
SUBSTITUTE HOUSE BILL 1678

State of Washington

64th Legislature

2015 Regular Session

By House Finance (originally sponsored by Representatives Carlyle and Nealey; by request of Department of Revenue)

READ FIRST TIME 02/26/15.

1 AN ACT Relating to improving tax fairness for businesses engaged
2 in electronic commerce by eliminating inconsistent tax treatment of
3 digital business inputs, ensuring that prewritten computer software
4 developers remain eligible for the manufacturing machinery and
5 equipment sales and use tax exemption, and providing greater clarity
6 for out-of-state sellers concerning their tax obligations; amending
7 RCW 82.08.02087, 82.12.02087, 82.08.195, and 82.04.067; reenacting
8 and amending RCW 82.08.02565; adding a new section to chapter 82.08
9 RCW; adding a new section to chapter 82.32 RCW; creating new
10 sections; providing an effective date; providing an expiration date;
11 and declaring an emergency.

12 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

13 **Part I**
14 **Sales and use tax exemptions for digital automated services used**
15 **solely for business purposes**

16 NEW SECTION. **Sec. 101.** (1) In 2009 the legislature enacted
17 comprehensive legislation addressing the excise taxation of digital
18 products. The term "digital products" encompasses two categories of
19 electronically transferred goods and services: "Digital goods," such

1 as a digital music file or an e-book, and "digital automated
2 services," such as an online research application.

3 (2) In general, the legislation provided that retail sales of
4 digital products are subject to retail sales tax, unless specifically
5 exempted. One of the exemptions provided in the 2009 enactment, as
6 modified by 2010 clean-up legislation, was for sales of digital goods
7 used solely for business purposes. The legislature's purpose in
8 enacting this exemption was to provide businesses with a meaningful
9 sales and use tax exemption for digital business inputs. This
10 exemption is not currently subject to an expiration date or to
11 accountability reporting requirements.

12 (3) The legislature finds that there has been a significant
13 migration of digital business inputs from digital goods to digital
14 automated services in the past several years, which was not
15 anticipated in 2009 and 2010. The legislature further finds that this
16 migration has significantly undermined the effect of the
17 legislature's policy choice to provide substantial sales and use tax
18 relief for the acquisition of digital business inputs. The
19 legislature further finds that electronic commerce has grown and
20 evolved dramatically in recent years. The legislature further finds
21 that our state's tax structure is ill-equipped to adapt to such a
22 quickly evolving digital landscape. The legislature further finds
23 that it is in the best interest of the state to carefully monitor the
24 fiscal impact of tax preferences related to digital products to
25 ensure that the actual revenue loss to the state reasonably conforms
26 to what was anticipated at the time the legislation was adopted.

27 (4)(a) This subsection is the tax preference performance
28 statement for the sales and use tax exemptions provided in RCW
29 82.08.02087(2) and 82.12.02087(2). The performance statement is only
30 intended to be used for subsequent evaluation of the tax preference.
31 It is not intended to create a private right of action by any party
32 or be used to determine eligibility for preferential tax treatment.

33 (b) The legislature categorizes this tax preference as one
34 intended to reduce structural inefficiencies in the tax structure and
35 provide tax relief, as indicated in RCW 82.32.808(2) (d) and (e).

36 (c) The legislature's specific public policy objectives are to:
37 (i) Provide more clarity and consistency in the sales and use
38 taxation of digital business inputs; (ii) reaffirm and restore the
39 policy choice it made in 2009 of providing substantial sales and use
40 tax relief to businesses for their acquisition of digital business

1 inputs; and (iii) evaluate whether the fiscal impact of these tax
2 preferences reasonably conforms to what was anticipated at the time
3 the implementing legislation was adopted. These objectives are
4 accomplished by broadening the exemptions for digital business inputs
5 by including digital automated services used solely for business
6 purposes, and requiring the joint legislative audit and review
7 committee, and the legislature, to evaluate the effectiveness and
8 fiscal impact of these tax preferences in ten years.

9 (d) To measure the effectiveness of the tax preference in
10 achieving the specific public policy objectives described in (c) of
11 this subsection, the joint legislative audit and review committee
12 must, at a minimum, evaluate the following:

13 (i) The number of businesses claiming the tax preference as
14 reported to the department of revenue pursuant to RCW 82.32.808(6);

15 (ii) The amount of sales and use taxes exempted under RCW
16 82.08.02087(2) and 82.12.02087(2) as reported to the department of
17 revenue pursuant to RCW 82.32.808(6); and

18 (iii) Whether the exemptions provided in RCW 82.08.02087(1) and
19 82.12.02087(1) are still in effect.

20 (e) The legislature intends for the legislative auditor to
21 recommend extending the expiration date of the tax preference if a
22 review finds that the exemptions in RCW 82.08.02087(1) and
23 82.12.02087(1) are still in effect on a permanent basis. If a review
24 finds that the legislature has added an expiration date for the tax
25 exemptions in RCW 82.08.02087(1) and 82.12.02087(1) and such
26 expiration date is after July 1, 2025, the legislature intends for
27 the legislative auditor to recommend extending the expiration date of
28 the tax preference to coincide with the expiration date of RCW
29 82.08.02087(1) and 82.12.02087(1).

30 (f) The department of revenue must provide data needed to perform
31 the review in (d) of this subsection. The joint legislative audit and
32 review committee may also refer to any other data it deems necessary
33 in conducting the review.

34 **Sec. 102.** RCW 82.08.02087 and 2010 c 111 s 402 are each amended
35 to read as follows:

36 (1) The tax imposed by RCW 82.08.020 does not apply to the sale
37 to a business of digital goods, and services rendered in respect to
38 digital goods, where the digital goods and services rendered in
39 respect to digital goods are purchased solely for business purposes.

1 The exemption provided by this section also applies to the sale to a
2 business of a digital code if all of the digital goods to be obtained
3 through the use of the code will be used solely for business
4 purposes.

5 ~~(2) ((The exemption is available only when the buyer provides the~~
6 ~~seller with))~~ Until July 1, 2025, the tax imposed by RCW 82.08.020
7 does not apply to the sale to a business of digital automated
8 services purchased solely for business purposes. The exemption
9 provided by this subsection (2) also applies to the sale to a
10 business of a digital code if all of the digital automated services
11 to be obtained through the use of the code will be used solely for
12 business purposes.

13 (3) Sellers making tax-exempt sales under this section must
14 obtain from the purchaser an exemption certificate in a form and
15 manner prescribed by the department. The seller must retain a copy of
16 the certificate for the seller's files.

17 ~~((3))~~ (4) For purposes of this section, the following
18 definitions apply:

19 (a) "Business purposes" means any purpose relevant to the
20 business needs of the taxpayer claiming an exemption under this
21 section. Business purposes do not include any personal, family, or
22 household purpose. The term also does not include any activity
23 conducted by a government entity as that term is defined in RCW
24 7.25.005; and

25 (b) "Services rendered in respect to digital goods" means those
26 services defined as a retail sale in RCW 82.04.050(2)(g).

27 **Sec. 103.** RCW 82.12.02087 and 2010 c 111 s 502 are each amended
28 to read as follows:

29 (1) The provisions of this chapter do not apply to the use by a
30 business of digital goods, and services rendered in respect to
31 digital goods, where the digital goods and services rendered in
32 respect to digital goods are used solely for business purposes. The
33 exemption provided by this section also applies to the use by a
34 business of a digital code if all of the digital goods to be obtained
35 through the use of the code will be used solely for business
36 purposes.

37 (2) Until July 1, 2025, the provisions of this chapter do not
38 apply to the use by a business of digital automated services solely
39 for business purposes. The exemption provided by this subsection (2)

1 also applies to the use by a business of a digital code if all of the
2 digital automated services to be obtained through the use of the code
3 will be used solely for business purposes.

4 (3) For purposes of this section, the definitions in RCW
5 82.08.02087 apply.

6 **Sec. 104.** RCW 82.08.195 and 2010 c 111 s 601 are each amended to
7 read as follows:

8 (1) Except as provided in subsection (6) of this section, a
9 bundled transaction is subject to the tax imposed by RCW 82.08.020 if
10 the retail sale of any of its component products would be subject to
11 the tax imposed by RCW 82.08.020.

12 (2) The transactions described in RCW 82.08.190(4) (a) and (b)
13 are subject to the tax imposed by RCW 82.08.020 if the service that
14 is the true object of the transaction is subject to the tax imposed
15 by RCW 82.08.020. If the service that is the true object of the
16 transaction is not subject to the tax imposed by RCW 82.08.020, the
17 transaction is not subject to the tax imposed by RCW 82.08.020.

18 (3) The transaction described in RCW 82.08.190(4)(c) is not
19 subject to the tax imposed by RCW 82.08.020.

20 (4) The transaction described in RCW 82.08.190(4)(d) is not
21 subject to the tax imposed by RCW 82.08.020.

22 (5) In the case of a bundled transaction that includes any of the
23 following: Telecommunications service, ancillary service, internet
24 access, or audio or video programming service:

25 (a) If the price is attributable to products that are taxable and
26 products that are not taxable, the portion of the price attributable
27 to the nontaxable products are subject to the tax imposed by RCW
28 82.08.020 unless the seller can identify by reasonable and verifiable
29 standards the portion from its books and records that are kept in the
30 regular course of business for other purposes including, but not
31 limited to, nontax purposes;

32 (b) If the price is attributable to products that are subject to
33 tax at different tax rates, the total price is attributable to the
34 products subject to the tax at the highest tax rate unless the seller
35 can identify by reasonable and verifiable standards the portion of
36 the price attributable to the products subject to the tax imposed by
37 RCW 82.08.020 at the lower rate from its books and records that are
38 kept in the regular course of business for other purposes including,
39 but not limited to, nontax purposes.

1 (6) The tax imposed by RCW 82.08.020 does not apply in respect to
2 a bundled transaction consisting entirely of the sale of services or
3 of services and prepared food, if the sale is to a resident, sixty-
4 two years of age or older, of a qualified low-income senior housing
5 facility by the lessor or operator of the facility. A single bundled
6 transaction involving both spouses of a marital community or both
7 domestic partners of a domestic partnership meets the age requirement
8 in this subsection if at least one of the spouses or domestic
9 partners is at least sixty-two years of age. For purposes of this
10 subsection, "qualified low-income senior housing facility" has the
11 same meaning as in RCW 82.08.0293.

12 (7) In the case of the sale of a code that provides a purchaser
13 with the right to obtain more than one digital product or one or more
14 digital products and other products or services, and all of the
15 products and services, digital or otherwise, to be obtained through
16 the use of the code do not have the same sales and use tax treatment,
17 for purposes of the tax imposed by RCW 82.08.020:

18 (a) The transaction is deemed to be the sale of the products and
19 services to be obtained through the use of the code; and

20 (b)(i) The tax imposed by RCW 82.08.020 applies to the entire
21 selling price of the code, except as provided in (b)(ii) of this
22 subsection (7).

23 (ii) If the seller can identify by reasonable and verifiable
24 standards the portion of the selling price attributable to the
25 products and services that are not subject to the tax imposed by RCW
26 82.08.020 from its books and records that are kept in the regular
27 course of business for other purposes including, but not limited to,
28 nontax purposes, the tax imposed by RCW 82.08.020 does not apply to
29 that portion of the selling price of the code attributable to the
30 products and services that are not subject to the tax imposed by RCW
31 82.08.020 nor to that portion of the selling price of the code
32 attributable to any digital (~~goods~~) products, the sale of which is
33 exempt under RCW 82.08.02087.

34 **Part II**
35 **Clarifying the sales and use tax exemption for machinery equipment**
36 **used in manufacturing, research and development, or testing**
37 **operations**

1 NEW SECTION. **Sec. 201.** (1) The legislature in 1995 established
2 sales and use tax exemptions for manufacturing machinery and
3 equipment, commonly referred to as the "M&E exemption." In 1996, the
4 legislature expanded the exemption to include machinery and equipment
5 used by a manufacturer in a research and development operation.

6 (2) The legislature finds that software developers that created
7 and produced prewritten computer software have historically qualified
8 for this exemption because the production of prewritten computer
9 software contained on a disc or other tangible storage media provided
10 to the buyer is considered to be a manufacturing activity. The
11 legislature further finds that changes in the software industry have
12 resulted in most prewritten computer software sold today being
13 delivered to buyers electronically. As a result of this change,
14 questions have been raised about the continued applicability of the
15 machinery and equipment exemption to the development and production
16 of prewritten computer software.

17 (3) Therefore, the legislature intends in section 202 of this act
18 to clarify its intent that the machinery and equipment exemption
19 applies to developers of prewritten computer software, regardless of
20 how the software is delivered to buyers. As a clarification of its
21 intent, the legislature does not intend section 202 of this act to be
22 considered the expansion of an existing tax preference for purposes
23 of RCW 82.32.805 and 82.32.808.

24 **Sec. 202.** RCW 82.08.02565 and 2014 c 216 s 401 and 2014 c 140 s
25 13 are each reenacted and amended to read as follows:

26 (1)(a) The tax levied by RCW 82.08.020 does not apply to sales to
27 a manufacturer or processor for hire of machinery and equipment used
28 directly in a manufacturing operation or research and development
29 operation, to sales to a person engaged in testing for a manufacturer
30 or processor for hire of machinery and equipment used directly in a
31 testing operation, or to sales of or charges made for labor and
32 services rendered in respect to installing, repairing, cleaning,
33 altering, or improving the machinery and equipment.

34 (b) Except as provided in (c) of this subsection, sellers making
35 tax-exempt sales under this section must obtain from the purchaser an
36 exemption certificate in a form and manner prescribed by the
37 department by rule. The seller must retain a copy of the certificate
38 for the seller's files.

1 (c)(i) The exemption under this section is in the form of a
2 remittance for a gas distribution business, as defined in RCW
3 82.16.010, claiming the exemption for machinery and equipment used
4 for the production of compressed natural gas or liquefied natural gas
5 for use as a transportation fuel.

6 (ii) A gas distribution business claiming an exemption from state
7 and local tax in the form of a remittance under this section must pay
8 the tax under RCW 82.08.020 and all applicable local sales taxes.
9 Beginning July 1, 2017, the gas distribution business may then apply
10 to the department for remittance of state and local sales and use
11 taxes. A gas distribution business may not apply for a remittance
12 more frequently than once a quarter. The gas distribution business
13 must specify the amount of exempted tax claimed and the qualifying
14 purchases for which the exemption is claimed. The gas distribution
15 business must retain, in adequate detail, records to enable the
16 department to determine whether the business is entitled to an
17 exemption under this section, including: Invoices; proof of tax paid;
18 and documents describing the machinery and equipment.

19 (iii) The department must determine eligibility under this
20 section based on the information provided by the gas distribution
21 business, which is subject to audit verification by the department.
22 The department must on a quarterly basis remit exempted amounts to
23 qualifying businesses who submitted applications during the previous
24 quarter.

25 (iv) Beginning July 1, 2028, a gas distribution business may not
26 apply for a refund under this section or RCW 82.12.02565.

27 (2) For purposes of this section and RCW 82.12.02565:

28 (a) "Machinery and equipment" means industrial fixtures, devices,
29 and support facilities, and tangible personal property that becomes
30 an ingredient or component thereof, including repair parts and
31 replacement parts. "Machinery and equipment" includes pollution
32 control equipment installed and used in a manufacturing operation,
33 testing operation, or research and development operation to prevent
34 air pollution, water pollution, or contamination that might otherwise
35 result from the manufacturing operation, testing operation, or
36 research and development operation. "Machinery and equipment" also
37 includes digital goods.

38 (b) "Machinery and equipment" does not include:

39 (i) Hand-powered tools;

40 (ii) Property with a useful life of less than one year;

1 (iii) Buildings, other than machinery and equipment that is
2 permanently affixed to or becomes a physical part of a building; and

3 (iv) Building fixtures that are not integral to the manufacturing
4 operation, testing operation, or research and development operation
5 that are permanently affixed to and become a physical part of a
6 building, such as utility systems for heating, ventilation, air
7 conditioning, communications, plumbing, or electrical.

8 (c) Machinery and equipment is "used directly" in a manufacturing
9 operation, testing operation, or research and development operation
10 if the machinery and equipment:

11 (i) Acts upon or interacts with an item of tangible personal
12 property;

13 (ii) Conveys, transports, handles, or temporarily stores an item
14 of tangible personal property at the manufacturing site or testing
15 site;

16 (iii) Controls, guides, measures, verifies, aligns, regulates, or
17 tests tangible personal property at the site or away from the site;

18 (iv) Provides physical support for or access to tangible personal
19 property;

20 (v) Produces power for, or lubricates machinery and equipment;

21 (vi) Produces another item of tangible personal property for use
22 in the manufacturing operation, testing operation, or research and
23 development operation;

24 (vii) Places tangible personal property in the container,
25 package, or wrapping in which the tangible personal property is
26 normally sold or transported; or

27 (viii) Is integral to research and development as defined in RCW
28 82.63.010.

29 (d) "Manufacturer" means a person that qualifies as a
30 manufacturer under RCW 82.04.110. "Manufacturer" also includes a
31 person that:

32 (i) Prints newspapers or other materials; or

33 (ii) Is engaged in the development of prewritten computer
34 software that is not transferred to purchasers by means of tangible
35 storage media.

36 (e) "Manufacturing" means only those activities that come within
37 the definition of "to manufacture" in RCW 82.04.120 and are taxed as
38 manufacturing or processing for hire under chapter 82.04 RCW, or
39 would be taxed as such if such activity were conducted in this state
40 or if not for an exemption or deduction. "Manufacturing" also

1 includes printing newspapers or other materials. An activity is not
2 taxed as manufacturing or processing for hire under chapter 82.04 RCW
3 if the activity is within the purview of chapter 82.16 RCW.

4 (f) "Manufacturing operation" means the manufacturing of
5 articles, substances, or commodities for sale as tangible personal
6 property. A manufacturing operation begins at the point where the raw
7 materials enter the manufacturing site and ends at the point where
8 the processed material leaves the manufacturing site. With respect to
9 the production of class A or exceptional quality biosolids by a
10 wastewater treatment facility, the manufacturing operation begins at
11 the point where class B biosolids undergo additional processing to
12 achieve class A or exceptional quality standards. Notwithstanding
13 anything to the contrary in this section, the term also includes that
14 portion of a cogeneration project that is used to generate power for
15 consumption within the manufacturing site of which the cogeneration
16 project is an integral part. The term does not include the
17 preparation of food products on the premises of a person selling food
18 products at retail.

19 (g) "Cogeneration" means the simultaneous generation of
20 electrical energy and low-grade heat from the same fuel.

21 (h) "Research and development operation" means engaging in
22 research and development as defined in RCW 82.63.010 by a
23 manufacturer or processor for hire.

24 (i) "Testing" means activities performed to establish or
25 determine the properties, qualities, and limitations of tangible
26 personal property.

27 (j) "Testing operation" means the testing of tangible personal
28 property for a manufacturer or processor for hire. A testing
29 operation begins at the point where the tangible personal property
30 enters the testing site and ends at the point where the tangible
31 personal property leaves the testing site. The term also includes the
32 testing of tangible personal property for use in that portion of a
33 cogeneration project that is used to generate power for consumption
34 within the manufacturing site of which the cogeneration project is an
35 integral part. The term does not include the testing of tangible
36 personal property for use in the production of electricity by a light
37 and power business as defined in RCW 82.16.010 or the preparation of
38 food products on the premises of a person selling food products at
39 retail.

1 (3) This section does not apply (a) to sales of machinery and
2 equipment used directly in the manufacturing, research and
3 development, or testing of marijuana, useable marijuana, or
4 marijuana-infused products, or (b) to sales of or charges made for
5 labor and services rendered in respect to installing, repairing,
6 cleaning, altering, or improving such machinery and equipment.

7 **Part III**
8 **Remote sellers**

9 NEW SECTION. **Sec. 301.** (1) The commerce clause of the United
10 States Constitution as currently interpreted by the United States
11 supreme court prohibits states from imposing sales or use tax
12 collection obligations on out-of-state businesses unless the business
13 has a substantial nexus with the taxing state.

14 (2) The legislature recognizes that under the United States
15 supreme court's decision in *Quill Corp. v. North Dakota*, 504 U.S. 298
16 (1992), a substantial nexus for sales and use tax collection purposes
17 requires that the taxpayer have a physical presence in the taxing
18 state.

19 (3) The legislature further recognizes that the requisite
20 physical presence can be established directly through a taxpayer's
21 own activities in the taxing state, or indirectly, through
22 independent contractors, agents, or other representatives who act on
23 behalf of the taxpayer in the taxing state.

24 (4) However, the legislature finds that because the United States
25 supreme court has not clearly defined the circumstances under which a
26 physical presence is sufficient to establish a substantial nexus for
27 tax purposes, frequent conflicts have arisen throughout the country
28 among state taxing authorities, taxpayers, tax practitioners, and
29 courts.

30 (5) Therefore, the legislature intends to provide more clarity
31 for out-of-state sellers that compensate Washington residents for
32 referring customers to the out-of-state seller by providing clear
33 statutory guidelines for determining when these out-of-state sellers
34 are required to collect Washington's retail sales tax.

35 (6) Nothing in Part III of this act may be construed as relieving
36 in-state businesses and other businesses having a substantial nexus
37 with Washington through a direct physical presence in this state from
38 their Washington sales and use tax collection obligations.

1 NEW SECTION. **Sec. 302.** A new section is added to chapter 82.08
2 RCW to be codified between RCW 82.08.050 and 82.08.054 to read as
3 follows:

4 (1) For purposes of this chapter, a remote seller is presumed to
5 have a substantial nexus with this state and is obligated to collect
6 retail sales tax if the remote seller enters into an agreement with a
7 resident of this state under which the resident, for a commission or
8 other consideration, directly or indirectly refers potential
9 customers, whether by a link on an internet web site or otherwise, to
10 the remote seller, if the cumulative gross receipts from sales by the
11 remote seller to customers in this state who are referred to the
12 remote seller by all residents with this type of an agreement with
13 the remote seller exceed ten thousand dollars during the preceding
14 calendar year. This presumption may be rebutted by proof that the
15 resident with whom the remote seller has an agreement did not engage
16 in any solicitation in this state on behalf of the remote seller that
17 would satisfy the nexus requirement of the United States Constitution
18 during the calendar year in question. Proof may be shown by (a)
19 establishing, in a manner acceptable to the department, that (i) each
20 in-state person with whom the remote seller has an agreement is
21 prohibited from engaging in any solicitation activities in this state
22 that refer potential customers to the remote seller, and (ii) such
23 in-state person or persons have complied with that prohibition, or
24 (b) any other means as may be approved by the department.

25 (2) "Remote seller" means a seller that makes retail sales in
26 this state through one or more agreements described in subsection (1)
27 of this section, and the seller's other physical presence in this
28 state, if any, is not sufficient to establish a retail sales or use
29 tax collection obligation under the commerce clause of the United
30 States Constitution.

31 (3) Nothing in this section may be construed to affect in any way
32 RCW 82.04.424, 82.08.050(11), or 82.12.040(5).

33 (4) This section is subject to section 304 of this act.

34 **Sec. 303.** RCW 82.04.067 and 2010 1st sp.s. c 23 s 104 are each
35 amended to read as follows:

36 (1) A person engaging in business is deemed to have substantial
37 nexus with this state if the person is:

38 (a) An individual and is a resident or domiciliary of this state;

1 (b) A business entity and is organized or commercially domiciled
2 in this state; or

3 (c) A nonresident individual or a business entity that is
4 organized or commercially domiciled outside this state, and in any
5 tax year the person has:

6 (i) More than fifty thousand dollars of property in this state;

7 (ii) More than fifty thousand dollars of payroll in this state;

8 (iii) More than two hundred fifty thousand dollars of receipts
9 from this state; or

10 (iv) At least twenty-five percent of the person's total property,
11 total payroll, or total receipts in this state.

12 (2)(a) Property counting toward the thresholds in subsection
13 (1)(c)(i) and (iv) of this section is the average value of the
14 taxpayer's property, including intangible property, owned or rented
15 and used in this state during the tax year.

16 (b)(i) Property owned by the taxpayer, other than loans and
17 credit card receivables owned by the taxpayer, is valued at its
18 original cost basis. Loans and credit card receivables owned by the
19 taxpayer are valued at their outstanding principal balance, without
20 regard to any reserve for bad debts. However, if a loan or credit
21 card receivable is charged off in whole or in part for federal income
22 tax purposes, the portion of the loan or credit card receivable
23 charged off is deducted from the outstanding principal balance.

24 (ii) Property rented by the taxpayer is valued at eight times the
25 net annual rental rate. For purposes of this subsection, "net annual
26 rental rate" means the annual rental rate paid by the taxpayer less
27 any annual rental rate received by the taxpayer from subrentals.

28 (c) The average value of property must be determined by averaging
29 the values at the beginning and ending of the tax year; but the
30 department may require the averaging of monthly values during the tax
31 year if reasonably required to properly reflect the average value of
32 the taxpayer's property.

33 (d)(i) For purposes of this subsection (2), loans and credit card
34 receivables are deemed owned and used in this state as follows:

35 (A) Loans secured by real property, personal property, or both
36 real and personal property((τ)) are deemed owned and used in the
37 state if the real property or personal property securing the loan is
38 located within this state. If the property securing the loan is
39 located both within this state and one or more other states, the loan
40 is deemed owned and used in this state if more than fifty percent of

1 the fair market value of the real or personal property is located
2 within this state. If more than fifty percent of the fair market
3 value of the real or personal property is not located within any one
4 state, then the loan is deemed owned and used in this state if the
5 borrower is located in this state. The determination of whether the
6 real or personal property securing a loan is located within this
7 state must be made, as of the time the original agreement was made,
8 and any and all subsequent substitutions of collateral must be
9 disregarded.

10 (B) Loans not secured by real or personal property are deemed
11 owned and used in this state if the borrower is located in this
12 state.

13 (C) Credit card receivables are deemed owned and used in this
14 state if the billing address of the cardholder is in this state.

15 (ii)(A) Except as otherwise provided in (d)(ii)(B) of this
16 subsection (2), the definitions in the multistate tax commission's
17 recommended formula for the apportionment and allocation of net
18 income of financial institutions as existing on June 1, 2010, or such
19 subsequent date as may be provided by the department by rule,
20 consistent with the purposes of this section, apply to this section.

21 (B) "Credit card" means a card or device existing for the purpose
22 of obtaining money, property, labor, or services on credit.

23 (e) Notwithstanding anything else to the contrary in this
24 subsection, property counting toward the thresholds in subsection
25 (1)(c)(i) and (iv) of this section does not include a person's
26 ownership of, or rights in, computer software as defined in RCW
27 82.04.215, including computer software used in providing a digital
28 automated service; master copies of software; and digital goods and
29 digital codes residing on servers located in this state.

30 (3)(a) Payroll counting toward the thresholds in subsection
31 (1)(c)(ii) and (iv) of this section is the total amount paid by the
32 taxpayer for compensation in this state during the tax year plus
33 nonemployee compensation paid to representative third parties in this
34 state. Nonemployee compensation paid to representative third parties
35 includes the gross amount paid to nonemployees who represent the
36 taxpayer in interactions with the taxpayer's clients and includes
37 sales commissions.

38 (b) Employee compensation is paid in this state if the
39 compensation is properly reportable to this state for unemployment

1 compensation tax purposes, regardless of whether the compensation was
2 actually reported to this state.

3 (c) Nonemployee compensation is paid in this state if the service
4 performed by the representative third party occurs entirely or
5 primarily within this state.

6 (d) For purposes of this subsection, "compensation" means wages,
7 salaries, commissions, and any other form of remuneration paid to
8 employees or nonemployees and defined as gross income under 26 U.S.C.
9 Sec. 61 of the federal internal revenue code of 1986, as existing on
10 June 1, 2010.

11 (4) Receipts counting toward the thresholds in subsection
12 (1)(c)(iii) and (iv) of this section are those amounts included in
13 the numerator of the receipts factor under RCW 82.04.462 and, for
14 financial institutions, those amounts included in the numerator of
15 the receipts factor under the rule adopted by the department as
16 authorized in RCW 82.04.460(2).

17 (5)(a) Each December, the department must review the cumulative
18 percentage change in the consumer price index. The department must
19 adjust the thresholds in subsection (1)(c)(i) through (iii) of this
20 section if the consumer price index has changed by five percent or
21 more since the later of June 1, 2010, or the date that the thresholds
22 were last adjusted under this subsection. For purposes of determining
23 the cumulative percentage change in the consumer price index, the
24 department must compare the consumer price index available as of
25 December 1st of the current year with the consumer price index as of
26 the later of June 1, 2010, or the date that the thresholds were last
27 adjusted under this subsection. The thresholds must be adjusted to
28 reflect that cumulative percentage change in the consumer price
29 index. The adjusted thresholds must be rounded to the nearest one
30 thousand dollars. Any adjustment will apply to tax periods that begin
31 after the adjustment is made.

32 (b) As used in this subsection, "consumer price index" means the
33 consumer price index for all urban consumers (CPI-U) available from
34 the bureau of labor statistics of the United States department of
35 labor.

36 (6)(a) Subsections (1) through (5) of this section only apply
37 with respect to the taxes imposed under this chapter on apportionable
38 activities as defined in RCW 82.04.460. For purposes of the taxes
39 imposed under this chapter on any activity not included in the
40 definition of apportionable activities in RCW 82.04.460, a person is

1 deemed to have a substantial nexus with this state if the person has
2 a physical presence in this state, which need only be demonstrably
3 more than a slightest presence.

4 (b) For purposes of this subsection, a person is physically
5 present in this state if the person has property or employees in this
6 state.

7 (c)(i) A person is also physically present in this state for the
8 purposes of this subsection if the person, either directly or through
9 an agent or other representative, engages in activities in this state
10 that are significantly associated with the person's ability to
11 establish or maintain a market for its products in this state.

12 (ii) A remote seller as defined in section 302 of this act is
13 presumed to be engaged in activities in this state that are
14 significantly associated with the remote seller's ability to
15 establish or maintain a market for its products in this state if the
16 remote seller is presumed to have a substantial nexus with this state
17 under section 302 of this act. The presumption in this subsection
18 (6)(c)(ii) may be rebutted as provided in section 302 of this act. To
19 the extent that the presumption in section 302 of this act is no
20 longer operative pursuant to section 304 of this act, the presumption
21 in this subsection (6)(c)(ii) is no longer operative. Nothing in this
22 section may be construed to affect in any way RCW 82.04.424,
23 82.08.050(11), or 82.12.040(5) or to narrow the scope of the terms
24 "agent" or "other representative" in this subsection (6)(c).

25 NEW SECTION. Sec. 304. A new section is added to chapter 82.32
26 RCW to read as follows:

27 (1) If the department determines that a change, taking effect
28 after the effective date of this section, in the streamlined sales
29 and use tax agreement or federal law creates a conflict with any
30 provision of section 302 of this act, such conflicting provision or
31 provisions of section 302 of this act, including any related
32 provisions that would not function as originally intended, have no
33 further force and effect as of the date the change in the streamlined
34 sales and use tax agreement or federal law becomes effective.

35 (2) For purposes of this section:

36 (a) A change in federal law conflicts with section 302 of this
37 act if the change clearly allows states to impose greater sales and
38 use tax collection obligations on remote sellers than provided for,
39 or clearly prevents states from imposing sales and use tax collection

1 obligations on remote sellers to the extent provided for, under
2 section 302 of this act.

3 (b) A change in the streamlined sales and use tax agreement
4 conflicts with section 302 of this act if one or more provisions of
5 section 302 of this act causes this state to be found out of
6 compliance with the streamlined sales and use tax agreement by its
7 governing board.

8 (3) If the department makes a determination under this section
9 that a change in federal law or the streamlined sales and use tax
10 agreement conflicts with one or more provisions of section 302 of
11 this act, the department:

12 (a) May adopt rules in accordance with chapter 34.05 RCW that are
13 consistent with the streamlined sales and use tax agreement and that
14 impose sales and use tax collection obligations on remote sellers to
15 the fullest extent allowed under state and federal law; and

16 (b) Must include information on its web site informing taxpayers
17 and the public (i) of the provision or provisions of section 302 of
18 this act that will have no further force and effect, (ii) when such
19 change will become effective, and (iii) about how to participate in
20 any rule making conducted by the department in accordance with (a) of
21 this subsection (3).

22 (4) For purposes of this section, "remote seller" has the same
23 meaning as in section 302 of this act.

24 **Part IV**
25 **Miscellaneous**

26 NEW SECTION. **Sec. 401.** If any provision of this act or its
27 application to any person or circumstance is held invalid, the
28 remainder of the act or the application of the provision to other
29 persons or circumstances is not affected.

30 NEW SECTION. **Sec. 402.** Section 202 of this act applies
31 prospectively and retroactively.

32 NEW SECTION. **Sec. 403.** Part III of this act expires July 1,
33 2025.

34 NEW SECTION. **Sec. 404.** This act is necessary for the immediate
35 preservation of the public peace, health, or safety, or support of

1 the state government and its existing public institutions, and takes
2 effect July 1, 2015.

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