code have the same retail sales and use tax treatment. A digital code may be obtained by any means, including e-mail or by tangible media regardless of its designation as song code, video code, book code, or some other term. For example, a digital code includes the sale of an alphanumeric code that, when entered online at a web site, provides the customer with a digital music file for download.

(a) **Products with mixed tax treatment.** Codes that provide the right to obtain one or more products that do not have the same retail sales and use tax treatment are not digital codes.

(b) **Codes that represent a stored monetary value, redeemable cards, gift cards, or gift certificates.** Codes that represent a stored monetary value that is deducted from a total as it is used by the purchaser or that represent a redeemable card, gift card, or gift certificate that entitles the holder to select digital products of an indicated cash value, are not digital codes.

Example 7. Calvin purchases a code at his local grocery store for use on Joe Seller's (JS) web site. At check out, Calvin tells the grocery store clerk to put $25.00 in value on the plastic card containing the code. Calvin then goes to JS's web site and inputs the code from the card. The $25.00 value of the card is stored in Calvin's "account" and can be used on any purchase by Calvin from JS's web site. Calvin

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then purchases five digital songs for $5.00 from JS. At check-out from JS's web site, $5.00 is deducted from Calvin's account to pay for the songs. When the transaction is complete, Calvin has a $20.00 balance remaining in his account on JS's web site. Because the code represents a stored monetary value it is not a digital code and the sale of the code is not subject to retail sales tax or retailing B&O tax.

Part 3. Are There Applicable Exclusions from the General Definitions of Digital Product and Digital Code?

(301) **Introduction.** For certain products or services transferred electronically that otherwise meet the definition of digital good or digital automated service (as discussed in Part 2) there may be a specific exclusion from the applicable definition. If an exclusion applies, then the product or service will generally not be considered a digital good or digital automated service for retail sales and use tax purposes. For example, a service that is transferred electronically and that uses one or more software applications will generally be subject to retail sales tax as a digital automated service. However, if the service is an advertising service, then an exclusion applies, and the service will not be a digital automated service subject to retail sales tax; however, the service may still be subject to B&O tax. An excluded service may also still be subject to retail sales tax under certain circumstances. For example, telecommunications services are excluded from the definition of digital automated services, but remain subject to retail sales tax under their own separate definition of retail sale.

(302) **Exclusions from the definition of digital good are:**

(a) **Telecommunications and ancillary services** as defined in RCW 82.04.065. These services may be used to distribute digital goods, digital automated services, and digital codes, but are not themselves any of these products.

(b) **Computer software** as defined in RCW 82.04.215 and WAC 458-20-15502. These are coded instructions designed to cause a computer or automatic data processing equipment to perform a task.

(c) **The internet and internet access** as defined in RCW 82.04.297.

(d) **Professional or personal services** represented in electronic form are not a digital good. This exclusion applies where the service primarily involves the application of human effort by the service provider, and the human effort originated after the customer requested the service. For example, an electronic engineering report created at the customer's request that reflects an engineer's professional analysis, calculations, and judgment, which is sent to the customer electronically, is considered evidence of a professional service and not a digital good.

Photography. This exclusion for professional or personal services does not apply to photographers in respect to amounts received for the taking of digital photographs that are transferred electronically to the end user/customer as defined in RCW 82.04.190(11). See Example 39 for an example of a nonend user transaction involving photography that is subject to royalties B&O tax.

(e) **Exclusions listed directly below for digital automated services** are also exclusions from the definition of digital good.

(303) **Exclusions from the definition of digital automated service are:**

(a) **Services that require primarily human effort by the seller** and the human effort originated after the customer requested the service. In this context, "primarily" means greater than fifty percent of

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the effort to perform the service involved human labor. To determine whether the fifty percent or greater threshold is satisfied, the average of the time and cost factors is considered. The time factor is determined by dividing the time spent to perform the human effort portion for customers by the total time spent performing the service. The cost factor is determined by dividing the direct costs incurred to perform the human effort portion for customers by the total direct costs incurred to perform the service. Direct costs of the human effort component include salaries, employee benefits and similar direct costs. Direct costs of the automated component include the cost of software, computers, hosting services and other similar direct costs. If the average of the time and cost factors is greater than fifty percent then the service requires primarily human effort and is not a digital automated service in which case the service will generally be subject to service and other activities B&O tax.

Example 8. RepuCo.com performs a reputation monitoring service on the internet for its clients. The service utilizes software and other technology that searches the internet for web sites that allow posting of information that may be harmful to RepuCo.com's client's reputation ("the automated component"). If the automated component finds a web site that is posting erroneous or harmful information about one of RepuCo.com's clients, then a RepuCo.com employee will contact the owner of the web site by phone or e-mail and work with the owner and the client to resolve the matter to the satisfaction of the client ("the human effort component"). If the human effort time factor is 20% and the human effort direct cost factor is 60%, then the average of the two factors is 40% (80%/2 = 40%). Accordingly, the service is performed using 40% human effort which is less than 50% and therefore the service does not require primarily human effort and is subject to retail sales tax as a digital automated service.

Alternative methods. If the time and cost factors in this rule do not fairly represent the extent to which the service is performed using primarily human effort, the taxpayer may ask in writing for, or the department may require, the employment of another reasonable method to equitably determine whether the service is performed using primarily human effort.

(b) **Loaning or transferring money or the purchase, sale, or transfer of financial instruments.** For purposes of this ((~~section~~)) rule, "financial instruments" include cash, accounts receivable and payable, loans and notes receivable and payable, debt securities, equity securities, as well as derivative contracts such as forward contracts, swap contracts, and options. For example, the electronic transfer of money from a savings account to a checking account, whether done for the customer by a bank teller or by an ATM machine, is excluded from the definition of digital automated service.

(c) **Dispensing cash or other physical items from a machine.** Includes an ATM that dispenses cash to users.

(d) **Payment processing services,** including services such as electronic credit card processing activities conducted online or in physical retail stores via electronic transmission.

(e) **Parimutuel wagering and handicapping contests** as authorized by chapter 67.16 RCW.

(f) **Telecommunications services and ancillary services** as those terms are defined in RCW 82.04.065. For additional information, refer to the discussion above concerning the comparable exclusion from the definition of digital goods (see Part 3, subsection (302)(a) of this ((~~section~~)) rule).

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(g) **The internet and internet access** as those terms are defined in RCW 82.04.297.

(h) **Remote access prewritten software.** Remote access prewritten software (defined in RCW 82.04.050 (6)(b)) provided on a standalone basis is excluded from the definition of digital automated service. However, software that is used in connection with a service that is transferred electronically would generally be included in the definition of a digital automated service.

Example 9. Company sells prewritten gaming software that is identical in all substantive respects to the same software available in stores for individual use and installation on home computers except that it is hosted on Company's servers and accessed by customers. Company's sales to consumers would be treated as a sale of remote access prewritten software and therefore is excluded from the definition of digital automated services and generally subject to retail sales tax and retailing B&O tax.

Example 10. Same facts as Example 9 except that Company uses the remote access prewritten software to provide a monthly subscription service that provides a real item multiplayer environment. Company is selling a digital automated service. In this case the customers are not merely receiving the individual use of software, but instead an online gaming service facilitated by the software. Thus, the monthly subscription service is not excluded from the definition of digital automated service and is subject to retail sales tax and retailing B&O tax.

(i) **Online education programs** provided by the following:

(i) Public or private elementary or secondary schools; or

(ii) An institution of higher education as defined in Sections 1001 or 1002 of the federal Higher Education Act of 1965 (Title 20 U.S.C. Sections 1001 and 1002), as existing on July 1, 2009. This would include most colleges and universities. For the purposes of this ((~~section~~)) rule, an online educational program must be encompassed within the institution's accreditation.

Example 11. ABC University, a qualifying institution of higher education under the federal Higher Education Act of 1965, provides an accredited online Spanish course for which it charges a quarterly access and use fee to students. The course is remotely accessed by students logging into a web site and accessing a fully interactive program that includes components of video, text, and audio, as well as extensive software code. This service would generally be considered a digital automated service. However, it is specifically excluded from the definition of digital automated service as an online educational program and may be subject to service and other activities B&O tax if another exclusion, deduction, or exemption does not apply.

(j) **Live presentations** such as lectures, seminars, workshops, or courses, where participants are connected to other participants and presenters via the internet or other networks, allowing the participants and the presenters to provide, receive, and discuss information together in real time.

Example 12. Company provides an online seminar service for Customer. Company provides a panel of live speakers that make a presentation to Customer's employees listening to and viewing the seminar through an internet connection supplied by a third-party service provider. The seminar allows Customer's employees and panelists to ask and answer questions on a real time basis. Company's online seminar service is transferred electronically and uses one or more software applications and therefore would generally be considered a digital au-

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tomated service. However, this type of service allowing live interaction is specifically excluded from the definition of digital automated service and would generally be subject to service and other activities B&O tax.

Example 13. Same facts as Example 12 except that Company records the seminar and charges other individuals a fee for accessing the seminar from Company's web site. The recorded presentation allows these customers to watch the presentation but it does not allow them to ask questions on a real time basis. Because the presentation was prerecorded there is no live interaction contemporaneous with the presentation and therefore Company is selling a digital good generally subject to retail sales tax and retailing B&O tax.

Example 14. Company provides online training courses to Steve for a fee. The training courses provide key interactive elements such as study guides, knowledge testing, and automated help, all facilitated by one or more software applications. Such courses are not live presentations and do not provide human interaction. Accordingly, Company is selling a digital automated service generally subject to retail sales tax and retailing B&O tax.

(k) **Travel agent services,** including online travel services, and automated systems used by travel agents to book reservations.

(l) **Online marketplace related activities,** which are services that allow the person receiving the services to make online sales of products or services, digital or otherwise, using either:

(i) The service provider's web site; or

(ii) The service recipient's web site, but only when the service provider's technology is used either to:

(A) Create or host the service recipient's web site; or

(B) Process orders from customers using the service recipient's web site.

Example 15. Company provides an "electronic marketplace" service to Holcomb that allows Holcomb to list and sell his coffee mugs on the internet using Company's web site. This online marketplace service is excluded from the definition of digital automated services and charges for the service would generally be subject to service and other activities B&O tax.

Example 16. Same facts as Example 15, except that now Holcomb decides he no longer wants to be just another seller on Company's web site. Instead, Holcomb wants his own "retailing presence" on the internet so Holcomb contracts with Company to create and host Holcomb's new coffee mug web site, "HolcombsCoffeeWorld.com." This is still an online marketplace service that is excluded from the definition of digital automated services and charges for the service would generally be subject to service and other activities B&O tax.

(iii) **Exclusion limitation.** The services described in this subsection do not include the underlying sale of the products or services, digital or otherwise, by the person receiving the service. For instance, in Examples 15 and 16, the sale by Holcomb of coffee mugs would still generally be subject to retail sales tax and retailing B&O tax as the sale of tangible personal property.

(m) **Advertising services** means all services directly related to the creation, preparation, production, or the dissemination of advertisements. Advertising services include: Layout, art direction, graphic design, mechanical preparation, production supervision, placement, and rendering advice to a client concerning the best methods of advertising that client's products or services. Advertising services also include online referrals, search engine marketing and lead generation

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optimization, web campaign planning, the acquisition of advertising space in the internet media, and the monitoring and evaluation of web site traffic for purposes of determining the effectiveness of an advertising campaign. Advertising services do not include web hosting services and domain name registration.

Example 17. Company provides marketing services to customers wishing to promote their products using the internet. Amy sells widgets on the internet and hires Company to market her products. Company consults with Amy on her marketing needs and then creates a marketing plan for her business. Company also creates and distributes online banners, links, and targeted "e-mail blasts" that promote Amy's business. All of the services provided by Company are advertising services excluded from the definition of digital automated services and would generally be subject to service and other activities B&O tax.

Example 18. RVP, Inc. creates "sponsored links" on its web site that drive customer traffic to Amy's web site. RVP is paid by Amy for each click on a sponsored link on RVP's web site. The services provided by RVP are advertising services excluded from the definition of digital automated services and charges for such would generally be subject to service and other activities B&O tax.

(n) **Storage, hosting, and back-up.** The mere storage of digital products, digital codes, computer software, or master copies of software is excluded from the definition of digital automated services. This exclusion includes providing space on a server for web hosting or backing-up data or other information.

Example 19. Company charges Rowe a fee for 25 terabytes of storage space under its "basic storage service" offering. Company also charges Rowe an additional and optional fee for its "premium service" package offering, which involves services beyond mere storage. The "basic storage" services are mere storage services and excluded from the definition of digital automated services. These services would generally be subject to service and other activities B&O tax. However, the charges for the optional premium services are more than mere storage or hosting services. As such, the premium services are not excluded from the definition of digital automated services and would generally be subject to retail sales tax and retailing B&O tax.

(o) **Data processing services** means a primarily automated service provided to a business or other organization where the primary object of the service is the systematic performance of operations by the service provider on data supplied in whole or in part by the customer to: (i) Extract the required information in an appropriate form, or (ii) to convert the data to usable information. Data processing services include check processing, image processing, form processing, survey processing, payroll processing, claim processing, and similar activities. Data processing does not include remote access prewritten software used by the customer to process their own data.

Example 20. Bango Corp., in preparation for litigation, hires Company to use its automated technology to search Bango's computers and gather documents relevant to the lawsuit. Company's service also provides software tools that allow Bango to categorize, copy, store, and notate the gathered documents. Company's service is not data processing. The services performed primarily involve gathering data, and providing software tools that allow the customer to categorize, copy, store and notate documents in preparation for litigation. Accordingly, Company is selling a digital automated service generally subject to retail sales tax and retailing B&O tax.

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Example 21: Company provides check processing services to Wallo Corp., a bank operating in Washington. Company accepts scanned checks provided by Wallo and then uses its software and technology to extract the check dollar amount, account number, and verify the check has been signed. Company then provides this extracted and reformatted data back to Wallo allowing it to reconcile its customer's accounts. Company provides data processing services which are excluded from the definition of digital automated services. These services would generally be subject to service and other activities B&O tax.

Example 22. Same facts as Example 21, except that Company accepts checks provided directly by Wallo's customers. Thus, check images come from both Wallo and Wallo's customers. The services provided by Company are still data processing services excluded from the definition of digital automated services even though the data does not come exclusively from Wallo. These services would generally be subject to service and other activities B&O tax.

Part 4. Are the Sales of the Digital Product or Digital Code Sourced to Washington?

(401) **Introduction.** Once it is determined that a transaction involves the sale of a digital product or digital code, the sale must be sourced to Washington in order to be subject to Washington's retail sales tax and B&O tax. If the sale is sourced outside Washington it is not subject to Washington sales tax or B&O tax. Sales of digital products are sourced using the same statute that applies to other retail sales, RCW 82.32.730 as outlined below.

(402) **Sourcing retail sales.**

(a) **Business location.** When a digital product or digital code is received by the buyer at a business location of the seller, the sale is sourced to that business location.

Example 23. Frank goes to BigBox brick-and-mortar store in Washington and purchases a music file from an electronic kiosk in the store. Frank purchases and downloads the music file inside BigBox's store by connecting his digital music player to the kiosk in the store. The sale of the music file is sourced to BigBox's store location in Washington and is generally subject to retail sales tax and retailing B&O tax.

(b) **Place of receipt.** If the first sourcing rule explained above in (a) of this subsection does not apply, the sale is sourced to the location where receipt takes place.

(i) The digital product or digital code may be received by the buyer at the buyer's location or by the buyer's donee (e.g., a gift recipient) at the donee's location.

(ii) In the context of digital products and digital codes, "receive" and "receipt" means: (A) Making first use of digital automated services; or (B) taking possession or making first use of digital goods or digital codes, whichever comes first.

Example 24. Drogba Inc., located in Olympia, Washington, purchases a digital automated service generally subject to retail sales tax from Company. Drogba's employees access and make first use of the service at their computer workstations located in Olympia. Company knows that the digital automated service is received in Olympia and therefore will source the sale of the digital automated service to that location.

(c) **Address in records.** If the first two sourcing rules explained in (a) and (b) of this subsection do not apply, the sale is sourced to the location indicated by an address for the buyer that is available

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from the seller's business records maintained in the ordinary course of business, so long as use of this address does not constitute bad faith. For example, any address of the buyer held by the seller that reasonably estimates the receipt location will be sufficient, including an address contained in a relevant service contract or an address used for accounts receivable purpose.

Example 25. Nani Corp., located in California, purchases a digital automated service generally subject to retail sales tax and retailing B&O tax from Company located in Washington. The purchase contract between Nani and Company provides that Nani may have 5 users access the digital automated service. Company does not know where the digital automated service is actually received. However, Company has Nani's California address in its business records and will therefore source the sale to Nani's California address. Because the sale is sourced outside Washington, it is not subject to Washington's retail sales tax or retailing B&O tax. Note, to the extent that Nani Corp., receives the service at locations in Washington, it may have a use tax liability. See subsection (403) of this ((~~section~~)) rule for more on use tax.

(d) **Address obtained during sale.** If the first three sourcing rules explained in (a), (b), and (c) of this subsection do not apply, the sale is sourced to the location indicated by an address for the buyer obtained during the consummation of the sale. For example, an address obtained during consummation of the sale would include the address of a buyer's payment instrument (e.g., billing address for a credit card), if no other address is available, so long as use of this address does not constitute bad faith.

Internet protocol (IP) address. The buyer's IP address is acceptable location information obtained at the time of sale if an address cannot otherwise be obtained during consummation of the sale.

(e) **Origin.** If the first four sourcing rules explained in (a), (b), (c), or (d) of this subsection do not apply, including the circumstance where the seller is without sufficient information to apply those provisions, then the sale must be sourced to the location determined by the address from which the digital good or digital code was first available for transmission by the seller, or from which the digital automated service was provided. Any location that merely provided the digital transfer of the product sold shall be disregarded.

(403) **Sourcing for use tax purposes.** The sales sourcing rules above in subsection (402) of this ((~~section~~)) rule are for sourcing sales subject to retail sales tax under RCW 82.08.020 and RCW 82.32.730. What follows below is a discussion of use tax reporting obligations with respect to digital goods, digital automated services, and digital codes. Generally, use tax applies to the use of a digital product or digital code in Washington if retail sales tax has not already been paid and no exemption otherwise applies.

(a) **Digital good or digital code.** "Use" means the first act within this state by which the taxpayer, as a consumer, views, accesses, downloads, possesses, stores, opens, manipulates, or otherwise uses or enjoys the digital good or digital code.

(b) **Digital automated service.** "Use" means the first act within this state by which the taxpayer, as a consumer, uses, enjoys, or otherwise receives the benefit of the service.

Example 26. Company, located in New York, sells a digital automated service generally subject to retail sales tax and retailing B&O tax to Lampard Inc., located in Washington. Lampard's employees in Washington use the internet to access Company's services using an in-

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ternet web browser. However, Company does not have nexus with Washington and is therefore not required to charge and collect retail sales tax on the sale of its service to Lampard. Lampard has a use tax reporting obligation because it uses, enjoys, or otherwise receives the benefit of Company's digital automated service at its location in Washington.

Part 5. Are there Applicable Retail Sales or Use Tax Exemptions for the Purchase or Use of the Digital Product or Digital Code?

(501) **Introduction.** After determining that a digital product or digital code has been sold or used and the sale or use is sourced to Washington, exemptions from retail sales or use tax should be examined. What follows is not an exhaustive list of exemptions but instead an explanation of the most common exemptions for digital products. Some exemptions may apply only with respect to certain digital products (e.g., some exemptions apply only to digital goods, not digital automated services). Exemptions may also require an exemption certificate or reseller permit.

(502) **Resale.** The purchase of a digital product or digital code for resale with no intervening use is not subject to retail sales or use tax. Sellers should obtain from buyers a copy of the buyer's reseller permit, a properly completed "Digital Products and Remote Access Software Exemption Certificate," or otherwise comply with RCW 82.04.470 to substantiate the wholesale nature of the sale. See RCW 82.32.780.

(503) **Component of a new product.** Generally, purchasing, acquiring, owning, holding, or using any digital product or digital code for purposes of incorporating it into a new product for sale will not be subject to retail sales tax. The digital product or digital code must become a component of the new product for sale. A digital code becomes a component of a new product if the digital good or digital automated service acquired through the use of the digital code becomes incorporated into a new product. RCW 82.04.190(11). This is also discussed in subsection (602) of this ((~~section~~)) rule in the context of wholesale sales.

Product. For purposes of this subsection, "product" means a digital product, an article of tangible personal property, or remote access prewritten software as defined in RCW 82.04.050 (6)(b). For example, an industrial drill manufacturer and seller combines hardware, software, and data to create a new product, a "smart drill." Software embedded in the drill uses the variance data (also embedded in the drill) to control the hardware during drill operations. The data is a digital good purchased for use as a component of a new product for sale (i.e., the drill). Sellers should obtain from buyers a copy of the buyer's reseller permit, a properly completed "Digital Products and Remote Access Software Exemption Certificate," or otherwise comply with RCW 82.04.470 to substantiate the wholesale nature of the sale.

(504) **Made available free to the general public.** Retail sales and use tax does not apply to the purchase or use by a business or other organization of a digital product (including a digital product acquired through the use of a digital code) in order to make that digital product (1) available free of charge for the use or enjoyment of (2) the general public. Buyers claiming this exemption must provide the seller with a properly completed "Digital Products and Remote Access Software Exemption Certificate" or other exemption certificate acceptable to the department. See RCW 82.08.02082.

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(a) **Available for free.** In order to qualify, the digital product purchased must be made available for free. In this context, "free" means that the recipient of the digital product does not need to provide anything of significant value. If the purchaser requires something of significant value from the recipient in exchange for the digital product, it is not given away for free.

Example 27. Mauro purchases 1,000 digital music files from Company to be used for a "give away" to the first 1,000 people to visit Mauro's web site. When people visit Mauro's web site they are required to fill out a marketing survey before they may receive a digital music file. The information gathered from the marketing survey is then sold to a marketing company by Mauro. Thus, Mauro has required that recipients provide something of significant value in exchange for the digital music file. This is not a "free" transaction and therefore, Mauro's purchase of the digital music from Company does not qualify for the exemption and would be subject to retail sales tax and retailing B&O tax. (See also Example 29.)

(b) **"General public"** means all persons and is not limited or restricted to a particular class of persons, except that the general public includes:

(i) **Certain classes of persons defined by their residency or property ownership.** The general public includes a class of persons residing or owning property within the boundaries of any state (e.g., Washington), political subdivision of a state (e.g., King County), or a municipal corporation (e.g., Seattle).

Example 28. The City of Evergreen (a municipal corporation) makes satellite images of land parcels available for free only to persons residing in Evergreen. Residents are required to enter their zip code prior to accessing the images and certify that they are a resident of the City. Accordingly, the City of Evergreen can purchase the satellite images exempt from retail sales tax.

(ii) **Library customers.** With respect to libraries, the term general public includes authorized library patrons.

(c) **Buyer must have the legal rights to provide the digital product to the general public.** The exemption provided in this subsection does not apply unless the purchaser has the legal right to broadcast, rebroadcast, transmit, retransmit, license, relicense, distribute, redistribute, or exhibit the digital product, in whole or in part, to the general public.

Example 29. Same facts as Example 27, except this time visitors to Mauro's web site are provided free access to the digital music files and no survey information is required in exchange. Additionally, Mauro purchased the digital music files from Company with the right to distribute them to the general public. Mauro also provided the seller with an exemption certificate. Accordingly, Mauro's purchase from Company qualifies for the exemption because he has made the digital audio files available free of charge to the general public pursuant to a contract that gives him rights of distribution. Mauro only purchased 1,000 files and therefore must limit the distribution to the first 1,000 people. Most "give-aways" will have similar quantity limitations but this fact alone will not disqualify such transactions under the "general public" requirement.

(505) **Purchased solely for business purpose.**

(a) **Introduction.** Retail sales and use tax does not apply to the sale to or use by a business of digital goods and services rendered in respect to those digital goods, where the digital goods and services rendered in respect to digital goods are purchased solely for business

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purposes. This exemption only applies to purchases of digital goods and does not apply to the purchase of digital automated services, prewritten software, or remote access prewritten software. The exemption is only available when the buyer provides the seller with an exemption certificate. Buyers may use the department's "Digital Products and Remote Access Software Exemption Certificate" to claim this exemption. See RCW 82.08.02087.

(b) **Digital codes.** This exemption also applies to the sale to or use by a business of a digital code if all of the digital goods to be obtained through the use of the code will be used solely for business purposes. If the digital code purchased by a business for a business purpose provides access to both digital goods and digital automated services, the purchase of the digital code does not qualify for this exemption.

(c) **"Business purposes"** means the digital good is relevant to the buyer's business needs.

(d) **Personal or household purpose.** This exemption does not apply to the purchase for personal or household purposes.

(e) **Government entities.** This exemption does not apply to purchases by a governmental entity.

(f) **Prior periods.** For the period July 26, 2009, through June 30, 2010, the "business purpose" exemption applied only to "standard digital information." Standard digital information is a subset of digital goods.

Standard digital information is a digital good that consists primarily of data, facts, and/or information that is not generated or compiled for a specific client or customer. Standard digital information does not include a digital good that is comprised primarily of sounds or images.

(506) **Purchases of standard financial information by qualifying international investment management companies.** Effective October 1, 2013, the purchase of standard financial information by a qualifying international investment management company is exempt from retail sales tax. The exemption applies regardless of whether the standard financial information is provided in a tangible format or on a tangible storage medium or as a digital product transferred electronically. This sales and use tax exemption expires July 1, 2021.

(a) **"Qualifying international investment management company"** means a person:

(i) Who is primarily engaged in the business of providing investment management services; and

(ii) Who has gross income that is at least ten percent derived from providing investment management services to:

(A) Persons or collective investment funds residing outside the United States; or

(B) Collective investment funds with at least ten percent of their investments located outside the United States.

(b) The definitions in RCW 82.04.293 generally apply here to this subsection (506) except as follows:

(i) **Important distinction.** This definition of "qualifying international investment management company" is more narrow than the definition in RCW 82.04.293; this definition in (a)(ii)(B) of this subsection excludes "persons" and only allows for "collective investment funds" unlike RCW 82.04.293 (1)(b)(ii) which includes "persons or collective investment funds" for B&O tax purposes.

(ii) **"Standard financial information"** means financial data, facts, or information, or financial information services, not gener-

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ated, compiled, or developed only for a single customer. Standard financial information includes, but is not limited to, financial market data, bond ratings, credit ratings, and deposit, loan, or mortgage reports.

(iii) **"Financial market data"** means market pricing information, such as for securities, commodities, and derivatives; corporate actions for publicly and privately traded companies, such as dividend schedules and reorganizations; corporate attributes, such as domicile, currencies used, and exchanges where shares are traded; and currency information.

(iv) **Filing and documentation.** Sellers making tax-exempt sales should obtain a completed buyer's retail sales tax exemption certificate from the buyer. In lieu of an exemption certificate, a seller may capture the relevant data elements as allowed under the streamlined sales and use tax agreement. The seller must retain a copy of the exemption certificate or other relevant data elements for the seller's files and must meet the records requirement in subsection (607) of this rule for tax liabilities owed to this state. For sellers who electronically file their taxes, the department will provide a separate tax reporting line for exemption amounts claimed under this ((~~section~~)) rule.

(v) **Limitations on exemption.** A buyer may not continue to claim the exemption once the buyer has purchased standard financial information during the current calendar year with an aggregate total selling price in excess of fifteen million dollars and an exemption has been claimed for such standard financial information. The fifteen million dollar limitation under this subsection does not apply to any other exemption that applies to standard financial information.

(vi) **Sellers' responsibilities.** Sellers are not responsible for ensuring a buyer's compliance with the fifteen million dollar limitation under this subsection. Sellers may not be assessed for uncollected sales tax on a sale to a buyer claiming an exemption under this ((~~section~~)) rule after having exceeded the fifteen million dollar limitation under this subsection, except as provided in RCW 82.08.050 (4) and (5).

(vii) **Reporting requirements for buyers.** This sales and use tax exemption for standard financial information is subject to additional reporting requirements. Buyers must report the amount of tax preference received as directed by the department. Buyers are not required to report the amount of preference received if the tax benefit to a buyer is less than one thousand dollars per year; or the buyer files an annual tax return with the department.

(507) **Multiple points of use (MPU).** Retail sales tax does not apply to the sale of digital products or digital codes concurrently available for use within and outside this state. See RCW 82.12.02088 and 82.08.02088. Note that Washington use tax still applies to the use of the digital product or digital code used in Washington.

(a) **Requirements.** A buyer is entitled to claim the MPU exemption only if:

(i) The buyer is a business or other organization.

(ii) The digital product purchased (or obtained by using the digital code purchased) will be concurrently available for use within and outside this state (not for personal use).

(iii) The buyer provides the seller with a valid exemption certificate acceptable to the department claiming the MPU exemption. Buyers may use the department's "Digital Products and Remote Access Software Exemption Certificate" to claim this exemption.

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(b) **Concurrently available.** "Concurrently available for use within and outside this state" means that employees or other agents of the buyer may use the digital product simultaneously from one or more locations within this state and one or more locations outside this state.

Example 30. Company sells an online patent searching service to Iniesta Corp., for simultaneous use at Iniesta's headquarters in Washington and its research and development facility in California. This service would generally be considered the sale of a digital automated service subject to retail sales tax and retailing B&O tax. In this case, the digital automated service is concurrently available for use by Iniesta's employees both within Washington and outside Washington, and therefore Iniesta may claim the MPU exemption from retail sales tax for its purchase of the digital automated service from Company. See (c) of this subsection for an explanation of how to apportion the use tax in this example.

(c) **Apportionment (allocation) of use tax.** For purposes of this subsection on multiple points of use, "allocation" and "apportionment" have the same meaning. A business or other organization subject to use tax on digital products or digital codes that are concurrently available for use within and outside this state is entitled to apportion the amount of tax due this state based on users in this state compared to users everywhere. For example, in the case of Iniesta in Example 30, if we assume Iniesta had five employees in California and five employees in Washington using the service concurrently, Iniesta would allocate one-half of the purchase price to Washington because five of its ten users are in Washington (e.g., 5/10 = 50%). Thus Iniesta would pay use tax to Washington based on fifty percent of the value of the digital automated service. Additionally, the department may authorize or require an alternative method of allocation supported by the taxpayer's records that fairly reflects the proportion of in-state to out-of-state use by the taxpayer.

(i) **Records requirement.** No allocation under this ((~~section~~)) rule is allowed unless the allocation method is supported by the taxpayer's records kept in the ordinary course of business in compliance with the records requirement in subsection (607) of this rule for tax liabilities owed to this state.

(ii) **"User"** means an employee or agent of the taxpayer who is authorized by the taxpayer to use the digital product purchased in the performance of his or her duties as an employee or other agent of the taxpayer.

(d) **Application to digital codes.** A digital code is concurrently available for use within and outside this state if users may use the digital goods or digital automated services to be obtained by the code simultaneously at one or more locations within this state and one or more locations outside this state.

(e) **Reporting.** A buyer claiming an exemption under this ((~~section~~)) rule must report and pay state and local use tax directly to the department. As explained in (c) of this subsection, use tax may be reported and paid on an apportioned basis if supported by the buyer's records in compliance with the records requirement in subsection (607) of this rule for tax liabilities owed to this state.

(508) **Machinery and equipment.** Generally retail sales and use tax does not apply to sales to or use by a manufacturer or processor for hire of certain machinery and equipment used directly in a manufacturing or research and development operation. This exemption is commonly referred to as the M&E exemption. (See RCW 82.08.02565 and 82.12.02565

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and WAC 458-20-13601 for information regarding the M&E exemption.) Included within the definition of "machinery and equipment" for purposes of the M&E exemption are digital goods. Accordingly, digital goods acquired by manufacturers and processors for hire and used directly in a manufacturing or research and development operation are exempt from retail sales and use tax, provided all of the requirements for the M&E exemption are met.

(509) **Audio or video programming.** Income received from the sale of regular audio or video programming by a radio or television broadcaster is generally subject to service and other B&O tax and therefore not subject to retail sales tax. However, the sale of audio or video programming sold on a pay per program or subscription on-demand basis is generally subject to retail sales and use tax except as provided in (d) and (e) of this subsection.

(a) **"Radio and television broadcasters"** include satellite radio providers, satellite television providers, cable television providers, and providers of subscription internet television.

(b) **"Pay per program or subscription on-demand basis"** means programming that the buyer pays for on a per program basis or a service that allows the buyer to access a library of programs at any time for a specific charge.

(c) **"Regular programming"** is scheduled programming. The person watching cannot stop, pause, rewind, or otherwise control the broadcast of the scheduled programming, including the time that the scheduled program is broadcast.

The fact that a customer uses a recording device, such as a VCR or DVR, does not result in the broadcaster's programming being characterized as a digital good.

(d) **Cable television providers paying franchise fees.** Cable television providers' sales of programming to consumers on a pay-per-program or subscription on-demand basis are not subject to retail sales and use tax if the cable television provider is subject to a franchise fee (under the authority of Title 47 U.S.C. Sec. 542(a)) on the gross revenue received from such sales. If the cable television provider is not subject to a franchise fee on the income from the sale of programming on a pay-per-program or subscription on-demand basis, then the exemption does not apply and the cable television provider must collect and remit retail sales tax on the retail sale of such programming.

Example 31. XYZ sells video programming to customers using cable technology. XYZ does not pay a franchise fee. Customers of XYZ are charged a monthly subscription fee to receive video programming. Customers are charged additional fees to view selected movies. XYZ must charge and collect retail sales tax on the additional fees charged to view the selected movies, but not on the monthly subscription fee which would generally be subject to service and other activities B&O tax.

(e) Satellite television providers do not generally pay franchise fees and therefore do not qualify for the retail sales and use tax exemption based on payment of franchise fees as described in (d) of this subsection.

(510) **Newspapers.** Generally, retail sales and use tax does not apply to sales of newspapers transferred electronically, provided that the electronic version has a printed counterpart, and the electronic version:

(a) Shares content with the printed newspaper; and

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(b) Is prominently identified by the same name as the printed newspaper or otherwise conspicuously indicates that it is a complement to the printed newspaper.

(c) "Printed newspaper" means a publication issued regularly at stated intervals at least twice a month and printed on newsprint in tabloid or broadsheet format folded loosely together without stapling, glue, or any other binding of any kind, including any supplement of a printed newspaper.

(511) **Received for free by end user.** Digital products and digital codes obtained by the end user for free are not subject to use tax.

(a) For example, a person's use of a free search engine is not subject to use tax.

(b) For example, a person reading an online article or viewing an online picture for free is not subject to use tax.

(512) **Other use tax exemptions.** Use tax does not apply to the use of digital goods that are:

(a) Noncommercial in nature, such as personal e-mail communications;

(b) Created solely for an internal audience; or

(c) Created solely for the business needs of the person who created the digital good and is not the type of digital good that is offered for sale, including business e-mail communications.

Example 32. Gary, an employee of Kadabbera Corp., creates a digital audio-visual presentation using presentation authoring software and his innate creative capacity. Gary distributes the presentation internally to various divisions within Kadabbera in order to train employees on changes to company policies. Gary has created and distributed an item that meets the definition of "digital good." However, the distribution and use of this digital good is not subject to use tax as long as it is used solely internally or solely for the business needs of Kadabbera.

Part 6. Miscellaneous Provisions

(601) **Retail services.** Washington imposes retail sales and use tax on certain enumerated services under RCW 82.04.050 ("retail services"). For example, the sale of credit bureau services is subject to retail sales tax. However, when a retail service is transferred electronically and also meets the definition of digital automated service or digital good, such service will be treated as a digital product and is eligible for all applicable digital products retail sales and use tax exemptions as described above in Part 5 of this rule. Retail services that are not transferred electronically or those retail services that are excluded from the definitions of digital good or digital automated service (e.g., telecommunications services and ancillary services) continue to be taxed as retail services.

Example 33. ABC creates a "canned" digital report on Company X's creditworthiness prepared prior to a customer request for the report. The report may be a credit bureau service and/or a digital good (if transferred electronically). The "canned" report is listed for sale on ABC's web site. An employee of InvestCo, Inc. purchases and downloads a digital copy of the "canned" credit report from ABC's web site for InvestCo's business purpose. ABC is selling a digital good generally subject to retail sales tax. However, the "canned" report is purchased by InvestCo solely for a business purpose and therefore exempt from retail sales tax (see subsection (505) of this ((~~section~~)) rule for more on this exemption).

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Example 34. Company sells credit reports and credit research services. EPD Corp., requests that Company prepare a credit report for EPD's specialized business purposes. After receiving the request, Company's employee researches, analyzes and generates information from various digital sources to prepare the credit report for EPD. Company then sends the report electronically as a digital file to EPD. Company is not selling a digital good because the digital item supplied to EPD is merely a representation of a professional service performed by EPD's employee. Therefore, Company's services are not a "digital product." However, Company is still required to charge and collect retail sales tax because Company is still providing credit bureau services, a retail service, subject to retail sales tax.

Example 35. Company sells an online credit reporting service. The service includes access to searchable data bases, digital data analysis, and digital data reporting tools. ManageCo investigates the credit worthiness of individuals and therefore purchases access to Company's online service. Company is selling a digital automated service to be used solely for a business purpose by ManageCo. However, the "used solely for a business purpose" exemption is limited to digital goods and is not applicable to digital automated services. As such, Company is required to charge and collect retail sales tax on its sale of the digital automated service to ManageCo.

(602) **Royalties and wholesaling B&O tax on digital products.** The sale of digital products to "nonend users" may be subject to royalties or wholesaling B&O tax depending on the type of transaction and the intangible rights provided to the purchaser. Transactions which provide the right to resell digital products (no copying rights) to consumers will generally be treated as wholesale sales. Additionally, transactions which allow the purchaser the right to incorporate a digital product into a new product for sale will also be treated as wholesale sales. See also subsection (503) of this ((~~section~~)) rule. Other nonend user transactions involving digital products or digital codes will generally be treated as royalties transactions.

Example 36. Media Corp., licenses to Rerun Inc., the right to further broadcast a digital movie file on Rerun's web site for a specified period of time. In this case Media Corp. provides Rerun with the right by contract to further commercially broadcast or exhibit a digital movie to its subscribers. This is a nonend user transaction subject to royalties B&O tax. Media Corp. would report its gross receipts from this transaction under the royalties B&O tax classification and not charge and collect retail sales tax on the transaction with Rerun. Rerun's charges for the subscription service provided to consumers are generally subject to retail sales tax and retailing B&O tax.

Example 37. Same facts as Example 36 except Rerun purchases individual digital movie files from Media Corp. with the right to resell those individual files to end users at retail instead of rebroadcasting or exhibiting to the public. In this case Media Corp. has provided Rerun with the right to resell individual digital movie files to end users. Media Corp. would report its gross receipts from this transaction under the wholesaling B&O tax classification and not charge and collect retail sales tax on the transaction with Rerun. Rerun's charges to consumers for the movie files are generally subject to retail sales tax and retailing B&O tax.

Example 38. Same facts as Example 37 except that Rerun purchases a single digital movie file with the right provided by contract to duplicate and sell that movie file. In this case Media Corp. has provi-

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ded Rerun with the right to duplicate and sell individual digital movie files. Media Corp. would report its gross receipts from this transaction under the royalties B&O tax classification. Media Corp. would not need to charge and collect retail sales or use tax from Rerun. Rerun's charges to consumers for the movie files are generally subject to retail sales tax and retailing B&O tax.

Example 39. Jack is a photographer who creates a digital picture of Mt. Rainier. Jack licenses, by contract, to Cashman the right to duplicate and sell copies of the Mt. Rainier picture in retail stores. Cashman's payment to Jack is for the grant of an intangible right and subject to royalties B&O tax. Cashman's sale of the picture at retail to customers is subject to retail sales tax and retailing B&O tax.

(603) **Substantial nexus** is not established in Washington if a business's only contact with the state of Washington is ownership of, or rights in, computer software as defined in RCW 82.04.215, including computer software used in providing a digital automated service; master copies of software; a digital goods or digital codes residing on servers in Washington. For purposes of this ((~~section~~)) rule, "substantial nexus" means the requisite connection that a person must have with a state to allow the state to subject the person to the state's taxing authority, consistent with the commerce clause of the United States Constitution.

(604) **Amnesty.** Before July 26, 2009, retail sales of downloaded digital goods on a permanent or nonpermanent basis were subject to retail sales tax. This did not include accessed or streamed digital goods. However, amnesty is available to those who did not collect or pay retail sales or use tax on digital goods and digital codes during that time. Sales of digital automated services and accessed or streamed digital goods were subject to service and other B&O tax before July 26, 2009, and amnesty does not extend to these transactions because they were not subject to retail sales tax during that time period.

(a) **Refunds and credits of retail sales or use tax.** No refund or credit will be given for state and local retail sales and use taxes properly paid on the sale or use, before July 26, 2009, of digital goods or of installing, repairing, altering, or improving digital goods.

(b) **No B&O tax refund or credit unless sales tax was paid.** If a taxpayer paid B&O tax under the service and other activities classification prior to July 26, 2009, on income received from retail sales of digital products or digital codes, the taxpayer may not receive a refund or credit for the difference between the B&O tax actually paid and the B&O tax that should have been paid under the retailing classification unless the taxpayer has remitted the retail sales tax for those sales.

(605) **Bundled transactions.** A "bundled transaction" is the retail sale of two or more products, which are distinct and identifiable for one nonitemized price. Because retail sales of digital products and digital codes are subject to retail sales tax, the general rules on the taxation of bundled transactions may apply to certain transactions involving digital products and digital codes. See RCW 82.08.190 and 82.08.195 for more information on the tax treatment of bundled transactions.

(606) **Property tax.** The excise tax laws relating to digital products and digital codes do not have any impact in the characterization of digital goods and digital codes as tangible or intangible personal property for purposes of property taxation and may not be used in any

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This rule draft is being proposed under an expedited rule-making process that does not require the agency to hold public hearings. Under no circumstances is this proposed rule to be used as a basis for determining tax liability or eligibility for a tax deduction, exemption, or credit.

way in construing Title 84 RCW. See section 1201, chapter 535, Laws of 2009.

(607) **Records requirement.** Every taxpayer liable for any tax collected by the department must keep and preserve, for a period of five years, suitable records to determine the amount of tax owed. Such records must include copies of all federal income tax and state tax returns and reports. All of taxpayer's books, records, and invoices must be open to examination by the department. An out-of-state taxpayer that does not keep the necessary books and records within this state may produce within this state the books and records required by the department, or permit the examination by an agent authorized or designated by the department at the place the books and records are kept.

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