

**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 Therefore, commenter requests that the emergency rule be rescinded.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"> 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.
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"> 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.
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"> The department has modified the rule to clarify that the penalties referred to are those provided in s. 71.80(9m), Wis. Stats.

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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"> • As explained in Comment #5, the minimum response time for the first request has been lengthened. • 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. • 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.
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"> • 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. • 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.

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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"> Many audits can be completed in less than 150 or 180 days. Such a delay could significantly increase audit time.
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"> 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.
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"> Example 3 has been so clarified.
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"> This definition has been clarified to indicate it does not apply to items protected by attorney-client privilege.
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"> A new definition of "provided" has been added as s. Tax 2.85(2)(e) to address this.

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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"> 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.
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"> Modification has been made to replace "unusual circumstance" with "facts and circumstances" since this is more consistent with the statute.
13	Written Comments from Taxpayers	2.85(4)(a)	Commenter suggests that "may" should be replaced with "shall."	<ul style="list-style-type: none"> The department has determined that "may" is appropriate based on the Administrative Rules Procedures Manual.
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"> 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.
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"> This factor could be unreliable since the taxpayer determines if personnel responsible for the tax compliance function are reassigned.

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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"> 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.
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"> This is an unnecessary duplication. The changes made to s. Tax 2.85(4)(a)5 as indicated in Comment #12 are sufficient to address this concern.
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"> Suggested change made.
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"> Clarifying language has been added to Example 2 to indicate this is a business that primarily receives payments in cash.

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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"> • Suggested change made in replacing "may" with "shall." • A "reduction" to zero is the same as an elimination so adding "or elimination" is unnecessary language.
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"> • 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.
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"> • Suggested changes made to s. Tax 2.85(4)(b) plus Examples 1 and 2.

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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"> 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.
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"> 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).
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"> 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.

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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"> • 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.
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"> • 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. • 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.

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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"> 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.
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"> 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.
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"> This is unlikely to be an issue since the rule now provides for two 30-day minimum response times. See Comment #5.
31	Written Comments from Taxpayers	2.85(2)(c)	Commenter suggests that if the department requests 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"> 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.

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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"> 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.
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"> 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.
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"> 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.
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"> 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.

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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"> 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. 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.
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"> Clarifying language has been added.
38	Written Comments from Taxpayers	2.85 New Subsection	Commenter believes that penalties should not be imposed with regarded 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"> 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.

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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"> 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.
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"> 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.
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"> 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).

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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"> 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.
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"> 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.
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"> Suggested changes made.
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"> Due to other changes made to this rule section, the word "following" was removed. Therefore, this suggested change is no longer relevant.

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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"> 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.
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"> Separate definitions for these terms would be duplicative. However, the language has been modified to clarify the meaning.
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"> Suggested change made.
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"> 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.

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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"> 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. 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.
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"> Suggested change made. However, due to other changes made, this language is now in newly created s. Tax 2.85(4)(c).