



# RULE-MAKING ORDER

**CR-103P (May 2009)**  
**(Implements RCW 34.05.360)**

**Agency:** Department of Revenue

**Permanent Rule Only**

**Effective date of rule:**

**Permanent Rules**

31 days after filing.

Other (specify) **(If less than 31 days after filing, a specific finding under RCW 34.05.380(3) is required and should be stated below)**

**Any other findings required by other provisions of law as precondition to adoption or effectiveness of rule?**

Yes  No If Yes, explain:

**Purpose:**

The Department has amended WAC AC 458-20-164 (Rule 164) *Insurance producers, adjusters – Title insurance agents – Surplus line brokers* to update information currently provided in the rule. The amended Rule 164:

- Recognizes 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);
- Includes language recognizing economic nexus;
- Includes language regarding to “surplus line brokers” (chapter 162, Laws of 2009);
- Includes a new subsection providing tax information for insurance adjusters, which is currently addressed in Rule 212. **Rule 212 is, as a result, being repealed;**
- Does not include portions of previous subsection (5) *Special classification for certain managing general agents* as that information is no longer needed. These taxpayers report under the “*Insurance producers, title insurance agents, or surplus line broker commissions*” B&O tax classification;
- Includes a new subsection covering purchases subject to retail sales or use tax; and
- Includes examples and subsection headings to provide information to readers in a more useful manner.

**Citation of existing rules affected by this order:**

Repealed: WAC 458-20-212 *Insurance adjusters*

Amended: WAC 458-20-164 *Insurance producers, adjusters – Title insurance agents – Surplus line brokers*

Suspended:

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

**Other authority:**

**PERMANENT RULE (Including Expedited Rule Making)**

Adopted under notice filed as WSR 12-02-084 on January 4, 2012.

Describe any changes other than editing from proposed to adopted version: **One change has been made. The phrase “minimum thresholds for apportioning activities” at the end of subsection (1)(a) has been changed to “minimum thresholds for apportionable activities.”**

If a preliminary cost-benefit analysis was prepared under RCW 34.05.328, a final cost-benefit analysis is available by contacting: **An analysis was not prepared.**

**Date adopted:**

May 3, 2012

**NAME**

Alan R. Lynn

**SIGNATURE**

**TITLE**

Rules Coordinator

**CODE REVISER USE ONLY**

OFFICE OF THE CODE REVISER  
STATE OF WASHINGTON  
FILED

**DATE: May 03, 2012**

**TIME: 9:20 AM**

**WSR 12-11-006**

**Note: If any category is left blank, it will be calculated as zero.  
No descriptive text.**

**Count by whole WAC sections only, from the WAC number through the history note.  
A section may be counted in more than one category.**

**The number of sections adopted in order to comply with:**

|   |     |         |          |
|---|-----|---------|----------|
| <b>Federal statute:</b>                 | New | Amended | Repealed |
| <b>Federal rules or standards:</b>      | New | Amended | Repealed |
| <b>Recently enacted state statutes:</b> | New | Amended | Repealed |

**The number of sections adopted at the request of a nongovernmental entity:**

|     |         |          |
|-----|---------|----------|
| New | Amended | Repealed |
|-----|---------|----------|

**The number of sections adopted in the agency's own initiative:**

|     |         |   |          |   |
|-----|---------|---|----------|---|
| New | Amended | 1 | Repealed | 1 |
|-----|---------|---|----------|---|

**The number of sections adopted in order to clarify, streamline, or reform agency procedures:**

|     |         |          |
|-----|---------|----------|
| New | Amended | Repealed |
|-----|---------|----------|

**The number of sections adopted using:**

|                                       |     |         |          |
|---------------------------------------|-----|---------|----------|
| <b>Negotiated rule making:</b>        | New | Amended | Repealed |
| <b>Pilot rule making:</b>             | New | Amended | Repealed |
| <b>Other alternative rule making:</b> | New | Amended | Repealed |

**This rule was repealed effective 6/3/12. It was effective for the period of 7/1/70 through 6/2/12.**

REPEALER

The following section of the Washington Administrative Code is repealed:

WAC 458-20-212

Insurance adjusters.

**This rule was adopted on 5/3/12 and becomes effective 6/3/12. It may be used to determine tax liability on and after the effective date, until the codified version is available from the code reviser's office.**

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 and Washington businesses conducting business for customers receiving benefits outside 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 apportionable 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. Tax results must be determined after a review of all 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. An insurance producer may receive a license to sell insurance products including, but not limited to, life, disability, property, and/or casualty. "Insurance producer" does not include title insurance agents or surplus line brokers. RCW 48.17.010 and 48.17.170.

. 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 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?** Income earned from engaging in business as insurance producers, title insurance agents, and surplus line brokers is apportionable income. The portion that is taxable income for B&O tax purposes must be determined 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) ~~((ii))~~ (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 ~~((r))~~ 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 products, unless specifically exempt; 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.