

**Publication Date:** October 19, 2009

**Effective Dates:** October 19, 2009 through March 17, 2010

### ORDER OF THE DEPARTMENT OF REVENUE ADOPTING AN EMERGENCY RULE

The Wisconsin Department of Revenue hereby adopts an emergency rule interpreting ss. 71.80(9m) and 77.61(19), Stats., 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.

Section 227.24, Stats., provides an agency may promulgate a rule as an emergency rule without complying with the notice, hearing, and publication requirements of the statutes if preservation of the public peace, health, safety, or welfare necessitates putting the rule into effect prior to the time it would take effect if the agency complied with the procedures.

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

**Plain language analysis:** This emergency 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:** The department is not aware of a similar rule in an adjacent state.

**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 emergency 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 emergency 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 emergency rule does not have a significant fiscal effect on the private sector.

**Effect on small business:** This emergency 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.

**Place where comments are to be submitted and deadline for submission:** Comments may be submitted to the contact person shown below no later than one week after the public hearing on this emergency rule is conducted. Information as to the place, date, and time of the public hearing will be published in the Wisconsin Administrative Register.

Dale Kleven  
Department of Revenue  
Mail Stop 6-40  
2135 Rimrock Road  
P.O. Box 8933  
Madison, WI 53708-8933

### **FINDING OF EMERGENCY**

The Department of Revenue finds that an emergency exists and that the attached rule order is necessary for the immediate preservation of the public peace, health, safety or welfare. A statement of the facts constituting the emergency is:

The emergency rule is to reflect changes in Wisconsin's tax laws due to the adoption of penalties for failure to produce records.

It is necessary to promulgate this rule order to provide guidance so that the penalties can be administered in a fair and consistent manner.

This rule is therefore promulgated as an emergency rule and shall take effect upon publication in the official state newspaper. Certified copies of this rule have been filed with the Secretary of State and Revisor of Statutes, as provided in s. 227.24, Stats.

### **TEXT OF RULE**

**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 the following penalties:

(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 under s. 71.80(9m), Stats., 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" include action taken by the department when a proposed assessment or refund or notice of assessment or refund is issued to a taxpayer.

(b) "Records" or "documents" include both paper and electronic formats. Examples include, but are not limited to, bills, receipts, invoices, contracts, letters, memos, accounting statements or schedules, general ledgers, journal entries, and board of director's minutes.

(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.

**(3) PROCEDURES.** The penalties in this section may be imposed if the records requested were not provided and the department provided the following notifications regarding the records requested:

(a) A first written request for records where the department allowed the person a minimum of 15 days for the records to be provided.

(b) A second written request for records where the department allowed the person a minimum of 30 days 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 John Jones on May 5, 2010, allowing him until May 20, 2010 to provide the records requested. Mr. Jones does not provide the requested records to the department by May 20, 2010. The department issues a second written request for records to him on June 1, 2010, allowing him until July 1, 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. Mr. Jones does not provide the requested records by July 1, 2010. 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 Mr. Jones not providing the records requested.

2) 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.

3) The department issues a first written request for records to Corporation B on January 5, 2010, 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 relate and impose a penalty equal to the greater of \$500 or 25% of the additional tax on the adjustments made resulting from Corporation B not providing the records requested.

(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 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 unusual circumstance 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), may result in a reduction of the penalty provided in sub. (1)(a) if the department determines that these records support a reduction in the disallowance or inclusion previously made by the department, but would not result in a reduction of the

penalty provided in sub. (1)(b) unless the person can show that under all the facts and circumstances providing the requested records at that time was reasonable or justified by factors beyond the person's control.

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. Additional tax of \$100,000 and penalty 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 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. However, the records provided support half of the interest expense deduction previously claimed. Therefore, the interest expense adjustment is modified to reduce the proposed additional tax from \$100,000 to \$50,000, but the original proposed penalty of \$25,000 for failure to provide records remains.

2) Since Mr. Smith does not provide the records requested regarding his cash business 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. Additional tax of \$60,000, a negligence penalty of \$15,000 and a penalty for failure to produce records 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 and negligence penalty are modified to reduce the additional tax from \$60,000 to \$12,000 and the negligence penalty from \$15,000 to \$3,000, but the original penalty for failure to produce records of \$15,000 remains.

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 for failure to produce records 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 the following penalties:

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

(a) In addition to any other penalties that the department may impose, a penalty for each violation under s. 77.61(19), Stats., 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" include action taken by the department when a proposed assessment or refund or notice of assessment or refund is issued to a taxpayer.

(b) "Records" or "documents" include both paper and electronic formats. Examples include, but are not limited to, bills, receipts, invoices, contracts, letters, memos, accounting statements or schedules, general ledgers, journal entries, and board of director's minutes.

(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.

**(3) PROCEDURES.** The penalties in this section may be imposed if the records requested were not provided and the department provided the following notifications regarding the records requested:

(a) A first written request for records where the department allowed the person a minimum of 15 days for the records to be provided.

(b) A second written request for records where the department allowed the person a minimum of 30 days 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 John Jones on May 5, 2010, allowing him until May 20, 2010, to provide the records requested. Mr. Jones does not provide the requested records to the department by May 20, 2010. The department issues a second written request for records to him on June 1, 2010, allowing him until July 1, 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. Mr. Jones does not provide the requested records by July 1, 2010. 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 Mr. Jones not providing the records requested.

**2)** 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.

**3)** The department issues a first written request for records to Corporation B on January 5, 2010, 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 relate and impose a penalty equal to the greater of \$500 or 25% of the additional tax on the adjustments made resulting from Corporation B not providing the records requested.

**(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 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 unusual circumstance 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), may result in a reduction of the penalty provided in sub. (1)(a) if the department determines that these records support a reduction in the disallowance or inclusion previously made by the department, but would not result in a reduction of the penalty provided in sub. (1)(b) unless the person can show that under all the facts and circumstances providing the requested records at that time was reasonable or justified by factors beyond the person's control.

**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. Additional tax of \$100,000 and penalty 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 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. However, the records provided support half of the deductions for exempt sales previously claimed. Therefore, the deductions for exempt sales adjustment is modified to reduce the proposed additional tax from \$100,000 to \$50,000, but the original proposed penalty of \$25,000 for failure to provide records remains.

**2)** Since Mr. Smith does not provide the records requested regarding his cash business 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. Additional tax of \$60,000, a negligence penalty of \$15,000 and a penalty for failure to produce records 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 and negligence penalty are modified to reduce the additional tax from \$60,000 to \$12,000 and the negligence penalty from \$15,000 to \$3,000, but the original penalty for failure to produce records of \$15,000 remains.

**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 for failure to produce records of \$15,000 is waived.

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The rules contained in this order shall take effect upon publication in the official state newspaper as provided in s. 227.22 (2) (c), Stats.

DEPARTMENT OF REVENUE

Dated: \_\_\_\_\_

By: \_\_\_\_\_

Roger M. Ervin  
Secretary of Revenue

E:Rules/285 1190 Proposed Order (emergency – v2)

FISCAL ESTIMATE FORM

2009 Session

ORIGINAL  UPDATED

CORRECTED

SUPPLEMENTAL

LRB # 09-

INTRODUCTION #

Admin. Rule # Chapter Tax 2.85 & 11.90 Failure to Produce Records (emergency)

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

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

Decrease Costs

Local:  No Local Government Costs

1.  Increase Costs

Permissive

Mandatory

2.  Decrease Costs

Permissive

Mandatory

3.  Increase Revenues

Permissive

Mandatory

4.  Decrease Revenues

Permissive

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.

**FISCAL ESTIMATE WORKSHEET**

ORIGINAL       UPDATED  
 CORRECTED       SUPPLEMENTAL

Detailed Estimate of Annual Fiscal Effect

**2009 Session**

<b>LRB # 09</b>	Admin. Rule #
<b>INTRODUCTION #</b>	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. I. One-Time Costs or Revenue Impacts for State and/or Local Government (do not include in annualized fiscal effect):**

<b>II. II. Annualized Costs:</b>	<b>Annualized Fiscal impact on State funds from:</b>	
<b>A. A. State Costs by Category</b>	<b>Increased Costs</b>	<b>Decreased Costs</b>
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>B. B. State Costs by Source of Funds</b>	<b>In Increased Costs</b>	<b>Decreased Costs</b>
GPR	\$ \$	\$ \$
FED		- -
PRO/PRS		- -



SEG/SEG-S	\$	- -
<b>III. State Revenues - Complete this only when proposal will increase or decrease state revenues (e.g., tax increase, decrease in license fee, etc.)</b>	In Increased Rev.	D Decreased Rev.
GPR Taxes	\$ \$	\$ \$ -
GPR Earned		- -
FED		- -
PRO/PRS		- -
SEG/SEG-S		- -
<b>TOTAL State Revenues</b>	\$ \$	\$ \$ -

**NET ANNUALIZED FISCAL IMPACT**

	<u>STATE</u>	<u>LOCAL</u>
NET CHANGE IN COSTS	\$ 0	\$ 0
NET CHANGE IN REVENUESage 9 <a href="#">1/29/2015-10/16/2009</a>	\$ 0	\$ 0
<b>Agency/Prepared by</b> Wisconsin Department of Revenue Paul Ziegler 608 266-5773	<b>Authorized Signature/Telephone No.</b> Wisconsin Department of Revenue Paul Ziegler 608 266-5773	<b>Date</b> 09/01/09