

☞ **09hr\_JCR-AR\_CRule\_09-087\_pt01**



(FORM UPDATED: 08/11/2010)

## WISCONSIN STATE LEGISLATURE ... PUBLIC HEARING - COMMITTEE RECORDS

### 2009-10

(session year)

### Joint

(Assembly, Senate or Joint)

### Committee for Review of Administrative Rules ...

#### COMMITTEE NOTICES ...

- Committee Reports ... **CR**
- Executive Sessions ... **ES**
- Public Hearings ... **PH**

#### INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
- Clearinghouse Rules ... **CRule** (w/Record of Comm. Proceedings)
- Hearing Records ... bills and resolutions (w/Record of Comm. Proceedings)  
(**ab** = Assembly Bill)                      (**ar** = Assembly Resolution)                      (**ajr** = Assembly Joint Resolution)  
(**sb** = Senate Bill)                              (**sr** = Senate Resolution)                              (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

\* Contents organized for archiving by: Stefanie Rose (LRB) (June 2012)



**State of Wisconsin • DEPARTMENT OF REVENUE**

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*Jim Doyle*  
Governor

*Roger M. Ervin*  
Secretary of Revenue

March 17, 2010

Honorable Jim Holperin  
Co-Chair Joint Committee for Review  
of Administrative Rules  
Room 409 South State Capitol  
PO Box 7882  
Madison WI 53707-7882

Honorable Josh Zepnick  
Co-Chair Joint Committee for Review  
of Administrative Rules  
Room 219 North State Capitol  
PO Box 8952  
Madison WI 53708-8952

Re: Clearinghouse Rule 09-087

Dear Senator Holperin and Representative Zepnick:

Enclosed are copies of Clearinghouse Rule 09-087 in final draft form, and the Report to the presiding officers of the State Senate and Assembly required under s. 227.19(2) and (3), Stats.

Sincerely,

Roger M. Ervin  
Secretary of Revenue

RME:DSK  
e:rules\285 1190 Committees - JCRAR

Enclosure

## PROPOSED ORDER OF THE DEPARTMENT OF REVENUE CREATING RULES

The Wisconsin Department of Revenue proposes an order to: **create** Tax 2.85 and 11.90; **relating to** penalties for failure to produce records.

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### *Analysis by the Department of Revenue*

**Statutes interpreted:** ss. 71.80(9m) and 77.61(19), Stats.

**Statutory authority:** ss. 71.80(9m)(c), 77.61(19)(c), and 227.24, Stats.

**Explanation of agency authority:** Sections 71.80(9m)(c) and 77.61(19)(c), Stats., provide that the Department shall promulgate rules to administer the penalties for failure to produce records.

**Related statute or rule:** There are no other applicable statutes or rules.

**Plain language analysis:** This proposed rule does the following:

- Reflects changes in Wisconsin's tax laws due to the adoption of penalties for failure to produce records.
- Provides guidance to Department employees and taxpayers so that the penalties can be administered in a fair and consistent manner. This includes providing a standard response time, a standard for noncompliance, and penalty waiver provisions.

**Summary of, and comparison with, existing or proposed federal regulation:**

There is no existing or proposed federal regulation that is intended to address the activities to be regulated by the rule.

**Comparison with rules in adjacent states:**

Illinois statute 35 ILCS 120/7 provides that, for sales and use tax purposes:

"...the Department is authorized to notify the taxpayer in writing to produce such evidence, and the taxpayer shall have 60 days subject to the right in the Department to extend this period either on request for good cause shown or on its own motion from the date when such notice is sent to the taxpayer by certified or registered mail (or delivered to the taxpayer if the notice is served personally) in which to obtain and produce such evidence for the Department's inspection, failing which the matter shall be closed, and the transaction shall be conclusively presumed to be taxable hereunder."

**Summary of factual data and analytical methodologies:** 2009 Wisconsin Act 28 adopted statutory changes creating penalties for failure to produce records. Within these provisions are requirements that the Department promulgate rules to administer these penalties. The department has created this rule to reflect these changes in Wisconsin's tax laws and comply with statutory requirements.

**Analysis and supporting documents used to determine effect on small business:**

As explained above, this rule is created to reflect changes in Wisconsin's tax laws and comply with statutory requirements. As the rule itself does not impose any significant financial or other compliance burden, the department has determined that it does not have a significant effect on small business.

**Anticipated costs incurred by private sector:** This rule does not have a significant fiscal effect on the private sector.

**Effect on small business:** This rule does not have a significant effect on small business.

**Agency contact person:** Please contact Dale Kleven at (608) 266-8253 or [dale.kleven@revenue.wi.gov](mailto:dale.kleven@revenue.wi.gov), if you have any questions regarding this emergency rule.

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**SECTION 1.** Tax 2.85 is created to read:

**Tax 2.85 Penalty for failure to produce records under s. 71.80(9m), Stats. (1)**

**GENERAL.** A person who fails to produce records or documents, as provided under ss. 71.74(2) and 73.03(9), Stats., that were requested by the department may be subject to any of the following penalties under s. 71.80(9m), Stats.:

(a) The disallowance of deductions, credits, exemptions or income inclusion to which the requested records relate.

(b) In addition to any other penalties that the department may impose, a penalty for each violation that is equal to the greater of \$500 or 25% of the amount of the additional tax on any adjustment made by the department that results from the person's failure to produce the records.

**(2) DEFINITIONS.** In this section:

(a) "Disallowance," "inclusion," or "adjustment" means that an item is disallowed, included or adjusted through action taken by the department when a proposed assessment or refund or notice of assessment or refund is issued to a taxpayer.

(b) "Records" include both paper and electronic formats. Examples include bills, receipts, invoices, contracts, letters, memos, accounting statements or schedules, general ledgers, journal entries, and board of director's minutes. "Records" do not include items protected by attorney-client privilege, if the taxpayer provides a brief description or summary of the contents of each record, the date each record was prepared, the person or persons who prepared each record, the person to whom each record was directed, or for whom each record was prepared, the purpose in preparing each record, and how each element of the privilege is met as to each record.

(c) "Records requested were not provided" means that all records requested were not provided to the department within the time specified by the department.

(d) "Written request for records" includes requests made by letter, e-mail, fax or any other written form.

(e) "Provided" means the records are provided by electronic means or in paper format to the address specified by the department in its written request for records. If the address specified by the department is the person's location, the records are considered provided on the date the person notifies the department they are available for review at that location.

**(3) PROCEDURES.** The penalties in this section may be imposed if the records requested were not provided and the department provided the notifications below regarding the records requested. The number of days established by the department for the person to respond to the record requests should be reasonable based on the facts of each situation.

(a) A first written request for records where the department allowed the person a minimum of 30 days from the date of request for the records to be provided.

(b) After the time period to respond to the first written request has expired as provided in par. (a), a second written request for records where the department allowed the person a minimum of 30 days from the date of request for the records to be provided. This second written request for records shall include a statement explaining that if the requested records are not provided by the date specified, the penalties provided by s. 71.80(9m), Stats., may be imposed.

**Examples: 1)** The department issues a first written request for records to Corporation A on September 1, 2009, allowing Corporation A until October 6, 2009, to provide the records requested. Corporation A does not provide the requested records to the department by October 6, 2009. The department issues a second written request for records to Corporation A on October 21, 2009, allowing Corporation A until November 30, 2009, to provide the records requested. Included in this second written request for records is a notification regarding the penalties provided by s. 71.80(9m), Stats. Corporation A does not provide the requested records by November 30, 2009. Therefore, the department may disallow the deductions, credits, or exemptions or include in Wisconsin income the additional income to which the requested records relate and impose a penalty equal to the greater of \$500 or 25% of the additional tax on the adjustments made resulting from Corporation A not providing the records requested.

**2)** The department issues a first written request for records to Corporation B on December 21, 2009, allowing Corporation B until January 20, 2010, to provide the records requested. Corporation B does not provide the requested records to the department by January 20, 2010. The department issues a second written request for records to Corporation B on February 8, 2010, allowing Corporation B until March 10, 2010, to provide the records requested. Included in this second written request for records is a notification regarding the penalties provided by s. 71.80(9m), Stats. Corporation B provides records to the department by March 10, 2010, but the department determines that the taxpayer did not provide some of the records requested by March 10, 2010. Therefore, since the taxpayer did not provide all of the records requested by March 10, 2010, the department may disallow the deductions, credits, or exemptions or include in Wisconsin income the additional income to which the requested records that were not provided relate and impose a penalty equal to the greater of \$500 or 25% of the additional tax on the adjustments made resulting from the requested records that were not provided.

**(4) WAIVER OF PENALTIES.** (a) The penalties in this section may be waived if the person whose records were requested can show that, under all the facts and circumstances, its response to the written request for records or its failure to respond to the written request for records was reasonable or justified by factors beyond the person's control. In determining whether the penalties will be waived, the department may consider any of the following factors:

1. Death of the taxpayer, tax preparer, accountant or other responsible party.
2. Onset of debilitating illness or injury of the taxpayer, tax preparer, accountant or other responsible party.
3. Natural disaster such as tornado, flood or fire.
4. Records that were destroyed due to events beyond control of the taxpayer or other responsible party and not due to neglect.
5. Any other facts and circumstances that the department believes pertinent.

(b) Providing requested records after the time period required for providing the records has expired, as provided in sub. (3), shall result in a reduction of the penalties provided in sub. (1)(a) and sub. (1)(b) if the department determines that these records support a reduction in the disallowance or inclusion previously made by the department.

**Examples: 1)** Since Corporation C does not provide the records requested by the date specified in a second written request for records to support interest expense deducted, the department issues a proposed audit report to Corporation C disallowing all the interest expense previously deducted, which represents the penalty provided in s. 71.80(9m)(a), Stats. Additional tax of \$100,000 and the penalty as provided in s. 71.80(9m)(b), Stats., of \$25,000 results in the proposed audit report from disallowing this interest expense. Corporation C provides the records requested 26 days after the department issues the proposed audit report but before the notice of assessment is issued and explains, without any further detail, that they were too busy with other aspects of their business to respond to the two written requests for records by the dates specified. In this situation, the failure to provide the records requested is not reasonable or justified by factors beyond the person's control. In addition, the records provided do not support a reduction of the interest expense disallowed in the proposed audit report. Therefore, the interest expense adjustment is not modified so the proposed additional tax of \$100,000 and the original proposed penalty as provided in s. 71.80(9m)(b), Stats., of \$25,000 remain.

**2)** Since Mr. Smith does not provide the records requested regarding his business, which primarily receives payments in cash, to support the reported gross receipts by the date specified in a second written request for records, the department issues a notice of assessment to Mr. Smith including an estimated amount into income for unreported receipts, which represents the penalty provided in s. 71.80(9m)(a), Stats. Additional tax of \$60,000, a negligence penalty of \$15,000 and the penalty as provided in s. 71.80(9m)(b), Stats., of \$15,000 results in the assessment from including these estimated receipts. Mr. Smith appeals the assessment, provides the records that were requested during the audit, and explains that he forgot to provide the records that were previously requested. In this situation, the failure to provide the records requested is not reasonable or justified by factors beyond the person's control. However, the records provided show that unreported receipts were only 20% of the amount previously included by the department as estimated unreported receipts. Therefore, the unreported receipts adjustment is modified to reduce the additional tax from \$60,000 to \$12,000, the negligence penalty is reduced from \$15,000 to \$3,000 and the original penalty as provided in s. 71.80(9m)(b), Stats., is reduced from \$15,000 to \$3,000.

3) Assume the same facts as example 2, except that Mr. Smith explains that he did not previously provide the requested records because his accountant had possession of them and was in the hospital when the records were requested during the audit. In this situation the failure to provide the records requested is reasonable or justified by factors beyond the person's control. Therefore, the unreported receipts adjustment is modified to reduce the additional tax from \$60,000 to \$12,000, the negligence penalty is reduced from \$15,000 to \$3,000 and the original penalty as provided in s. 71.80(9m)(b), Stats., of \$15,000 is waived.

**SECTION 2.** Tax 11.90 is created to read:

**Tax 11.90 Penalty for failure to produce records under s. 77.61(19), Stats. (1) GENERAL.** A person who fails to produce records or documents, as provided under ss. 73.03(9) and 77.59(2), Stats., that were requested by the department may be subject to any of the following penalties under s. 77.61(19), Stats.:

(a) The disallowance of deductions, credits, exemptions or inclusions of additional taxable sales or additional taxable purchases to which the requested records relate.

(b) In addition to any other penalties that the department may impose, a penalty for each violation that is equal to the greater of \$500 or 25% of the amount of the additional tax on any adjustment made by the department that results from the person's failure to produce the records.

**(2) DEFINITIONS.** In this section:

(a) "Disallowance," "inclusion," or "adjustment" means that an item is disallowed, included or adjusted through action taken by the department when a proposed assessment or refund or notice of assessment or refund is issued to a taxpayer.

(b) "Records" include both paper and electronic formats. Examples include bills, receipts, invoices, contracts, letters, memos, accounting statements or schedules, general ledgers, journal entries, and board of director's minutes. "Records" do not include items protected by attorney-client privilege, if the taxpayer provides a brief description or summary of the contents of each record, the date each record was prepared, the person or persons who prepared each record, the person to whom each record was directed, or for whom each record was prepared, the purpose in preparing each record, and how each element of the privilege is met as to each record.

(c) "Records requested were not provided" means that all records requested were not provided to the department within the time specified by the department.

(d) "Written request for records" includes requests made by letter, e-mail, fax or any other written form.

(e) "Provided" means the records are provided by electronic means or in paper format to the address specified by the department in its written request for records. If the address specified by the department is the person's location, the records are considered provided on the date the person notifies the department they are available for review at that location.

**(3) PROCEDURES.** The penalties in this section may be imposed if the records requested were not provided and the department provided the notifications below regarding the records requested. The number of days established by the department for the person to respond to the record requests should be reasonable based on the facts of each situation.

(a) A first written request for records where the department allowed the person a minimum of 30 days from the date of request for the records to be provided.

(b) After the time period to respond to the first written request has expired as provided in par. (a), a second written request for records where the department allowed the person a minimum of 30 days from the date of request for the records to be provided. This second written request for records shall include a statement explaining that if the requested records are not provided by the date specified, the penalties provided by s. 77.61(19), Stats., may be imposed.

**Examples:** 1) The department issues a first written request for records to Corporation A on September 1, 2009, allowing Corporation A until October 6, 2009, to provide the records requested. Corporation A does not provide the requested records to the department by October 6, 2009. The department issues a second written request for records to Corporation A on October 21, 2009, allowing Corporation A until November 30, 2009, to provide the records requested. Included in this second written request for records is a notification regarding the penalties provided by s. 77.61(19), Stats. Corporation A does not provide the requested records by November 30, 2009. Therefore, the department may disallow the deductions, credits, or exemptions or include the additional taxable sales or additional taxable purchases to which the requested records relate and impose a penalty equal to the greater of \$500 or 25% of the additional tax on the adjustments made resulting from Corporation A not providing the records requested.

2) The department issues a first written request for records to Corporation B on December 21, 2009, allowing Corporation B until January 20, 2010, to provide the records requested. Corporation B does not provide the requested records to the department by January 20, 2010. The department issues a second written request for records to Corporation B on February 8, 2010, allowing Corporation B until March 10, 2010, to provide the records requested. Included in this second written request for records is a notification regarding the penalties provided by s. 77.61(19), Stats. Corporation B provides records to the department by March 10, 2010, but the department determines that the taxpayer did not provide some of the records requested by March 10, 2010. Therefore, since the taxpayer did not provide all of the records requested by March 10, 2010, the department may disallow the deductions, credits, or exemptions or include the additional taxable sales or additional taxable purchases to which the requested records that were not provided relate and impose a penalty equal to the greater of \$500 or 25% of the additional tax on the adjustments made resulting from the requested records that were not provided.

**(4) WAIVER OF PENALTIES.** (a) The penalties in this section may be waived if the person whose records were requested can show that, under all the facts and circumstances, its response to the written request for records or its failure to respond to the written request for records was reasonable or justified by factors beyond the person's control. In determining whether the penalties will be waived, the department may consider any of the following factors:

1. Death of the taxpayer, tax preparer, accountant or other responsible party.
2. Onset of debilitating illness or injury of the taxpayer, tax preparer, accountant or other responsible party.

3. Natural disaster such as tornado, flood or fire.
4. Records that were destroyed due to events beyond control of the taxpayer or other responsible party and not due to neglect.
5. Any other facts and circumstances that the department believes pertinent.

(b) Providing requested records after the time period required for providing the records has expired, as provided in sub. (3), shall result in a reduction of the penalties provided in sub. (1)(a) and sub. (1)(b) if the department determines that these records support a reduction in the disallowance or inclusion previously made by the department.

**Examples: 1)** Since Corporation C does not provide the records requested by the date specified in a second written request for records to support deductions for exempt sales, the department issues a proposed audit report to Corporation C disallowing all the deductions for exempt sales previously claimed, which represents the penalty provided in s. 77.61(19)(a), Stats. Additional tax of \$100,000 and the penalty as provided in s. 77.61(19)(b), Stats., of \$25,000 results in the proposed audit report from disallowing the deductions for exempt sales. Corporation C provides the records requested 26 days after the department issues the proposed audit report but before the notice of assessment is issued and explains, without any further detail, that they were too busy with other aspects of their business to respond to the two written requests for records by the dates specified. In this situation, the failure to provide the records requested is not reasonable or justified by factors beyond the person's control. In addition, the records provided do not support a reduction of the exempt sales deductions disallowed in the proposed audit report. Therefore, the deductions for exempt sales adjustment is not modified so the proposed additional tax of \$100,000 and the original proposed penalty as provided in s. 77.61(19)(b), Stats., of \$25,000 remain.

**2)** Since Mr. Smith does not provide the records requested regarding his business, which primarily receives payments in cash, to support the reported gross receipts by the date specified in a second written request for records, the department issues a notice of assessment to Mr. Smith including an estimated amount into taxable sales for unreported receipts, which represents the penalty provided in s. 77.61(19)(a), Stats. Additional tax of \$60,000, a negligence penalty of \$15,000 and the penalty as provided in s. 77.61(19)(b), Stats., of \$15,000 results in the assessment from including these estimated receipts. Mr. Smith appeals the assessment, provides the records that were requested during the audit, and explains that he forgot to provide the records that were previously requested. In this situation, the failure to provide the records requested is not reasonable or justified by factors beyond the person's control. However, the records provided show that unreported receipts were only 20% of the amount previously included by the department as estimated unreported receipts. Therefore, the unreported receipts adjustment is modified to reduce the additional tax from \$60,000 to \$12,000, the negligence penalty is reduced from \$15,000 to \$3,000 and the original penalty as provided in s. 77.61(19)(b), Stats., is reduced from \$15,000 to \$3,000.

**3)** Assume the same facts as example 2, except that Mr. Smith explains that he did not previously provide the requested records because his accountant had possession of them and was in the hospital when the records were requested during the audit. In this situation the failure to provide the records requested is reasonable or justified by factors beyond the person's control. Therefore, the unreported receipts adjustment is modified to reduce the additional tax from \$60,000 to \$12,000, the negligence penalty is reduced from \$15,000 to \$3,000 and the original penalty as provided in s. 77.61(19)(b), Stats., of \$15,000 is waived.

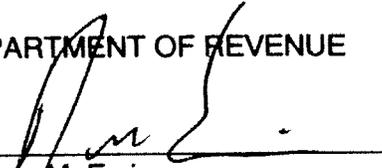
The rules contained in this order shall take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.22(2)(intro.), Stats.

**Initial Regulatory Flexibility Analysis**

This proposed rule order does not have a significant economic impact on a substantial number of small businesses.

Dated: 3/17/2010

DEPARTMENT OF REVENUE

By:   
Roger M. Ervin  
Secretary of Revenue

E:Rules/285 1190 Proposed Order (v3)

**FISCAL ESTIMATE FORM**

**2009 Session**

- ORIGINAL     UPDATED  
 CORRECTED     SUPPLEMENTAL

<b>LRB #</b> 09-
<b>INTRODUCTION #</b>
<b>Admin. Rule #</b> Chapter Tax 2.85 & 11.90 Failure to Produce Records (permanent)

**Subject PROPOSED ORDER OF THE DEPARTMENT OF REVENUE REPEALING, RENUMBERING, RENUMBERING AND AMENDING, AMENDING, REPEALING AND RECREATING, AND CREATING RULES**

**Fiscal Effect**

**State:**  No State Fiscal Effect  
 Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation

- Increase Existing Appropriation     Increase Existing Revenues  
 Decrease Existing Appropriation     Decrease Existing Revenues  
 Create New Appropriation

- Increase Costs - May be Possible to Absorb Within Agency's Budget  Yes  No  
 Decrease Costs

**Local:**  No Local Government Costs

- |  |   |
|--|---|
| 1. <input type="checkbox"/> Increase Costs<br><input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory | 3. <input type="checkbox"/> Increase Revenues<br><input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory |
| 2. <input type="checkbox"/> Decrease Costs<br><input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory | 4. <input type="checkbox"/> Decrease Revenues<br><input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory |

5. Types of Local Governmental Units Affected:  
 Towns     Villages     Cities  
 Counties     Others \_\_\_\_\_  
 School Districts     WTCS Districts

**Fund Sources Affected**

- GPR     FED     PRO     PRS     SEG     SEG-S

**Affected Ch. 20 Appropriations**

**Assumptions Used In Arriving at Fiscal Estimate:**

2009 Wisconsin Act 28 (the 2009-2011 budget bill) established penalties for the failure to produce tax records or documents that support information shown on tax returns. The penalties may include the disallowance of deductions, credits, exemptions, or the inclusion of income, taxable sales, or taxable purchases to which the records relate. In addition to other penalties, a penalty may be imposed equal to the greater of \$500 or 25% of the amount of the additional tax on any adjustment made by the department that results from the person's failure to produce records. Act 28 further specified that the Department of Revenue shall promulgate administrative rules specifying a standard response time, a standard for noncompliance, and penalty waiver provisions.

The proposed rule conforms Chapter Tax 2.85 and 11.90 to current law. In addition, the rule states circumstances whereby the penalties may be waived (including death, debilitating illness, natural disaster, or other circumstance the department deems pertinent). The proposal also specifies that the penalties for failure to produce records may be imposed after:

- a) a first written request for records is given where the department allows the person a minimum of 15 days for the records to be produced, and
- b) a second written request for records is given where the department allows the person a minimum of 30 days for the records to be provided and the second written request includes a statement explaining that if the requested records are not provided by the date specified that the penalties may be imposed.

The fiscal effect of these changes (a minimal increase in state revenues) was included in the fiscal estimates of 2009 Wisconsin Act 28. Consequently, this proposed rule has no fiscal effect.

(continued on page two)

**Long-Range Fiscal Implications:**

<b>Agency/Prepared by</b> Wisconsin Department of Revenue	<b>Authorized Signature/Telephone No.</b>	<b>Date</b>
Paul Ziegler 608 266-5773	Paul Ziegler 608 266-5773	09/01/09

**FISCAL ESTIMATE WORKSHEET**

Detailed Estimate of Annual Fiscal Effect

**2009 Session**

- ORIGINAL     UPDATED  
 CORRECTED     SUPPLEMENTAL

**LRB # 09**  
**INTRODUCTION #**

Admin. Rule #  
 Tax 2.85 & 11.90  
 Failure to Produce  
 Records

**Subject PROPOSED ORDER OF THE DEPARTMENT OF REVENUE REPEALING, RENUMBERING, RENUMBERING AND AMENDING, AMENDING, REPEALING AND RECREATING, AND CREATING RULES**

**I. One-Time Costs or Revenue impacts for State and/or Local Government (do not include in annualized fiscal effect):**

II. Annualized Costs:	Annualized Fiscal Impact on State funds from:	
A. State Costs by Category	Increased Costs	Decreased Costs
State Operations - Salaries and Fringe	\$	\$ -
(FTE Position Changes)	( )	-
State Operations-Other Costs		-
Local Assistance		-
Aids to Individuals or Organizations		-
<b>TOTAL State Costs by Category</b>	<b>\$</b>	<b>-</b>
B. State Costs by Source of Funds	Increased Costs	Decreased Costs
GPR	\$	\$
FED		-
PRO/PRS		-
SEG/SEG-S	\$	-
III. State Revenues - Complete this only when proposal will increase or decrease state revenues (e.g., tax increase, decrease in license fee, etc.)	Increased Rev.	Decreased Rev.
GPR Taxes	\$	\$ -
GPR Earned		-
FED		-
PRO/PRS		-
SEG/SEG-S		-
<b>TOTAL State Revenues</b>	<b>\$</b>	<b>\$ -</b>

**NET ANNUALIZED FISCAL IMPACT**

STATE

LOCAL

NET CHANGE IN COSTS                      \$ 0    \$ 0  
 NET CHANGE IN REVENUES                      \$ 0    \$ 0

Agency/Prepared by Wisconsin Department of Revenue Paul Ziegler 608 266-5773	Authorized Signature/Telephone No. Wisconsin Department of Revenue Paul Ziegler 608 266-5773	Date 09/01/09
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**DEPARTMENT OF REVENUE**  
**CLEARINGHOUSE RULE NUMBER 09-087**  
**SECTION 227.19(2) AND (3), STATS., REPORT**

**Basis and Purpose of the Proposed Rule**

The rule is necessary to reflect changes in Wisconsin's tax laws due to the adoption of penalties for failure to produce records and provide guidance to Department employees and taxpayers so that the penalties can be administered in a fair and consistent manner.

**Public Hearings**

Public hearings were held on December 10 and 21, 2009. No testimony was offered at the hearings.

**Public Comment and Legislative Council Staff Recommendations**

See attached Summary of Comments.

**Regulatory Flexibility Analysis**

The proposed rule order does not have a significant economic impact on a substantial number of small businesses.

**Summary of Comments on Emergency Rules for Penalty for Failure to Produce Records  
(Sections Tax 2.85 & 11.90)**

**NOTE: Since secs. Tax 2.85 & 11.90 are virtually identical, reference below is only to sec. Tax 2.85. However, all comments apply equally to sec. Tax 11.90.**

Comment No.	Source	Rule Section	Description of Comment	Department Response
1	Written Comments from Taxpayers	General Comment	Commenters state that the requirements of publishing an emergency rule as provided by s. 227.24(1)(a), Wis. Stats., were not satisfied since nothing in s. 71.80(9m), Wis. Stats., contains an indication or finding of an emergency. Therefore, commenter requests that the emergency rule be rescinded.	<ul style="list-style-type: none"> <li>The requirements of s. 227.24(1)(a), Wis. Stats. were met. Since s. 71.80(9m), Wis. Stats., became effective July 1, 2009, the public welfare was best preserved by providing guidance on these matters as soon as possible. Section 227.24(1)(a), Wis. Stats., does not require the statute to make a finding of emergency.</li> </ul>
2	Written Comments from Taxpayers	General Comment	Commenter believes the rule should incentivize auditors and taxpayers to work together to complete an audit in an efficient manner. Concern is expressed that the threat or imposition of severe penalties has the unintended consequence of interfering with that goal.	<ul style="list-style-type: none"> <li>At the suggestion of taxpayers, the department has adopted a Mutual Commitment Date (MCD) process for auditors and taxpayers to work together to complete an audit in an efficient manner.</li> </ul>
3	Written Comments from Taxpayers	2.85(1)	Commenters suggest that the language in s. 71.80(9m), Wis. Stats., should be included in the rule that records requested must "support amounts or other information required to be shown on any return."	<ul style="list-style-type: none"> <li>The department has modified the rule to clarify that the penalties referred to are those provided in s. 71.80(9m), Wis. Stats.</li> </ul>

**Summary of Comments on Emergency Rules for Penalty for Failure to Produce Records  
(Sections Tax 2.85 & 11.90)**

**NOTE: Since secs. Tax 2.85 & 11.90 are virtually identical, reference below is only to sec. Tax 2.85. However, all comments apply equally to sec. Tax 11.90.**

Comment No.	Source	Rule Section	Description of Comment	Department Response
4	Written Comments from Taxpayers	2.85(3)	Commenters believe the standard response times provided by the department in many cases may be unreasonably short and unworkable.	<ul style="list-style-type: none"> <li>As explained in Comment #5, the minimum response time for the first request has been lengthened.</li> <li>The rule clearly states that the standard response times are only <u>minimums</u>. This is confirmed in Example 2 since more than the minimum standard response times are provided. Also, if the MCD process is used for the audit as explained in Comment #2, a standard response time is mutually agreed between the department and the taxpayer.</li> <li>To provide further clarification in the rule, language has been added indicating that the response times established by the department should be reasonable based on the facts of each situation.</li> </ul>
5	Written Comments from Taxpayers	2.85(3)(a)&(b)	Commenter suggests changing the minimum response time for the first request from 15 days to 30 days and for the second request from 30 days to 60 days. Another commenter suggests changing the minimum response time for the first request from 15 days to 45 days and for the second request from 30 days to 60 days.	<ul style="list-style-type: none"> <li>The minimum response time for the first request has been changed from 15 days to 30 days. In addition, Example 3 was modified to use 30 days for the first request instead of 15 days.</li> <li>A minimum response time of 60 days for all situations is too long for the second request. However, a response time of 60 days could be provided by the department for the second request if it is reasonable based on the facts of the situation as explained in Comment #4.</li> </ul>

**Summary of Comments on Emergency Rules for Penalty for Failure to Produce Records  
(Sections Tax 2.85 & 11.90)**

**NOTE: Since secs. Tax 2.85 & 11.90 are virtually identical, reference below is only to sec. Tax 2.85. However, all comments apply equally to sec. Tax 11.90.**

Comment No.	Source	Rule Section	Description of Comment	Department Response
6	Written Comments from Taxpayers	2.85(3)	Commenter suggests that the first request cannot be issued by the department until a minimum of 150 days after the initial notice of the audit is received by the taxpayer. Another commenter suggests this period should be 180 days.	<ul style="list-style-type: none"> <li>Many audits can be completed in less than 150 or 180 days. Such a delay could significantly increase audit time.</li> </ul>
7	Written Comments from Taxpayers	2.85(3)	Commenter suggests that the rule should state the penalties can be appealed.	<ul style="list-style-type: none"> <li>This is unnecessary since s. 71.88(1)(a), Wis. Stats., provides the authority for a taxpayer to appeal contested assessments, including any penalty. In addition, Examples 2 and 3 following s. Tax 2.85(4)(b) involve a taxpayer that has appealed these penalties, which demonstrates the penalties can be appealed.</li> </ul>
8	Written Comments from Taxpayers	2.85(3)	Commenter suggests that Example 3 should be clarified to specify that when some, but not all, records are provided, the penalties may apply only with respect to the records that were not provided.	<ul style="list-style-type: none"> <li>Example 3 has been so clarified.</li> </ul>
9	Written Comments from Taxpayers	2.85(2)(b)	Commenters suggest that this definition should be clarified to indicate it does not apply with respect to records or documents withheld by a taxpayer in good faith on the basis of attorney-client privilege.	<ul style="list-style-type: none"> <li>This definition has been clarified to indicate it does not apply to items protected by attorney-client privilege.</li> </ul>
10	Written Comments from Taxpayers	2.85(2)(c)	Commenters suggest that this definition should be clarified to indicate that records are "provided" by making them available for inspection at the taxpayer's place of business or where the records are maintained by the taxpayer.	<ul style="list-style-type: none"> <li>A new definition of "provided" has been added as s. Tax 2.85(2)(e) to address this.</li> </ul>

**Summary of Comments on Emergency Rules for Penalty for Failure to Produce Records  
(Sections Tax 2.85 & 11.90)**

**NOTE: Since secs. Tax 2.85 & 11.90 are virtually identical, reference below is only to sec. Tax 2.85. However, all comments apply equally to sec. Tax 11.90.**

Comment No.	Source	Rule Section	Description of Comment	Department Response
11	Written Comments from Taxpayers	2.85(2)(d)	Commenter suggests that this definition should be modified to require that written requests for records be sent by certified mail.	<ul style="list-style-type: none"> <li>Written requests for records can be provided to a taxpayer more efficiently by e-mail, fax or in person, which would be prevented if certified mail was required. In addition, such a requirement would impose an unnecessary financial burden on the state.</li> </ul>
12	Written Comments from Taxpayers	2.85(4)(a)5	Commenter believes that use of the word "unusual" should be changed to "reasonable" to be consistent with the statute.	<ul style="list-style-type: none"> <li><b>Modification has been made to replace "unusual circumstance" with "facts and circumstances" since this is more consistent with the statute.</b></li> </ul>
13	Written Comments from Taxpayers	2.85(4)(a)	Commenter suggests that "may" should be replaced with "shall."	<ul style="list-style-type: none"> <li>The department has determined that "may" is appropriate based on the Administrative Rules Procedures Manual.</li> </ul>
14	Written Comments from Taxpayers	2.85(4)(a)	Commenter suggests that a change in accounting firm by the taxpayer should be added as a new factor for the department to consider.	<ul style="list-style-type: none"> <li>This factor could add confusion since the taxpayer typically has the records requested by the department, not the accounting firm. Therefore, changing accounting firms is typically not relevant regarding the production of records.</li> </ul>
15	Written Comments from Taxpayers	2.85(4)(a)	Commenter suggests that turnover in taxpayer's personnel responsible for the tax compliance function should be added as a new factor for the department to consider.	<ul style="list-style-type: none"> <li>This factor could be unreliable since the taxpayer determines if personnel responsible for the tax compliance function are reassigned.</li> </ul>

**Summary of Comments on Emergency Rules for Penalty for Failure to Produce Records  
(Sections Tax 2.85 & 11.90)**

**NOTE: Since secs. Tax 2.85 & 11.90 are virtually identical, reference below is only to sec. Tax 2.85. However, all comments apply equally to sec. Tax 11.90.**

Comment No.	Source	Rule Section	Description of Comment	Department Response
16	Written Comments from Taxpayers	2.85(4)(a)	Commenter suggests that the volume and nature of the records requested should be added as a new factor for the department to consider.	<ul style="list-style-type: none"> <li>The volume and nature of the records requested will be considered by the auditor when establishing the response time for the records requested. This has been addressed by the language added to s. Tax 2.85(3) requiring the department to be reasonable in establishing the response time based on the facts of each situation. See Comment #4.</li> </ul>
17	Written Comments from Taxpayers	2.85(4)(a)5	Commenter suggests rewriting the last factor to restate most of the language used in s. Tax 2.85(4)(a).	<ul style="list-style-type: none"> <li>This is an unnecessary duplication.</li> <li><b>The changes made to s. Tax 2.85(4)(a)5 as indicated in Comment #12 are sufficient to address this concern.</b></li> </ul>
18	Written Comments from Taxpayers	2.85(4)	Commenter suggests adding "without any further detail" to Example 1 between the words "explains" and "that" to clarify that under certain circumstances being too busy may be a factor to consider to waive the penalties.	<ul style="list-style-type: none"> <li><b>Suggested change made.</b></li> </ul>
19	Written Comments from Taxpayers	2.85(4)	Commenter suggests removing the word "cash" from "cash business" in Example 2 since it is unclear.	<ul style="list-style-type: none"> <li><b>Clarifying language has been added to Example 2 to indicate this is a business that primarily receives payments in cash.</b></li> </ul>

**Summary of Comments on Emergency Rules for Penalty for Failure to Produce Records**  
(Sections Tax 2.85 & 11.90)

**NOTE: Since secs. Tax 2.85 & 11.90 are virtually identical, reference below is only to sec. Tax 2.85. However, all comments apply equally to sec. Tax 11.90.**

Comment No.	Source	Rule Section	Description of Comment	Department Response
20	Written Comments from Taxpayers	2.85(4)(b)	Commenter suggests that the word "shall" should replace "may" on the second line and that "reduction" should be changed to "reduction or elimination."	<ul style="list-style-type: none"> <li>• <b>Suggested change made in replacing "may" with "shall."</b></li> <li>• A "reduction" to zero is the same as an elimination so adding "or elimination" is unnecessary language.</li> </ul>
21	Written Comments from Taxpayers	2.85(4)(b)	Commenter suggests removing "the department determines" to eliminate any implication that the assessment of the penalties is not subject to review by the Tax Appeals Commission and the courts.	<ul style="list-style-type: none"> <li>• This language is appropriate since it is the department that makes the initial determination whether or not to impose these penalties. If the taxpayer does not agree with the imposition of these penalties, the taxpayer clearly has the right to appeal as explained in Comment #7.</li> </ul>
22	Written Comments from Taxpayers	2.85(4)(b)	Commenter believes that "the additional tax on any adjustment made by the department that results from the person's failure to produce records" as provided in s. 71.80(9m)(b), Wis. Stats., refers to the additional tax that is finally determined to be due and owing. Therefore, commenter suggests that the rule be modified to indicate that if the tax relating to the penalty adjustment made pursuant to s. 71.80(9m)(a), Wis. Stats., is reduced, the penalty imposed pursuant to s. 71.80(9m)(b), Wis. Stats., should likewise be reduced. In addition, Examples 1 and 2 should also be modified to reflect this change.	<ul style="list-style-type: none"> <li>• <b>Suggested changes made to s. Tax 2.85(4)(b) plus Examples 1 and 2.</b></li> </ul>

**Summary of Comments on Emergency Rules for Penalty for Failure to Produce Records  
(Sections Tax 2.85 & 11.90)**

**NOTE: Since secs. Tax 2.85 & 11.90 are virtually identical, reference below is only to sec. Tax 2.85. However, all comments apply equally to sec. Tax 11.90.**

Comment No.	Source	Rule Section	Description of Comment	Department Response
23	Written Comments from Taxpayers	2.85(4)	Commenter suggests creating a new paragraph to provide that the penalties do not apply if the taxpayer provides records other than what was requested by the department and these records support the claimed tax treatment by the taxpayer.	<ul style="list-style-type: none"> <li>The department requests the records it determines necessary to conduct an audit. A taxpayer should not be allowed to substitute records for those requested unless the department authorizes the taxpayer to do so.</li> </ul>
24	Written Comments from Taxpayers	2.85(4)	Commenters suggest creating a new paragraph to provide that the penalties do not apply if the taxpayer attests that the records requested are not available.	<ul style="list-style-type: none"> <li>This is unnecessary, since if the records are truly unavailable the penalty can be waived based on the provisions of s. Tax 2.85(4)(a).</li> </ul>
25	Written Comments from Taxpayers	2.85(4)	Commenters suggest creating a new paragraph to provide that the penalties do not apply for records that are irrelevant to the audit, unreasonable in scope and volume or are ambiguous.	<ul style="list-style-type: none"> <li>The department requests the records it determines necessary to conduct an audit. If a taxpayer feels a request is irrelevant, unreasonable or ambiguous, the taxpayer should discuss the matter with the auditor.</li> </ul>

**Summary of Comments on Emergency Rules for Penalty for Failure to Produce Records  
(Sections Tax 2.85 & 11.90)**

**NOTE: Since secs. Tax 2.85 & 11.90 are virtually identical, reference below is only to sec. Tax 2.85. However, all comments apply equally to sec. Tax 11.90.**

Comment No.	Source	Rule Section	Description of Comment	Department Response
26	Written Comments from Taxpayers	2.85 New Subsection	Commenter suggests creating a new subsection in the rule to require the department to provide notice of these penalties with the initial written notice of an audit. In addition, if the department does not provide this notice the penalties will not apply.	<ul style="list-style-type: none"> <li>A summary of these penalties has been added to Publication 501 (Field Audit of Wisconsin Tax Returns) and audit procedures require the auditor to provide a copy of this publication with the initial contact letter or at the initial conference. Also, the department is required to provide a written warning regarding the possible imposition of these penalties with the second request as provided by s. Tax 2.85(3)(b). Therefore, there will be sufficient notice to taxpayers so the suggested new subsection is unnecessary.</li> </ul>
27	Written Comments from Taxpayers	General Comment	Commenter believes the rule contains significant penalties for potentially minor infractions. For example, a taxpayer could provide one record one day late and be subject to a large penalty.	<ul style="list-style-type: none"> <li>Written deadlines for providing the requested records are necessary to provide the department and taxpayers the necessary guidance so the imposition of these penalties can be administered fairly and consistently. No penalties can be imposed until the taxpayer has missed two separate deadlines.</li> <li>Section Tax 2.85(4)(b) has been modified to indicate that if the penalty adjustment made pursuant to s. 71.80(9m)(a), Wis. Stats., is reduced, the penalty imposed pursuant to s. 71.80(9m)(b), Wis. Stats., will likewise be reduced. See Comment #22.</li> </ul>

**Summary of Comments on Emergency Rules for Penalty for Failure to Produce Records  
(Sections Tax 2.85 & 11.90)**

**NOTE: Since secs. Tax 2.85 & 11.90 are virtually identical, reference below is only to sec. Tax 2.85. However, all comments apply equally to sec. Tax 11.90.**

Comment No.	Source	Rule Section	Description of Comment	Department Response
28	Written Comments from Taxpayers	General Comment	Commenter believes the rule provides auditors with a tremendous amount of leverage that could potentially be abused.	<ul style="list-style-type: none"> <li>As provided in s. Tax 2.85(3), before imposing these penalties the department must provide the taxpayer two written notices, provide the minimum number of days for the taxpayer to respond and provide a warning about the possible penalty imposition.</li> </ul>
29	Written Comments from Taxpayers	2.85 New Subsection	Commenter suggests allowing taxpayers to have the ability to decline providing requested records that are confidential due to contractual or regulatory requirements since s. 71.78, Wis. Stats., only provides limited confidentiality protections.	<ul style="list-style-type: none"> <li>The confidentiality requirements provided by s. 71.78, Wis. Stats., are adequate. In addition, contracts that prohibit disclosure of relevant records to the department are void against public policy.</li> </ul>
30	Written Comments from Taxpayers	2.85 New Subsection	Commenter suggests that the rule require record requests be made in a timely manner so the deadline for producing documents falls no later than 60 days prior to the running of the statute of limitations. Doing so will allow the records to be relied upon in making an assessment decision and the audit to be conducted in an efficient manner.	<ul style="list-style-type: none"> <li>This is unlikely to be an issue since the rule now provides for two 30-day minimum response times. See Comment #5.</li> </ul>
31	Written Comments from Taxpayers	2.85(2)(c)	Commenter suggests that if the department requires copies of records, the rule should require the department to reimburse the taxpayer for the cost of making the copies at the rate the department charges taxpayers for copies of audit materials.	<ul style="list-style-type: none"> <li>As indicated in Comment #10, a new definition of "provided" has been added as s. Tax 2.85(2)(e). This new definition allows requested records to be provided by the taxpayer in either electronic or paper format.</li> </ul>

**Summary of Comments on Emergency Rules for Penalty for Failure to Produce Records  
(Sections Tax 2.85 & 11.90)**

**NOTE: Since secs. Tax 2.85 & 11.90 are virtually identical, reference below is only to sec. Tax 2.85. However, all comments apply equally to sec. Tax 11.90.**

Comment No.	Source	Rule Section	Description of Comment	Department Response
32	Written Comments from Taxpayers	2.85 New Subsection	Commenter suggests that the taxpayer should be allowed to provide the records in the format in which they are normally maintained and that the taxpayer should not be required to change the format of the records requested.	<ul style="list-style-type: none"> <li>As Indicated in Comment #10, a new definition of "provided" has been added as s. Tax 2.85(2)(e). This new definition allows requested records to be provided by the taxpayer in either electronic or paper format.</li> </ul>
33	Written Comments from Taxpayers	2.85(3)	Commenter suggests requiring no additional record requests until the deadlines have passed for the first and second request for records previously requested. There is a concern with having multiple record requests outstanding at one time.	<ul style="list-style-type: none"> <li>It is not practical to require in the rule that all subsequent record requests should be postponed after a record request has already been made since this could unnecessarily delay completion of the audit. However, auditors are encouraged to combine record requests wherever possible so that typically only one second request for records will be outstanding at any given time.</li> </ul>
34	Written Comments from Taxpayers	2.85(2)(d)	Commenter suggests that three days should be added to the due date for record requests sent to the taxpayer through the mail.	<ul style="list-style-type: none"> <li>Auditors are already directed to add five days so that the minimum response time for a first or second request is 35 days for records that are sent to the taxpayer through the mail.</li> </ul>
35	Written Comments from Taxpayers	2.85(2)(c)	Commenter suggests modifying this definition to replace "time specified by the department" with "time specified by this rule." There is a concern that without this change the department could specify response times shorter than the minimums provided in the rule.	<ul style="list-style-type: none"> <li>Minimum response times are provided for the first and second request for records in s. Tax 2.85(3). The department is required to provide these minimum response times before these penalties could be imposed.</li> </ul>

**Summary of Comments on Emergency Rules for Penalty for Failure to Produce Records  
(Sections Tax 2.85 & 11.90)**

**NOTE: Since secs. Tax 2.85 & 11.90 are virtually identical, reference below is only to sec. Tax 2.85. However, all comments apply equally to sec. Tax 11.90.**

Comment No.	Source	Rule Section	Description of Comment	Department Response
36	Written Comments from Taxpayers	2.85 New Subsection	Commenter suggests allowing a taxpayer up to 60 days during any audit where the taxpayer may toll all pending document requests by providing written notice to the auditor. Another commenter suggests allowing a taxpayer to request one 90 day extension during an audit to provide the records requested. There is a concern the rule does not take into account the reality that many businesses have seasonal or period obligations that make compliance with record requests difficult.	<ul style="list-style-type: none"> <li>It is not practical to require in the rule that a taxpayer can arbitrarily postpone providing the requested records since this could unnecessarily delay completion of the audit.</li> <li>As indicated in Comment #4, language has been added to s. Tax 2.85(3) indicating that the response times established by the department should be reasonable based on the facts of each situation. Therefore, as long as the taxpayer communicates with the auditor, reasonable response times will be established.</li> </ul>
37	Written Comments from Taxpayers	2.85(3)(b)	Commenter suggests clarifying that the second request for records cannot be issued by the department until the deadline for the first request for records has lapsed.	<ul style="list-style-type: none"> <li>Clarifying language has been added.</li> </ul>
38	Written Comments from Taxpayers	2.85 New Subsection	Commenter believes that penalties should not be imposed with regard to estimated adjustments that are made if the records requested are not available. Therefore, commenter suggests requiring the department to show that the requested records existed or were in control of the taxpayer when the record request was made.	<ul style="list-style-type: none"> <li>This matter is already addressed by s. Tax 2.85(4)(a). If the taxpayer can show that records requested are not available due to factors beyond the taxpayer's control, the penalties will not be imposed.</li> </ul>

**Summary of Comments on Emergency Rules for Penalty for Failure to Produce Records**  
(Sections Tax 2.85 & 11.90)

**NOTE: Since secs. Tax 2.85 & 11.90 are virtually identical, reference below is only to sec. Tax 2.85. However, all comments apply equally to sec. Tax 11.90.**

Comment No.	Source	Rule Section	Description of Comment	Department Response
39	Written Comments from Taxpayers	2.85 New Subsection	Commenter believes that auditors should conduct audits with reasonable promptness and not use auditor-caused delay as an excuse to penalize a taxpayer for not responding promptly. The rule should include the expectation that auditors will use the records provided in a reasonably prompt manner.	<ul style="list-style-type: none"> <li>As provided in s. Tax 2.85(3), before imposing these penalties the department must provide the taxpayer two written notices, provide at least the minimum number of days for the taxpayer to respond and provide a warning about the possible penalty imposition. Therefore, an auditor-caused delay could not be used to impose these penalties.</li> </ul>
40	Written Comments from Taxpayers	2.85(4)(a)	Commenter suggests adding a factor to consider for waiving the penalties that says "the requested record is pertinent only to a year closed by the statute of limitations."	<ul style="list-style-type: none"> <li>There are situations where it is appropriate for the department to request records from a year that is closed by the statute of limitations since the records are relevant regarding a matter in a year where the statute of limitations is not closed. For example, if an asset is sold during the current year, records from a prior year may be requested to support the basis claimed in the computation of the gain for this asset sale in the current year.</li> </ul>
41	Written Comments from Taxpayers	2.85(4)(a)	Commenter suggests adding a factor that allows the department to consider the taxpayer's level of cooperation and responsiveness regarding the waiver of these penalties when all the requested records are not provided.	<ul style="list-style-type: none"> <li>As provided in s. Tax 2.85(2)(c), all the requested records must be provided within the time specified by the department to avoid the penalties. However, if all the requested records are not available, the taxpayer has the ability to show this to have the penalties waived under s. Tax 2.85(4).</li> </ul>

**Summary of Comments on Emergency Rules for Penalty for Failure to Produce Records  
(Sections Tax 2.85 & 11.90)**

**NOTE: Since secs. Tax 2.85 & 11.90 are virtually identical, reference below is only to sec. Tax 2.85. However, all comments apply equally to sec. Tax 11.90.**

Comment No.	Source	Rule Section	Description of Comment	Department Response
42	Written Comments from Taxpayers	General Comment	Commenter believes the rule fails to embrace the department's stated intent to only impose these penalties in limited circumstances. Therefore, the rule should incorporate the department's desire to use these penalties only sparingly.	<ul style="list-style-type: none"> <li>As provided in s. Tax 2.85(3), before imposing these penalties the department must provide the taxpayer two written notices, provide at least the minimum number of days for the taxpayer to respond and provide a warning about the possible penalty imposition. This means that the penalties will only be imposed in the limited circumstances where these requirements are met.</li> </ul>
43	Written Comments from Taxpayers	General Comment	Commenter believes that the legislative provisions that are the basis for the rule (s. 71.80(9m), Wis. Stats.) have no counterpart in other states or in other areas of Wisconsin law.	<ul style="list-style-type: none"> <li>The states of Florida, Illinois, Louisiana, Mississippi, North Carolina, Pennsylvania, Texas, Virginia and Washington have laws that impose penalties or other consequences when a taxpayer delays or refuses to provide requested records.</li> </ul>
44	Comments from Wisconsin Legislative Council Rules Clearinghouse	2.85(1) & (4)	Legislative Council advises that "any of" should be inserted before the phrase "the following."	<ul style="list-style-type: none"> <li><b>Suggested changes made.</b></li> </ul>
45	Comments from Wisconsin Legislative Council Rules Clearinghouse	2.85(3)	Legislative Council advises that "all of" should be inserted before the phrase "the following."	<ul style="list-style-type: none"> <li>Due to other changes made to this rule section, the word "following" was removed. Therefore, this suggested change is no longer relevant.</li> </ul>

**Summary of Comments on Emergency Rules for Penalty for Failure to Produce Records  
(Sections Tax 2.85 & 11.90)**

**NOTE: Since secs. Tax 2.85 & 11.90 are virtually identical, reference below is only to sec. Tax 2.85. However, all comments apply equally to sec. Tax 11.90.**

Comment No.	Source	Rule Section	Description of Comment	Department Response
46	Comments from Wisconsin Legislative Council Rules Clearinghouse	Rule Analysis Section	Legislative Council advises that "emergency" should be deleted from the rule analysis section relating to the effect on small business since the rule does not appear to be an emergency rule pursuant to section 1.02(5) of the Administrative Rules Procedures Manual.	<ul style="list-style-type: none"> <li>Section 1.02(5) of the Administrative Rules Procedures Manual states that if the rule is an emergency rule, it shall include a statement of the facts constituting an emergency. Since the rule analysis section does contain a Finding of Emergency statement, this is an emergency rule.</li> </ul>
47	Comments from Wisconsin Legislative Council Rules Clearinghouse	2.85(2)(a) & (b)	Legislative Council advises that the rule should define each term separately.	<ul style="list-style-type: none"> <li>Separate definitions for these terms would be duplicative. However, the language has been modified to clarify the meaning.</li> </ul>
48	Comments from Wisconsin Legislative Council Rules Clearinghouse	2.85(2)(b)	Legislative Council advises that "but are not limited to" should be deleted.	<ul style="list-style-type: none"> <li><b>Suggested change made.</b></li> </ul>
49	Comments from Wisconsin Legislative Council Rules Clearinghouse	2.85(3)	Legislative Council questions the necessity of Example 1 and Example 2 since the only difference between them appears to be that Example 1 uses exactly the minimum response periods and Example 2 uses more than the minimum response periods.	<ul style="list-style-type: none"> <li><b>Example 1 has been deleted since it is agreed that it does not add anything of value that is not addressed by Examples 2 and 3. In addition, Examples 2 and 3 have been renumbered to be Examples 1 and 2.</b></li> </ul>

**Summary of Comments on Emergency Rules for Failure to Produce Records  
(Sections Tax 2.85 & 11.90)**

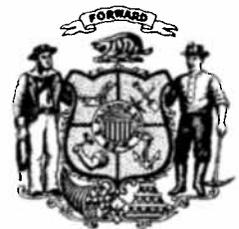
3/9/2010

**NOTE: Since secs. Tax 2.85 & 11.90 are virtually identical, reference below is only to sec. Tax 2.85. However, all comments apply equally to sec. Tax 11.90.**

Comment No.	Source	Rule Section	Description of Comment	Department Response
50	Comments from Wisconsin Legislative Council Rules Clearinghouse	2.85(1)(b) & (4)(b)	Legislative Council comments that, generally, s. Tax 2.85(1)(b) permits the department to impose the penalty at its discretion but s. Tax 2.85(4)(b) and the following examples appear to describe a more stringent standard for waiving the penalty once it has been imposed. Therefore, will this result in inequitable treatment of taxpayers depending on the department's exercise of judgment in the initial imposition of the penalty?	<ul style="list-style-type: none"> <li>Section Tax 2.85(1)(b) does not permit the department to assess the penalty at its discretion. As indicated in s. Tax 2.85(3), this penalty cannot be imposed unless the taxpayer does not provide the requested records after the department provides the taxpayer two written notices, at least the minimum number of days for the taxpayer to respond and a warning about the possible penalty imposition.</li> <li>Section Tax 2.85(4)(b) has been modified to indicate that if the penalty adjustment made pursuant to s. 71.80(9m)(a), Wis. Stats., is reduced, the penalty imposed pursuant to s. 71.80(9m)(b), Wis. Stats., will likewise be reduced. See Comment #22.</li> </ul>
51	Comments from Wisconsin Legislative Council Rules Clearinghouse	2.85(4)(b)	Legislative Council advises that "may not" should replace "would not."	<ul style="list-style-type: none"> <li>Suggested change made. However, due to other changes made, this language is now in newly created s. Tax 2.85(4)(c).</li> </ul>



# WISCONSIN STATE LEGISLATURE





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## WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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**Ronald Sklansky**  
*Clearinghouse Director*

**Richard Sweet**  
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**Terry C. Anderson**  
*Legislative Council Director*

**Laura D. Rose**  
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### CLEARINGHOUSE REPORT TO AGENCY

[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

CLEARINGHOUSE RULE **09-087**

AN ORDER to create Tax 2.85 and 11.90, relating to penalties for failure to produce records.

Submitted by **DEPARTMENT OF REVENUE**

10-23-2009 RECEIVED BY LEGISLATIVE COUNCIL.

11-19-2009 REPORT SENT TO AGENCY.

RS:SG

**LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT**

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]  
Comment Attached            YES             NO
  
2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]  
Comment Attached            YES             NO
  
3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]  
Comment Attached            YES             NO
  
4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS  
[s. 227.15 (2) (e)]  
Comment Attached            YES             NO
  
5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]  
Comment Attached            YES             NO
  
6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL  
REGULATIONS [s. 227.15 (2) (g)]  
Comment Attached            YES             NO
  
7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]  
Comment Attached            YES             NO



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## WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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### CLEARINGHOUSE RULE 09-087

#### Comments

**[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Legislative Reference Bureau and the Legislative Council Staff, dated September 2008.]**

#### 2. Form, Style and Placement in Administrative Code

a. In s. Tax 2.85 (1) (intro.) and (4) (intro.), the phrase "any of" should be inserted before the phrase "the following." In sub. (3) (intro.), the phrase "all of" should be inserted before the phrase "the following." The same comments apply to the similar provisions in s. Tax 11.90.

b. In the section of the rule analysis relating to small business, the department should delete the word "emergency." The proposed rule does not appear to be an emergency rule. [s. 1.02 (5), Manual.]

c. In ss. Tax 2.85 (2) (a) and (b) and 11.90 (2) (a) and (b), the department should define each term separately. In ss. Tax 2.85 (2) (b) and 11.90 (2) (b), the department should delete "but are not limited to." [s. 1.01 (7) (c), Manual.]

d. In ss. Tax 2.85 (3) and 11.90 (3), example 1 appears to show the similar treatment for a response period of exactly the minimum period specified by pars. (a) and (b) and example 2 appears to show a response period that provides more than the minimum time specified by pars. (a) and (b). Are there other distinctions drawn by examples 1 and 2? If not, is the distinction described above sufficient to merit separate examples?

e. Generally, ss. Tax 2.85 (1) (b) and 11.90 (1) (b) permit the department to assess a penalty at its discretion, however, ss. Tax 2.85 (4) (b) and 11.90 (4) (b) and the examples in the

rule appear to describe a more stringent standard for waiving that penalty once it has been imposed. Will this combination of standards result in inequitable treatment of taxpayers depending on the department's exercise of judgment in the initial imposition of the penalty?

**5. Clarity, Grammar, Punctuation and Use of Plain Language**

In ss. Tax 2.85 (4) (b) and 11.90 (4) (b), the department should say "may not" instead of "would not."