



PREPROPOSAL STATEMENT OF INQUIRY

CR-101 (June 2004)
(Implements RCW 34.05.310)
Do NOT use for expedited rule making

Agency: Department of Revenue

Subject of possible rule making: WAC 458-20-164 (Rule 164) *Insurance ((agents, brokers and solicitors)) producers, adjusters – Title insurance agents – Surplus line brokers.*

Statutes authorizing the agency to adopt rules on this subject: RCW 82.32.300 and 82.01.060(2)

Reasons why rules on this subject may be needed and what they might accomplish: The Department is considering revisions to Rule 164 to:

- Recognize legislation changing terms from “insurance agents, brokers, or solicitors” to “insurance producers,” and the addition of “title insurance agents” in chapter 82.04 RCW (chapter 217, Laws of 2008);
- Add language pertaining to economic nexus;
- Add language pertaining to “surplus line brokers” in chapter 82.04 RCW (chapter 162, Laws of 2009);
- Addition of a new subsection for tax information for insurance adjusters;
- Delete portions of subsection (5) *Special classification for certain managing general agents* as no longer needed. These taxpayers report under the “*Insurance producers, title insurance agents, or surplus line broker commissions*’ B&O tax classification;
- Add a new subsection covering purchases subject to retail sales tax; and
- Add examples and subsection headings.

Identify other federal and state agencies that regulate this subject and the process coordinating the rule with these agencies: None

Process for developing new rule (check all that apply):

- Negotiated rule making
 Pilot rule making
 Agency study

X Other (describe) Parties interested in this rule making may contact the individual listed below. The public may also participate by providing written comments throughout this rule making or giving oral testimony at the public meeting or public hearing.

How interested parties can participate in the decision to adopt the new rule and formulation of the proposed rule before publication:

Written comments may be submitted by mail, fax, or at the public meeting. Oral comments will be accepted at the public meeting. A preliminary draft of anticipated changes will be available upon request shortly before the public meeting. Written comments on and/or requests for copies of the rule may be directed to: Gayle Carlson, Interpretations and Technical Advice Division, P. O. Box 47453, Olympia, WA 98504-7453; e-mail: GayleC@dor.wa.gov; phone: (360) 534-1576.

Public meeting location:

Capitol Plaza Building
4th Floor – RLA Large Conference Room
1025 Union Avenue SE
Olympia, Washington

Date: September 28, 2011 **Time:** 9:30 A.M.

Date	August 23, 2011
Name (type or print)	Alan R. Lynn
Signature	
Title	Rules Coordinator

OFFICE OF THE CODE REVISER STATE OF WASHINGTON FILED
DATE: August 23, 2011 TIME: 11:14 AM WSR 11-17-115

This draft is provided for discussion purposes only to determine what topics a possible proposed rule might address. This discussion draft is under no circumstances to be used to determine a tax liability and/or eligibility for tax exemptions.

AMENDATORY SECTION (Amending WSR 92-19-004, filed 9/3/92, effective 10/4/92)

WAC 458-20-164 Insurance ~~((agents, brokers and solicitors))~~ producers, adjusters--Title insurance agents--Surplus line brokers. (1) **Introduction.** This section explains the taxability of amounts ~~((received))~~ earned by insurance ~~((agents, brokers, or solicitors))~~ producers, title insurance agents, and surplus line brokers, which include persons commonly referred to as insurance agents, solicitors, representatives, brokers, or dealers.

(a) **Economic nexus.** Nonresident individuals or business entities organized or commercially domiciled outside the state of Washington should refer to WAC 458-20-19401, Minimum nexus thresholds for apportionable activities, which include engaging in business as an insurance producer, title insurance agent, or a surplus line broker, to determine if they meet the minimum thresholds for apportioning activities.

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

(2) **Definitions.** ~~((The words "agent," "broker," and "solicitor" mean a person licensed as such under the provisions of chapter 48.17 RCW.))~~

 Insurance producer. An insurance producer is a person required to be licensed under the laws of this state to sell, solicit, or negotiate insurance. "Insurance producer" does not include title insurance agents or surplus line brokers. RCW 48.17.010.

 Title insurance agent. A title insurance agent is a business entity licensed under the laws of this state and appointed by an authorized title insurance company to sell, solicit, or negotiate insurance on behalf of the title insurance company.

 Surplus line broker. A surplus line broker is a person specially licensed under chapter 48.15 RCW to procure policies from an insurer not licensed in Washington.

(3) **Business and occupation (B&O) tax.** ~~((Every))~~ Persons engaging in business ~~((as an insurance agent, broker, or~~

~~solicitor is~~) in this state as an insurance producer or a title insurance agent licensed under chapter 48.17 RCW, or a surplus line broker licensed under chapter 48.15 RCW are taxable on gross income earned from such licensed activities, including commissions, fees, and renewals, under the insurance (~~agents and brokers~~) producers/title insurance agents/surplus line broker commissions B&O tax classification (~~upon the gross income of the business~~). (See WAC 458-20-156, Abstract, title insurance and escrow businesses for taxability of fees/premiums charged to consumers for title insurance.)

Persons engaging in this state as an agent, broker, representative, or solicitor licensed under chapter 48.18A RCW are taxable on gross income earned from such licensed activities under the service and other activities B&O tax classification.

(a) **How is gross income determined?** The gross income of the business is determined by the amount of gross commissions received, not by the gross premiums paid by the insured. The term "gross income of the business" includes gross receipts from commissions, fees, renewals, or other amounts which the (~~agent, broker, or solicitor~~) insurance producer, title insurance agent, or surplus line broker receives or becomes entitled to receive. RCW 82.04.080. The gross income of the business does not include amounts held in trust for the insurer or the client. (See (~~also~~) WAC 458-20-111, Advances and reimbursements.)

(b) **Are commissions and expenses deductible?** No deduction is allowed for commissions, fees, or salaries paid to other (~~agents, brokers, or solicitors nor~~) insurance producers, title insurance agents, or surplus line brokers or for other expenses of doing business.

(c) **Examples.**

(i) ABC Financial Services (ABC) is a full-service broker-dealer firm with independent contractors, referred to as "representatives," licensed to sell insurance products (chapter 48.17 RCW) and securities (chapter 48.18A RCW). ABC's top selling representative is John. When John sells an insurance policy to a client, ABC receives a commission from the insurer and pays a portion of that commission to John, which John reports under the insurance producers/title insurance agents/surplus line broker commissions B&O tax classification. When John sells securities, ABC charges the purchaser a fee and pays a portion of that fee to John as a commission, which John reports under the service and other activities B&O tax classification. ABC is taxable on the total commissions received from the sale of insurance products (under the insurance producers/title insurance agents/surplus line broker commissions classification) and fees charged for security transactions, (under the service and other activities classification), including the amount in commissions paid to John.

(ii) Tom is an independent contractor with agency agreements with several insurance companies that authorize him to accept applications for insurance. Tom also has an agreement with William, who will market insurance policies for Tom. When William sells a policy for Tom, William collects the entire gross premium from the customer. William deposits the entire amount, and sends Tom a check for the balance remaining after William deducts his commission. Tom deposits the check and writes a check to the insurance company for the net premium. As Tom, not William, has the contractual relationship with the insurance company, Tom owes B&O tax on the gross commission income including the amount retained by William. Tom cannot deduct the amount William kept as it is a cost of doing business for Tom. He will report under the insurance producers/title insurance agent/surplus line broker commissions B&O tax classification. William will also report his commission income on his excise tax return under the insurance producers/title insurance agent/surplus line broker commissions B&O tax classification.

(iii) Lisa sells life insurance and variable annuities. Lisa is not an employee of the insurance company and is taxable under the insurance producers/title insurance agent/surplus line broker commissions B&O tax classification on the commissions she earns from selling insurance. Commissions earned from selling variable annuities, where the death benefits are incidental, are taxable under the service and other business activities B&O tax classification. See RCW 48.18A.030.

(d) **Engaging in business.** Every person acting in the capacity of ~~((agent, broker, or solicitor))~~ an insurance producer, title insurance agent, or surplus line broker is presumed to be engaging in business and subject to the ~~((business and occupation))~~ B&O tax unless ~~((such))~~ the person can demonstrate he or she is a bona fide employee. The burden is ~~((upon such))~~ on the person to establish the fact of his or her status as an employee. (See WAC 458-20-105, Employees distinguished from persons engaging in business.)

(e) **How do I apportion my income?** Persons earning apportionable income subject to B&O tax and also taxable in another state are entitled to determine taxable income for B&O tax purposes by using the apportionment method provided in WAC 458-20-19402, Single factor receipts apportionment--Generally.

(4) **Full-time life insurance salespersons.** ~~((After June 30, 1991,))~~ Persons who sell life insurance on a full-time basis, as provided in section 3121 (d)(3)(B) of the Internal Revenue Code (statutory employee), will be considered employees. ~~((Such))~~ These persons will not be subject to the ~~((business and occupation))~~ B&O tax on amounts received in their capacity as statutory employees.

(a) **What are the criteria for full-time life insurance**

salespersons? For purposes of this subsection (4), a full-time life insurance salesperson is an individual who meets all of the following criteria:

(i) The person's principal business activity is devoted to the solicitation of life insurance or annuity contracts, or both, primarily for one insurance company;

(ii) The contract between the individual and the primary life insurance company contemplates that substantially all of such services are to be performed personally by such individual;

(iii) The individual does not have a substantial investment in facilities used in connection with the sale of life insurance or annuity contracts (other than in facilities for transportation); and

(iv) The sale of life insurance by such individual occurs in the course of a continuing relationship with the primary life insurance company.

(b) **What is a principal business activity?** A person's principal business activity is the activity from which he or she generally receives the greatest remuneration. All business activities, including acting as an employee, will be considered in determining a person's principal business activity.

(c) **What is considered a facility?** The facilities referred to in (a)(~~(iii)~~) (iii) of this subsection include such things as office space, office equipment, and secretarial services. The term facilities does not include (~~such~~) tools, instruments, or clothing as are commonly furnished by employees. An investment is substantial if a deduction for the item is taken in calculating the person's federal income tax liability.

(d) **What will disqualify a person?** Failure to satisfy any one of the criteria listed in (a) of this subsection will disqualify a person from treatment as an employee under this subsection.

(e) **You can be an employee for only one life insurance company.** A person will be considered an employee under this subsection (4):

(i) With only one company, even if selling on behalf of more than one insurance company; and

(ii) Only as to amounts received as compensation for the sale of life insurance or annuity contracts, or both(~~(7)~~) from one life insurance company(~~(, regardless of whether the person sells life insurance on behalf of other companies)~~).

(f) **Receiving a Form W-2 as a statutory employee.** A person will be presumed to be a full-time life insurance salesperson within the meaning of section 3121 (d)(3)(B) of the Internal Revenue Code if they receive a Form W-2 (federal income tax wage and tax statement) indicating that they are a statutory employee. A person receiving a W-2 as a statutory employee will be presumed to be an employee under this subsection only as to amounts reported on the W-2 as compensation for the sale of life

insurance.

~~((g))~~ A person who does not receive a properly marked W-2 has the burden of establishing that they are a full-time life insurance salesperson as provided in (a) of this subsection.

~~((h))~~ (g) Examples.

(i) A person sells life insurance on a full-time basis on behalf of one company. The company issues a Form W-2 which indicates that the person is a statutory employee. Under these circumstances, the person will be presumed an employee as to amounts reported on the Form W-2 as compensation for the sale of life insurance and will not be taxable under the ~~((business and occupation))~~ B&O tax on ((such)) these amounts.

(ii) A person sells insurance on behalf of several insurance companies two of which are life insurance companies and the others are casualty insurance companies. The person sells both life insurance and casualty insurance. One of the life insurance companies issues a Form W-2 indicating that the person is a statutory employee. The person will be presumed an employee as to amounts reported on the Form W-2 as compensation for the sale of life insurance and will not be taxable under the ~~((business and occupation))~~ B&O tax on ((such)) these amounts.

(iii) A person sells life insurance on behalf of several life insurance companies and does not engage in any other business activity. Most of the policies sold by the person are written with one company. The person does not receive a Form W-2 from any of the companies for which life insurance is sold. The person's sales activities are conducted from an office which he or she leases. The office lease payments are deducted by the salesperson in computing his or her federal income tax liability. In addition, the salesperson has an employee whose salary is also deducted for federal income tax purposes. Because the person does not receive a Form W-2, he or she will not be presumed to be an employee. Instead, the person has the burden of proving the existence of each of the criteria listed in subsection (4)(a) of this section. In this example, the salesperson will not be considered an employee under this subsection (4) of this section because they have a substantial investment in facilities.

(5) ~~((Special classification for certain))~~ Licensed producer appointed as a managing general agent((s)). ~~((Under RCW 82.04.280(5))~~ A person((s)) representing and performing services for fire or casualty insurance companies as an independent resident managing general agent((s-are)) is subject to tax ((at the prevailing rate upon)) on the gross income of ((the)) such business activities and will report under the insurance producers/title insurance agents/surplus line broker commissions B&O tax classification.

~~((a) In view of the small number of persons falling in this special category, no separate classification line on the~~

~~combined excise tax return has been provided for reporting this income; it should be shown on line 1 of the combined excise tax return with the explanatory note: "Income for insurance managing general agent taxable under RCW 82.04.280(5)."~~

~~(b))~~ Any person claiming to fall within this tax classification must demonstrate:

~~((i))~~ (a) That ~~((he))~~ the person is licensed as a resident ~~((general agent))~~ producer by the insurance commissioner; and

~~((ii))~~ (b) That ~~((he))~~ the person performs the following independent manager functions:

~~((A))~~ (i) Pays all sales and/or production expense; including salaries of special field representatives, underwriters, and inspectors as well as all office expenses of rent, supplies, secretarial help, etc.

~~((B))~~ (ii) Bills all premiums for the company so represented.

~~((C))~~ (iii) Directly contracts for or hires all selling agents.

~~((D))~~ (iv) Exercises final responsibility with respect to selecting risks and underwriting matters.

~~((E))~~ (v) Makes all arrangements for reinsurance.

~~((F))~~ (vi) Handles all claims adjustments directly with the insured (by his own staff or through hiring an independent adjuster).

~~((c) Persons wishing to claim qualification for this special insurance agent classification should request application forms from the department of revenue.))~~ (6)

Insurance adjusters. For the purpose of this section, adjuster means a person licensed as such under the provisions of chapter 48.17 RCW. Persons engaged in business as insurance adjusters are taxable under the service and other business activities classification upon the gross income of the business.

Gross income includes all fees received for services rendered, and all charges recovered for expenses incurred in performing services, such as transportation costs, hotel, restaurant, and telephone charges, etc.

In computing tax liability, there may be deducted from the gross income (if included therein) money or credits received as reimbursement of advances made for:

 Towing;

 Storage of damaged automobiles;

 Repairs to damaged automobiles;

 Advances for doctor, hospital, and ambulance fees and charges; and

 Other such expenditures made with respect to damaged property or injured persons.

The words "advance" and "reimbursement" apply only when the

insurer or the insured alone is liable for the payment of the fees or costs and when the adjuster making the payment has no personal liability therefore, either primarily or secondarily, other than as agent for the insurer or the insured. Refer to WAC 458-20-111, Advances and reimbursements.

(7) **Purchases subject to retail sales tax.** Retail sales tax is owed on purchases of:

✎ Tangible personal property such as office equipment, supplies, furnishings, computers, prewritten software;

✎ Digital automated services; and

✎ Retail services, such as telephone service, construction services, landscape services, repair services.

If retail sales tax is not paid at the time of purchase, deferred sales tax or use tax is owed by the purchaser. See WAC 458-20-178, Use tax.