



PREPROPOSAL STATEMENT OF INQUIRY

CR-101 (October 2017) (Implements RCW 34.05.310)

Do **NOT** use for expedited rule making

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FILED

DATE: February 17, 2021

TIME: 10:13 AM

WSR 21-05-068

Agency: Department of Revenue

Subject of possible rule making: Workforce education investment surcharge – Select advanced computing businesses; Engrossed Substitute Senate Bill 6492 (2020)

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

Reasons why rules on this subject may be needed and what they might accomplish: The Department is proposing a new rule that provides information about the taxability of, and surcharge imposed on, select advanced computing businesses as described in RCW 82.04.299.

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

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.

Interested parties can participate in the decision to adopt the new rule and formulation of the proposed rule before publication by contacting:

| | |
|---|-------------------------|
| Name: Leslie Mullin | (If necessary) Name: |
| Address: PO Box 47453, Olympia, WA 98504-7453 | Address: |
| Phone: 360-534-1589 | Phone: |
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| Other: | Other: |


Additional comments: Written comments may be submitted by mail or email and should be directed to Leslie Mullin using one of the contact methods above. Written and oral comments will be accepted at the Public Meeting.

Date: March 10, 2021

Time: 10:00 A.M.

Public Meeting Location: Telephonic/internet meeting only.

Contact Keith Dacus at KeithD@dor.wa.gov for dial-in/login information.

| | |
|---------------------------------|---|
| Date: February 17, 2021 | Signature:  |
| Name: Atif Aziz | |
| Title: Rules Coordinator | |

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**WAC 458-20-NEW Workforce education investment surcharge -
Select advanced computing businesses.**

(1) **Introduction.** This rule provides information about the taxability of and surcharge for select advanced computing businesses as described in RCW 82.04.299.

(2) **Examples.** This rule includes examples that identify a number of facts and then state a conclusion. These examples should only be used as a general guide. The tax results of other situations must be determined after a review of all the facts and circumstances.

(3) **Definitions.** The following definitions apply throughout this rule:

(a) **"Advanced computing"** means the design or development of computer software or computer hardware, whether directly or contracting with another person, including modifications to computer software or computer hardware. Advanced computing also includes providing cloud computing services, operating an online marketplace such as an e-commerce site where products or services

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are offered by third parties and the business operating the e-commerce site processes the transactions, operating an online search engine, or operating an online social networking platform.

(b) **"Advanced computing business"** means a business that derives income from engaging in advanced computing.

(c) **"Affiliate"** and **"affiliated"** means a person that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with another person.

(d) **"Affiliated group"** means a group of two or more persons that are affiliated with each other.

(e) **"Cloud computing services"** means on-demand delivery of computing resources, such as networks, servers, storage, applications, and services, over the internet.

(f) **"Control"** means the possession, directly or indirectly, of more than fifty percent of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting shares, by contract, or otherwise.

(g) **"Select advanced computing business"** means a person who is a member of an affiliated group with at least one member of the

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affiliated group engaging in the business of advanced computing, and the affiliated group had worldwide gross revenue of more than twenty-five billion dollars during the immediately preceding calendar year. A select advanced computing business does not include any of the following:

(i) A person primarily engaged within this state in the provision of commercial mobile service, as that term is defined in 47 U.S.C. Sec. 332(d) (1);

(ii) A person primarily engaged in this state in the operation and provision of access to transmission facilities and infrastructure that the person owns or leases for the transmission of voice, data, text, sound, and video using wired telecommunications networks; or

(iii) A person primarily engaged in business as a "financial institution" as defined in RCW 82.04.29004, as that section existed on January 1, 2020.

For purposes of this subsection (g), "primarily" is determined based on the taxable income of the business, as defined in subsection (h) of this rule.

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(h) **"Taxable income of the business"** means the gross income of the business, as defined in RCW 82.04.080, to which the tax rate in RCW 82.04.290(2) is applied to determine the business's tax liability under that B&O tax classification. In other words, it is the business's taxable income under the service and other activities B&O tax classification.

(i) **"Worldwide gross revenue"** means the annual sum of all sources of revenues, worldwide, prior to any subtractions, for all members of an affiliated group.

(4) **Select advanced computing businesses - Taxability.**

(a) **Service and other activities B&O tax.** A select advanced computing business is subject to the service and other activities B&O tax rate of 1.5 percent as required in RCW 82.04.290(2)(a)(ii).

(b) **Workforce education investment surcharge.** Beginning with business activities occurring on or after April 1, 2020, a workforce education investment surcharge (surcharge) is imposed on select advanced computing businesses. This surcharge is in addition to the B&O taxes described in subsection (4)(a) of this

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rule, plus any additional taxes that are due and payable to the department.

(i) Surcharge amount. For each select advanced computing business, the surcharge is equal to the taxable income of the business, multiplied by a rate of 1.22 percent. The combined annual surcharge paid by all members of an affiliated group may not exceed nine million dollars.

(ii) Surcharge reporting. A select advanced computing business must report and pay the surcharge to the department on a quarterly basis, regardless of the tax reporting frequencies of the members in the select advanced computing business under RCW 82.32.045. The return and amount payable are due by the last day of the month immediately following the end of the quarter. This reporting requirement continues even if the combined annual surcharge paid by all members of an affiliated group reaches the nine million dollar annual maximum amount described in (4)(b)(i).

(iii) Surcharge payment agreement. Members of an affiliated group of select advanced computing businesses may enter into an

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agreement with the department for facilitating the payment of the surcharge for all members of the group.

(iv) Disclosure obligations. The department may require persons believed to be engaging in advanced computing, or affiliated with a person believed to be engaging in advanced computing, to disclose whether they are a member of an affiliated group, and if so, to identify all other members of the affiliated group subject to the surcharge.

(v) Penalties. If the department establishes by clear, cogent, and convincing evidence, that one or more members of an affiliated group, with the intent to evade the surcharge, failed to fully comply with the department's disclosure request, as described in subsection (iv), that person, or those persons collectively, will be assessed a penalty equal to fifty percent of the amount of the total surcharge payable by all members of that affiliated group for the calendar year during which the person or persons failed to comply. This penalty is in lieu of, and not in addition to, the evasion penalty under RCW 82.32.090(7). However, additional penalties may still apply, including but not limited to

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the penalty for late payment of tax due on a return. See RCW 82.32.090(1).

(v) Hospital exemption. The surcharge described in this subsection (4)(b) does not apply to a hospital as defined in RCW 70.41.020, including any hospital that comes within the scope of chapter 71.12 RCW if the hospital is also licensed under chapter 70.41 RCW.

(c) **Example.** Entity X, Entity Y, and Entity Z, an affiliated group, cumulatively had worldwide gross revenue of over twenty-five billion dollars in 2021. Entity X and Entity Y are engaged in advanced computing. All three entities are registered with the department and file and pay taxes on a monthly basis. For the first quarter of 2022, the entities reported the following amounts as taxable income of the business, respectively: Entity X: \$800,000; Entity Y: \$100,000; and Entity Z: \$1,200,000.

The first step is to determine whether the taxable income subject to tax under the service and other activities B&O tax classification for each entity is subject to the 1.22 percent surcharge. Because Entities X, Y, and Z are all members of an

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affiliated group that had more than twenty-five billion dollars of worldwide gross revenue during the preceding calendar year (2021 in this example), and Entity X and Entity Y are engaged in the business of advanced computing, Entities X, Y, and Z are each considered a "select advanced computing business." Therefore, the taxable income of the business of each is subject to the 1.22 percent surcharge as follows:

Entity X: $\$800,000 * 1.22\% = \$9,760$

Entity Y: $\$100,000 * 1.22\% = \$1,220$

Entity Z: $\$1,200,000 * 1.22\% = \$14,640$

The total surcharge owed by this affiliated group of select advanced computing businesses for the first quarter of 2022 is \$25,620. This amount is due no later than April 30, 2022, and must be reported and paid by each select advanced computing business to the department.

The next step is to determine the service and other activities B&O tax rate in RCW 82.04.290(2) to apply to the taxable income reported by each entity. Because the three entities are subject to the 1.22 percent surcharge, the taxable income reported under RCW

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82.04.290(2) by each entity will be subject to the B&O tax rate of 1.5 percent as required in RCW 82.04.290(2)(a)(ii):

Entity X: \$800,000 (*) 1.5% (=) \$12,000

Entity Y: \$100,000 (*) 1.5% (=) \$1,500

Entity Z: \$1,200,000 (*) 1.5% (=) \$18,000

Each entity will continue to file and pay any taxes due on a monthly basis.