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No. 65372-5-I

IN THE COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

MARK LITCHFIELD, on behalf of himself and all others similarly
situated,

Petitioners/Cross-Respondents/Plaintiffs,

v.

KPMG LLP,

Respondent/Cross-Petitioner/Defendant.

COURT OF APPEALS
STATE OF WASHINGTON
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BRIEF OF RESPONDENT/CROSS-PETITIONER KPMG LLP

George E. Greer,
(WSBA No. 11050)
ORRICK HERRINGTON &
SUTCLIFFE LLP
701 Fifth Avenue, Suite 5600
Seattle, WA 98104
Telephone: (206) 839-4300
Facsimile: (206) 839-4301

Michael C. Kelley
(*admitted pro hac vice*)
Jennifer Altfeld Landau
(*admitted pro hac vice*)
SIDLEY AUSTIN LLP
555 West Fifth Street, Suite 4000
Los Angeles, CA 90013
Telephone: (213) 896-6000
Facsimile: (213) 896-6600

Leonard J. Feldman
(WSBA No. 20961)
STOEL RIVES LLP
600 University Street, Suite 3600
Seattle, WA 98101
Telephone: (206) 624-0900
Facsimile: (206) 386-7500

Attorneys for Respondent/Cross-Petitioner/Defendant KPMG LLP

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GLOSSARY

AS	Auditing Standards adopted by the Public Company Accounting Oversight Board (PCAOB)
AU	Auditing Standards promulgated by the Auditing Standards Board of the American Institute of Certified Public Accountants (AICPA)
CPA	Certified Public Accountant
L&I	Washington State Department of Labor & Industries
MWA	Minimum Wage Act
WHD	Wage & Hour Division of the United States Department of Labor

INTRODUCTION

Under Washington's Minimum Wage Act ("MWA"), individuals "employed in a bona fide ... professional capacity" are not entitled to overtime. The Washington State Legislature delegated responsibility for defining who is employed in a "professional capacity" to the Washington State Department of Labor and Industries ("L&I"), the agency responsible for protecting the health, safety, and security of employees in the state. And, in detailed regulations, as well as guidance documents in which L&I interpreted the regulations it promulgated, L&I made clear that an accountant need not be licensed as a Certified Public Accountant ("CPA") to be exempt from these wage-and-hour protections. Rather, the proper analysis of whether a given worker is exempt depends primarily upon his or her actual job duties. It is telling that Plaintiff Mark Litchfield does not deal meaningfully with these regulations, although he previously acknowledged that they deserve deference. These binding regulations and policies should be the beginning and end of this appeal.

The sweeping rule advocated by Litchfield – namely, that every unlicensed accountant is entitled to overtime by definition and as a matter of law, no matter how well educated; no matter the complexity of his or her job duties; and no matter how much discretion or judgment he or she actually exercises in performing accounting work – is unprecedented. Such a rule would be contrary to the authoritative regulation promulgated

and then interpreted by the agency charged with defining the exemption; it would be contrary to the analogous federal law upon which Washington's provisions are based, and to which Washington courts give significant weight; and it finds no support in the separate statute regulating accountancy upon which Litchfield principally relies. The trial court therefore acted properly when it rejected this argument in its Order of March 1, 2010. *See* CP 2088-90.

Litchfield's alternative argument (which the trial court did accept, *see* CP 2347-50) is equally untethered to the MWA and its implementing regulations. Specifically, he argues, even if an accountant need not actually be *licensed* in order to qualify for the professional exemption, he or she must meet most (but not all) of the requirements for obtaining a CPA license under the Accountancy Act – namely, the educational prerequisite and the requirement of 2,000 hours' employment experience over a 12-month period. But it is the MWA and its implementing regulations that govern here, not the Accountancy Act, and the MWA contains *no* experience requirement for exempt professional status. This is not surprising: The Accountancy Act is a separate statute designed to serve separate consumer-protection goals. To import its requirements into the MWA is to rewrite the binding regulations authored by the agency that the Washington State Legislature authorized to undertake this task. The trial court's Order of April 22 should therefore be reversed.

ASSIGNMENT OF ERROR ON CROSS-REVIEW

The trial court erred when it entered its April 22, 2010 Order Granting Plaintiffs' Motion for Partial Summary Judgment. CP 2347-50.

ISSUES PRESENTED

Using the proposed order submitted by Litchfield, the trial court certified two issues for discretionary review under RAP 2.3(b)(4), and stated which party prevailed on each issue, as follows:

1. Whether unlicensed audit associates need to obtain a CPA license to practice as auditors before they are professionals exempt from overtime. (The plaintiff class lost on this issue.)

2. Whether the minimum educational requirement for unlicensed individuals performing audit work to be exempt from overtime as professional employees is at least the bachelor's degree specified in WAC 4-25-[710¹] and, after receiving the degree, the on-the-job audit work-training experience for a minimum of 2,000 hours over a 12-month period, also specified in WAC 4-25-730. (The plaintiff class won on this issue and defendant KPMG lost on this issue.)

CP 2351-53.² In addition to those two issues, Litchfield impermissibly addresses two evidentiary issues upon which the Court did not grant

¹ The educational requirements to which the court refers appeared in WAC 4-25-710, not 4-25-730, which the court later noted in its Order Certifying Issues for Appeal Under RAP 2.3(b)(4). CP 2351-53.

Litchfield's Opening Brief cites to the former codification of these provisions in WAC 4-25. WAC 4-25 has been recodified as WAC 4-30. Sections 4-25-710 and 4-25-730 were amended and recodified as WAC 4-30-060 and WAC 4-30-070, respectively. This brief cites to the current versions of those provisions.

² For the Court's convenience, a copy of Commissioner Verellen's August 18, 2010 Notational Ruling granting discretionary review is included in the attached appendix, along with the statutes and regulations cited in this brief.

review, Opening Br. at 23-31, and which therefore are not properly before the Court.

STATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND

A. The Minimum Wage Act

The MWA requires employers to pay overtime wages to employees who work more than 40 hours per week, but not those employees who work in a “bona fide executive, administrative, or professional capacity.” RCW 49.46.010(5)(c). The MWA itself does not define who is “employed in a bona fide ... professional capacity,” but instead provides that this “term[]” is to be “defined and delimited by rules of the director [of labor and industries].” *Id.*

Pursuant to this express statutory authority, L&I promulgated regulations defining who is employed in a “bona fide ... professional capacity.” *See* WAC 296-128-530. Relevant here, the regulation provides (under what commonly is known as the “short test” for exempt status)

[t]hat an employee who is compensated on a salary or fee basis at a rate of not less than \$250 per week ..., and whose *primary duty consists of the performance of work either requiring knowledge of an advanced type in a field of science or learning, which includes work requiring the consistent exercise of discretion and judgment* ... shall be deemed to meet all of the requirements of this section.

WAC 296-128-530(5) (emphasis added). Similarly, under the standard test for exemption, an “individual employed in a bona fide ... professional capacity” is defined to include an employee

- (1) Whose primary duty consists of the performance of work:
 - (a) Requiring knowledge of an advanced type in a field of ... learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, [and]

....
- (2) Whose work requires the consistent exercise of discretion and judgment in its performance....

WAC 296-128-530(1)(a); WAC 296-128-530(2). L&I further interpreted these regulations in an authoritative, Administrative Policy document, which is discussed in greater detail below. *Infra* at 16-18.

B. The Accountancy Act

Separate and apart from the MWA is the Accountancy Act, which is codified elsewhere in the Revised Code of Washington. *See generally* RCW ch. 18.04. The Accountancy Act does not concern itself with wages; rather, its purposes, as set forth by the Legislature, are to “promote the dependability of information which is used for” various financial and accounting purposes; and to “protect the public interest” by ensuring that accounting licensees govern themselves competently, ethically, and professionally, and by regulating who may be licensed as a CPA and who may hold themselves out as such. RCW 18.04.015(1). Thus, the Accountancy Act defines the requirements that must be met to be licensed as a CPA in Washington, which include passing the CPA exam, satisfying

educational requirements established by the State Board of Accountancy (“Accountancy Board”), obtaining one year of experience, being of good character, and paying certain fees. RCW 18.04.105(1)(a)-(e).

The state Accountancy Board additionally has promulgated regulations interpreting the Accountancy Act, *see* WAC 4-30, including the Act’s licensure requirements, *see* WAC 4-30-060. Like the Act itself, the Accountancy Board’s purposes and authority include no mention of wages or hours, or indeed any issue of workplace conditions or compensation. *See* WAC 4-30-020. Under these regulations, a CPA candidate must meet stringent educational requirements. He or she must complete 150 semester hours of college education, including a baccalaureate or higher degree, an accounting concentration that includes upper-level or graduate coursework, and specified coursework in business administration at the undergraduate or graduate level. WAC 4-30-060(a)-(c). The 150-hour requirement exceeds the standard requirement for obtaining a bachelor’s degree at most universities. In addition, the regulations separately specify the work experience required to obtain a CPA license – at least 2,000 hours of work over at least 12 months, WAC 4-30-070(2)(a)-(b), which must include a variety of enumerated “skills” and “competencies,” WAC 4-30-070(3).

II. KPMG AND ITS AUDIT PRACTICE

KPMG provides audit, tax, and advisory services to public and private clients throughout the United States. The allegations in this case directly concern KPMG's audit practice, as Litchfield was an Audit Associate. The implications of Litchfield's statutory arguments about exempt professionals, however, reach those performing any accounting line of service.

All of KPMG's Washington Audit Associates have obtained at least a four-year college degree in accounting or a related field. In addition, half of them have master's degrees in accounting. CP 1351 (Carlile ¶ 28). Litchfield understood at the time he was hired that KPMG required its Audit Associates in Washington to have a major in accounting, finance, or business. CP 2239 (Litchfield Dep. Tr. 58:11-23). The strong academic background of KPMG's Audit Associates enables them to perform the tasks, duties, and responsibilities assigned to them once they are hired and begin work on audits. CP 1380 (Handley ¶ 46).

Audit services include audits of financial statements. CP 1345-47, 1371-73 (Carlile ¶¶ 6, 10-11; Handley ¶¶ 12-21). The objective of a financial statement audit is to obtain reasonable assurance that the financial statements are free of material misstatement, and to issue an audit report. CP 1372 (Handley ¶¶ 16-19). During such an audit, both licensed and unlicensed Audit Associates collect and critically evaluate audit

evidence. CP 1378-81, 1560-63, 1565-72 (Handley ¶¶ 40-43, 48-50; Guy ¶¶ 47-52, 54, 60-63, 67-73). Governing professional standards require these procedures to be performed with due professional care, professional skepticism, and judgment. *See* AU 230.07, 230.08, 312.04, 326.13, 329.09, 339.01, AS 3³; *see also* CP 1554, 1582-91, 1375-76 (Guy ¶¶ 19-21, 102-22; Handley ¶¶ 28-29).

The record contains unrefuted declarations from numerous Audit Associates regarding the work they performed at KPMG. Armed with their advanced education, they perform complex and substantive tasks requiring the exercise of professional care, discretion, and judgment. CP 1341-43, 1554-55, 1583-91 (Compendium of Witness Declarations (“Compendium”) ¶¶ 6-9; Guy ¶¶ 19-22, 104-122). For instance, individual declarants planned audit procedures using their professional judgment concerning the kind and scope of audit test work that would be performed during the audit. CP 1445, 1467, 1490, 1528-29 (Crawford ¶ 40; Gorder ¶¶ 22-23; Hautz ¶ 21; Skager ¶ 14). They applied auditing and accounting guidance principles to evaluate and test the reasonableness of client estimates, including estimates of insurance funds likely to be recovered, and estimates of allowances to be reserved against accounts receivables – areas which by their nature are highly judgmental. CP 1456-57, 1477

³ “AU” refers to auditing standards promulgated by the AICPA and adopted as interim auditing standards by the PCAOB. “AS” refers to Auditing Standards adopted by the PCAOB and approved by the SEC.

(Dobrey ¶¶ 17-18; Guenser ¶ 19). Audit Associates researched and analyzed developing or complex accounting and auditing issues, and drafted opinion memoranda to be incorporated in guidance used by auditors in the field. CP 1424-26 (Blair ¶¶ 12-16).

Equally important, in all their work – from interviewing client personnel to reviewing and analyzing accounting documentation – KPMG Audit Associates were required to use their independent judgment in identifying issues, on the basis of what they saw as well as what they did not see, to be raised and discussed with the engagement team. CP 1341-43 (Compendium ¶¶ 6-9); *see* CP 1425-26, 1428-29, 1435-37, 1453-54, 1479-80, 1480-81, 1497-98, 1510-11, 1529 (Blair ¶¶ 13-16, 21; Crawford ¶¶ 14-15; Dobrey ¶¶ 9-10; Guenser ¶¶ 26-27, 30, 33; Kurtzman ¶¶ 13-14; Pedersen ¶¶ 15-16; Skager ¶ 15); *see also* CP 1409-10, 1386 (Larsen ¶ 11; Handley ¶¶ 70-72). Critically, the record shows that these job duties and responsibilities do not change simply because a KPMG Audit Associate receives a CPA license. CP 1452, 1495, 1535-36 (Dobrey ¶ 4; Kurtzman ¶ 8; Skager ¶ 32).⁴

⁴ Litchfield asserts that “none of KPMG’s audit associates are licensed to be a Certified Public Accountant.” Opening Br. at 6. On the contrary, the record shows that KPMG employs some Audit Associates who are CPAs (CP 1542, 1452, 1461-62 (Zygar ¶ 6; Dobrey ¶¶ 3-4; Gorder ¶¶ 3, 6)); some Audit Associates who are not CPAs (CP 1422-23, 1433, 1484, 1506 (Blair ¶¶ 3, 7; Crawford ¶¶ 3-4; Hautz ¶¶ 3, 5; Pedersen ¶¶ 3, 5)); and some Audit Associates who have passed the CPA exam and satisfied the experience requirement for licensure, but who for whatever reason did not submit their paperwork to become a CPA immediately upon becoming eligible (CP 1473, 1515-16, 1494 (Guenser ¶¶ 3-4; Sigafos ¶¶ 3, 6; Kurtzman ¶¶ 3, 4)).

III. LITCHFIELD'S EMPLOYMENT WITH KPMG AND SUBSEQUENT LAWSUIT

KPMG employed Litchfield for approximately one year as an Audit Associate in its Seattle office. CP 2561 (Compl. ¶ 3.1). Throughout his employment, KPMG paid Litchfield on a salary basis and classified him as exempt from overtime requirements, pursuant to Washington's professional exemption. CP 2561-64 (Compl. ¶¶ 5.1, 5.4); CP 1355-56 (Carlile ¶ 50).

Before joining KPMG, Litchfield graduated from Brigham Young University with a Bachelor of Science degree in Accounting. CP 2235 (Litchfield Dep. Tr. 19:12-17); CP 2213-14 (Litchfield Dep. Ex. 5). At BYU, Litchfield earned 156.5 credits. These included more than the 24 semester-hours in accounting-related courses, and the 24 semester-hours in business administration courses, that are necessary to become a CPA in Washington. CP 2213-14 (Litchfield Dep. Ex. 5); CP 1575-76 (Guy ¶ 84); *see* WAC 4-30-060.

Shortly before he left KPMG, and after having passed the Washington CPA exam, Litchfield represented in his application for a CPA license (executed under penalty of perjury) and in resumes to prospective employers that his experience at KPMG had included the type of audit work that requires the exercise of due professional care, professional skepticism, and judgment. This work included planning audits; assessing compliance by analyzing and verifying financial accounts; improving

clients' compliance by recommending changes in their management and accounting operation systems and controls; and performing analytical and substantive audit procedures on financial statement accounts. CP 2210-12, 2215-25, 2236, 2240, 2241-42, 2243-44, 2245 (Litchfield Dep. Exs. 3, 13-17 & Tr. 49:23-51:14, 162:19-24, 170:21-171:11, 183:16-184:21, 187:5-23).

IV. PROCEDURAL BACKGROUND

On April 4, 2007, Litchfield sued KPMG in King County Superior Court, alleging that his job duties for KPMG did not place him within the professional (or any other) exemption to the MWA. Thus, he asserted, he was entitled to unpaid overtime. CP 2560-68. The court subsequently certified the case as a class action under CR 23(b)(1)(A) and CR 23(b)(2), defining the class as associates who were employed in KPMG's Audit Practice in the State of Washington from April 2004 to the present, and who were not licensed as CPAs. CP 1253. Relevant here, the court identified as a question of law common to the class "[w]hether a CPA license is needed to practice as an auditor and be exempt from the overtime law as an auditor." CP 1251.

Litchfield sought partial summary judgment on, among other questions, whether an accountant must have a CPA license in order to qualify for the professional exemption. CP 1625. The court denied Litchfield's motion, reasoning that "[i]t is possible for an unlicensed accountant

performing work to assist licensed auditors on audit engagements to qualify for the professional exemption if they have the requisite educational background and the work they actually perform satisfies the elements of the exemption.” CP 2090.

Litchfield subsequently filed a second motion for partial summary judgment in which he presented a fallback position. Even if *licensure* is not necessary for exempt professional status, he argued, accountants cannot qualify for the professional exemption until they have satisfied two of the requirements for a CPA license – namely, the work-experience and educational requirements set forth in the regulations interpreting the Accountancy Act. This time, the trial court agreed. It concluded that “[t]he minimum *educational* requirement for assistants of auditors assisting auditors in performing audit work to be exempt from overtime as ‘professional’ employees is at least the bachelor’s degree specified in WAC 4-25-[710] and, after having received their bachelor’s degree, the on-the-job audit work-training *experience* for a minimum of 2,000 hours over a 12-month period, also specified by WAC 4-25-730.” CP 2349 (emphases added).

On April 22, 2010, the trial court certified the issues quoted above (*supra* at 3) for discretionary review. CP 2352. The parties’ cross-motions for discretionary review were granted on August 18, 2010.

ARGUMENT

I. THE TRIAL COURT PROPERLY REJECTED LITCHFIELD'S ARGUMENT THAT ONLY LICENSED ACCOUNTANTS CAN BE EXEMPT.

A. Nothing In The MWA Or Its Implementing Regulations Requires An Accountant To Be Licensed In Order To Be Exempt.

In his motions for class certification and summary judgment in the trial court, and now in his Opening Brief before this Court, Litchfield's principal argument has been a sweeping one: Where accountancy is concerned, he asserts, *only* a licensed CPA can be exempt. *E.g.*, Opening Br. at 11 ("Only by fulfilling *all* the requirements for licensing ... should an employee be considered ... exempt from overtime regulations."). This argument is flatly contrary to the regulations that define who is an exempt professional; the authoritative Administrative Policy promulgated by L&I; and the provisions of federal law upon which the MWA is based.

Starting with the controlling regulations: When the Legislature exempted those who are "employed in a bona fide executive, administrative, or professional capacity" from the MWA, it expressly delegated to L&I the task of defining those three categories of exemption. *See* RCW 49.46.010(5)(c) (delegation to L&I); WAC 296-128-530 (regulation promulgated by L&I). L&I enacted a regulation containing this definition,

which has the force of law,⁵ and “[a] court must give great weight to the statute’s interpretation by the agency which is charged with its administration.” *Marquis v. City of Spokane*, 130 Wn. 2d 97, 111, 922 P.2d 43 (1996); *see also Phillips v. City of Seattle*, 111 Wn.2d 903, 908, 766 P.2d 1099 (1989) (when a statute leaves a term undefined, courts afford the agency’s definition “great weight as it is the construction of the statute by the administrative body whose duty it is to administer its terms”); *Coronado v. Orona*, 137 Wn. App. 308, 315-16, 153 P.3d 217 (2007) (deferring to L&I). This is particularly true in this circumstance, given that the statute specifically directs the agency to supply the relevant definition.

L&I’s regulation defines with great specificity who is “employed in a bona fide ... professional capacity,” and nowhere equates exempt status with licensure. It provides in relevant part that, to be employed in a “professional capacity,” the employee’s primary duty must “consist[] of the performance of work ... [r]equiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a

⁵ *See Champagne v. Thurston Cnty.*, 163 Wn.2d 69, 80, 178 P.2d 936 (2008); *Wingert v. Yellow Freight Sys.*, 146 Wn.2d 841, 848, 50 P.3d 256 (2002); *cf. Armstrong v. State*, 91 Wn. App. 530, 536-37, 958 P.2d 1010 (1998) (“[W]here the Legislature has specifically delegated rule-making authority to an agency, the agency’s regulations are presumed valid, and only compelling reasons demonstrating that the regulation conflicts with the intent and purpose of the legislation warrant striking down a challenged regulation.”). Litchfield has not challenged the regulation’s validity. On the contrary, Litchfield cites the regulation only in passing (Opening Br. at 16, 20, 22), and on each occasion takes its validity as given.

general academic education and from an apprenticeship.” WAC 296-128-530(1)(a); *see also* WAC 296-128-530(5) (professional exemption applies to employee “whose primary duty consists of the performance of work ... requiring knowledge of an advanced type in a field of science or learning”). In short, exempt status depends upon the performance of job duties requiring advanced knowledge, not licensure.

It was no accident that L&I defined the term “professional capacity” without requiring licensure – when L&I intended its regulations governing professionals to turn on licensure, it said so expressly. Most notably, elsewhere in the same regulation at issue here, L&I created an exception to the so-called “salary basis” requirement which applies to employees who are “the holder of a valid license or certificate permitting the practice of law, medicine, or dentistry.” WAC 296-128-530(5) (emphasis added). In short, L&I was well aware that certain professions are subject to licensure requirements, and it knew how to refer to licensure when it wanted to do so. Its decision to incorporate licensure in selective contexts – including elsewhere within the very same regulation – demonstrates that its omission of licensure in the provision at issue here was purposeful. *City of Algona v. Sharp*, 30 Wn. App. 837, 842, 638 P.2d 627 (1982) (concluding that an omission from a list of statutory exceptions was deliberate); *see also In re Det. of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002).

Turning to the Administrative Policy promulgated by L&I, that document confirms that an accountant need not be a licensed CPA in order to be an exempt professional. In 2005 L&I published a new policy statement interpreting the “minimum wage and overtime requirements for professional positions.” Administrative Policy No. ES.A.9.5 (June 24, 2005) (capitalization omitted). That interpretation is controlling here, and rejects the notion that an employee is only employed in a “professional capacity” if he or she is licensed. It states that “accounting” is one of the “learned professions ... requiring knowledge of an advanced type” that “meet[s] the requirement for a prolonged course of specialized intellectual instruction and study” as required by WAC 296-128-530. *See* ES.A.9.5.8.

Thus, it explains, whether an accountant is exempt “must be determined on the basis of the individual employee’s duties and the other criteria in the regulations.” ES.A.9.5.8.2 (hereinafter, “Section 8.2”). Under this test, unlicensed accountants indeed may be exempt professionals: “[A]ccountants who are not certified public accountants may also be exempt as professional employees if they actually perform work that requires the consistent exercise of discretion and judgment and otherwise meet the tests prescribed in the definition of professional employee.” *Id.* Simply put, exempt status turns on the individual’s actual job duties:

The professional exemption is determined on the basis of the individual employee’s duties, which must include the consistent exercise of discretion and judgment. The title “Junior Accountant,” however, is not determinative of fail-

ure to qualify for exemption any more than the title “Senior Accountant” would necessarily imply that the employee is exempt.

Id.; see also ES.A.9.5.3 (“[i]t is the duties required of the job, not the employee’s expertise or title that determines whether the exemption applies”).⁶

L&I’s interpretation of its own regulation is particularly significant because “[w]hen the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order.” *Udall v. Tallman*, 380 U.S. 1, 16 (1965). The Washington Supreme Court made clear the need for such deference in the very context of reversing a court of appeals decision that deferred insufficiently to L&I:

This court has made clear that we will give great deference to an agency’s interpretation of its own properly promulgated regulations, “absent a compelling indication” that the agency’s regulatory interpretation conflicts with legislative intent or is in excess of the agency’s authority. We give this high level of deference to an agency’s interpretation of its regulations because the agency has expertise and insight gained from administering the regulation that we, as the reviewing court, do not possess.

Silverstreak, Inc. v. Dep’t of Labor & Indus., 159 Wn.2d 868, 884-85, 154 P.3d 891 (2007) (en banc) (citations omitted).⁷ Litchfield would be hard-

⁶ As in the regulations themselves, when L&I wished in the Administrative Policy to focus on a particular qualification, it knew how to do so. For instance, the Administrative Policy establishes criteria for “registered” nurses. ES.A.9.5.8.1; see also ES.A.9.5.10 (specifying which test for exemption applies to employees who “hold licenses to practice law, medicine, or dentistry and do not practice in their field”); see also ES.A.9.5.8.3 (specifying the effect of a State-issued “certification” on a teacher’s exempt status).

⁷ See also *State Liquor Control Bd. v. State Personnel Bd.*, 88 Wn.2d 368, 379, 561 P.2d (continued...)

pressed to argue otherwise; in the trial court, he squarely acknowledged that L&I's regulatory interpretations are entitled to deference. CP 1630 n.7. Here, Litchfield fails to even mention L&I's Administrative Policy, much less to challenge its force or distinguish its relevance.

Finally, Litchfield's proposed interpretation of Washington law conflicts with analogous federal authority. This parallel is significant because L&I relies on federal interpretations of pre-August 23, 2004 federal regulations.⁸ And, under the federal laws and regulations upon which Washington's exemption for "professional capacity" was modeled,

(continued....)

195 (1977) ("The construction of a rule by the agency which promulgated it is entitled to great weight."); *State Emps. Ass'n v. Cleary*, 86 Wn.2d 124, 129, 542 P.2d 1249 (1975) (construction of agency rules "by the identical agency which promulgated the rule initially is entitled to great weight"); *W. Wash. Operating Eng'rs Apprenticeship Comm. v. State Apprenticeship & Training Council*, 144 Wn. App. 145, 163, 190 P.3d 506 (2008) (citing *Silverstreak*).

Such heightened deference also is accorded by federal courts applying administrative-law principles, to which courts of this State have looked in considering analogous questions. See *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171 (2007) ("an agency's interpretation of its own regulations is 'controlling' unless plainly erroneous or inconsistent with the regulations being interpreted"); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945) (same); see *State Emps. Ass'n*, 86 Wn.2d at 129 (relying on *Seminole Rock*).

⁸ ES.A.9.5.1; accord ES.A.9.2.1 ("Washington state overtime regulations generally follow the pre-August 23, 2004 federal overtime regulations."); ES.A.9.2.2 (same); see also *Inmiss v. Tandy Corp.*, 141 Wn.2d 517, 524-25, 7 P.3d 807 (2000) ("When construing provisions of the Washington Minimum Wage Act, this Court may consider interpretations of comparable provisions of the Fair Labor Standards Act of 1938 as persuasive authority.... This Court may also consider the Code of Federal Regulations (C.F.R.) as persuasive authority.").

L&I relies on pre-August 23, 2004 regulations because the federal regulations upon which Washington's regulations were based were modified in 2004. For this reason, citations in this brief to 29 C.F.R. § 541 are to the pre-2004 version unless otherwise indicated. That said, the regulation relevant here remained consistent even after 2004; it currently provides that "many other accountants who are not certified public accountants but perform similar job duties may qualify as exempt learned professionals." 29 C.F.R. § 541.301(e)(5) (2010).

licensure is not necessary for exempt status. Like the Washington regulation (WAC 296-128-530), the federal regulation that defines “professional capacity” made no mention of licensure, but instead focused on “specialized intellectual instruction.” 29 C.F.R. § 541.3 (2003). In addition, just as L&I did, the Secretary of Labor issued an interpretation discussing who is a “learned professional.” *See* 29 C.F.R. § 541.301(f) (2003). That federal interpretation confirms that unlicensed accountants indeed may be exempt, because they work in a “professional capacity”:

Many accountants are exempt as professional employees (regardless of whether they are employed by public accounting firms or by other types of enterprises) [A]ccountants who are not certified public accountants may also be exempt as professional employees if they actually perform work which requires the consistent exercise of discretion and judgment and otherwise meet the tests prescribed in the definition of “professional” employee.

Id. Decisions of federal courts interpreting analogous federal law are likewise instructive,⁹ and they support the same result: They long have concluded that unlicensed employees, in professions for which a license may be obtained, may qualify as exempt.¹⁰

⁹ *See Navlet v. Port of Seattle*, 164 Wn.2d 818, 828, 194 P.3d 221 (2008) (“[W]e may look to the interpretation of federal labor law where the law is similar to state law.”); *see also id.* at 853 (“This court frequently considers federal case law when deciding labor cases”); *Inniss*, 141 Wn.2d at 524 (“When construing provisions of the Washington Minimum Wage Act, this Court may consider interpretations of comparable provisions of the Fair Labor Standards Act of 1938 as persuasive authority.”).

¹⁰ *See Piscione v. Ernst & Young, L.L.P.*, 171 F.3d 527, 543 (7th Cir. 1999) (unlicensed actuary qualified for exemption as learned professional under FLSA despite not having obtained the “enrolled” actuary certification that would permit him to sign off on the reports he was compiling); *Dingwall v. Friedman Fisher Assocs., P.C.*, 3 F. Supp. 2d 215, 218-20 (N.D.N.Y. 1998) (unlicensed design engineer is exempt learned professional; “nowhere in the regulation is there a requirement that the employee hold a profession-

(continued...)

Each of these federal authorities confirms what is clear under Washington law: It is job duties, not licensure, that determines exempt status.

B. The Accountancy Act Does Not Support A Different Interpretation Of The MWA And Its Regulations.

As just set forth, each of the relevant authorities – the MWA, L&I’s authoritative regulations and its Administrative Policy, and analogous federal regulations and case law – contradicts Litchfield’s argument that licensure is the *sine qua non* of exempt professional status. Faced with this overwhelming authority, Litchfield changes the subject. He does not discuss L&I’s definition of what it means to be an “individual employed in a bona fide ... professional capacity.” He ignores Section 8.2 of L&I’s interpretive Administrative Policy, the analogous federal regulations, and the federal decisions interpreting them. Instead, he looks to a different statute entirely to interpret the MWA: the Accountancy Act. *E.g.*, Opening Br. at 14-15 (discussing RCW ch. 18.04; WAC 4-30). His sole support for this argument is his contention that “courts look at not only the legislative provision at issue but related statutes” – and indeed even “other laws” – when they “determine legislative intent.” Opening

(continued...)

al license”); *Tavassol v. Hewitt-Wash. & Assocs.*, No. 97-3278, 1998 U.S. Dist. LEXIS 17028, at *4-6 (E.D. La. Oct. 22, 1998) (unlicensed architect is exempt learned professional; “neither the statute nor the regulations require that a professional be licensed”); *Adams v. Niagara Mohawk Power Corp.*, 45 Empl. Benefits Cas. (B.N.A.) 1410 (N.D.N.Y. Sept. 30, 2008) (plaintiffs’ assertion of nonlicensure insufficient on its own to show genuine issue of material fact as to whether they were exempt engineers).

Br. at 14, 15. But here, there is no cause or basis to do so – the MWA expressly delegated to L&I the authority to define the term “professional capacity.” Given this clear direction by the Legislature, there is one place, and one place only, to look for the term’s definition – in the interpretive regulations that the Legislature directed L&I to promulgate.¹¹

The cases cited by Litchfield are not to the contrary. They stand for the unremarkable proposition that in other circumstances, courts sometimes will use a term within a statute to aid in interpreting similar terms in the same or related statutes.¹² But those cases do not deal with a clear delegation of interpretive authority to an agency, as occurred here.

And, even when – unlike in this case – two statutes use the *same* term,

¹¹ For this reason, among others, Litchfield is mistaken to rely on *Chen Chi Wang v. United States*, 757 F.2d 1000 (9th Cir. 1985), for the proposition that “[a]ccountants cannot achieve professional status without meeting state licensing standards.” Opening Br. at 18. That case does not pertain to the professional exemption in particular, or even wage and hour laws in general. In it, the Ninth Circuit affirmed a district court’s dismissal of a petition to quash an IRS summons. 757 F.2d at 1001. In so doing, the court upheld the validity of a very different Treasury Regulation limiting “third party record keepers” entitled to receive notice of an IRS summons to accountants who were “registered, licensed, or certified under State law.” *Id.* at 1002-04 (quoting Treas. Reg. § 301.7609-2(a)(1) (1983)).

¹² See *City of Olympia v. Drebeck*, 156 Wn. 2d 289, 296-98, 126 P.3d 802 (2006) (interpreting one section of statute with reference to another provision in same chapter); *Mader v. Health Care Auth.*, 149 Wn.2d 458, 472-75, 70 P.3d 931 (2003) (interpreting one provision in regulation with reference to governing statute and to other provisions in same regulatory section); *Delyria v. State Sch. for the Blind*, 165 Wn.2d 559, 563-65, 199 P.3d 980 (2009) (involving related statutes requiring that teachers at state school for blind receive same “salary” as teachers in local school district); *Cerrillo v. Esparza*, 158 Wn.2d 194, 202, 142 P.3d 155 (2006) (court erred in looking to extrinsic interpretive aids because statute was not ambiguous). *Snohomish County Fire Protection District No. 1 v. State Boundary Review Board* simply requires that a court identify the legislature’s “intended meaning,” 155 Wn.2d 70, 77, 117 P.3d 348 (2005), and here, the Legislature made explicit that the “meaning” of the statute it “intended” was to be found in L&I’s regulations.

courts long have cautioned against wrenching statutory terms from context: “Language that is used ... in different chapters of the RCW does not dictate the proper interpretation of an unrelated, separate, and distinct chapter.” *Sherman v. Kissinger*, 146 Wn. App. 855, 869, 195 P.3d 539 (2008); see also, e.g., *In re Det. of Capello*, 114 Wn. App. 739, 751, 60 P.3d 620 (2002) (“[T]he rules of statutory construction apply to the interpretation of a single statute or, at most, a single chapter.”). That is precisely what we have here – two different statutes, enacted at two different times, codified in two different chapters of the RCW, and serving two different purposes.

Seeking to avoid the clear delegation of authority to L&I, Litchfield suggests that L&I failed to define “bona fide.” Opening Br. at 16 (“the DLI regulations do not state what particular professions are ‘bona fide’ professions, nor do the DLI regulations define the educational requirements of a ‘bona fide’ professional within any particular profession”). This being the case, Litchfield asserts, it is appropriate to canvass dictionaries and case law to define the term “bona fide,” and ultimately he turns to the Accountancy Act to determine which accountants are “bona fide.” Opening Br. at 16-17. This argument flatly ignores the language of the binding regulations. Section 296-128-530 of the WAC – the very regulation that exercises the interpretive authority granted by the Legislature – defines the term “individual employed in a bona fide ... profession-

al capacity,” and it does so with no mention of licenses. There simply is no way around the plain text of the MWA, which specifies the method by which it is to be interpreted, and the Accountancy Act is nowhere in the picture.

It is with good reason that the MWA does not look to the Accountancy Act or its implementing regulations – neither of them purports to address compensation or overtime pay. Rather, the Accountancy Act establishes licensing standards and serves consumer-protection goals. RCW 18.04.015; *supra* at 5-6. Its purpose is fundamentally different from that of the MWA and attendant L&I regulations, which articulate standards to guide employers in applying the state’s wage and hour laws. *Supra* at 4-5, 13-15. By contrast, the Accountancy Act established the Accountancy Board as the “licensing and disciplinary agency for certified public accountants,” and delegated to the Accountancy Board the responsibility to promulgate regulations to carry out the Act’s consumer-protection purposes. WAC 4-30-020. Given that charter, the Accountancy Board has extensive experience and knowledge with regard to licensing and other such matters, *see* WAC 4-30-010 to 4-30-142, but – unlike L&I – has no expertise in adjudicating or otherwise addressing compensation or overtime pay. Under these circumstances, it would be all the more strange to look to the Accountancy Board to interpret the MWA – which in effect is what Litchfield seeks – when the Legislature plainly delegated

such authority to the director of L&I.

Notwithstanding his inability to show that the Accountancy Act can or should be used to interpret the MWA, Litchfield proffers yet another line of argument that depends on the Accountancy Act: The Act, he says, precludes unlicensed accountants from holding themselves out as auditors and CPAs, and from practicing as “auditors,” and therefore they must have a CPA license to qualify for the professional exemption. *E.g.*, Opening Br. at 18-19. The latter half of this argument is a non-sequitur, and is mistaken for the reasons we previously have explained: Whatever the Accountancy Act says about what accountants may do, it cannot and does not export its licensure requirements into the separate analysis of who is employed in a “professional capacity” within the meaning of the MWA. But Litchfield’s argument fails for a second reason as well: It depends upon a basic mischaracterization of the Accountancy Act, which indeed permits unlicensed accountants to perform audit work as members of an engagement team, and it requires all accounting professionals – whether licensed or not – to perform their work in accordance with professional standards that require the exercise of due professional care, skepticism, and judgment, all of which are hallmarks of professional status under WAC 296-128-530(2).

There also is no support for Litchfield’s oft-repeated claim that an unlicensed Audit Associate at KPMG may not “practice as an auditor”

without a license. *E.g.*, Opening Br. at 3, 8, 9, 10, 17, 18, 32. The Accountancy Act neither defines what it means to “practice as an auditor,” nor precludes an unlicensed accountant from doing so. It does not restrict the duties that an unlicensed person may perform in the employ of a licensed accounting firm, such as KPMG. *See* RCW 18.04.350(1) (“[n]othing in this chapter prohibits any individual not holding a license ... from serving as an employee” of a licensed firm, provided the individual does not issue any audit or certain other reports “over his or her name”).¹³ And the Legislature repeatedly has disclaimed any intent to impose additional limitations on the work that unlicensed accountants may perform. *See* RCW 18.04.015(2), (3).

Similarly, the Accountancy Board “has not issued rules that require that specific portions or aspects of audit engagements (other than signing and issuance of audit or other attest reports) be performed by licensed CPAs as distinguished from unlicensed professional employees of CPA firms.” CP 2043-44, 2040-41 (Sweeney ¶¶ 13, 4(c)). Rather, with respect to unlicensed accountants, the Act has a very limited purpose – to prevent them from holding themselves out to the public as CPAs who can issue

¹³ There likewise is no support for Litchfield’s contention that the Accountancy Act makes it a “crime for an unlicensed individual to practice as an auditor.” Opening Br. at 18. RCW 18.04.370, upon which Litchfield relies, imposes penalties for unlicensed accountants who violate RCW 18.04.345 by using prohibited titles (for example, “CPA,” “certified public accountant,” or “auditor”). It does not preclude unlicensed accountants from practicing as auditors or from performing any particular duties. This stands in stark contrast to statutes that prohibit the practice of law and medicine without a license. *See* RCW 2.48.190; RCW 18.71.021.

audit reports, and from using certain words (such as “audit,” “review,” and “compilation”) when describing any report they issue. RCW 18.04.015(1), 18.04.345(2), (9); *see also* RCW 18.04.025(9); WAC 4-30-010(20).¹⁴

In addition, both the Accountancy Act and the relevant professional standards require *all* employees of a licensed CPA firm who are assigned to work on an audit engagement team – including unlicensed employees, like KPMG’s Audit Associates – to perform their work in accordance with professional standards that require the exercise of due professional care, professional skepticism, and judgment. *See* WAC-4-30-048; *see also supra* at 7-8. Professional standards likewise require all professionals, including both CPAs and non-CPAs, to participate in Continuing Professional Education. *See, e.g.,* AICPA SEC Practice

¹⁴ For this same reason, Litchfield errs in repeatedly suggesting that there is some separate class of professionals known as “auditors” who, he insinuates, are or should be subject to special and more stringent standards for exemption. *E.g.*, Opening Br. at 9 (“an audit associate must [meet certain requirements] *to practice as an auditor*” (emphasis added)); *id.* at 17 (discussing “educational requirements *to practice auditing*” (emphasis added)). Accountants perform work on audit engagements, among other types of accounting work, just as lawyers perform multiple different types of work. Accordingly, the Accountancy Act establishes a single licensing scheme for all applicants for a CPA license, regardless whether the individual intends to perform audit, tax, financial advisory, or any other type of accounting work – just as there is a single bar exam and application for all lawyers, regardless whether they will specialize in litigation, transactional work, or something else. RCW 18.04.105; CP 2040, 2043 (Sweeney ¶¶ 4(a), 12).

Further, in discussing unlicensed accountants, neither Section 8.2 of L&I’s guidance memorandum nor 29 C.F.R. § 541.301(f) (2003) distinguishes between the nature, type, or subject matter of accounting work performed in stating that unlicensed accountants may qualify for the exemption. *Supra* at 16-19. While he was the Program Manager of the Employment Standards Division of L&I, Richard Ervin submitted an un rebutted declaration that L&I never has based its determination of an accountant’s exempt status on the subject matter of the accounting work performed. CP 1974 (Ervin ¶ 13).

Section § 1000.08(d). In other words, they must do their work as *professional* auditors – which is the very thing Litchfield’s construction of the Accountancy Act would say that they cannot do.

* * *

In the end, the answer to the first issue accepted for review is straightforward. The official interpretation of the MWA, which was promulgated in a regulation by the agency delegated that task by the Legislature, makes clear that there is no legal requirement of licensure before an employee is exempt. The further interpretation of that regulation by the same expert agency that promulgated it, and which therefore also is entitled to great deference, confirms the same rule. So do federal statutes, regulations, and interpretations. This controlling authority makes clear that exempt status turns not on licensure, but on the job duties actually performed by the employee in question. Litchfield’s first argument should be rejected, and the trial court’s March 1 Order should be affirmed.

II. THE TRIAL COURT ERRED IN CONCLUDING THAT ACCOUNTANTS MUST AS A MATTER OF LAW HAVE THE EXPERIENCE SPECIFIED IN THE ACCOUNTANCY ACT TO SATISFY THE MWA’S EXEMPTION FOR “PROFESSIONAL CAPACITY.”

Having properly rejected Litchfield’s argument that “no unlicensed accountant working in [KPMG’s] Seattle Audit practice could be exempt from the overtime requirements under” the MWA, *see* CP 2089, the trial

court entertained Litchfield's alternative argument that KPMG's Audit Associates must satisfy some (but not all) of the Accountancy Act's requirements for licensure in order to be exempt under the MWA. In its order of April 22, 2010, the court accepted that argument. The entirety of its reasoning was as follows:

The minimum educational requirements for assistants or auditors assisting auditors in performing audit work to be exempt from overtime as "professional" employees is at least the bachelor's degree specified in WAC 4-25-[710] and, after having received their bachelor's degree, the on-the-job audit work-training experience for a minimum of 2,000 hours over a 12-month period, also specified by WAC 4-25-730. Accordingly, the Court modifies its prior summary judgment order and grants summary judgment in part for the plaintiffs on the professional employee exemption.

CP 2349. This was error, for reasons closely related to those set forth above. The MWA does not incorporate the standards of the Accountancy Act into the analysis of who is exempt for wage and hour purposes – and it certainly does not do so selectively. Furthermore, the trial court's reasoning collapses the fundamental distinction between *education* requirements and *experience* requirements that is maintained throughout the MWA and its regulations. This was error as a matter of law, and it requires that the trial court's April 22 Order be reversed. This Court should make clear that the "knowledge" requirement of the MWA does not incorporate any separate requirement of the Accountancy Act or its implementing regulations.

A. The Professional Exemption’s Requirement Of “Knowledge Of An Advanced Type” Contains No Requirement Of Experience.

The trial court’s April 22 ruling turned on its interpretation of WAC 296-128-530 which, as discussed above, defines when an individual is employed in a “professional capacity,” and therefore exempt under section 49.46.010(5)(c) of the MWA. That regulation on its face refutes the interpretation given to it by the trial court, because it contains no requirement of work “experience.” Rather, the regulation specifies that an employee qualifies as exempt if his or her “primary duty consists of the performance of work ... requiring knowledge of an advanced type in a field of science or learning, which includes work requiring the consistent exercise of discretion and judgment.” WAC 296-128-530(5). Whereas the regulation points specifically to the performance of job duties that require the requisite “knowledge,” it says nothing whatsoever about some minimum quantum of “experience.”

On the contrary, that same regulation elsewhere defines “knowledge” in a way that contrasts education (which is relevant) with experience (which is not). It defines a person employed in a “bona fide ... professional capacity” in relevant part as an employee “[w]hose primary duty consists of the performance of work ... [r]equiring knowledge of an advanced type in a field of ... learning customarily acquired by a prolonged course of specialized intellectual instruction and study, *as distin-*

guished from a general academic education and from an apprenticeship.” WAC 296-128-530(1)(a) (emphases added). To import a requirement of “experience” from the Accountancy Act into this regulation, as the trial court did, CP 2349, is wrong not only because the Accountancy Act does not define the MWA, *see supra* 22-24, but also because by its plain terms, the MWA’s definitional regulations distinguish plainly between intellectual study and practical work experience.

L&I’s Administrative Policy maintains this same distinction. As discussed above (at 16-18), in this Administrative Policy, L&I interpreted its regulation, WAC 296-128-530. In so doing, it again explained that accountancy requires knowledge that is “customarily acquired by a prolonged course of specialized intellectual instruction and study,” which “is different from ... an apprenticeship.” ES.A.9.5.8. Thus, L&I further explained, “[t]he typical symbol of the professional training and the best evidence of its possession is, of course, the appropriate academic degree.” *Id.*; *see also id.* (“in the vast majority of cases the specific academic training is a prerequisite for entrance into the profession”). By contrast, excluded from the exempt “learned professions” are “the members of such quasi-professions as journalism in which the bulk of the employees have acquired their skill *by experience rather than by any formal specialized training.*” *Id.* (emphasis added). Again, the mark of exempt status is the

performance of job duties that require advanced academic training, not a showing of particular, prior work experience.¹⁵

Analogous federal authorities likewise provide that “professional capacity” does not require an accountant to have garnered particular work experience. Federal authorities are instructive here, *see supra* at 18-20, and both WAC 296-128-530 and ES.A.9.5.8 are modeled on federal regulations that maintain a clear distinction between “intellectual instruction” and “apprenticeship.” *See* 29 C.F.R. §§ 541.3, 541.301 (2003). Like the Washington regulations, the relevant federal regulations do not exempt “the members of such quasi-professions as journalism in which the bulk of the employees have acquired their skill by experience rather than by any formal specialized training.” *Id.* § 541.301(d) (2003); *see also id.* § 541.301(e)(1) (2003). And, in determining who is exempt and who is not, these federal regulations do not rely on or incorporate separate statutory or

¹⁵ The former Program Manager of L&I, Richard Ervin, confirmed that L&I does not consider the experience requirements for licensure when determining whether an accountant performing audit work is exempt:

Regardless of whether an accountant is performing audit work, there is no requirement in L&I’s policy governing the professional exemption that an accountant (licensed or unlicensed) (a) work for a public accounting firm for a year, (b) perform a minimum number of hours of accounting work (e.g., 2,000 hours), or (c) satisfy any other specific experience or on-the-job training requirement before he or she may qualify for the professional exemption under the Minimum Wage Act. As a matter of practice, L&I does not require such work experience before learned professionals, including accountants, may qualify for the professional exemption.

CP 2195 (Second Declaration of Richard Ervin ¶ 4).

regulatory regimes concerning accountants. Washington's MWA and implementing regulations likewise should not be interpreted as doing so.

Courts interpreting these federal provisions therefore consistently recognize that "professional capacity" does not turn on a showing of job experience. In *Piscione*, for instance, the Seventh Circuit held that "a relevant academic degree serves as prima facie evidence of the possession of professional training," and concluded that an unlicensed actuary with a B.S. in mathematics and 20 hours of continuing professional education training was exempt under the FLSA. 171 F.3d at 543 (*citing* 29 C.F.R. § 541.301(e)(1) (2003)). Simply put, "[t]he core requirement of the learned professional exemption is that the duties of the position call for a person who is in a 'learned profession' with at least a college degree in a specialized type of learning." *Bolduc v. Nat'l Semiconductor Corp.*, 35 F. Supp. 2d 106, 114 (D. Me. 1998). Numerous other authorities hold likewise.¹⁶ And, federal courts repeatedly have held that possessing a

¹⁶ *E.g., Reich v. Wyoming*, 993 F.2d 739, 742 (10th Cir. 1993) (a game warden whose job required a bachelor's degree in wildlife management, biology, or a related field was exempt under FLSA); *Tavassol*, 1998 U.S. Dist. LEXIS 17028, at *4-6 (an unlicensed architect satisfied the "first requirement of prolonged study with his degree in architecture"; nowhere addressing then-applicable Louisiana regulations requiring architects to satisfy work experience requirement for licensure); *see also Dybach v. Fla. Dep't of Corr.*, 942 F.2d 1562, 1565 (11th Cir. 1991) ("[T]he duties of that position must call for a person who is in a learned profession with at least a college degree in a specialized type of learning.").

license or specialized knowledge is no substitute for the educational requirement.¹⁷

B. Even If The Accountancy Act Were Relevant, It Also Maintains A Clear Distinction Between Education And Experience.

When interpreting the MWA, it is directly contrary to the scheme enacted by the Legislature to look to the Accountancy Act, rather than to the legally binding regulations giving content to the MWA. *Supra* at 20-24. But even if the Accountancy Act were relevant, that statute only confirms the clear distinction between education (which is relevant to exempt status) and work experience (which is not). The Accountancy Act and its implementing regulations contain separate provisions concerning education and experience. The Act specifies that in order to obtain a CPA license, one must meet “the educational standards established by rule as

¹⁷ See, e.g., *Howard v. Port Auth. of N.Y. & N.J.*, 684 F. Supp. 2d 409, 412-15 (S.D.N.Y. 2010) (non-degreed, licensed commercial helicopter pilot who acquired specialized skills through training was not exempt professional; “[i]f this prong of the learned professional exception could always be satisfied by showing that the required knowledge is sufficiently complex or specialized in substance, then this requirement, which pertains to the means by which such knowledge is attained, would lose all independent force”); *Pignataro v. Port Auth. of N.Y. & N.J.*, 593 F.3d 265, 270 (3d Cir. 2010) (helicopter pilots who acquire specialized skills primarily through in-flight instruction are not learned professionals “because pilots’ knowledge and skills were acquired through experience and supervised training as opposed to intellectual, academic instruction”); *Young v. Cooper Cameron Corp.*, 586 F.3d 201, 203 (2d Cir. 2009) (no professional exemption for non-degreed, product-design specialist with 20 years of engineering-type experience, whose work involved complicated technical expertise and responsibility); *Vela v. City of Hous.*, 276 F.3d 659, 675 (5th Cir. 2001) (EMTs and paramedics required to complete 200 and 880 hours respectively of training and field experience but not required to have college degree did not meet educational requirement of professional exemption); *Quirk v. Balt. Cnty.*, 895 F. Supp. 773, 785-86 (D. Md. 1995) (“Although paramedic training is indeed rigorous, ... paramedics do not have the necessary education to be considered professionals under the regulations.... Paramedics are not required to have any, much less an advanced, academic degree.”).

the board determines to be appropriate.” RCW 18.04.105(1)(b). It governs experience separately, requiring that a prospective licensee have “one year of experience which is gained” in specified ways. RCW 18.04.105(1)(d).

Regulations implementing the Accountancy Act maintain the same distinction. WAC 4-30-060 sets forth in detail the “education requirements to qualify to apply for the CPA examination.” *Supra* at 6 (describing these requirements). It makes no mention of work experience. Separately, WAC 4-30-070 elaborates in detail on “the *experience* require[d] in order to obtain a CPA license” (emphasis added). *Supra* at 6. And, just as the educational provisions do not mention work experience, the regulation governing experience establishes no educational requirement. Education and experience are separate and distinct concepts within the Accountancy Act and its regulations; accordingly, even if the Accountancy Act were at all relevant in interpreting the MWA, it would only confirm that the MWA’s “knowledge” requirement does not incorporate work-experience requirements.

Similar to these arguments conflating experience with education, Litchfield argues in various ways that the nature of Audit Associates’ on-the-job training prevents them from being exempt. He cites professional standards concerning the supervision of “assistants” to argue that they cannot be exempt. *E.g.*, Opening Br. at 21. This argument proves far too

much for, if true, it would turn numerous senior accountants, many of whom are licensed CPAs, into non-exempt employees – a position that even Litchfield does not embrace. Professional standards define the term “assistants” to include all “firm personnel other than the auditor with final responsibility for the audit,” and the term “auditor” is defined as “either the auditor with final responsibility for the audit or assistants.” AU 311.02 (1978) (current version at AU 311.04). In short, the term “assistants” means all members of the audit team other than the audit engagement partner – senior managers, managers, and senior associates, as well as associates – and not just unlicensed associates.¹⁸

Litchfield couples this insinuation with the argument that Audit Associates cannot be exempt because they are “still undergoing specialized instruction in audit work” during their first year of employment. *See* Opening Br. at 21; *id.* at 9 (arguing that the entire first year of employment constitutes “on-the-job instruction and training”). Even if this assertion were factually correct – which it is not¹⁹ – it is irrelevant as a matter of

¹⁸ Additionally, all of the provisions relied upon by Litchfield refer to “assistants” without differentiating between licensed and unlicensed “assistants,” and even the trial court expressly found that “an unlicensed accountant performing work to assist licensed auditors” may qualify for the professional exemption. CP 2090. Similarly, AU 210, which is titled “Training and Proficiency of the Independent Auditor,” requires all members of an audit engagement team – including licensed CPAs and unlicensed employees of a licensed firm – to have adequate training and proficiency, not just unlicensed Associates. *See* AU 210.03; CP 2046 (Sweeney ¶ 18) (AU 210 “does not draw any distinction between unlicensed professional employees and licensed CPAs, nor does it refer to an ‘apprenticeship’ concept”).

¹⁹ The record contains un rebutted declarations from numerous Audit Associates confirming that their work included a wide variety of substantive and analytical procedures that
(continued...)

law. L&I's Administrative Policy makes clear that a professional employee does not lose his or her exempt status "merely by undergoing further training for the job performed." ES.A.9.5.7. On the contrary, whether an employee is exempt requires analysis of the employee's job duties. *Id.*; see also CP 1975 (Ervin ¶ 15). At an appropriate point in the proceedings, KPMG will establish that particular Audit Associates are exempt based on their job duties. But for present purposes, it is sufficient to require reversal that the trial court erred in concluding that accountants must as a matter of law have the experience specified in the Accountancy Act in order to be treated as performing work in a "professional capacity."²⁰ The trial court's April 22 Order should be reversed.

(continued....)

were performed in accordance with professional standards that required the exercise of due professional care, discretion and judgment. CP 1339-43 (Compendium at 1-4); *supra* at 8-9. Litchfield never challenged this evidence.

Litchfield's characterization of the allegedly "extensive on-the-job instruction and training" provided by KPMG is also misleading. The portions of the record cited by Litchfield for KPMG's alleged "extensive on-the-job instruction and training" refer only to a 32-hour class on "Audit Fundamentals" that KPMG requires its Audit Associates to take shortly after their arrival. See Opening Br. at 9 (citing CP 1357, 1580-82 (Carlile ¶¶ 53-56; Guy ¶¶ 95-100)). One 32-hour training course is hardly the type of "extensive on-the-job instruction and training" that could possibly preclude exempt treatment as a matter of law.

²⁰ Litchfield's assertion that "exemption decisions under the overtime regulations are properly made on a position-wide basis" does not change the analysis in this case. Opening Br. at 13. To be sure, if the required analysis can be performed on a class-wide basis, there is no rule against doing so. Indeed, in *Berrocal v. Fernandez*, 155 Wn.2d 585, 597, 121 P.3d 82 (2005), the court found that, there, the issue of whether workers' on-call time was substantial was "a categorical question requiring an affirmative or negative response." However, the court also noted, as to that very same issue, "there will often be factual questions." *Id.*

III. THE TRIAL COURT'S ORDER DENYING LITCHFIELD'S MOTION TO STRIKE CERTAIN EVIDENTIARY MATERIALS IS NOT PROPERLY BEFORE THIS COURT, AND WAS NO ABUSE OF DISCRETION IN ANY EVENT.

Finally, Litchfield asks this Court to reverse the trial court's evidentiary ruling denying his motion to strike the declarations of three expert witnesses: (1) Tammy McCutchen, the former Administrator of the WHD; (2) Richard Ervin, the then-Program Manager of the Employment Standards Division of L&I; and (3) Richard Sweeney, the Executive Director of the Accountancy Board. Opening Br. at 23-31.

As an initial matter, this request is manifestly improper, as this issue is not properly before the Court. The trial court did not certify this issue for review; the parties did not brief this issue in their requests for discretionary review; and this Court did not authorize appeal of this issue when it granted discretionary review. CP 2351-53; Aug. 18, 2010 Notational Ruling granting discretionary review. Nor does this garden-variety evidentiary ruling remotely satisfy the standards for immediate interlocutory review. RAP 2.3(b). The Court should not waste scarce judicial resources on this issue. *See, e.g., State v. Jarvis*, ___ Wn. App. ___, No. 39588-6-II, 2011 Wash. App. LEXIS 376, at *9 (Wash. Ct. App. Feb. 11, 2011) (“[b]ecause Jarvis did not seek and we did not grant discretionary review of [this issue] ... we do not consider her argument”); *City of Bothell v. Barnhart*, 156 Wn. App. 531, 538 n.2, 234 P.3d 264 (“We granted review on a single, narrow issue. Accordingly, we decline to

address other issues for which discretionary review was not granted.”),
rev. granted, 170 Wn.2d 1005 (2010).

In any event, the trial court acted well within its discretion in admitting the challenged declarations.²¹ Contrary to Litchfield’s argument (at 24), the declarations did not opine on an ultimate issue of law. Rather, they describe the policies and enforcement practices of the three most relevant government agencies: WHD, L&I, and the Accountancy Board. Testimony is admissible where it explains how a statute or regulation is interpreted by the officials who are charged with its enforcement. *Minert v. Harsco Corp.*, 26 Wn. App. 867, 873, 614 P.2d 686 (1980) (testimony by industrial safety engineer with L&I regarding the standard of care under WSHA/OSHA was admissible). For this same reason, the cases cited by Litchfield (at 26) are inapposite – in each of those cases, unlike here, the expert did opine about the ultimate legal issue before the court.²²

²¹ Litchfield errs in asserting (at 25) that the trial court’s evidentiary rulings are reviewed de novo. The Washington Supreme Court has explained that “[t]he abuse of discretion standard applies to review of a trial court’s decision on a motion to strike a declaration or affidavit allegedly containing inadmissible evidence.” *Oltman v. Holland Am. Line USA, Inc.*, 163 Wn.2d 236, 247 178 P.3d 981 (2008). The result in this case would be the same under any standard, however, as the declarations were properly admitted.

²² For example, *State Physicians Insurance Exchange & Ass’n v. Fisons Corp.* held that the trial court should not have considered opinion testimony from attorneys as to whether sanctions should be imposed due to discovery abuse where that was the very issue before the trial court. 122 Wn.2d 299, 344, 858 P.2d 1054 (1993). Similarly, in *Hyatt v. Sellen Construction Co.*, the court properly excluded testimony that the defendant had violated safety regulations and statutes. 40 Wn. App. 893, 898-99, 700 P.2d 1164 (1985); *see also Stenger v. State*, 104 Wn. App. 393, 408-09, 16 P.3d 655 (2001) (court properly excluded testimony from attorney that state agency had not complied with disability laws and regulations); *Eriks v. Denver*, 118 Wn.2d 451, 457-58, 824 P.2d 1207 (1992) (court properly disregarded testimony whether attorney’s conduct violated Code of Professional Responsibility); *Bell v. State*, 147 Wn.2d 166, 179-80, 52 P.3d 503 (2002) (trial court

(continued...)

In any event, if there were any error, it was harmless. *See Am. States Ins. Co. v. Rancho San Marcos Props, L.L.C.*, 123 Wn. App. 205, 214, 97 P.3d 775 (2004) (affirming ruling where “[t]he material ... sought to [be] excluded was ... not prejudicial”). By Litchfield’s own argument, the declarations cannot have been prejudicial; his very premise is that the issues in dispute are legal rather than factual, and he does not contend that the trial court deferred to the declarants’ analysis. On the contrary, Litchfield admits that the Ervin and Sweeney declarations “did not adversely affect the trial court’s decision,” Opening Br. at 31 n.3, and it seems clear that the trial court paid them little heed, stating that “I understand that some of the information is not terribly persuasive, but I am not excluding it from consideration.” Reported Proceedings 2:11-17 (Apr. 16, 2010).²³ Although these issues are not properly presented, affirmance of

(continued...)

erred in admitting expert testimony regarding legal standard of proof). *City of Spokane v. State* is not pertinent; it stands only for the proposition that legislative intent cannot be established by the testimony of the governor and the legislators who voted for the statute. 198 Wash. 682, 687, 89 P.2d 826 (1939). Litchfield also cites *Cowiche Canyon Conservancy v. Bosley*, but that case stands only for the proposition that an agency cannot invent a favorable interpretation for litigation to which it is a party. 118 Wn.2d 801, 828 P.2d 549 (1992). L&I, the WHD, and the Accountancy Board are not parties to this litigation.

²³ Curiously, Litchfield also challenges McCutchen’s declaration based on two WHD Opinion Letters regarding paralegals. Opening Br. at 30. Some of this material is entirely inapposite, as it deals with the administrative rather than the professional exemption. And the portion of the Opinion Letter that does discuss the professional exemption is consistent with KPMG’s position, not Litchfield’s; it explains that “paralegals and legal assistants generally do not qualify for the professional exemption *because an advanced specialized academic degree is not a standard prerequisite for entry into the field.*” FLSA Op. Ltr. 2005 WL 3638473 (December 16, 2005) (emphasis added); *see also* FLSA Op. Ltr., 1998 WL 852701 (February 19, 1998). KPMG’s Audit Associates in Washington are required to have at least a four-year college degree in accounting, finance, or business. CP 1348 (Carlile ¶ 18); CP 2239 (Litchfield Dep. Tr. 58:11-23).

the trial court's order denying Litchfield's motion to strike is therefore required in any event.

CONCLUSION

For the foregoing reasons, KPMG respectfully requests that the Court affirm the trial court's March 1 Order, reverse the trial court's April 22 Order, and remand for further proceedings.

DATED: March 18, 2011 STOEL RIVES LLP



Leonard J. Feldman (WSBA No. 20961)
600 University Street, Suite 3600
Seattle, WA 98101

George E. Greer (WSBA No. 11050)
ORRICK HERRINGTON & SUTCLIFFE
LLP
701 Fifth Avenue, Suite 5600
Seattle, WA 98104

Michael C. Kelley (*admitted pro hac vice*)
Jennifer Altfeld Landau (*admitted pro hac vice*)
SIDLEY AUSTIN LLP
555 West Fifth Street, Suite 4000
Los Angeles, CA 90013

Attorneys for Defendant-Respondent
KPMG LLP

APPENDIX

NOTATION RULING
Litchfield v KPMG, LLP No. 65372-5
August 18, 2010

Mark Litchfield and KPMG, LLP have noted cross motions for discretionary review for argument on Friday, August 20, 2010. Both argue that the trial court certification under RAP 2.3(b)(4) supports discretionary review. I agree. Rather than require counsel to appear for argument on August 20, the clerk's office shall provide them with this ruling and the motions for discretionary review are stricken from the August 20 motion calendar.

The two partial summary judgment rulings in this class action litigation reflect the trial court's determination that i) an "audit associate" working for KPMG in Washington is not required to hold a license (CPA) in order to qualify for the "professional capacity" exemption from overtime pay under Washington law (MWA) – the March 1 order, and ii) an "audit associate" working for KPMG in Washington must have a bachelor's degree and a minimum of 2,000 hours of on-the-job audit work experience in order to qualify for the "professional capacity" exemption – the April 22 order. The trial court certified and the parties agree that these issues of first impression present controlling questions of law for which there are substantial grounds for difference of opinion, and immediate review will materially advance the outcome and ultimate termination of the litigation. After reviewing the briefing of the parties I agree that the certified issues qualify for discretionary review under RAP 2.3(b)(4).

The only remaining issue is the disagreement between the parties whether Litchfield should be realigned as the respondent/cross-appellant based on his argument that the net practical result of the two orders is that Litchfield has mostly prevailed and KPMG has mostly lost, and therefore KPMG should be deemed the appellant/cross-respondent. There may be some nuance that evades me, but in such a cross review setting both sides get to file briefs responding and replying on all issues, and panels would normally allow consistent allocations of time at oral argument. Perhaps the "appellant" is stuck advancing the costs of the clerk's papers and any report of proceedings, but those costs are recoverable ultimately to the substantially prevailing party. The practical impact of the trial court's two rulings may be more advantageous to one party than the other, but both sides seek significant relief on appeal and I am not persuaded that the parties should be realigned.

Therefore, it is

ORDERED that discretionary review is granted as to the issues certified by the trial court under RAP 2.3(b)(4). It is further

ORDERED that Mark Litchfield shall be the appellant/cross-respondent and KPMG, LLG the respondent/cross-appellant. It is further

ORDERED that the clerk shall set a perfection schedule.

James Verellen
Court Commissioner

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STATE OF WASHINGTON
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RCW 2.48.190
Qualifications on admission to practice.

No person shall be permitted to practice as an attorney or counselor at law or to do work of a legal nature for compensation, or to represent himself or herself as an attorney or counselor at law or qualified to do work of a legal nature, unless he or she is a citizen of the United States and a bona fide resident of this state and has been admitted to practice law in this state: PROVIDED, That any person may appear and conduct his or her own case in any action or proceeding brought by or against him or her, or may appear in his or her own behalf in the small claims department of the district court: AND PROVIDED FURTHER, That an attorney of another state may appear as counselor in a court of this state without admission, upon satisfying the court that his or her state grants the same right to attorneys of this state.

[1987 c 202 § 107; 1921 c 126 § 4; RRS § 139-4. Prior: 1919 c 100 § 1; 1917 c 115 § 1.]

Notes:

Rules of court: Admission – APR 5.

Reviser's note: Last proviso, see later enactment, RCW 2.48.170.

Intent – 1987 c 202: See note following RCW 2.04.190.

RCW 18.04.015
Purpose.

(1) It is the policy of this state and the purpose of this chapter:

(a) To promote the dependability of information which is used for guidance in financial transactions or for accounting for or assessing the status or performance of commercial and noncommercial enterprises, whether public, private or governmental; and

(b) To protect the public interest by requiring that:

(i) Persons who hold themselves out as licensees or certificate holders conduct themselves in a competent, ethical, and professional manner;

(ii) A public authority be established that is competent to prescribe and assess the qualifications of certified public accountants, including certificate holders who are not licensed for the practice of public accounting;

(iii) Persons other than licensees refrain from using the words "audit," "review," and "compilation" when designating a report customarily prepared by someone knowledgeable in accounting;

(iv) A public authority be established to provide for consumer alerts and public protection information to be published regarding persons or firms who violate the provisions of chapter 294, Laws of 2001 or board rule and to provide general consumer protection information to the public; and

(v) The use of accounting titles likely to confuse the public be prohibited.

(2) The purpose of chapter 294, Laws of 2001 is to make revisions to chapter 234, Laws of 1983 and chapter 103, Laws of 1992 to: Fortify the public protection provisions of chapter 294, Laws of 2001; establish one set of qualifications to be a licensee; revise the regulations of certified public accountants; make revisions in the ownership of certified public accounting firms; assure to the greatest extent possible that certified public accountants from Washington state are substantially equivalent with certified public accountants in other states and can therefore perform the duties of certified public accountants in as many states and countries as possible; assure certified public accountants from other states and countries have met qualifications that are substantially equivalent to the certified public accountant qualifications of this state; and clarify the authority of the board of accountancy with respect to the activities of persons holding licenses and certificates under this chapter. It is not the intent of chapter 294, Laws of 2001 to in any way restrict or limit the activities of persons not holding licenses or certificates under this chapter except as otherwise specifically restricted or limited by chapter 234, Laws of 1983 and chapter 103, Laws of 1992.

(3) A purpose of chapter 103, Laws of 1992, revising provisions of chapter 234, Laws of 1983, is to clarify the authority of the board of accountancy with respect to the activities of persons holding certificates under this chapter. Furthermore, it is not the intent of chapter 103, Laws of 1992 to in any way restrict or limit the activities of persons not holding certificates under this chapter except as otherwise specifically restricted or limited by chapter 234, Laws of 1983.

[2001 c 294 § 1; 1992 c 103 § 1; 1983 c 234 § 2.]

Notes:

Effective date – 2001 c 294: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect July 1, 2001." [2001 c 294 § 24.]

RCW 18.04.025
Definitions.

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

- (1) "Attest" means providing the following financial statement services:
 - (a) Any audit or other engagement to be performed in accordance with the statements on auditing standards;
 - (b) Any review of a financial statement to be provided in accordance with the statements on standards for accounting and review services;
 - (c) Any examination of prospective financial information to be performed in accordance with the statements on standards for attestation engagements; and
 - (d) Any engagement to be performed in accordance with the public company accounting oversight board auditing standards.
- (2) "Board" means the board of accountancy created by RCW 18.04.035.
- (3) "Certificate" means a certificate as a certified public accountant issued prior to July 1, 2001, as authorized under the provisions of this chapter.
- (4) "Certificate holder" means the holder of a certificate as a certified public accountant who has not become a licensee, has maintained CPE requirements, and who does not practice public accounting.
- (5) "Certified public accountant" or "CPA" means a person holding a certified public accountant license or certificate.
- (6) "Compilation" means providing a service to be performed in accordance with statements on standards for accounting and review services that is presenting in the form of financial statements, information that is the representation of management (owners) without undertaking to express any assurance on the statements.
- (7) "CPE" means continuing professional education.
- (8) "Firm" means a sole proprietorship, a corporation, or a partnership. "Firm" also means a limited liability company formed under chapter 25.15 RCW.
- (9) "Holding out" means any representation to the public by the use of restricted titles as set forth in RCW 18.04.345 by a person or firm that the person or firm holds a license under this chapter and that the person or firm offers to perform any professional services to the public as a licensee. "Holding out" shall not affect or limit a person or firm not required to hold a license under this chapter from engaging in practices identified in RCW 18.04.350.
- (10) "Home office" is the location specified by the client as the address to which a service is directed.
- (11) "Inactive" means the certificate is in an inactive status because a person who held a valid certificate before July 1, 2001, has not met the current requirements of licensure and has been granted inactive certificate holder status through an approval process established by the board.
- (12) "Individual" means a living, human being.
- (13) "License" means a license to practice public accountancy issued to an individual under this chapter, or a license issued to a firm under this chapter.
- (14) "Licensee" means the holder of a license to practice public accountancy issued under this chapter.
- (15) "Manager" means a manager of a limited liability company licensed as a firm under this chapter.
- (16) "NASBA" means the national association of state boards of accountancy.
- (17) "Peer review" means a study, appraisal, or review of one or more aspects of the attest or compilation work of a licensee or licensed firm in the practice of public accountancy, by a person or persons who hold licenses and who are not affiliated with the person or firm being reviewed, including a peer review, or any internal review or inspection

intended to comply with quality control policies and procedures, but not including the "quality assurance review" under subsection (21) of this section.

(18) "Person" means any individual, nongovernmental organization, or business entity regardless of legal form, including a sole proprietorship, firm, partnership, corporation, limited liability company, association, or not-for-profit organization, and including the sole proprietor, partners, members, and, as applied to corporations, the officers.

(19) "Practice of public accounting" means performing or offering to perform by a person or firm holding itself out to the public as a licensee, for a client or potential client, one or more kinds of services involving the use of accounting or auditing skills, including the issuance of "audit reports," "review reports," or "compilation reports" on financial statements, or one or more kinds of management advisory, or consulting services, or the preparation of tax returns, or the furnishing of advice on tax matters. "Practice of public accounting" shall not include practices that are permitted under the provisions of RCW 18.04.350(10) by persons or firms not required to be licensed under this chapter.

(20) "Principal place of business" means the office location designated by the licensee for purposes of substantial equivalency and reciprocity.

(21) "Quality assurance review" means a process established by and conducted at the direction of the board of study, appraisal, or review of one or more aspects of the attest or compilation work of a licensee or licensed firm in the practice of public accountancy, by a person or persons who hold licenses and who are not affiliated with the person or firm being reviewed.

(22) "Reports on financial statements" means any reports or opinions prepared by licensees or persons holding practice privileges under substantial equivalency, based on services performed in accordance with generally accepted auditing standards, standards for attestation engagements, or standards for accounting and review services as to whether the presentation of information used for guidance in financial transactions or for accounting for or assessing the status or performance of commercial and noncommercial enterprises, whether public, private, or governmental, conforms with generally accepted accounting principles or another comprehensive basis of accounting. "Reports on financial statements" does not include services referenced in RCW 18.04.350(10) provided by persons not holding a license under this chapter.

(23) "Review committee" means any person carrying out, administering or overseeing a peer review authorized by the reviewee.

(24) "Rule" means any rule adopted by the board under authority of this chapter.

(25) "Sole proprietorship" means a legal form of organization owned by one person meeting the requirements of RCW 18.04.195.

(26) "State" includes the states of the United States, the District of Columbia, Puerto Rico, Guam, the United States Virgin Islands, and the Commonwealth of the Northern Mariana Islands at such time as the board determines that the Commonwealth of the Northern Mariana Islands is issuing licenses under the substantially equivalent standards in RCW 18.04.350(2)(a).

[2008 c 16 § 2; 2001 c 294 § 2; 1999 c 378 § 1; 1994 c 211 § 1401; 1992 c 103 § 2; 1986 c 295 § 1; 1983 c 234 § 3.]

Notes:

Alphabetization--2008 c 16: "The code reviser shall alphabetize and renumber the definitions in RCW 18.04.025 and correct any references." [2008 c 16 § 7.]

Finding -- Intent -- 2008 c 16: "The legislature finds the multiple state licensing and registering requirements for certified public accountants to be cumbersome and an unnecessary constraint on the consumers of professional certified public accountant services. In the majority of United States jurisdictions, certified public accountants are licensed based on substantially equivalent education, national exam, and experience requirements. Yet in order to serve their various client needs, certified public accountants must often delay service while they first spend countless hours and dollars to register with regulators in the jurisdictions of the client.

To clarify the legislative intent of chapter 294, Laws of 2001, reduce the administrative licensing burden on certified public accountants licensed in any substantially equivalent jurisdiction, and facilitate consumer choice, the legislature intends to eliminate the requirement for out-of-state certified public accountants to notify the Washington state board of accountancy of intent to practice and pay a fee;

however, firms providing audit or opinion-type services would be required to be licensed in this state. The requirement for notification will be replaced with "consent to automatic jurisdiction," which clarifies the legal disciplinary authority of the Washington state board of accountancy over out-of-state certified public accountants practicing in Washington state. This allows the board to more efficiently protect consumers while facilitating practice mobility and consumer choice." [2008 c 16 § 1.]

Effective date -- 2001 c 294: See note following RCW 18.04.015.

Effective date -- Severability -- 1994 c 211: See RCW 25.15.900 and 25.15.902.

RCW 18.04.105

Issuance of license — Requirements — Examination — Fees — Certified public accountants' account — Valid certificates previously issued under chapter — Continuing professional education — Inactive certificates.

(1) A license to practice public accounting shall be granted by the board to any person:

(a) Who is of good character. Good character, for purposes of this section, means lack of a history of dishonest or felonious acts. The board may refuse to grant a license on the ground of failure to satisfy this requirement only if there is a substantial connection between the lack of good character of the applicant and the professional and ethical responsibilities of a licensee and if the finding by the board of lack of good character is supported by a preponderance of evidence. When an applicant is found to be unqualified for a license because of a lack of good character, the board shall furnish the applicant a statement containing the findings of the board and a notice of the applicant's right of appeal;

(b) Who has met the educational standards established by rule as the board determines to be appropriate;

(c) Who has passed an examination;

(d) Who has had one year of experience which is gained:

(i) Through the use of accounting, issuing reports on financial statements, management advisory, financial advisory, tax, tax advisory, or consulting skills;

(ii) While employed in government, industry, academia, or public practice; and

(iii) Meeting the competency requirements in a manner as determined by the board to be appropriate and established by board rule; and

(e) Who has paid appropriate fees as established by rule by the board.

(2) The examination described in subsection (1)(c) of this section shall test the applicant's knowledge of the subjects of accounting and auditing, and other related fields the board may specify by rule. The time for holding the examination is fixed by the board and may be changed from time to time. The board shall prescribe by rule the methods of applying for and taking the examination, including methods for grading examinations and determining a passing grade required of an applicant for a license. The board shall to the extent possible see to it that the grading of the examination, and the passing grades, are uniform with those applicable to all other states. The board may make use of all or a part of the uniform certified public accountant examination and advisory grading service of the American Institute of Certified Public Accountants and may contract with third parties to perform administrative services with respect to the examination as the board deems appropriate to assist it in performing its duties under this chapter. The board shall establish by rule provisions for transitioning to a new examination structure or to a new media for administering the examination.

(3) The board shall charge each applicant an examination fee for the initial examination or for reexamination. The applicable fee shall be paid by the person at the time he or she applies for examination, reexamination, or evaluation of educational qualifications. Fees for examination, reexamination, or evaluation of educational qualifications shall be determined by the board under chapter 18.04 RCW. There is established in the state treasury an account to be known as the certified public accountants' account. All fees received from candidates to take any or all sections of the certified public accountant examination shall be used only for costs related to the examination.

(4) Persons who on June 30, 2001, held valid certificates previously issued under this chapter shall be deemed to be certificate holders, subject to the following:

(a) Certificate holders may, prior to June 30, 2006, petition the board to become licensees by documenting to the board that they have gained one year of experience through the use of accounting, issuing reports on financial statements, management advisory, financial advisory, tax, tax advisory, or consulting skills, without regard to the eight-year limitation set forth in (b) of this subsection, while employed in government, industry, academia, or public practice.

(b) Certificate holders who do not petition to become licensees prior to June 30, 2006, may after that date petition the board to become licensees by documenting to the board that they have one year of experience acquired within eight years prior to applying for a license through the use of accounting, issuing reports on financial statements, management advisory, financial advisory, tax, tax advisory, or consulting skills in government, industry, academia, or public practice.

(c) Certificate holders who petition the board pursuant to (a) or (b) of this subsection must also meet competency requirements in a manner as determined by the board to be appropriate and established by board rule.

(d) Any certificate holder petitioning the board pursuant to (a) or (b) of this subsection to become a licensee must submit to the board satisfactory proof of having completed an accumulation of one hundred twenty hours of CPE during the thirty-six months preceding the date of filing the petition.

(e) Any certificate holder petitioning the board pursuant to (a) or (b) of this subsection to become a licensee must pay the appropriate fees established by rule by the board.

(5) Certificate holders shall comply with the prohibition against the practice of public accounting in RCW 18.04.345.

(6) Persons who on June 30, 2001, held valid certificates previously issued under this chapter are deemed to hold inactive certificates, subject to renewal as inactive certificates, until they have petitioned the board to become licensees and have met the requirements of subsection (4) of this section. No individual who did not hold a valid certificate before July 1, 2001, is eligible to obtain an inactive certificate.

(7) Persons deemed to hold inactive certificates under subsection (6) of this section shall comply with the prohibition against the practice of public accounting in subsection (8)(b) of this section and RCW 18.04.345, but are not required to display the term inactive as part of their title, as required by subsection (8)(a) of this section until renewal. Certificates renewed to any persons after June 30, 2001, are inactive certificates and the inactive certificate holders are subject to the requirements of subsection (8) of this section.

(8) Persons holding an inactive certificate:

(a) Must use or attach the term "inactive" whenever using the title CPA or certified public accountant or referring to the certificate, and print the word "inactive" immediately following the title, whenever the title is printed on a business card, letterhead, or any other document, including documents published or transmitted through electronic media, in the same font and font size as the title; and

(b) Are prohibited from practicing public accounting.

[2004 c 159 § 2; 2001 c 294 § 7; 2000 c 171 § 2; 1999 c 378 § 2; 1992 c 103 § 7; 1991 sp.s. c 13 § 20; 1986 c 295 § 6; 1985 c 57 § 3; 1983 c 234 § 7.]

Notes:

Effective date -- 2001 c 294: See note following RCW 18.04.015.

Effective dates -- Severability -- 1991 sp.s. c 13: See notes following RCW 18.08.240.

Effective date -- 1985 c 57: "This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect July 1, 1985." [1985 c 57 § 91.]

RCW 18.04.345
Prohibited practices.

(1) No individual may assume or use the designation "certified public accountant-inactive" or "CPA-inactive" or any other title, designation, words, letters, abbreviation, sign, card, or device tending to indicate that the individual is a certified public accountant-inactive or CPA-inactive unless the individual holds a certificate. Individuals holding only a certificate may not practice public accounting.

(2) No individual may hold himself or herself out to the public or assume or use the designation "certified public accountant" or "CPA" or any other title, designation, words, letters, abbreviation, sign, card, or device tending to indicate that the individual is a certified public accountant or CPA unless the individual qualifies for the privileges authorized by RCW 18.04.350(2) or holds a license under RCW 18.04.105 and 18.04.215.

(3) No firm with an office in this state may perform or offer to perform attest services as defined in RCW 18.04.025(1) or compilation services as defined in RCW 18.04.025(6) or assume or use the designation "certified public accountant" or "CPA" or any other title, designation, words, letters, abbreviation, sign, card, or device tending to indicate that the firm is composed of certified public accountants or CPAs, unless the firm is licensed under RCW 18.04.195 and all offices of the firm in this state are maintained and registered under RCW 18.04.205. This subsection does not limit the services permitted under RCW 18.04.350(10) by persons not required to be licensed under this chapter.

(4) No firm may perform the services defined in RCW 18.04.025(1) (a), (c), or (d) for a client with its home office in this state unless the firm is licensed under RCW 18.04.195, renews the firm license as required under RCW 18.04.215, and all offices of the firm in this state are maintained and registered under RCW 18.04.205.

(5) No individual, partnership, limited liability company, or corporation offering public accounting services to the public may hold himself, herself, or itself out to the public, or assume or use along, or in connection with his, hers, or its name, or any other name the title or designation "certified accountant," "chartered accountant," "licensed accountant," "licensed public accountant," "public accountant," or any other title or designation likely to be confused with "certified public accountant" or any of the abbreviations "CA," "LA," "LPA," or "PA," or similar abbreviations likely to be confused with "CPA."

(6) No licensed firm may operate under an alias, a firm name, title, or "DBA" that differs from the firm name that is registered with the board.

(7) No individual with an office in this state may sign, affix, or associate his or her name or any trade or assumed name used by the individual in his or her business to any report prescribed by professional standards unless the individual holds a license to practice under RCW 18.04.105 and 18.04.215, a firm holds a license under RCW 18.04.195, and all of the individual's offices in this state are registered under RCW 18.04.205.

(8) No individual licensed in another state may sign, affix, or associate a firm name to any report prescribed by professional standards, or associate a firm name in conjunction with the title certified public accountant, unless the individual:

(a) Qualifies for the practice privileges authorized by RCW 18.04.350(2); or

(b) Is licensed under RCW 18.04.105 and 18.04.215, and all of the individual's offices in this state are maintained and registered under RCW 18.04.205.

(9) No individual, partnership, limited liability company, or corporation not holding a license to practice under RCW 18.04.105 and 18.04.215, or firm not licensed under RCW 18.04.195 or firm not registering all of the firm's offices in this state under RCW 18.04.205, or not qualified for the practice privileges authorized by RCW 18.04.350(2), may hold himself, herself, or itself out to the public as an "auditor" with or without any other description or designation by use of such word on any sign, card, letterhead, or in any advertisement or directory.

(10) For purposes of this section, because individuals practicing using practice privileges under RCW 18.04.350(2) are deemed substantially equivalent to licensees under RCW 18.04.105 and 18.04.215, every word, term, or reference that includes the latter shall be deemed to include the former, provided the conditions of such practice privilege, as set forth in RCW 18.04.350 (4) and (5) are maintained.

(11) Notwithstanding anything to the contrary in this section, it is not a violation of this section for a firm that does not hold a valid license under RCW 18.04.195 and that does not have an office in this state to provide its professional services in this state so long as it complies with the requirements of RCW 18.04.195(1)(b).

[2009 c 116 § 1; 2008 c 16 § 5; 2001 c 294 § 17; 1999 c 378 § 8; 1992 c 103 § 14; 1986 c 295 § 15; 1983 c 234 § 16.]

Notes:

Finding -- Intent -- 2008 c 16: See note following RCW 18.04.025.

Effective date -- 2001 c 294: See note following RCW 18.04.015.

RCW 18.04.350
Practices not prohibited.

(1) Nothing in this chapter prohibits any individual not holding a license and not qualified for the practice privileges authorized by subsection (2) of this section from serving as an employee of a firm licensed under RCW 18.04.195 and 18.04.215. However, the employee shall not issue any compilation, review, audit, or examination report on financial or other information over his or her name.

(2) An individual whose principal place of business is not in this state shall be presumed to have qualifications substantially equivalent to this state's requirements and shall have all the privileges of licensees of this state without the need to obtain a license under RCW 18.04.105 if the individual:

(a) Holds a valid license as a certified public accountant from any state that requires, as a condition of licensure, that an individual:

(i) Have at least one hundred fifty semester hours of college or university education including a baccalaureate or higher degree conferred by a college or university;

(ii) Achieve a passing grade on the uniform certified public accountant examination; and

(iii) Possess at least one year of experience including service or advice involving the use of accounting, attest, compilation, management advisory, financial advisory, tax, or consulting skills, all of which was verified by a licensee; or

(b) Holds a valid license as a certified public accountant from any state that does not meet the requirements of (a) of this subsection, but such individual's qualifications are substantially equivalent to those requirements. Any individual who passed the uniform certified public accountant examination and holds a valid license issued by any other state prior to January 1, 2012, may be exempt from the education requirements in (a)(i) of this subsection for purposes of this section.

(3) Notwithstanding any other provision of law, an individual who qualifies for the practice privilege under subsection (2) of this section may offer or render professional services, whether in person or by mail, telephone, or electronic means, and no notice, fee, or other submission shall be provided by any such individual. Such an individual shall be subject to the requirements of subsection (4) of this section.

(4) Any individual licensee of another state exercising the privilege afforded under subsection (2) of this section and the firm that employs that licensee simultaneously consent, as a condition of exercising this privilege:

(a) To the personal and subject matter jurisdiction and disciplinary authority of the board;

(b) To comply with this chapter and the board's rules;

(c) That in the event the license from the state of the individual's principal place of business is no longer valid, the individual will cease offering or rendering professional services in this state individually and on behalf of a firm; and

(d) To the appointment of the state board which issued the certificate or license as their agent upon whom process may be served in any action or proceeding by this state's board against the certificate holder or licensee.

(5) An individual who qualifies for practice privileges under subsection (2) of this section may, for any entity with its home office in this state, perform the following services only through a firm that has obtained a license under RCW 18.04.195 and 18.04.215:

(a) Any financial statement audit or other engagement to be performed in accordance with statements on auditing standards;

(b) Any examination of prospective financial information to be performed in accordance with statements on standards for attestation engagements; or

(c) Any engagement to be performed in accordance with public company accounting oversight board auditing standards.

(6) A licensee of this state offering or rendering services or using their CPA title in another state shall be subject to disciplinary action in this state for an act committed in another state for which the licensee would be subject to

discipline for an act committed in the other state. Notwithstanding RCW 18.04.295 and this section, the board shall cooperate with and investigate any complaint made by the board of accountancy of another state or jurisdiction.

(7) Nothing in this chapter prohibits a licensee, a licensed firm, any of their employees, or persons qualifying for practice privileges by this section from disclosing any data in confidence to other certified public accountants, quality assurance or peer review teams, partnerships, limited liability companies, or corporations of certified public accountants or to the board or any of its employees engaged in conducting quality assurance or peer reviews, or any one of their employees in connection with quality or peer reviews of that accountant's accounting and auditing practice conducted under the auspices of recognized professional associations.

(8) Nothing in this chapter prohibits a licensee, a licensed firm, any of their employees, or persons qualifying for practice privileges by this section from disclosing any data in confidence to any employee, representative, officer, or committee member of a recognized professional association, or to the board, or any of its employees or committees in connection with a professional investigation held under the auspices of recognized professional associations or the board.

(9) Nothing in this chapter prohibits any officer, employee, partner, or principal of any organization:

(a) From affixing his or her signature to any statement or report in reference to the affairs of the organization with any wording designating the position, title, or office which he or she holds in the organization; or

(b) From describing himself or herself by the position, title, or office he or she holds in such organization.

(10) Nothing in this chapter prohibits any person or firm composed of persons not holding a license under this chapter from offering or rendering to the public bookkeeping, accounting, tax services, the devising and installing of financial information systems, management advisory, or consulting services, the preparation of tax returns, or the furnishing of advice on tax matters, the preparation of financial statements, written statements describing how such financial statements were prepared, or similar services, provided that persons, partnerships, limited liability companies, or corporations not holding a license who offer or render these services do not designate any written statement as an "audit report," "review report," or "compilation report," do not issue any written statement which purports to express or disclaim an opinion on financial statements which have been audited, and do not issue any written statement which expresses assurance on financial statements which have been reviewed.

(11) Nothing in this chapter prohibits any act of or the use of any words by a public official or a public employee in the performance of his or her duties.

(12) Nothing contained in this chapter prohibits any person who holds only a valid certificate from assuming or using the designation "certified public accountant-inactive" or "CPA-inactive" or any other title, designation, words, letters, sign, card, or device tending to indicate the person is a certificate holder, provided, that such person does not perform or offer to perform for the public one or more kinds of services involving the use of accounting or auditing skills, including issuance of reports on financial statements or of one or more kinds of management advisory, financial advisory, consulting services, the preparation of tax returns, or the furnishing of advice on tax matters.

(13) Nothing in this chapter prohibits the use of the title "accountant" by any person regardless of whether the person has been granted a certificate or holds a license under this chapter. Nothing in this chapter prohibits the use of the title "enrolled agent" or the designation "EA" by any person regardless of whether the person has been granted a certificate or holds a license under this chapter if the person is properly authorized at the time of use to use the title or designation by the United States department of the treasury. The board shall by rule allow the use of other titles by any person regardless of whether the person has been granted a certificate or holds a license under this chapter if the person using the titles or designations is authorized at the time of use by a nationally recognized entity sanctioning the use of board authorized titles.

[2008 c 16 § 6; 2001 c 294 § 18; 1992 c 103 § 15; 1986 c 295 § 16; 1983 c 234 § 17; 1969 c 114 § 7; 1949 c 226 § 34; Rem. Supp. 1949 § 8269-41.]

Notes:

Finding -- Intent -- 2008 c 16: See note following RCW 18.04.025.

Effective date -- 2001 c 294: See note following RCW 18.04.015.

RCW 18.04.370
Penalty.

(1) Any person who violates any provision of this chapter shall be guilty of a crime, as follows:

(a) Any person who violates any provision of this chapter is guilty of a misdemeanor, and upon conviction thereof, shall be subject to a fine of not more than thirty thousand dollars, or to imprisonment for not more than six months, or to both such fine and imprisonment.

(b) Notwithstanding (a) of this subsection, any person who uses a professional title intended to deceive the public, in violation of RCW 18.04.345, having previously entered into a stipulated agreement and order of assurance with the board, is guilty of a class C felony, and upon conviction thereof, is subject to a fine of not more than thirty thousand dollars, or to imprisonment for not more than two years, or to both such fine and imprisonment.

(c) Notwithstanding (a) of this subsection, any person whose license or certificate was suspended or revoked by the board and who uses the CPA professional title intending to deceive the public, in violation of RCW 18.04.345, having previously entered into a stipulated agreement and order of assurance with the board, is guilty of a class C felony, and upon conviction thereof, is subject to a fine of not more than thirty thousand dollars, or to imprisonment for not more than two years, or to both fine and imprisonment.

(2) With the exception of first time violations of RCW 18.04.345, subject to subsection (3) of this section whenever the board has reason to believe that any person is violating the provisions of this chapter it shall certify the facts to the prosecuting attorney of the county in which such person resides or may be apprehended and the prosecuting attorney shall cause appropriate proceedings to be brought against such person.

(3) The board may elect to enter into a stipulated agreement and orders of assurance with persons in violation of RCW 18.04.345 who have not previously been found to have violated the provisions of this chapter. The board may order full restitution to injured parties as a condition of a stipulated agreement and order of assurance.

(4) Nothing herein contained shall be held to in any way affect the power of the courts to grant injunctive or other relief as above provided.

[2004 c 159 § 5. Prior: 2003 c 290 § 5; 2003 c 53 § 120; 2001 c 294 § 19; 1983 c 234 § 19; 1949 c 226 § 36; Rem. Supp. 1949 § 8269-43.]

Notes:

Effective date – 2004 c 159 § 5: "Section 5 of this act takes effect July 1, 2004." [2004 c 159 § 6.]

Intent – Effective date -- 2003 c 53: See notes following RCW 2.48.180.

Effective date – 2001 c 294: See note following RCW 18.04.015.

RCW 18.71.021
License required.

No person may practice or represent himself or herself as practicing medicine without first having a valid license to do so.

[1987 c 150 § 46.]

Notes:

Severability -- 1987 c 150: See RCW 18.122.901.

RCW 49.46.010

Definitions. (*Effective until December 31, 2011.*)

As used in this chapter:

- (1) "Director" means the director of labor and industries;
- (2) "Wage" means compensation due to an employee by reason of employment, payable in legal tender of the United States or checks on banks convertible into cash on demand at full face value, subject to such deductions, charges, or allowances as may be permitted by rules of the director;
- (3) "Employ" includes to permit to work;
- (4) "Employer" includes any individual, partnership, association, corporation, business trust, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee;
- (5) "Employee" includes any individual employed by an employer but shall not include:
 - (a) Any individual (i) employed as a hand harvest laborer and paid on a piece rate basis in an operation which has been, and is generally and customarily recognized as having been, paid on a piece rate basis in the region of employment; (ii) who commutes daily from his or her permanent residence to the farm on which he or she is employed; and (iii) who has been employed in agriculture less than thirteen weeks during the preceding calendar year;
 - (b) Any individual employed in casual labor in or about a private home, unless performed in the course of the employer's trade, business, or profession;
 - (c) Any individual employed in a bona fide executive, administrative, or professional capacity or in the capacity of outside salesperson as those terms are defined and delimited by rules of the director. However, those terms shall be defined and delimited by the director of personnel pursuant to chapter 41.06 RCW for employees employed under the director of personnel's jurisdiction;
 - (d) Any individual engaged in the activities of an educational, charitable, religious, state or local governmental body or agency, or nonprofit organization where the employer-employee relationship does not in fact exist or where the services are rendered to such organizations gratuitously. If the individual receives reimbursement in lieu of compensation for normally incurred out-of-pocket expenses or receives a nominal amount of compensation per unit of voluntary service rendered, an employer-employee relationship is deemed not to exist for the purpose of this section or for purposes of membership or qualification in any state, local government, or publicly supported retirement system other than that provided under chapter 41.24 RCW;
 - (e) Any individual employed full time by any state or local governmental body or agency who provides voluntary services but only with regard to the provision of the voluntary services. The voluntary services and any compensation therefor shall not affect or add to qualification, entitlement, or benefit rights under any state, local government, or publicly supported retirement system other than that provided under chapter 41.24 RCW;
 - (f) Any newspaper vendor or carrier;
 - (g) Any carrier subject to regulation by Part 1 of the Interstate Commerce Act;
 - (h) Any individual engaged in forest protection and fire prevention activities;
 - (i) Any individual employed by any charitable institution charged with child care responsibilities engaged primarily in the development of character or citizenship or promoting health or physical fitness or providing or sponsoring recreational opportunities or facilities for young people or members of the armed forces of the United States;
 - (j) Any individual whose duties require that he or she reside or sleep at the place of his or her employment or who otherwise spends a substantial portion of his or her work time subject to call, and not engaged in the performance of active duties;
 - (k) Any resident, inmate, or patient of a state, county, or municipal correctional, detention, treatment or rehabilitative institution;
 - (l) Any individual who holds a public elective or appointive office of the state, any county, city, town, municipal

corporation or quasi municipal corporation, political subdivision, or any instrumentality thereof, or any employee of the state legislature;

(m) All vessel operating crews of the Washington state ferries operated by the department of transportation;

(n) Any individual employed as a seaman on a vessel other than an American vessel;

(o) Any farm intern providing his or her services to a small farm which has a special certificate issued under RCW 49.12.465;

(6) "Occupation" means any occupation, service, trade, business, industry, or branch or group of industries or employment or class of employment in which employees are gainfully employed;

(7) "Retail or service establishment" means an establishment seventy-five percent of whose annual dollar volume of sales of goods or services, or both, is not for resale and is recognized as retail sales or services in the particular industry.

[2010 c 160 § 2; 2010 c 8 § 12040; 2002 c 354 § 231; 1997 c 203 § 3; 1993 c 281 § 56; 1989 c 1 § 1 (Initiative Measure No. 518, approved November 8, 1988); 1984 c 7 § 364; 1977 ex.s. c 69 § 1; 1975 1st ex.s. c 289 § 1; 1974 ex.s. c 107 § 1; 1961 ex.s. c 18 § 2; 1959 c 294 § 1.]

Notes:

Reviser's note: This section was amended by 2010 c 8 § 12040 and by 2010 c 160 § 2, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

Expiration date -- 2010 c 160: See note following RCW 49.12.465.

Short title -- Headings, captions not law -- Severability -- Effective dates -- 2002 c 354: See RCW 41.80.907 through 41.80.910.

Construction -- 1997 c 203: See note following RCW 49.46.130.

Effective date -- 1993 c 281: See note following RCW 41.06.022.

Effective date -- 1989 c 1 (Initiative Measure No. 518, approved November 8, 1988): "This act shall take effect January 1, 1989." [1989 c 1 § 5.]

Severability -- 1984 c 7: See note following RCW 47.01.141.

Effect of offset of military pay on status of bona fide executive, administrative, and professional employees: RCW 73.16.080.

RCW 49.46.010
Definitions. (*Effective December 31, 2011.*)

As used in this chapter:

(1) "Director" means the director of labor and industries;

(2) "Wage" means compensation due to an employee by reason of employment, payable in legal tender of the United States or checks on banks convertible into cash on demand at full face value, subject to such deductions, charges, or allowances as may be permitted by rules of the director;

(3) "Employ" includes to permit to work;

(4) "Employer" includes any individual, partnership, association, corporation, business trust, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee;

(5) "Employee" includes any individual employed by an employer but shall not include:

(a) Any individual (i) employed as a hand harvest laborer and paid on a piece rate basis in an operation which has been, and is generally and customarily recognized as having been, paid on a piece rate basis in the region of employment; (ii) who commutes daily from his or her permanent residence to the farm on which he or she is employed; and (iii) who has been employed in agriculture less than thirteen weeks during the preceding calendar year;

(b) Any individual employed in casual labor in or about a private home, unless performed in the course of the employer's trade, business, or profession;

(c) Any individual employed in a bona fide executive, administrative, or professional capacity or in the capacity of outside salesperson as those terms are defined and delimited by rules of the director. However, those terms shall be defined and delimited by the director of personnel pursuant to chapter 41.06 RCW for employees employed under the director of personnel's jurisdiction;

(d) Any individual engaged in the activities of an educational, charitable, religious, state or local governmental body or agency, or nonprofit organization where the employer-employee relationship does not in fact exist or where the services are rendered to such organizations gratuitously. If the individual receives reimbursement in lieu of compensation for normally incurred out-of-pocket expenses or receives a nominal amount of compensation per unit of voluntary service rendered, an employer-employee relationship is deemed not to exist for the purpose of this section or for purposes of membership or qualification in any state, local government, or publicly supported retirement system other than that provided under chapter 41.24 RCW;

(e) Any individual employed full time by any state or local governmental body or agency who provides voluntary services but only with regard to the provision of the voluntary services. The voluntary services and any compensation therefor shall not affect or add to qualification, entitlement, or benefit rights under any state, local government, or publicly supported retirement system other than that provided under chapter 41.24 RCW;

(f) Any newspaper vendor or carrier;

(g) Any carrier subject to regulation by Part 1 of the Interstate Commerce Act;

(h) Any individual engaged in forest protection and fire prevention activities;

(i) Any individual employed by any charitable institution charged with child care responsibilities engaged primarily in the development of character or citizenship or promoting health or physical fitness or providing or sponsoring recreational opportunities or facilities for young people or members of the armed forces of the United States;

(j) Any individual whose duties require that he or she reside or sleep at the place of his or her employment or who otherwise spends a substantial portion of his or her work time subject to call, and not engaged in the performance of active duties;

(k) Any resident, inmate, or patient of a state, county, or municipal correctional, detention, treatment or rehabilitative institution;

(l) Any individual who holds a public elective or appointive office of the state, any county, city, town, municipal corporation or quasi municipal corporation, political subdivision, or any instrumentality thereof, or any employee of the state legislature;

(m) All vessel operating crews of the Washington state ferries operated by the department of transportation;

(n) Any individual employed as a seaman on a vessel other than an American vessel;

(6) "Occupation" means any occupation, service, trade, business, industry, or branch or group of industries or employment or class of employment in which employees are gainfully employed;

(7) "Retail or service establishment" means an establishment seventy-five percent of whose annual dollar volume of sales of goods or services, or both, is not for resale and is recognized as retail sales or services in the particular industry.

[2010 c 8 § 12040; 2002 c 354 § 231; 1997 c 203 § 3; 1993 c 281 § 56; 1989 c 1 § 1 (Initiative Measure No. 518, approved November 8, 1988); 1984 c 7 § 364; 1977 ex.s. c 69 § 1; 1975 1st ex.s. c 289 § 1; 1974 ex.s. c 107 § 1; 1961 ex.s. c 18 § 2; 1959 c 294 § 1.]

Notes:

Short title -- Headings, captions not law -- Severability -- Effective dates -- 2002 c 354: See RCW 41.80.907 through 41.80.910.

Construction -- 1997 c 203: See note following RCW 49.46.130.

Effective date -- 1993 c 281: See note following RCW 41.06.022.

Effective date -- 1989 c 1 (Initiative Measure No. 518, approved November 8, 1988): "This act shall take effect January 1, 1989." [1989 c 1 § 5.]

Severability -- 1984 c 7: See note following RCW 47.01.141.

Effect of offset of military pay on status of bona fide executive, administrative, and professional employees: RCW 73.16.080.

in the manner prescribed by the board, within thirty days of the issuance of:

(a) A sanction, order, suspension, revocation, or modification of a license, certificate, permit or practice rights by the SEC, PCAOB, IRS, or another state board of accountancy for any cause other than failure to pay a professional license fee by the due date or failure to meet the continuing professional education requirements of another state board of accountancy; or

(b) Charges filed by the SEC, IRS, PCAOB, another state board of accountancy, or a federal or state taxing, insurance or securities regulatory body that the licensee, CPA-Inactive certificateholder, or nonlicensee firm owner committed a prohibited act that would be a violation of board ethical or technical standards.

(2) Individual licensees and sole proprietors are to report action pursuant to subsection (1) of this section taken against the individual's license and/or the license of the sole proprietorship.

(3) Licensed CPA firms with more than one licensed owner are not required to report on action taken against owners, principals, partners, or employees.

(4) If you hold a license or CPA-Inactive certificate issued through the foreign reciprocity provisions of the act, you must notify the board of any investigations undertaken, or sanctions imposed, by a foreign credentialing body against your foreign credential within thirty days of receiving notice that an investigation has begun or a sanction was imposed.

[Statutory Authority: RCW 18.04.195 (13)(b), 18.04.215 (9)(b), 08-18-016, § 4-25-670, filed 8/25/08, effective 9/25/08. Statutory Authority: RCW 18.04.195 (10)(b) and 18.04.215 (9)(b), 05-01-137, § 4-25-670, filed 12/16/04, effective 1/31/05; 03-24-033, § 4-25-670, filed 11/25/03, effective 12/31/03.]

ENTRY REQUIREMENTS

WAC 4-25-710 What are the education requirements to qualify to apply for the CPA examination? (1) **Education requirements:** Effective July 1, 2000, to apply for the CPA examination you must have completed:

(a) At least one hundred fifty semester hours (two hundred twenty-five quarter hours) of college education, including

(b) A baccalaureate or higher degree; and

(c) An accounting concentration as defined as at least:

(i) Twenty-four semester hours (thirty-six quarter hours) or the equivalent in accounting subjects of which at least fifteen semester hours must be at the upper level or graduate level (an upper level course is defined as a course that frequently carries completion of a lower level course(s) as a prerequisite. For the purposes of meeting this subsection, individuals will be given 1.5 credits for each 1.0 graduate level credit of accounting courses taken; and

(ii) Twenty-four semester hours (thirty-six quarter hours) or the equivalent in business administration subjects at the undergraduate or graduate level.

(d) The board will not recognize accounting concentration credits awarded for "life experience" or similar activities retroactively evaluated and recognized by colleges or universities. This restriction is not intended to apply to internships prospectively approved by colleges or universities.

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(2) **One hundred eighty-day provision:** If you expect to meet the education requirements of this section within one hundred eighty days following the examination, you will be eligible to take the CPA examination provided you submit, on a form provided by the board's designee, signed confirmation from the university that you are enrolled in stating that you will meet the board's education requirements within one hundred eighty days following the day you first sit for any one section of the examination. If you apply for the exam using the one hundred eighty-day provision, then within two hundred ten days of first sitting for any section of the exam, you must provide the board complete documentation demonstrating that you met the board's education requirements within one hundred eighty days of first sitting for any one section of the exam. If you do not provide such documentation within the required two hundred ten-day time period, your exam score(s) will not be released and you will not be given credit for any section(s) of the examination. Applicants failing to provide such documentation must reapply as a first-time applicant.

(3) **Education obtained outside the United States:** If you obtained all or a portion of your education outside the United States you must have your education evaluated by a board approved foreign education credential evaluation service. The board will establish the criteria for board approval of foreign education credential evaluation services. The board will not provide education credential evaluation services.

(4) **Semester versus quarter hours:** As used in these rules, a "semester hour" means the conventional college semester hour. Your quarter hours will be converted to semester hours by multiplying them by two-thirds.

(5) **Accreditation standards:** For purposes of this rule, the board will recognize colleges and universities which are accredited in accordance with (a) through (c) of this subsection.

(a) The accredited college or university must be accredited at the time your education was earned by virtue of membership in one of the following accrediting agencies:

(i) Middle States Association of College and Secondary Schools;

(ii) New England Association of Schools and Colleges;

(iii) North Central Association of Colleges and Secondary Schools;

(iv) Northwest Commission on Colleges and Universities (formerly the Northwest Association of Schools and Colleges);

(v) Southern Association of Colleges and Schools;

(vi) Western Association of Schools and Colleges; and

(vii) Accrediting Commission for Independent Colleges and Schools, or its predecessor, the Accrediting Commission of the Association of Independent Colleges and Schools.

(b) If an institution was not accredited at the time your education was earned but is so accredited at the time your application is filed with the board, the institution will be deemed to be accredited for the purpose of (a) of this subsection provided that it:

(i) Certifies that your total educational program would qualify the applicant for graduation with a baccalaureate degree during the time the institution has been accredited; and

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ule a hearing to determine the validity of the charge of cheating.

[Statutory Authority: RCW 18.04.105(2), 05-01-137, § 4-25-721, filed 12/16/04, effective 1/31/05; 03-17-042, § 4-25-721, filed 8/15/03, effective 9/30/03. Statutory Authority: RCW 18.04.055, 02-04-064, § 4-25-721, filed 1/31/02, effective 3/15/02. Statutory Authority: RCW 18.04.055(11), 01-11-127, § 4-25-721, filed 5/22/01, effective 6/30/01. Statutory Authority: RCW 18.04.055, 93-12-069, § 4-25-721, filed 5/27/93, effective 7/1/93.]

WAC 4-25-730 What are the experience requirements in order to obtain a CPA license? Qualifying experience may be obtained through the practice of public accounting and/or employment in industry, academia, or government. Your experience may be obtained through one or more employers, with or without compensation, and may consist of a combination of full-time and part-time employment.

(1) Your experience must support the attainment of the competencies defined by subsection (2) of this section and:

- (a) Cover a minimum twelve-month period (this time period does not need to be consecutive);
- (b) Consist of a minimum of two thousand hours;
- (c) Be obtained through the use of accounting, attest, management advisory, financial advisory, tax, tax advisory or consulting skills;
- (d) Be verified by a licensed CPA as meeting the requirements identified in subsection (3) of this section; and
- (e) Unless you meet the requirements of subsection (4) of this section, be obtained no more than eight years prior to the date the board receives your complete license application.

(2) **Competencies:** The experience must support the attainment of the following competencies:

- (a) Understand the rules of professional conduct contained in chapter 4-25 WAC;
- (b) Assess the achievement of an entity's objectives;
- (c) Develop documentation and sufficient data to support analysis and conclusions;
- (d) Understand transaction streams and information systems;
- (e) Assess risk and design appropriate procedures;
- (f) Make decisions, solve problems, and think critically in the context of analysis; and
- (g) Communicate scope of work, findings and conclusions effectively.

(3) **Verifying CPA:** To verify a candidate's experience you must have held a valid CPA license to practice public accounting in Washington or another jurisdiction on the date that you verified the candidate's experience and also for a minimum of five years prior to verifying the candidate's experience. The five years do not need to be consecutive.

(4) **CPA-Inactive certificateholders applying for a license:** If you held a Washington state certificate on June 30, 2001, and you submit your application for a license by June 30, 2006, you may include experience obtained at any time during your lifetime.

(5) **Experience affidavit:** The applicant must verify that they have met the experience requirements of this section on the appropriate form(s) provided by the board. The verifying CPA must certify that the applicant's experience meets subsection (2) of this section.

(6) **Records retention:** Candidates must maintain documentation supporting the representations made on their

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experience affidavit for a minimum of three years after the date the candidate's initial license is issued by the board.

(7) **Audit:** The board may audit compliance with these experience requirements at any time during the three-year period following the date the candidate's initial license is issued.

[Statutory Authority: RCW 18.04.955(11) [18.04.055(11)] and 18.04.105 (1)(d), 05-01-137, § 4-25-730, filed 12/16/04, effective 1/31/05. Statutory Authority: RCW 18.04.055(11) and 18.04.105 (1)(d), 02-04-064, § 4-25-730, filed 1/31/02, effective 3/15/02. Statutory Authority: RCW 18.04.215, 01-03-011, § 4-25-730, filed 1/5/01, effective 6/30/01. Statutory Authority: RCW 18.04.055 and 18.04.215 (1)(a), 99-18-113, § 4-25-730, filed 9/1/99, effective 1/1/00. Statutory Authority: RCW 18.04.055, 93-12-068, § 4-25-730, filed 5/27/93, effective 7/1/93.]

WAC 4-25-735 How does a CPA-Inactive certificateholder apply for licensure? CPA-Inactive certificateholders are individuals who held a valid certificate on June 30, 2001, but did not hold a valid Washington state license to practice public accounting on that date. Individuals who did not hold a valid certificate on June 30, 2001 and licensees are not eligible for CPA-Inactive certificateholder status.

(1) If you are a CPA-Inactive certificateholder you:

- (a) May not "practice public accounting" as that term is defined in WAC 4-25-410;
- (b) Must meet the CPE requirements of WAC 4-25-830(1) and supporting documentation requirements of WAC 4-25-833;
- (c) Must comply with the act and board rules;
- (d) Must meet the renewal requirements of WAC 4-25-790; and

(e) Must use the title CPA-Inactive and print or display the word "Inactive" immediately following the initials CPA or certified public accountant whenever the initials CPA or certified public accountant is printed on a business card, letterhead, or other document including documents published or transmitted through electronic media, in exactly the same font and font size as the initials CPA or certified public accountant.

(2) If you are a CPA-Inactive certificateholder, to qualify for licensure you must:

- (a) Meet the experience requirements of WAC 4-25-730 or have had an approved experience affidavit on file with the board on or before June 30, 2001; and
- (b) Meet the CPE requirements of WAC 4-25-830(5).

(3) To apply for a license, you must submit to the board a certification that you meet the requirements of subsection (2) of this section and:

- (a) Have not held out in public practice during the time in which you were a CPA-Inactive certificateholder; and
- (b) Other required documentation or information deemed necessary by the board.

Board forms are available on the board's web site or upon request for your use.

(4) An initial application is not complete and cannot be processed until all fees, required information, required documentation, or other documentation or information the board may deem necessary is received by the board. When your application is approved, your license will be mailed to your address of record.

(5) Your CPE reporting period and your renewal cycle will remain the same.

[Title 4 WAC—p. 19]

WAC 4-30-010
Definitions.

For purposes of these rules the following terms have the meanings indicated unless a different meaning is otherwise clearly provided in these rules:

- (1) **"Act"** means the Public Accountancy Act codified as chapter 18.04 RCW.
- (2) **"Active individual participant"** means an individual whose primary occupation is at the firm or affiliated entity's business. An individual whose primary source of income from the business entity is provided as a result of passive investment is not an active individual participant.
- (3) **"Affiliated entity"** means any entity, entities or persons that directly or indirectly through one or more relationships influences or controls, is influenced or controlled by, or is under common influence or control with other entities or persons. This definition includes, but is not limited to, parents, subsidiaries, investors or investees, coinvestors, dual employment or management in joint ventures or brother-sister entities.
- (4) **"Applicant"** means an individual who has applied:
 - (a) To take the national uniform CPA examination;
 - (b) For an initial individual license, an initial firm license, or initial registration as a resident nonlicensee owner;
 - (c) To renew an individual license, a CPA-Inactive certificate, a CPA firm license, or registration as a resident nonlicensee firm owner;
 - (d) To reinstate an individual license, a CPA-Inactive certificate, registration as a resident nonlicensee firm owner, or practice privileges.
- (5) **"Attest"** means providing the following financial statement services:
 - (a) Any audit or other engagement to be performed in accordance with the statements on auditing standards;
 - (b) Any review of a financial statement to be provided in accordance with the statements on standards for accounting and review services;
 - (c) Any examination of prospective financial information to be performed in accordance with the statements on standards for attestation engagements; and
 - (d) Any engagement to be performed in accordance with the public company accounting oversight board auditing standards.
- (6) **"Audit," "review," and "compilation"** are terms reserved for use by licensees, as defined in subsection (28) of this section.
- (7) **"Board"** means the board of accountancy created by RCW 18.04.035.
- (8) **"Certificate"** means a certificate as a CPA-Inactive issued in the state of Washington prior to July 1, 2001, as authorized by the act, unless otherwise defined in rule.
- (9) **"Certificate holder"** means the holder of a valid CPA-Inactive certificate where the individual is not a licensee and is prohibited from practicing public accounting.
- (10) **"Client"** means the person or entity that retains a licensee, as defined in subsection (28) of this section, a CPA-Inactive certificate holder, a nonlicensee firm owner of a licensed firm, or an entity affiliated with a licensed firm to perform professional services through other than an employer/employee relationship.
- (11) **"Commissions and referral fees"** are compensation arrangements where the primary contractual relationship for the product or service is not between the client and licensee, as defined in subsection (28) of this section, CPA-Inactive certificate holder, nonlicensee firm owner of a licensed firm, or a person affiliated with a licensed firm; and
 - (a) Such persons are not primarily responsible to the client for the performance or reliability of the product or service; or

(b) Such persons add no significant value to the product or service; or

(c) A third party instead of the client pays the persons for the products or services.

(12) **"Compilation"** means providing a service to be performed in accordance with statements on standards for accounting and review services that is presenting in the form of financial statements, information that is the representation of management (owners) without undertaking to express any assurance on the statements.

(13) **"Contingent fees"** are fees established for the performance of any service pursuant to an arrangement in which no fee will be charged unless a specified finding or result is attained, or in which the amount of the fee is otherwise dependent upon the finding or result of such service.

(14) **"CPA" or "certified public accountant"** means an individual holding a license to practice public accounting under chapter 18.04 RCW or recognized by the board in the state of Washington, including an individual exercising practice privileges pursuant to RCW 18.04.350(2).

(15) **"CPA-Inactive"** means an individual holding a CPA-Inactive certificate recognized in the state of Washington. An individual holding a CPA-Inactive certificate is prohibited from practicing public accounting and may only use the CPA-Inactive title if they are not offering accounting, tax, tax consulting, management advisory, or similar services to the public.

(16) **"CPE"** means continuing professional education.

(17) **"Firm"** means a sole proprietorship, a corporation, or a partnership. "Firm" also means a limited liability company or partnership formed under chapters 25.15 and 18.100 RCW and a professional service corporation formed under chapters 23B.02 and 18.100 RCW.

(18) **"Generally accepted accounting principles"** (GAAP) is an accounting term that encompasses the conventions, rules, and procedures necessary to define accepted accounting practice at a particular time. It includes not only broad guidelines of general application, but also detailed practices and procedures. Those conventions, rules, and procedures provide a standard by which to measure financial presentations.

(19) **"Generally accepted auditing standards"** (GAAS) are guidelines and procedures, promulgated by the AICPA, for conducting individual audits of historical financial statements.

(20) **"Holding out"** means any representation to the public by the use of restricted titles as set forth in RCW 18.04.345 by a person that the person holds a license or practice privileges under the act and that the person offers to perform any professional services to the public. "Holding out" shall not affect or limit a person not required to hold a license under the act from engaging in practices identified in RCW 18.04.350.

(21) **"Home office"** is the location specified by the client as the address to which a service is directed.

(22) **"Inactive"** means the individual held a valid certificate on June 30, 2001, has not met the current requirements of licensure and has been granted CPA-Inactive certificate holder status through the renewal process established by the board. A CPA-Inactive may not practice public accounting nor may the individual use the CPA-Inactive title if they are offering accounting, tax, tax consulting, management advisory, or similar services to the public.

(23) **"Individual"** means a living, human being.

(24) **"Independence"** means an absence of relationships that impair a licensee's impartiality and objectivity in rendering professional services for which a report expressing assurance is prescribed by professional standards.

(25) **"Interactive self-study program"** means a CPE program that provides feedback throughout the course.

(26) **"IRS"** means Internal Revenue Service.

(27) **"License"** means a license to practice public accounting issued to an individual or a firm under the act or the act of another state.

(28) **"Licensee"** means an individual or firm holding a valid license to practice public accounting issued under the act, including out-of-state individuals exercising practice privileges in this state under RCW 18.04.350(2) and out-of-state firms permitted to offer or render certain professional services in this state under the conditions prescribed in

RCW 18.04.195 (1)(b).

(29) **"Manager"** means a manager of a limited liability company licensed as a firm under the act.

(30) **"NASBA"** means the National Association of State Boards of Accountancy.

(31) **"Nonlicensee firm owner"** means an individual, not licensed in any state to practice public accounting, who holds an ownership interest in a firm permitted to practice public accounting in this state.

(32) **"PCAOB"** means Public Company Accounting Oversight Board.

(33) **"Peer review"** means a study, appraisal, or review of one or more aspects of the attest or compilation work of a licensee or licensed firm in the practice of public accounting, by a person or persons who hold licenses and who are not affiliated with the person or firm being reviewed, including a peer review, or any internal review or inspection intended to comply with quality control policies and procedures, but not including the "quality assurance review" under subsection (38) of this section.

(34) **"Person"** means any individual, nongovernmental organization, or business entity regardless of legal form, including a sole proprietorship, firm, partnership, corporation, limited liability company, association, or not-for-profit organization, and including the sole proprietor, partners, members, and, as applied to corporations, the officers.

(35) **"Practice privileges"** are the rights granted by chapter 18.04 RCW to a person who:

(a) Has a principal place of business outside of Washington state;

(b) Is licensed to practice public accounting in another substantially equivalent state;

(c) Meets the statutory criteria for the exercise of privileges as set forth in RCW 18.04.350(2) for individuals or RCW 18.04.195 (1)(b) for firms;

(d) Exercises the right to practice public accounting in this state individually or on behalf of a firm;

(e) Is subject to the personal and subject matter jurisdiction and disciplinary authority of the board in this state;

(f) Must comply with the act and all board rules applicable to Washington state licensees to retain the privilege; and

(g) Consents to the appointment of the issuing state board of another state as agent for the service of process in any action or proceeding by this state's board against the certificate holder or licensee.

(36) **"Principal place of business"** means the office location designated by the licensee for purposes of substantial equivalency and reciprocity.

(37) **"Public practice"** or the **"practice of public accounting"** means performing or offering to perform by a person or firm holding itself out to the public as a licensee, or as an individual exercising practice privileges, for a client or potential client, one or more kinds of services involving the use of accounting or auditing skills, including the issuance of "audit reports," "review reports," or "compilation reports" on financial statements, or one or more kinds of management advisory, or consulting services, or the preparation of tax returns, or the furnishing of advice on tax matters. The "practice of public accounting" shall not include practices that are permitted under the provisions of RCW 18.04.350(10) by persons or firms not required to be licensed under the act.

(38) **"Quality assurance review or QAR"** is the process, established by and conducted at the direction of the board, to study, appraise, or review one or more aspects of the audit, compilation, review, and other professional services for which a report expressing assurance is prescribed by professional standards of a licensee or licensed firm in the practice of public accounting, by a person or persons who hold licenses and who are not affiliated with the person or firm being reviewed.

(39) **"Reciprocity"** means board recognition of licenses, permits, certificates or other public accounting credentials of another jurisdiction that the board will rely upon in full or partial satisfaction of licensing requirements.

(40) **"Referral fees"** see definition of "commissions and referral fees" in subsection (11) of this section.

(41) **"Reports on financial statements"** means any reports or opinions prepared by licensees, based on services performed in accordance with generally accepted auditing standards, standards for attestation engagements, or

standards for accounting and review services, as to whether the presentation of information used for guidance in financial transactions or for accounting for or assessing the status or performance of an entity, whether public, private, or governmental, conforms with generally accepted accounting principles or an "other comprehensive bases of accounting," or the presentation and disclosure requirements of other professional standards. "Reports on financial statements" does not include services referenced in RCW 18.04.350(10) provided by persons not holding a license under the act.

(42) **"Representing oneself"** means having a license, practice privilege, certificate or registration that entitles the holder to use the title "CPA," "CPA-Inactive," or be a nonlicensee firm owner.

(43) **"Rules of professional conduct"** means rules adopted by the board to govern the conduct of licensees, as defined in subsection (28) of this section, while representing themselves to others as licensees. These rules also govern the conduct of CPA-Inactive certificate holders, nonlicensee firm owners, and persons exercising practice privileges pursuant to RCW 18.04.350(2).

(44) **"SEC"** means the Securities and Exchange Commission.

(45) **"Sole proprietorship"** means a legal form of organization owned by one person meeting the requirements of RCW 18.04.195.

(46) **"State"** includes the states and territories of the United States, including the District of Columbia, Puerto Rico, Guam, and the United States Virgin Islands, and the Commonwealth of the Northern Mariana Islands at such time as the board determines that the Commonwealth of the Northern Mariana Islands is issuing licenses under the substantially equivalent standards of RCW 18.04.350 (2)(a).

(47) **"Statements on auditing standards (SAS)"** are interpretations of the generally accepted auditing standards and are issued by the Auditing Standards Board of the AICPA. Licensees are required to adhere to these standards in the performance of audits of financial statements.

(48) **"Statements on standards for accounting and review services (SSARS)"** are standards, promulgated by the AICPA, to give guidance to licensees who are associated with the financial statements of nonpublic companies and issue compilation or review reports.

(49) **"Statements on standards for attestation engagements (SSAE)"** are guidelines, promulgated by the AICPA, for use by licensees in attesting to assertions involving matters other than historical financial statements and for which no other standards exist.

[Statutory Authority: 18.04.055, 18.04.025, 18.04.350, 10-24-009, amended and recodified as § 4-30-010, filed 11/18/10, effective 12/19/10. Statutory Authority: RCW 18.04.055, 18.04.025, 08-18-016, § 4-25-410, filed 8/25/08, effective 9/25/08. Statutory Authority: RCW 18.04.055, 05-01-137, § 4-25-410, filed 12/16/04, effective 1/31/05; 03-24-033, § 4-25-410, filed 11/25/03, effective 12/31/03. Statutory Authority: RCW 18.04.055(16), 02-04-064, § 4-25-410, filed 1/31/02, effective 3/15/02. Statutory Authority: RCW 18.04.055(11), 01-11-124, § 4-25-410, filed 5/22/01, effective 6/30/01; 98-12-020, § 4-25-410, filed 5/27/98, effective 6/27/98; 94-23-071, § 4-25-410, filed 11/15/94, effective 12/16/94.]

WAC 4-30-020

What is the authority for and the purpose of the board's rules?

The Public Accountancy Act (act), chapter 18.04 RCW, establishes the board as the licensing and disciplinary agency for certified public accountants (CPA), CPA-Inactive certificate holders, CPA firms, and owners of CPA firms. The act authorizes the board to promulgate rules to carry out the purpose of the act, which include:

- Protecting the public interest;
- Enhancing the reliability of information used for guidance in financial transactions or for accounting for or assessing financial status or performance;
- Establishing one set of qualifications to be a licensee of this state;
- Assuring that CPAs practicing in Washington have substantially equivalent qualifications to those practicing in other states;
- Regulating ownership of CPA firms;
- Publishing consumer alerts and public protection information regarding persons and firms who violate the act or board rules; and
- Providing general consumer protection information to the public.

The board's rules, contained in chapter 4-25 [4-30] WAC, encompass these subjects:

- Definitions;
- Administration of the board;
- Ethics and prohibited practices;
- Entry and renewal requirements;
- Continuing competency; and
- Regulation and enforcement.

[Statutory Authority: RCW 18.04.055, 10-24-009, recodified as § 4-30-020, filed 11/18/10, effective 12/19/10; 08-18-016, § 4-25-400, filed 8/25/08, effective 9/25/08; 05-01-137, § 4-25-400, filed 12/16/04, effective 1/31/05; 01-22-036, § 4-25-400, filed 10/30/01, effective 12/1/01; 00-11-067, § 4-25-400, filed 5/15/00, effective 6/30/00; 93-12-063, § 4-25-400, filed 5/27/93, effective 7/1/93.]

WAC 4-30-048

Compliance is required with which rules, regulations and professional standards?

Licensees, including out-of-state individuals exercising practice privileges in this state under RCW 18.04.350(2) and out-of-state firms permitted to offer or render certain professional services in this state under the conditions prescribed in RCW 18.04.195 (1)(b), CPA-Inactive certificate holders, CPA firms, nonlicensee firm owners, and employees of such persons must comply with rules, regulations, and professional standards promulgated by the appropriate bodies for each service undertaken. However, if the requirements found in the professional standards listed in this section differ from the requirements found in specific board rules, board rules prevail.

Authoritative bodies include, but are not limited to, the Securities and Exchange Commission (SEC); the Public Company Accounting Oversight Board (PCAOB); the Financial Accounting Standards Board (FASB); the Governmental Accounting Standards Board (GASB); the Cost Accounting Standards Board (CASB); the Federal Accounting Standards Advisory Board (FASAB); the U.S. Governmental Accountability Office (GAO); the Federal Office of Management and Budget (OMB); the Internal Revenue Service (IRS); the American Institute of Certified Public Accountants (AICPA), and federal, state, and local audit, regulatory and tax agencies.

Such standards include:

- (1) Statements on Auditing Standards and related Auditing Interpretations issued by the AICPA;
- (2) Statements on Standards for Accounting and Review Services and related Accounting and Review Services Interpretations issued by the AICPA;
- (3) Statements on Governmental Accounting and Financial Reporting Standards issued by GASB;
- (4) Statements on Standards for Attestation Engagements and related Attestation Engagements Interpretations issued by AICPA;
- (5) Statements of Financial Accounting Standards and Interpretations, and Staff Positions issued by FASB, together with those Accounting Research Bulletins and Accounting Principles Board Opinions which are not superseded by action of the FASB;
- (6) Statement on Standards for Consulting Services issued by the AICPA;
- (7) Statements on Quality Control Standards issued by the AICPA;
- (8) Statements on Standards for Tax Services and Interpretation of Statements on Standards for Tax Services issued by the AICPA;
- (9) Statements on Responsibilities in Personal Financial Planning Practice issued by the AICPA;
- (10) Statements on Standards for Litigation Services issued by the AICPA;
- (11) Professional Code of Conduct issued by the AICPA including interpretations and ethics rulings;
- (12) Governmental Auditing Standards issued by the U.S. Governmental Accountability Office;
- (13) AICPA Industry Audit and Accounting Guides;
- (14) SEC Rules, Concept Releases, Interpretative Releases, and Policy Statements;
- (15) Standards issued by the PCAOB; and
- (16) IRS Circular 230;
- (17) Any additional national or international standards recognized by the AICPA, PCAOB, SEC and/or GAO.

If the professional services are governed by standards not included in subsections (1) through (16) of this section, individuals and firms including persons exercising practice privileges under RCW 18.04.350(2) who offer or render professional services in this state or for clients located in this state and the firms rendering professional services in this state or for clients located in this state through such qualifying individuals must:

- (a) Maintain documentation of the justification for the departure from the standards listed in subsections (1)

through (16) of this section;

(b) Determine and document what standards are applicable; and

(c) Demonstrate compliance with the applicable standards.

[Statutory Authority: RCW 18.04.055(2). 10-24-009, amended and recodified as § 4-30-048, filed 11/18/10, effective 12/19/10; 08-18-016, § 4-25-631, filed 8/25/08, effective 9/25/08; 05-01-137, § 4-25-631, filed 12/16/04, effective 1/31/05; 02-04-064, § 4-25-631, filed 1/31/02, effective 3/15/02. Statutory Authority: RCW 18.04.055 (2) and (6). 00-11-071, § 4-25-631, filed 5/15/00, effective 6/30/00. Statutory Authority: RCW 18.04.055(6). 98-12-050, § 4-25-631, filed 5/29/98, effective 6/29/98. Statutory Authority: RCW 18.40.055 [18.04.055]. 93-22-046, § 4-25-631, filed 10/28/93, effective 11/28/93.]

WAC 4-30-060

What are the education requirements to qualify to apply for the CPA examination?

(1) **Education requirements:** Effective July 1, 2000, to apply for the CPA examination you must have completed:

(a) At least one hundred fifty semester hours (two hundred twenty-five quarter hours) of college education, including;

(b) A baccalaureate or higher degree; and

(c) An accounting concentration as defined as at least:

(i) Twenty-four semester hours (thirty-six quarter hours) or the equivalent in accounting subjects of which at least fifteen semester hours must be at the upper level or graduate level (an upper level course is defined as a course that frequently carries completion of a lower level course(s) as a prerequisite). For the purposes of meeting this subsection, individuals will be given 1.5 credits for each 1.0 graduate level credit of accounting courses taken; and

(ii) Twenty-four semester hours (thirty-six quarter hours) or the equivalent in business administration subjects at the undergraduate or graduate level.

(d) The board will not recognize accounting concentration credits awarded for "life experience" or similar activities retroactively evaluated and recognized by colleges or universities. This restriction is not intended to apply to internships prospectively approved by colleges or universities.

(2) **One hundred eighty-day provision:** If you expect to meet the education requirements of this section within one hundred eighty days following the examination, you will be eligible to take the CPA examination provided you submit a signed Certificate of Enrollment from the educational institution in which you are enrolled stating that you will meet the board's education requirements within one hundred eighty days following the day you first sit for any one section of the examination. If you apply for the exam using the one hundred eighty-day provision, then within two hundred ten days of first sitting for any section of the exam, you must provide the examination administrator complete documentation demonstrating that you met the board's education requirements within one hundred eighty days of first sitting for any one section of the exam. If you do not provide such documentation within the required two hundred ten-day time period, your exam score(s) will not be released and you will not be given credit for any section(s) of the examination. Applicants failing to provide such documentation must reapply as a first-time applicant.

(3) **Education obtained outside the United States:** If you obtained all or a portion of your education outside the United States you must have your education evaluated by a board approved foreign education credential evaluation service. The board will establish the criteria for board approval of foreign education credential evaluation services. The board will not provide education credential evaluation services.

(4) **Semester versus quarter hours:** As used in these rules, a "semester hour" means the conventional college semester hour. Your quarter hours will be converted to semester hours by multiplying them by two-thirds.

(5) **Accreditation standards:** For purposes of this rule, the board will recognize colleges and universities which are accredited in accordance with (a) through (c) of this subsection.

(a) The accredited college or university must be accredited at the time your education was earned by virtue of membership in one of the following accrediting agencies:

(i) Middle States Association of College and Secondary Schools;

(ii) New England Association of Schools and Colleges;

(iii) North Central Association of Colleges and Schools, Higher Learning Commission;

(iv) Northwest Commission on Colleges and Universities (formerly the Northwest Association of Schools and Colleges);

(v) Southern Association of Colleges and Schools;

(vi) Western Association of Schools and Colleges; and

(vii) Accrediting Commission for Independent Colleges and Schools, or its predecessor, the Accrediting Commission of the Association of Independent Colleges and Schools.

(b) If an institution was not accredited at the time your education was earned but is so accredited at the time your application is filed with the board, the institution will be deemed to be accredited for the purpose of (a) of this subsection provided that it:

(i) Certifies that your total educational program would qualify the applicant for graduation with a baccalaureate degree during the time the institution has been accredited; and

(ii) Furnishes the board satisfactory proof, including college catalogue course numbers and descriptions, that the preaccrediting courses used to qualify you for a concentration in accounting are substantially equivalent to postaccrediting courses.

(c) If your degree was received at an accredited college or university as defined by (a) or (b) of this subsection, but the educational program which was used to qualify you for a concentration in accounting included courses taken at nonaccredited institutions, either before or after graduation, such courses will be deemed to have been taken at the accredited institution from which your degree was received, provided the accredited institution either:

(i) Has accepted such courses by including them in its official transcript; or

(ii) Certifies to the board that it will accept such courses for credit toward graduation.

(6) **Alternative to accreditation:** If you graduated from a four-year degree-granting institution that was not accredited at the time your degree was received or at the time your application was filed, you will be deemed to be a graduate of a four-year accredited college or university if a credentials evaluation service approved by the board certifies that your degree is equivalent to a degree from an accredited college or university as defined in subsection (5) of this section. The board does not provide education credential evaluation services.

[Statutory Authority: RCW 18.04.055(5), 18.04.105(1), 10-24-009, amended and recodified as § 4-30-060, filed 11/18/10, effective 12/19/10; 05-01-137, § 4-25-710, filed 12/16/04, effective 1/31/05; 02-04-064, § 4-25-710, filed 1/31/02, effective 3/15/02. Statutory Authority: RCW 18.04.055(5), 95-20-065, § 4-25-710, filed 10/3/95, effective 11/3/95; 93-12-071, § 4-25-710, filed 5/27/93, effective 7/1/93.]

WAC 4-30-070

What are the experience requirements in order to obtain a CPA license?

(1) **Qualifying experience** may be obtained through the practice of public accounting and/or employment in industry or government. In certain situations, employment in academia may also provide experience to obtain some or all of the competency requirements. Qualifying experience may be obtained through one or more employers, with or without compensation, and may consist of a combination of full-time and part-time employment.

(2) Employment experience should demonstrate that it occurred in a work environment and included tasks sufficient to have provided an opportunity to obtain the competencies defined by subsection (3) of this section and:

(a) Covered a minimum twelve-month period (this time period does not need to be consecutive);

(b) Consisted of a minimum of two thousand hours;

(c) Provided the opportunity to utilize the skills generally used in business and accounting and auditing including, but not limited to, accounting for transactions, budgeting, data analysis, internal auditing, preparation of reports to taxing authorities, controllership functions, financial analysis, performance auditing and similar skills;

(d) Be verified by a licensed CPA as meeting the requirements identified in subsection (5) of this section; and

(e) Be obtained no more than eight years prior to the date the board receives your complete license application.

(3) **Competencies:** The experience should demonstrate that the work environment and tasks performed provided the applicant an opportunity to obtain the following competencies:

(a) Knowledge of the Public Accountancy Act and related board rules applicable to licensed persons in the state of Washington;

(b) Assess the achievement of an entity's objectives;

(c) Develop documentation and sufficient data to support analysis and conclusions;

(d) Understand transaction streams and information systems;

(e) Assess risk and design appropriate procedures;

(f) Make decisions, solve problems, and think critically in the context of analysis; and

(g) Communicate scope of work, findings and conclusions effectively.

(4) **The applicant's responsibilities:** The applicant for a license requesting verification is responsible for:

(a) Providing information and evidence to support the applicant's assertion that their job experience could have reasonably provided the opportunity to obtain the specific competencies, included on the applicant's Experience Affidavit form presented for the verifying CPA's evaluation;

(b) Producing that documentation and the completed Experience Affidavit form to a qualified verifying CPA of their choice;

(c) Determining that the verifying CPA meets the requirements of subsection (5) of this section; and

(d) Maintaining this documentation for a minimum of three years.

(5) **Qualification of a verifying CPA:** A verifying CPA must have held a valid CPA license to practice public accounting in the state of Washington or be qualified for practice privileges as defined in RCW 18.04.350(2) for a minimum of five years prior to verifying the candidate's experience, including the date that the applicant's experience is verified. The five years do not need to be consecutive.

[Statutory Authority: RCW 18.04.055(11), 18.04.105 (1)(d), 10-24-009, amended and recodified as § 4-30-070, filed 11/18/10, effective 12/19/10; 05-01-137, § 4-25-730, filed 12/16/04, effective 1/31/05. Statutory Authority: RCW 18.04.055(11) and 18.04.105 (1)(d), 02-04-064, § 4-25-730, filed 1/31/02, effective 3/15/02. Statutory Authority: RCW 18.04.215, 01-03-011, § 4-25-730, filed 1/5/01, effective 6/30/01. Statutory Authority: RCW 18.04.055 and 18.04.215 (1)(a), 99-18-113, § 4-25-730, filed 9/1/99, effective 1/1/00. Statutory Authority: RCW

18.04.055. 93-12-068, § 4-25-730, filed 5/27/93, effective 7/1/93.]

WAC 296-128-530
Professional.

The term "individual employed in a bona fide . . . professional capacity" in RCW 49.46.010 (5)(c) shall mean any employee:

- (1) Whose primary duty consists of the performance of work:
 - (a) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or
 - (b) Original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the intention, imagination, or talent of the employee; or
 - (c) Teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in the school system or educational establishment or institution by which he is employed; and
- (2) Whose work requires the consistent exercise of discretion and judgment in its performance; and
- (3) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical or physical work) and is of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and
- (4) Who does not devote more than 20 percent of his hours worked in the work week to activities which are not an essential part of and necessarily incident to the work described in paragraphs (1) through (3) of this section; and
- (5) Who is compensated for his services on a salary or fee basis at a rate of not less than \$170 per week exclusive of board, lodging, or facilities: Provided, That this paragraph (5) shall not apply in the case of an employee who is the holder of a valid license or certificate permitting the practice of law, medicine, or dentistry and who is actually engaged in the practice thereof: Provided, That an employee who is compensated on a salary or fee basis at a rate of not less than \$250 per week (exclusive of board, lodging, or other facilities), and whose primary duty consists of the performance of work either requiring knowledge of an advanced type in a field of science or learning, which includes work requiring the consistent exercise of discretion and judgment, or requiring invention, imagination, or talent in a recognized field of artistic endeavor, shall be deemed to meet all of the requirements of this section.

[Order 76-5, § 296-128-530, filed 2/24/76.]

operations of his employer or his employer's customers, or

(2) The performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein; and

(b) Who customarily and regularly exercises discretion and independent judgment; and

(c)(1) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined in the regulations of this subpart), or

(2) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge, or

(3) Who executes under only general supervision special assignments and tasks; and

(d) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (c) of this section; and

(e)(1) Who is compensated for his services on a salary or fee basis at a rate of not less than \$155 per week (\$130 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, or

(2) Who, in the case of academic administrative personnel, is compensated for services as required by paragraph (e)(1) of this section, or on a salary basis which is at least equal to the entrance salary for teachers in the school system, educational establishment, or institution by which employed: *Provided*, That an employee who is compensated on a salary or fee basis at a rate of not less than \$250 per week (\$200 per week if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the performance of

work described in paragraph (a) of this section, which includes work requiring the exercise of discretion and independent judgment, shall be deemed to meet all the requirements of this section.

[38 FR 11390, May 7, 1973. as amended at 40 FR 7092, Feb. 19, 1975]

EFFECTIVE DATE NOTE: Paragraph (e) in §541.2 was revised at 46 FR 3013, Jan. 13, 1981. In accordance with the President's Memorandum of January 29, 1981 (46 FR 11227, Feb. 6, 1981), the effective date was postponed indefinitely at 46 FR 11972, Feb. 12, 1981.

The text of paragraph (e) set forth above remains in effect pending further action by the issuing agency. The text of the postponed regulation appears below.

§541.2 Administrative.

* * * * *

(e)(1) Who is compensated for his services on a salary or fee basis at a rate of not less than \$225 per week beginning February 13, 1981 and \$250 per week beginning February 13, 1983 (\$180 per week beginning February 13, 1981 and \$200 per week beginning February 13, 1983, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, or

(2) Who, in the case of academic administrative personnel, is compensated for services as required by paragraph (e)(1) of this section, or on a salary basis which is at least equal to the entrance salary for teachers in the school system, educational establishment, or institution by which employed: *Provided*, That an employee who is compensated on a salary or fee basis at a rate of not less than \$320 per week beginning February 13, 1981 and \$345 per week beginning February 13, 1983 (\$260 per week beginning February 13, 1981 and \$285 per week beginning February 13, 1983, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the performance of work described in paragraph (a) of this section, which includes work requiring the exercise of discretion and independent judgment, shall be deemed to meet all the requirements of this section.

§541.3 Professional.

The term *employee employed in a bona fide * * * professional capacity* in section 13(a)(1) of the Act shall mean any employee:

(a) Whose primary duty consists of the performance of:

(1) Work requiring knowledge of an advance type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or

(2) Work that is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee, or

(3) Teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in the school system or educational establishment or institution by which he is employed, or

(4) Work that requires theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering, and who is employed and engaged in these activities as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field, as provided in § 541.303; and

(b) Whose work requires the consistent exercise of discretion and judgment in its performance; and

(c) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and

(d) Who does not devote more than 20 percent of his hours worked in the workweek to activities which are not an essential part of and necessarily incident to the work described in paragraphs (a) through (c) of this section; and

(e) Who is compensated for services on a salary or fee basis at a rate of not less than \$170 per week (\$150 per week, if employed by other than the Federal

Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities: *Provided*, That this paragraph shall not apply in the case of an employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and who is actually engaged in the practice thereof, nor in the case of an employee who is the holder of the requisite academic degree for the general practice of medicine and is engaged in an internship or resident program pursuant to the practice of medicine or any of its branches, nor in the case of an employee employed and engaged as a teacher as provided in paragraph (a)(3) of this section: *Provided further*, That an employee who is compensated on a salary or fee basis at a rate of not less than \$250 per week (or \$200 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the performance either of work described in paragraph (a) (1), (3), or (4) of this section, which includes work requiring the consistent exercise of discretion and judgment, or of work requiring invention, imagination, or talent in a recognized field of artistic endeavor, shall be deemed to meet all of the requirements of this section: *Provided further*, That the salary or fee requirements of this paragraph shall not apply to an employee engaged in computer-related work within the scope of paragraph (a)(4) of this section and who is compensated on an hourly basis at a rate in excess of 6½ times the minimum wage provided by section 6 of the Act.

[38 FR 11390, May 7, 1973, as amended at 40 FR 7092, Feb. 19, 1975; 57 FR 46744, Oct. 9, 1992]

EFFECTIVE DATE NOTE: Paragraph (e) in § 541.3 was revised at 46 FR 3014, Jan. 13, 1981. In accordance with the President's Memorandum of January 29, 1981 (46 FR 11227, Feb. 6, 1981), the effective date was postponed indefinitely at 46 FR 11972, Feb. 12, 1981.

The text of paragraph (e) set forth above remains in effect pending further action by the issuing agency. The text of the postponed regulation appears below.

§ 541.3 Professional.

* * * * *

(e) Who is compensated for services on a salary or fee basis at a rate of not less than \$250 per week beginning February 13, 1981 and \$280 per week beginning February 13, 1983 (\$225 per week beginning February 13, 1981 and \$250 per week beginning February 13, 1983 if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities: *Provided*, That this paragraph shall not apply in the case of an employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and who is actually engaged in the practice thereof, nor in the case of an employee who is the holder of the requisite academic degree for the general practice of medicine and is engaged in an internship or resident program pursuant to the practice of medicine or any of its branches, nor in the case of an employee employed and engaged as a teacher as provided in paragraph (a)(3) of this section: *Provided further*, That an employee who is compensated on a salary or fee basis at a rate of not less than \$320 per week beginning February 13, 1981 and \$345 per week beginning February 13, 1983 (or \$260 per week beginning February 13, 1981 and \$285 per week beginning February 13, 1983 if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the performance either of work described in paragraph (a) (1) or (3) of this section, which includes work requiring the consistent exercise of discretion and judgment, or of work requiring invention, imagination, or talent in a recognized field of artistic endeavor, shall be deemed to meet all of the requirements of this section.

§ 541.5 Outside salesman.

The term *employee employed * * * in the capacity of outside salesman* in section 13(a)(1) of the Act shall mean any employee:

(a) Who is employed for the purpose of and who is customarily and regularly engaged away from his employer's place or places of business in:

- (1) Making sales within the meaning of section 3(k) of the Act, or
- (2) Obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and

(b) Whose hours of work of a nature other than that described in paragraph

(a)(1) or (2) of this section do not exceed 20 percent of the hours worked in the workweek by nonexempt employees of the employer: *Provided*, That work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall not be regarded as nonexempt work.

§ 541.5a Special provision for motion picture producing industry.

The requirement of §§ 541.1, 541.2, and 541.3 that the employee be paid "on a salary basis" shall not apply to an employee in the motion picture producing industry who is compensated at a base rate of at least \$200 a week (exclusive of board, lodging, or other facilities).

EFFECTIVE DATE NOTE: Section 541.5a was revised at 46 FR 3014, Jan. 13, 1981. In accordance with the President's Memorandum of January 29, 1981 (46 FR 11227, Feb. 6, 1981), the effective date was postponed indefinitely at 46 FR 11972, Feb. 12, 1981.

The text of § 541.5a set forth above remains in effect pending further action by the issuing agency. The text of the postponed regulation appears below.

§ 541.5a Special provision for motion picture producing industry.

The requirement of §§ 541.1, 541.2, and 541.3 that the employee be paid "on a salary basis" shall not apply to an employee in the motion picture producing industry who is compensated at a base rate of at least \$320 per week beginning February 13, 1981 and \$345 per week beginning February 13, 1983 (exclusive of board, lodging, or other facilities).

§ 541.5b Equal pay provisions of section 6(d) of the act apply to executive, administrative, and professional employees, and to outside salesmen.

Effective July 1, 1972, the Fair Labor Standards Act was amended to include within the protection of the equal pay provisions those employees exempt from the minimum wage and overtime pay provisions as bona fide executive, administrative, and professional employees (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesmen under

or nonmanual work directly related to management policies or general business operations of the employer or the employer's customers, or the performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein, where the performance of such primary duty includes work requiring the exercise of discretion and independent judgment. Such a highly paid employee having such work as his or her primary duty is deemed to meet all the requirements in § 541.2 (a) through (e). If an employee qualifies for exemption under this proviso, it is not necessary to test the employee's qualifications in detail under § 541.2 (a) through (e).

(b) In Puerto Rico, the Virgin Islands, and American Samoa, the proviso of § 541.2(c) applies to those administrative employees other than an employee of the Federal Government who are compensated on a salary or fee basis or not less than \$260 per week beginning February 13, 1981 and \$285 per week beginning February 13, 1983.

§ 541.215 Elementary or secondary schools and other educational establishments and institutions.

To be considered for exemption as employed in the capacity of academic administrative personnel, the employment must be in connection with the operation of an elementary or secondary school system, an institution of higher education, or other educational establishment or institution. Sections 3(v) and 3(w) of the Act define elementary and secondary schools as those day or residential schools which provide elementary or secondary education, as determined under State law. Under the laws of most States, such education includes the curriculums in grades 1 through 12; under many it includes also the introductory programs in kindergarten. Such education in some States may include also nursery school programs in elementary education and junior college curriculums in secondary education. Education above the secondary school level is in any event included in the programs of institutions of higher education. Special schools for mentally or physically handicapped or gifted children are included among the educational establishments in which teachers and academic administrative personnel may qualify for the administrative exemp-

tion, regardless of any classification of such schools as elementary, secondary, or higher. Also, for purposes of the exemption, no distinction is drawn between public or private schools. Accordingly, the classification for other purposes of the school system, or educational establishment or institution, is ordinarily not a matter requiring consideration in a determination of whether the exemption applies. If the work is that of a teacher or academic personnel as defined in the regulations, in such an educational system, establishment, or institution, and if the other requirement of the regulations, are met, the level of instruction involved and the status of the school as public or private or operated for profit or not for profit will not alter the availability of the exemption.

EMPLOYEE EMPLOYED IN A BONA FIDE PROFESSIONAL CAPACITY

§ 541.300 General.

The term "professional" is not restricted to the traditional professions of law, medicine, and theology. It includes those professions which have a recognized status and which are based on the acquirement of professional knowledge through prolonged study. It also includes the artistic professions, such as acting or music. Since the test of the bona fide professional capacity of such employment is different in character from the test for persons in the learned professions, an alternative test for such employees is contained in the regulations, in addition to the requirements common to both groups.

[38 FR 11390, May 7, 1973. Redesignated at 57 FR 46744, Oct. 9, 1992.]

§ 541.301 Learned professions.

(a) The "learned" professions are described in § 541.3(a)(1) as those requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study as distinguished from a general academic education and from an apprenticeship and from training in the performance of routine mental, manual, or physical processes.

(b) The first element in the requirement is that the knowledge be of an advanced type. Thus, generally speaking, it must be knowledge which cannot be attained at the high school level.

(c) Second, it must be knowledge in a field of science or learning. This serves to distinguish the professions from the mechanical arts where in some instances the knowledge is of a fairly advanced type, but not in a field of science or learning.

(d) The requisite knowledge, in the third place, must be customarily acquired by a prolonged course of specialized intellectual instruction and study. Here it should be noted that the word "customarily" has been used to meet a specific problem occurring in many industries. As is well known, even in the classical profession of law, there are still a few practitioners who have gained their knowledge by home study and experience. Characteristically, the members of the profession are graduates of law schools, but some few of their fellow professionals whose status is equal to theirs, whose attainments are the same, and whose word is the same did not enjoy that opportunity. Such persons are not barred from the exemption. The word "customarily" implies that in the vast majority of cases the specific academic training is a prerequisite for entrance into the profession. It makes the exemption available to the occasional lawyer who has not gone to law school, or the occasional chemist who is not the possessor of a degree in chemistry, etc., but it does not include the members of such quasi-professions as journalism in which the bulk of the employees have acquired their skill by experience rather than by any formal specialized training. It should be noted also that many employees in these quasi-professions may qualify for exemption under other sections of the regulations in subpart A of this part or under the alternative paragraph of the "professional" definition applicable to the artistic fields.

(e)(1) Generally speaking the professions which meet the requirement for a prolonged course of specialized intellectual instruction and study include law, medicine, nursing, accounting, actuarial computation, engineering, ar-

chitecture, teaching, various types of physical, chemical, and biological sciences, including pharmacy and registered or certified medical technology and so forth. The typical symbol of the professional training and the best prima facie evidence of its possession is, of course, the appropriate academic degree, and in these professions an advanced academic degree is a standard (if not universal) prerequisite. In the case of registered (or certified) medical technologists, successful completion of 3 academic years of preprofessional study in an accredited college or university plus a fourth year of professional course work in a school of medical technology approved by the Council of Medical Education of the American Medical Association will be recognized as a prolonged course of specialized intellectual instruction and study. Registered nurses have traditionally been recognized as professional employees by the Division in its enforcement of the act. Although, in some cases, the course of study has become shortened (but more concentrated), nurses who are registered by the appropriate State examining board will continue to be recognized as having met the requirement of § 541.3(a)(1) of the regulations.

(2) The areas in which professional exemptions may be available are expanding. As knowledge is developed, academic training is broadened, degrees are offered in new and diverse fields, specialties are created and the true specialist, so trained, who is given new and greater responsibilities, comes closer to meeting the tests. However, just as an excellent legal stenographer is not a lawyer, these technical specialists must be more than highly skilled technicians. Many employees in industry rise to executive or administrative positions by their natural ability and good commonsense, combined with long experience with a company, without the aid of a college education or degree in any area. A college education would perhaps give an executive or administrator a more cultured and polished approach but the necessary know-how for doing the executive job would depend upon the person's own inherent talent. The professional person, on the other hand, attains his status

after a prolonged course of specialized intellectual instruction and study.

(f) Many accountants are exempt as professional employees (regardless of whether they are employed by public accounting firms or by other types of enterprises). (Some accountants may qualify for exemption as bona fide administrative employees.) However, exemption of accountants, as in the case of other occupational groups (see § 541.308), must be determined on the basis of the individual employee's duties and the other criteria in the regulations. It has been the Divisions' experience that certified public accountants who meet the salary requirement of the regulations will, except in unusual cases, meet the requirements of the professional exemption since they meet the tests contained in § 541.3. Similarly, accountants who are not certified public accountants may also be exempt as professional employees if they actually perform work which requires the consistent exercise of discretion and judgment and otherwise meet the tests prescribed in the definition of "professional" employee. Accounting clerks, junior accountants, and other accountants, on the other hand, normally perform a great deal of routine work which is not an essential part of and necessarily incident to any professional work which they may do. Where these facts are found such accountants are not exempt. The title "Junior Accountant," however, is not determinative of failure to qualify for exemption any more than the title "Senior Accountant" would necessarily imply that the employee is exempt.

(g)(1) A requisite for exemption as a teacher is the condition that the employee is "employed and engaged" in this activity as a teacher in the school system, or educational establishment or institution by which he is employed.

(2) "Employed and engaged as a teacher" denotes employment and engagement in the named specific occupational category as a requisite for exemption. Teaching consists of the activities of teaching, tutoring, instructing, lecturing, and the like in the activity of imparting knowledge. Teaching personnel may include the following (although not necessarily limited to): Regular academic teachers'

teachers of kindergarten or nursery school pupils or of gifted or handicapped children; teachers of skilled and semiskilled trades and occupations; teachers engaged in automobile driving instruction; aircraft flight instructors; home economics teachers; and vocal or instrumental music instructors. Those faculty members who are engaged as teachers but also spend a considerable amount of their time in extra-curricular activities such as coaching athletic teams or acting as moderators or advisers in such areas as drama, forensics, or journalism are engaged in teaching. Such activities are a recognized part of the school's responsibility in contributing to the educational development of the student.

(3) Within the public schools of all the States, certificates, whether conditional or unconditional, have become a uniform requirement for employment as a teacher at the elementary and secondary levels. The possession of an elementary or secondary teacher's certificate provide a uniform means of identifying the individuals contemplated as being within the scope of the exemption provided by the statutory language and defined in § 541.3(a)(3) with respect to all teachers employed in public schools and those private schools who possess State certificates. However, the private schools of all the States are not uniform in requiring a certificate for employment as an elementary or secondary school teacher and teacher's certificates are not generally necessary for employment as a teacher in institutions of higher education or other educational establishments which rely on other qualification standards. Therefore, a teacher who is not certified but is engaged in teaching in such a school may be considered for exemption provided that such teacher is employed as a teacher by the employing school or school system and satisfies the other requirements of § 541.3.

(4) Whether certification is conditional or unconditional will not affect the determination as to employment within the scope of the exemption contemplated by this section. There is no standard terminology within the States referring to the different kinds of certificates. The meanings of such

labels as permanent, standard, provisional, temporary, emergency, professional, highest standard, limited, and unlimited vary widely. For the purpose of this section, the terminology affixed by the particular State in designating the certificates does not affect the determination of the exempt status of the individual.

[38 FR 11390, May 7, 1973. Redesignated and amended at 57 FR 46744, Oct. 9, 1992.]

§ 541.302 Artistic professions.

(a) The requirements concerning the character of the artistic type of professional work are contained in § 541.3(a)(2). Work of this type is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee.

(b) The work must be "in a recognized field of artistic endeavor." This includes such fields as music, writing, the theater, and the plastic and graphic arts.

(c)(1) The work must be original and creative in character, as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training. In the field of music there should be little difficulty in ascertaining the application of the requirement. Musicians, composers, conductors, soloists, all are engaged in original and creative work within the sense of this definition. In the plastic and graphic arts the requirement is, generally speaking, met by painters who at most are given the subject matter of their painting. It is similarly met by cartoonists who are merely told the title or underlying concept of a cartoon and then must rely on their own creative powers to express the concept. It would not normally be met by a person who is employed as a copyist, or as an "animator" of motion-picture cartoons, or as a retoucher of photographs since it is not believed that such work is properly described as creative in character.

(2) In the field of writing the distinction is perhaps more difficult to draw. Obviously the requirement is met by

essayists or novelists or scenario writers who choose their own subjects and hand in a finished piece of work to their employers (the majority of such persons are, of course, not employees but self-employed). The requirement would also be met, generally speaking, by persons holding the more responsible writing positions in advertising agencies.

(d) Another requirement is that the employee be engaged in work "the result of which depends primarily on the invention, imagination, or talent of the employee." This requirement is easily met by a person employed as an actor, or a singer, or a violinist, or a short-story writer. In the case of newspaper employees the distinction here is similar to the distinction observed above in connection with the requirement that the work be "original and creative in character." Obviously the majority of reporters do work which depends primarily on intelligence, diligence, and accuracy. It is the minority whose work depends primarily on "invention, imaging, or talent." On the other hand, this requirement will normally be met by actors, musicians, painters, and other artists.

(e)(1) The determination of the exempt or nonexempt status of radio and television announcers as professional employees has been relatively difficult because of the merging of the artistic aspects of the job with the commercial. There is considerable variation in the type of work performed by various announcers, ranging from predominantly routine to predominantly exempt work. The wide variation in earnings as between individual announcers, from the highly paid "name" announcer on a national network who is greatly in demand by sponsors to the staff announcer paid a comparatively small salary in a small station, indicates not only great differences in personality, voice and manner, but also in some inherent special ability or talent which, while extremely difficult to define, is nevertheless real.

(2) The duties which many announcers are called upon to perform include: Functioning as a master of ceremonies; playing dramatic, comedy, or straight

§ 541.605; "board, lodging or other facilities" is defined at § 541.606; and "primary duty" is defined at § 541.700.

§ 541.301 Learned professionals.

(a) To qualify for the learned professional exemption, an employee's primary duty must be the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction. This primary duty test includes three elements:

(1) The employee must perform work requiring advanced knowledge;

(2) The advanced knowledge must be in a field of science or learning; and

(3) The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

(b) The phrase "work requiring advanced knowledge" means work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work. An employee who performs work requiring advanced knowledge generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances. Advanced knowledge cannot be attained at the high school level.

(c) The phrase "field of science or learning" includes the traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other similar occupations that have a recognized professional status as distinguished from the mechanical arts or skilled trades where in some instances the knowledge is of a fairly advanced type, but is not in a field of science or learning.

(d) The phrase "customarily acquired by a prolonged course of specialized intellectual instruction" restricts the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best prima facie evidence that an employee meets this require-

ment is possession of the appropriate academic degree. However, the word "customarily" means that the exemption is also available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction. Thus, for example, the learned professional exemption is available to the occasional lawyer who has not gone to law school, or the occasional chemist who is not the possessor of a degree in chemistry. However, the learned professional exemption is not available for occupations that customarily may be performed with only the general knowledge acquired by an academic degree in any field, with knowledge acquired through an apprenticeship, or with training in the performance of routine mental, manual, mechanical or physical processes. The learned professional exemption also does not apply to occupations in which most employees have acquired their skill by experience rather than by advanced specialized intellectual instruction.

(e)(1) *Registered or certified medical technologists.* Registered or certified medical technologists who have successfully completed three academic years of pre-professional study in an accredited college or university plus a fourth year of professional course work in a school of medical technology approved by the Council of Medical Education of the American Medical Association generally meet the duties requirements for the learned professional exemption.

(2) *Nurses.* Registered nurses who are registered by the appropriate State examining board generally meet the duties requirements for the learned professional exemption. Licensed practical nurses and other similar health care employees, however, generally do not qualify as exempt learned professionals because possession of a specialized advanced academic degree is not a standard prerequisite for entry into such occupations.

(3) *Dental hygienists.* Dental hygienists who have successfully completed four academic years of pre-professional

and professional study in an accredited college or university approved by the Commission on Accreditation of Dental and Dental Auxiliary Educational Programs of the American Dental Association generally meet the duties requirements for the learned professional exemption.

(4) *Physician assistants.* Physician assistants who have successfully completed four academic years of pre-professional and professional study, including graduation from a physician assistant program accredited by the Accreditation Review Commission on Education for the Physician Assistant, and who are certified by the National Commission on Certification of Physician Assistants generally meet the duties requirements for the learned professional exemption.

(5) *Accountants.* Certified public accountants generally meet the duties requirements for the learned professional exemption. In addition, many other accountants who are not certified public accountants but perform similar job duties may qualify as exempt learned professionals. However, accounting clerks, bookkeepers and other employees who normally perform a great deal of routine work generally will not qualify as exempt professionals.

(6) *Chefs.* Chefs, such as executive chefs and sous chefs, who have attained a four-year specialized academic degree in a culinary arts program, generally meet the duties requirements for the learned professional exemption. The learned professional exemption is not available to cooks who perform predominantly routine mental, manual, mechanical or physical work.

(7) *Paralegals.* Paralegals and legal assistants generally do not qualify as exempt learned professionals because an advanced specialized academic degree is not a standard prerequisite for entry into the field. Although many paralegals possess general four-year advanced degrees, most specialized paralegal programs are two-year associate degree programs from a community college or equivalent institution. However, the learned professional exemption is available for paralegals who possess advanced specialized degrees in other professional fields and apply advanced knowledge in that field in the

performance of their duties. For example, if a law firm hires an engineer as a paralegal to provide expert advice on product liability cases or to assist on patent matters, that engineer would qualify for exemption.

(8) *Athletic trainers.* Athletic trainers who have successfully completed four academic years of pre-professional and professional study in a specialized curriculum accredited by the Commission on Accreditation of Allied Health Education Programs and who are certified by the Board of Certification of the National Athletic Trainers Association Board of Certification generally meet the duties requirements for the learned professional exemption.

(9) *Funeral directors or embalmers.* Licensed funeral directors and embalmers who are licensed by and working in a state that requires successful completion of four academic years of pre-professional and professional study, including graduation from a college of mortuary science accredited by the American Board of Funeral Service Education, generally meet the duties requirements for the learned professional exemption.

(f) The areas in which the professional exemption may be available are expanding. As knowledge is developed, academic training is broadened and specialized degrees are offered in new and diverse fields, thus creating new specialists in particular fields of science or learning. When an advanced specialized degree has become a standard requirement for a particular occupation, that occupation may have acquired the characteristics of a learned profession. Accrediting and certifying organizations similar to those listed in paragraphs (e)(1), (e)(3), (e)(4), (e)(8) and (e)(9) of this section also may be created in the future. Such organizations may develop similar specialized curriculums and certification programs which, if a standard requirement for a particular occupation, may indicate that the occupation has acquired the characteristics of a learned profession.

§ 541.302 Creative professionals.

(a) To qualify for the creative professional exemption, an employee's primary duty must be the performance of work requiring invention, imagination,



ADMINISTRATIVE POLICY

STATE OF WASHINGTON DEPARTMENT OF LABOR AND INDUSTRIES EMPLOYMENT STANDARDS

TITLE: GENERAL INFORMATION APPLICABLE TO EXEMPTIONS FROM MINIMUM WAGE AND OVERTIME REQUIREMENTS FOR WHITE-COLLAR WORKERS

NUMBER: ES.A.9.2

ISSUED: 6/24/2005

CHAPTER: RCW.49.46.010(5)(c),
RCW 49.46.130(2)(a),
WAC 296-128-500 – 540

SEE ALSO: ES.A.9.3 - 8,
ES.A.8.1 and ES.A.8.2,
ES.A.9.1, ES.A.10.1,
ES.A.10.2 and
ES.A.10.3

ADMINISTRATIVE POLICY DISCLAIMER

This policy is designed to provide general information in regard to the current opinions of the Department of Labor & Industries on the subject matter covered. This policy is intended as a guide in the interpretation and application of the relevant statutes, regulations, and policies, and may not be applicable to all situations. This policy does not replace applicable RCW or WAC standards. If additional clarification is required, the Program Manager for Employment Standards should be consulted.

This document is effective as of the date of print and supersedes all previous interpretations and guidelines. Changes may occur after the date of print due to subsequent legislation, administrative rule, or judicial proceedings. The user is encouraged to notify the Program Manager to provide or receive updated information. This document will remain in effect until rescinded, modified, or withdrawn by the Director or his or her designee.

The administrative policies for the white-collar exemptions have been separated into individual policies and are identified by the following numbers.

<u>ES.A.9.2</u>	General Application
<u>ES.A.9.3</u>	Executive (Short test)
<u>ES.A.9.4</u>	Administrative (Short test)
<u>ES.A.9.5</u>	Professional (Short test)
<u>ES.A.9.6</u>	Computer Professional
<u>ES.A.9.7</u>	Outside Sales
<u>ES.A.9.8</u>	Definition of Fee Basis

GENERAL APPLICATION

1. On August 23, 2004, the U.S. Department of Labor published revised regulations for the "white collar" overtime exempt regulations, including executive, administrative, professional, and outside sales positions. The State regulations on these exemptions have not changed. The federal regulations, and existing state regulations, affect *white-collar employees only* (*executive, administrative, professional, outside sales*).

Employers must comply with both state and federal overtime regulations. Where differences exist between Washington state and new federal overtime regulations, an employer must follow the regulation that is most favorable to the worker. For more specific information on federal regulations, check with the U.S. Department of Labor at their toll free # 1-866-487-9243 or their Web site at http://www.dol.gov/WHD/overtime_pay.htm or with a qualified consultant, to determine how changes in federal overtime requirements affect the specific circumstances.

Washington state overtime regulations generally follow the pre-August 23, 2004 federal overtime regulations. Because the federal regulations changed, there will now be some cases in which the federal regulations are more favorable to workers, and some in which the state regulations are more favorable.

Each of the administrative policies on these exemptions contains a chart with a summarized comparison of the state and federal regulations.

The new federal regulations provide that executive, administrative, or professional workers are also exempt from overtime pay if they are earning more than \$100,000 per year as long as they perform at least one duty in an executive, administrative, or professional function job. State regulations contain no similar provision. Executive, administrative, and professional workers must meet all of the state requirements for the exemptions to apply.

The new federal regulations allow an employer to impose *unpaid* disciplinary suspensions of *one or more full days* for workplace-conduct rule infractions for exempt workers. Washington State allows an *unpaid* disciplinary suspension in increments of less than one week *only* for violations of safety rules of major significance. Unpaid disciplinary suspensions for non-major safety violations cannot be in less than full-week increments.

2. Reliance On Pre-August 23, 2004 Federal Interpretation. Prior to August 23, 2004, state and federal “white collar” exempt regulations had many identical parts. On August 23, 2004, substantial changes were made to the federal regulations. The Department relies on the interpretations of the pre-August 23, 2004 regulations where identical.

3. Employees in executive, administrative, professional, computer professional, and outside sales positions are exempt from the Minimum Wage and Overtime Act, **RCW 49.46**, and its provisions. The Department of Labor & Industries has opted to base the interpretations in these administrative policies from pre-August 23, 2004 U.S. Department of Labor regulations, 29CFR Part 541. Also see #8 below regarding state vs. federal exemptions.

4. Exemption to Minimum Wage and Overtime for Certain Types of Employees (RCW 49.46.010 (5)(c)). **RCW 49.46.010(5)(c)** removes from the definition of “employee” for purposes of minimum wage and overtime individuals employed in “a bona fide executive, administrative or professional capacity” or in the capacity of “outside salesman.”

The statute does not define the terms “executive, administrative, professional, or outside salesman”, but delegates that authority to the Department by rulemaking. The Department’s rules defining the above terms are found at [WAC 296-128-500-540](http://www.wa.gov/WAC/296-128-500-540), including the computer professional exemption adopted by the department in 1998.

5. General Considerations When Determining Whether an Employee is Exempt from Minimum Wage and Overtime as Executive, Administrative, Professional or Outside Sales.

Employers are not required to claim these exemptions. They may pay minimum wage and overtime to all of their employees. Employers choose to claim the exemptions and it is their burden to demonstrate that a particular exemption applies. Exemptions to the wage and hour laws are to be construed narrowly. Employers should carefully check the exact terms and conditions of an exemption before applying it.

A title alone is not sufficient to meet the requirements of these exemptions. The exemption is determined by the employee's actual job duties performed and on the actual payment on a salary basis the equivalent of \$250 per week. Should an exempt worker's duties or method of payment change during their employment so that they no longer meet the exemption's criteria, the worker would no longer be considered exempt and all minimum wage and overtime provisions would apply from the date the criteria were no longer met.

In addition to "duties" requirements, executive, administrative, and professional employees must be compensated on a "salary basis" in order to qualify for the exemption from minimum wage and overtime. The amount of the weekly salary determines which test is to be applied. If the employee is not paid by the week, the requirement will be met if the salary translates into the appropriate weekly equivalent. A salary must be a true salary, not a mere "ruse" for treating the employee as an hourly worker. See Administrative Policy **ES.A.9.1** for Questions and Answers About Salary Basis Regulation, **WAC 296-128-532** and **WAC 296-128-533** for private and public employers adopted effective February 21, 2003. The salary basis regulations apply to executive, administrative, and professional workers.

All of the applicable requirements of the related section must be met for an exemption to apply and merely meeting one or two requirements does not fulfill the exemption.

Application of or recognition of these exemptions will be on a case-by-case basis depending on the relevant facts.

If the specific requirements of a particular exemption are not met, employees are entitled to the payment of overtime for hours worked in excess of forty per week, regardless whether they are paid on a salary, hourly, or other basis.

6. See **ES.A.8.1** entitled "Overtime" and **ES.A.8.2** for brochure entitled "How to Compute Overtime" for specific examples of how to compute overtime when an exemption is not met.

7. If the worker meets all of the criteria in the short test, the requirements of the long test are not considered. If the worker does not meet the requirements of the short test, all of the criteria in the long test must be met.

8. For the purposes of this administrative policy, the short test applications will be provided for each applicable exemption. This policy does not include an explanation of the long test applicable to the executive, administrative and professional exemptions. If there are questions about the long test, contact the department. The L&I offices can be found in the telephone directory and on-line at <http://www.lni.wa.gov> or contact the department in Olympia, WA at 1-360-902-5316.

9. The short test does not apply to employees in an academic administrative exemption in an educational setting. See ES.A.9.4, paragraph 10.

10. Each exemption is summarized separately in administrative policies:

Administrative Policy Number	Title
<u>ES.A.9.3</u>	Executive
<u>ES.A.9.4</u>	Administrative
<u>ES.A.9.5</u>	Professional
<u>ES.A.9.6</u>	Computer Professional
<u>ES.A.9.7</u>	Outside Sales
<u>ES.A.9.8</u>	Definition of "Fee Basis" payments



ADMINISTRATIVE POLICY

STATE OF WASHINGTON DEPARTMENT OF LABOR AND INDUSTRIES EMPLOYMENT STANDARDS

TITLE:	EXEMPTION FROM MINIMUM WAGE AND OVERTIME REQUIREMENTS FOR <u>PROFESSIONAL</u> POSITIONS	NUMBER: ES.A.9.5
		ISSUED: 6/24/2005
CHAPTER:	<u>RCW.49.46.010(5)(c),</u> <u>RCW 49.46.130(2)(a),</u> <u>WAC 296-128-530</u>	SEE ALSO: ES.A.9.2 - 4 and ES.A.9.6 – 8, <u>ES.A.8.1</u> and <u>ES.A.8.2,</u> <u>ES.A.9.1, ES.A.10.1</u> <u>ES.A.10.2,</u> and <u>ES.A.10.3</u>

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PROFESSIONAL (WAC 296-128-530)

1. On August 23, 2004, the U.S. Department of Labor published revised regulations for the "white collar" overtime exempt regulations, including executive, administrative, professional, and outside sales positions. The State regulation on the professional exemption has not changed. The federal regulations, and existing state regulations, affect *white-collar employees only (executive, administrative, professional, outside sales)*.

Employers must comply with both state and federal overtime regulations. Where differences exist between Washington State and new federal overtime regulations, an employer must follow the regulation that is most favorable to the worker. The following chart is designed to provide a summarized analysis of both state and federal regulations for the professional exemption. Greater details of the state professional exemption follow this chart. For more specific information on federal regulations, check with the U.S. Department of Labor at their toll free # 1-866-487-9243, or at their website @ http://www.dol.gov/WHD/overtime_pay.htm or with a qualified consultant, to determine how changes in federal overtime requirements affect the specific circumstances.

Professional

Requirements under state regulations	Requirements under new federal regulations	Differences between state and federal regulations
<p>Must meet all parts of this four-part test in the state regulation:</p> <ol style="list-style-type: none"> 1) Meets minimum salary or fee basis payment of not less than \$250/wk; 2) Primary duty consists of the performance of work either requiring knowledge of an advanced type in a field of science or learning, or 3) Primary duty consists of work requiring invention, imagination, or talent in a recognized field of artistic endeavor 4) Work must require the consistent exercise of discretion and judgment. 	<p>Must meet all parts of this four-part test in the federal regulations:</p> <ol style="list-style-type: none"> 1) Meets minimum salary or fee requirement of not less than \$455/wk; 2) Primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment; 3) Advanced knowledge must be in a field of science or learning, and; 4) Advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction. 	<p>Washington's minimum salary for overtime-exempt workers is \$250/wk vs. the new federal minimum of \$455/wk.</p> <p>Washington does not specifically split professional into learned and creative subdivisions, but there is little difference in application.</p>
<p>Employees classified as "creative professional." Examples may include: music, writing, acting and graphic arts, composers, conductors, soloists, painters, cartoonists, essayists, novelists, short-story writers, screenplay writers, responsible writing positions in advertising agencies, certain journalists.</p>	<p>Must meet all parts of this two-part test in the federal regulation:</p> <ol style="list-style-type: none"> 1) Meets minimum salary or fee requirement of \$455/wk; 2) Primary work requires invention, imagination, originality or talent in a recognized field of artistic or creative endeavor. 	<p>Washington's minimum salary for overtime-exempt workers is \$250/wk vs. the new federal minimum of \$455/wk.</p>
<p>"Computer-related professional" comparison is in Policy ES.A.9.6</p>		<p>It may be possible that a computer professional employee paid on a salary basis may be exempt under the professional exemption. See ES.A.9.6 paragraph number 4.</p>

The new federal regulations provide that executive, administrative, or professional workers are also exempt from overtime pay if they are earning more than \$100,000 per year as long as they perform at least one duty in an executive, administrative, or professional function job. State regulations contain no similar provision. Professional workers must meet all of the state requirements for the exemption to apply.

The new federal regulations allow an employer to impose *unpaid* disciplinary suspensions of *one or more full days* for workplace-conduct rule infractions for exempt workers. Washington State allows an *unpaid* disciplinary suspension in increments of less than one week *only* for violations of safety rules of major significance. Unpaid disciplinary suspensions for non-major safety violations cannot be in less than full-week increments.

2. Reliance On Pre-August 23, 2004 Federal Interpretation. Prior to August 23, 2004, state and federal “white collar” exempt regulations had many identical parts. On August 23, 2004, substantial changes were made to the federal regulations. The Department relies on the interpretations of the pre-August 23, 2004 regulations where identical.

3. The Job Duties Determine Who Meets the Professional Exemption. A person who is employed in a bona fide professional capacity is exempt from the payment of minimum wage and overtime wages.

Certain workers are considered to be professionals according to industry practice or company standard. However, that consideration does not automatically determine the professional exemption in **WAC 296-128-530**. It is the duties required of the job, not the employee’s expertise or title that determines whether the exemption applies. Even though workers may be technically expert, knowledgeable in their field, experienced from many years in the industry, and perform their work to an excellent standard, the job duties must meet the requirements of **WAC 296-128-530** to be exempt from payment of minimum wage and overtime.

4. Professional Employees Must be Compensated on a Salary or Fee Basis. In order to qualify for the professional exemption, the employee must meet the duties and must be compensated on a salary or fee basis. This standard also provides for application of a short test and a long test. See **ES.A.9.8** Fee Basis and **ES.A.9.1** Questions and Answers About Salary Basis.

5. Lawyers, Doctors and Dentists are Exempt Professionals. An employee who has a valid license to practice law, medicine, including residents and interns, or dentistry **and** who actually practices in his or her field is an exempt professional regardless if paid on a salary, hourly, or fee basis. If an individual meets these criteria no further analysis is required. If they hold the degree but do not practice within their licensed profession, the appropriate short or long test must be satisfied for the exemption to apply.

6. Special Short Test Proviso. Employees are considered exempt if they meet the duties and salary test. The salary test is met if they are compensated on a salary or fee basis of \$250 per week or its equivalent and meet the duties test; the duties test is met if their primary duty is work requiring knowledge of an advanced type in a field or science or learning, and it is work that requires the consistent exercise of discretion and judgment, or their primary duty is work which requires invention, imagination or talent in a recognized field of artistic endeavor. If an employee qualifies for exemption under the short test proviso, it is not necessary to test the employee's qualifications in detail under the long test.

A prime characteristic of professional work is the fact that the employee does apply his or her special knowledge or talents with discretion and judgment. Purely mechanical or routine work is not professional.

7. Trainees. The exemption for professional employees does not apply to workers in training for these positions and not actually performing the duties of a full-fledged professional

employee. However, a bona fide professional employee does not lose his or her exempt status merely by undergoing further training for the job performed.

8. Learned Professions Require Knowledge of An Advance Type In a Field of Science or Learning. The learned professions are those requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study that is different from a general academic education, from an apprenticeship, from training in the performance of routine mental, manual, or physical processes. Generally speaking, it must be knowledge that cannot be attained at the high school level.

The word "customarily" implies that in the vast majority of cases the specific academic training is a prerequisite for entrance into the profession. It makes the exemption available to the occasional chemist who is not the possessor of a degree in chemistry, or law, because they have obtained status that is equal to a degreed professional, whose attainments and word are the same but did not graduate from a college or university or law school. It does not include the members of such quasi-professions as journalism in which the bulk of the employees have acquired their skill by experience rather than by any formal specialized training. It should be noted also that many employees in these quasi-professions might qualify for exemption under the executive or administrative regulations or under the alternative paragraph of the professional definition applicable to the artistic fields.

Generally speaking the requisite knowledge which meet the requirement for a prolonged course of specialized intellectual instruction and study include nursing, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical, and biological sciences, including pharmacy and registered or certified medical technology and so forth. The professional must be able to use the advanced knowledge gained in the job performed.

The typical symbol of the professional training and the best evidence of its possession is, of course, the appropriate academic degree, and in these professions an advanced academic degree is standard. In the case of registered or certified medical technologists, successful completion of three academic years of preprofessional study in an accredited college or university plus a fourth year of professional course work in a school of medical technology approved by the Council of Medical Education of the American Medical Association will be recognized as a prolonged course of specialized intellectual instruction and study. Typical Learned Professions include:

8.1 Registered nurses have traditionally been recognized as professional employees. Although, in some cases, the course of study has become shortened, but more concentrated, nurses who are registered by the appropriate State examining board will continue to be recognized as having met the professional requirement.

8.2 Many accountants are exempt as professional employees, regardless of whether they are employed by public accounting firms or by other types of enterprises. Some accountants may qualify for exemption as bona fide administrative employees. However, exemption of accountants, as in the case of other occupational groups, must be determined on the basis of the individual employee's duties and the other criteria in the regulations. Certified public accountants who meet the salary requirement of the regulations will, except in

unusual cases, meet the requirements of the professional exemption. Similarly, accountants who are not certified public accountants may also be exempt as professional employees if they actually perform work that requires the consistent exercise of discretion and judgment and otherwise meet the tests prescribed in the definition of professional employee.

Accounting clerks, junior accountants, and other accountants, on the other hand, normally perform a great deal of routine work that is not an essential part of and necessarily incident to any professional work which they may do. Such accountants are not normally exempt when the majority of their work is routine work. The professional exemption is determined on the basis of the individual employee's duties, which must include the consistent exercise of discretion and judgment. The title "Junior Accountant," however, is not determinative of failure to qualify for exemption any more than the title "Senior Accountant" would necessarily imply that the employee is exempt.

8.3 Teaching and Related Professions. Teaching, instructing or lecturing with the result of imparting knowledge is work subject to the professional exemption.

The primary duty of an employee as a teacher must be that of activity in the field of teaching. The exemption is also met if the teacher has satisfied the educational requirements of the Office of Superintendent of Public Instruction and has been granted the right to teach in public or private schools. Mere certification by the State, or employment in a school will not suffice to qualify an individual for exemption if the individual is not in fact both certified and engaged as a teacher.

Teaching consists of the activities of teaching, tutoring, instructing, lecturing, and the like in the activity of imparting knowledge. Teaching personnel may include the following (although not necessarily limited to): Regular academic teachers', teachers of kindergarten or nursery school pupils or of gifted or handicapped children; teachers of skilled and semiskilled trades and occupations; teachers engaged in automobile driving instruction; aircraft flight instructors; home economics teachers; and vocal or instrumental music instructors. Those faculty members who are engaged as teachers but also spend a considerable amount of their time in extracurricular activities such as coaching athletic teams or acting as moderators or advisers in such areas as drama, forensics, or journalism are engaged in teaching. Such activities are a recognized part of the school's responsibility in contributing to the educational development of the student.

8.4 Artistic Professions. This is work that is original and creative in nature, and work that requires invention, imagination, or talent and discriminating skills in a recognized field of artistic endeavor. This is professional work that requires the individual to be original in the particular artistic field and express creative powers to achieve such results. This is distinguished from work that can be produced by a person with general manual or intellectual ability and training. The result of work that is original and creative in nature depends on and varies according to the intention, imagination and talent of the employee.

The exemption may be met if the work is in a recognized field of artistic endeavor. This includes such fields as music, writing, the theater, and graphic arts.

Musicians, composers, conductors, and soloists who are engaged in original and creative work within the sense of this definition. In graphic arts the requirement is, generally speaking, met by painters who at most are given the subject matter of their painting. The exemption is similarly met by cartoonists who are merely told the title or underlying concept of a cartoon and then must rely on their own creative powers to express the concept. The exemption would not normally be met by a person who is employed as a copyist, or as an animator of motion-picture cartoons, or as a retoucher of photographs since it is not believed that such work is properly described as creative in character.

In the field of writing, essayists or novelists or scenario writers who choose their own subjects and hand in a finished piece of work meet the definition. The exemption would generally be met persons holding the more responsible writing positions in advertising agencies.

Another requirement is that the employee be engaged in work the result of which depends primarily on the invention, imagination, or talent of the employee. A person employed as an actor, or a singer, or a violinist, or a short-story writer easily meets this requirement.

8.5 Radio and Television. There is considerable variation in the type of work performed by various announcers, ranging from predominantly routine to predominantly exempt work. The wide variation in earnings as between individual announcers, from the highly paid name announcer on a national network who is greatly in demand by sponsors to the staff announcer paid a comparatively small salary in a small station, indicates not only great differences in personality, voice and manner, but also in some inherent special ability or talent which, while extremely difficult to define, is nevertheless real.

The duties which many announcers are called upon to perform include: Functioning as a master of ceremonies; playing dramatic, comedy, or straight parts in a program; interviewing; conducting farm, fashion, and home economics programs; covering public events, such as sports programs, in which the announcer may be required to ad lib and describe current changing events; and acting as narrator and commentator. Such work is generally exempt. Work such as giving station identification and time signals, announcing the names of programs, and similar routine work is nonexempt work. In the field of radio entertainment as in other fields of artistic endeavor, the status of an employee as a bona fide professional is in large part dependent upon whether his duties are original and creative in character, and whether they require invention, imagination or talent. The determination of whether a particular announcer is exempt as a professional employee must be based upon his or her individual duties and the amount of exempt and nonexempt work performed, as well as compensation paid.

8.6 Journalism. The field of journalism also employs exempt as well as nonexempt employees under the same or similar job titles. Newspaper writers, with possible rare exceptions in certain highly technical fields, do not meet the

requirements for exemption as professional employees of the learned type. Exemption for newspaper writers as professional employees is normally available only under the provisions for the artistic type. Newspaper writing of the exempt type must, therefore, be predominantly original and creative in character. Only writing that is analytical, interpretative or highly individualized is considered to be creative in nature. The writing of fiction to the extent that it may be found on a newspaper would also be considered as exempt work. Newspaper writers commonly performing work that is original and creative are editorial writers, columnists, critics, and top-flight writers of analytical and interpretative articles.

In the case of newspaper employees the distinction here is similar to the distinction observed in connection with the requirement that the work be original and creative in character. The majority of reporters do work which depends primarily on intelligence, diligence, and accuracy. It is the minority whose work depends primarily on invention, imagination, or talent.

The reporting of news, the rewriting of stories received from various sources, or the routine editorial work of a newspaper is not predominantly original and creative in character and must be considered as nonexempt work. A reporter or news writer ordinarily collects facts about news events by investigation, interview, or personal observation and writes stories reporting these events for publication, or submits the facts to a rewrite employee or other editorial employees for story preparation. Such work is nonexempt work. Reporters covering a police beat, or sent out under specific instructions to cover a murder, fire, accident, ship arrival, convention, sport event, etc., are normally performing duties which are not professional in nature.

Incidental interviewing or investigation, when it is performed as an essential part of and is necessarily incident to an employee's professional work, however, need not be counted as nonexempt work. If a dramatic critic interviews an actor or actress and writes a story around the interview, the work of interviewing and writing the story would be exempt work. However, a dramatic critic who is assigned to cover a routine news event such as a fire or a convention would be doing nonexempt work since covering the fire or the convention would not be necessary and incident to his or her work as a dramatic critic.

9. Exercise of Discretion and Judgment. A professional must perform work requiring the consistent exercise of discretion and judgment. Work that requires discretion and independent judgment is work that is not ordinary or routine in nature.

In general, the exercise of "discretion and independent judgment" implies that the person applies their advanced knowledge gained from their course of study to the particular circumstances. A professional employee must perform work that requires the consistent exercise of discretion and judgment. A prime characteristic of professional work is the fact that the employee does apply his or her special knowledge or talents with discretion and judgment. Purely mechanical or routine work is not professional.

Work that exercises discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The person has the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance. This is different from use of skill in applying techniques, procedures or specific

standards or from freedom to make decisions independently on matters of little consequence. Tasks that are comparatively routine in nature can involve the exercise of discretion and judgment if the person who actually makes the ultimate decisions is doing them.

There are duties that are an essential part of and necessarily incident to professional work. This includes menial tasks that must be performed in order for a professional to complete his or her job and which are essential to the successful completion of the job. An example could include menial tasks in conjunction with a chemist's experiments, despite the fact that identical tasks can and are performed by lab assistants.

10. Application of "Short Test" vs. Long Test. If employees do not meet all of the short test requirements, or hold licenses to practice law, medicine, or dentistry and do not practice in their field as outlined in section 5, all of the long test requirements must be met.

SEC Practice Section (SECPS) - Requirements of Membership

Section 1000.08(d) – Continuing Professional Education of Audit Firm Personnel

Ensure that all professionals in the firm residing in the United States, including CPAs and non-CPAs, participate in at least 20 hours of qualifying continuing professional education (CPE) every year and at least 120 hours every three years. Effective for CPE years beginning on or after January 1, 1995, professionals who devote at least 25% of their time to performing audit, review or other attest engagements (excluding compilations), or who have the partner/manager-level responsibility for the overall supervision or review of any such engagements, must obtain at least 40% (eight hours in any one year and 48 hours every three years) of their required CPE in subjects relating to accounting and auditing. The term accounting and auditing subjects should be broadly interpreted, and for example, include subjects relating to the business or economic environments of the entities to which the professional is assigned.^{fn1}

Section 1000.08(l) – Communication by Written Statement to all Professional Personnel of Firm Policies and Procedures on the Recommendation and Approval of Accounting Principles, Present and Potential Client Relationships, and the Types of Services Provided

Communicate through a written statement to all professional firm personnel the broad principles that influence the firm's quality control and operating policies and procedures on, as a minimum, matters related to the recommendation and approval of accounting principles, present and potential client relationships, and the types of services provided, and inform professional firm personnel periodically that compliance with those principles is mandatory.^{fn3} (Appendix H, SECPS §1000.42 is an illustration of such a statement.)

Section 1000.08(m) – Notification of the Commission of Resignations and Dismissals from Audit Engagements for Commission Registrants

When the member firm has been the auditor for an SEC registrant (as defined in Appendix D, SECPS §1000.38) and has resigned, declined to stand for re-election or been dismissed, report the fact that the client-auditor relationship has ceased directly in writing to the former SEC client, with a simultaneous copy to the Office of the Chief Accountant of the Securities and Exchange Commission.^{fn4} Such report shall be sent to the former SEC client and to the Office of the Chief Accountant by the end of the fifth business day following the member firm's determination that the client-auditor relationship has ended, irrespective of whether or not the registrant has reported the change in auditors in a timely filed Form 8-K.

Section 1000.08(n) – Audit Firm Obligations with Respect to the Policies and Procedures of Correspondent Firms and of Other Members of International Firms or International Associations of Firms

For SECPS member firms that are members of, correspondents with, or similarly associated with international firms or international associations of firms, seek adoption of policies and procedures by the international organization or individual foreign associated firms^{fn5} that are consistent with the objectives set forth in Appendix K, SECPS §1000.45 for SEC registrants.^{fn6}

Section 1000.08(o) – Policies and Procedures to Comply with Independence Requirements

Ensure that the member firm has policies and procedures in place to comply with applicable independence requirements of the AICPA, SEC and Independence Standards Board.^{fn7}

Footnotes (SEC Practice Section (SECPS) - Requirements of Membership):

^{fn1} See SECPS §8000 for additional information about the continuing professional education requirement and the manner in which compliance is to be measured.

[^{fn2}] [Superseded by Auditing Standard No. 7, Engagement Quality Review, effective for engagement quality reviews of audits and interim reviews for fiscal years beginning on or after December 15, 2009]

^{fn3} Firms that become members of the Section shall prepare and issue such a statement within six months of joining the Section.

^{fn4} See Appendix I, SECPS §1000.43, for standard form of such report.

^{fn5} For this purpose, a foreign associated firm is a firm domiciled outside of the United States and its territories that is a member of, correspondent with, or similarly associated with an international association of firms with which the SECPS member is associated.

^{fn6} See Appendix D, SECPS §1000.38, "Revised Definition of an SEC Engagement" for purposes of determining compliance with the membership requirements of SECPS §1000.08e, f, g, h, i, k, m, n, o, and p.

^{fn7} See Appendix L, SECPS §1000.46, "Independence Quality Controls" for purposes of determining compliance with the membership requirement.

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Auditing Standard No. 3

Audit Documentation

Supersedes AU sec. 339, Audit Documentation, and AU sec. 9339, Audit Documentation: Auditing Interpretations of Section 339

Effective Date: For audits of financial statements, which may include an audit of internal control over financial reporting, with respect to fiscal years ending on or after November 15, 2004. For other engagements conducted pursuant to the standards of the PCAOB, including reviews of interim financial information, this standard takes effect beginning with the first quarter ending after the first financial statement audit covered by this standard.

Final Rule: PCAOB Release No. 2004-006

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Appendix A Background and Basis for Conclusions

INTRODUCTION

1. This standard establishes general requirements for documentation the auditor should prepare and retain in connection with engagements conducted pursuant to the standards of the Public Company Accounting Oversight Board ("PCAOB"). Such engagements include an audit of financial statements, an audit of internal control over financial reporting, and a review of interim financial information. This standard does not replace specific documentation requirements of other standards of the PCAOB.

OBJECTIVES OF AUDIT DOCUMENTATION

2. *Audit documentation* is the written record of the basis for the auditor's conclusions that provides the support for the auditor's representations, whether those representations are contained in the auditor's report or otherwise. Audit documentation also facilitates the planning, performance, and supervision of the engagement, and is the basis for the review of the quality of the work because it provides the reviewer with written documentation of the evidence supporting the auditor's significant conclusions. Among other things, audit documentation includes records of the planning and performance of the work, the procedures performed, evidence obtained, and conclusions reached by the auditor. Audit documentation also may be referred to as *work papers* or *working papers*.

Note: An auditor's representations to a company's board of directors or audit committee, stockholders, investors, or other interested parties are usually included in the auditor's report accompanying the financial statements of the company. The auditor also might make oral representations to the company or others, either on a voluntary basis or if necessary to comply with professional standards, including in

connection with an engagement for which an auditor's report is not issued. For example, although an auditor might not issue a report in connection with an engagement to review interim financial information, he or she ordinarily would make oral representations about the results of the review.

3. Audit documentation is reviewed by members of the engagement team performing the work and might be reviewed by others. Reviewers might include, for example:
 - a. Auditors who are new to an engagement and review the prior year's documentation to understand the work performed as an aid in planning and performing the current engagement.

[The following subparagraph is effective for audits of fiscal years beginning on or after December 15, 2010. See PCAOB Release No. 2010-004. For audits of fiscal years beginning before December 15, 2010, [click here](#).]

- b. Supervisory personnel who review documentation prepared by other members of the engagement team.
 - c. Engagement supervisors and engagement quality reviewers who review documentation to understand how the engagement team reached significant conclusions and whether there is adequate evidential support for those conclusions.
 - d. A successor auditor who reviews a predecessor auditor's audit documentation.
 - e. Internal and external inspection teams that review documentation to assess audit quality and compliance with auditing and related professional practice standards; applicable laws, rules, and regulations; and the auditor's own quality control policies.
 - f. Others, including advisors engaged by the audit committee or representatives of a party to an acquisition.

AUDIT DOCUMENTATION REQUIREMENT

4. The auditor must prepare audit documentation in connection with each engagement conducted pursuant to the standards of the PCAOB. Audit documentation should be prepared in sufficient detail to provide a clear understanding of its purpose, source, and the conclusions reached. Also, the documentation should be appropriately organized to provide a clear link to the significant findings or issues. ^{1/} Examples of audit documentation include memoranda, confirmations, correspondence, schedules, audit programs, and letters of representation. Audit documentation may be in the form of paper, electronic files, or other media.

5. Because audit documentation is the written record that provides the support for the representations in the auditor's report, it should:

- a. Demonstrate that the engagement complied with the standards of the PCAOB,
 - b. Support the basis for the auditor's conclusions concerning every relevant financial statement assertion, and
 - c. Demonstrate that the underlying accounting records agreed or reconciled with the financial statements.

6. The auditor must document the procedures performed, evidence obtained, and conclusions reached with respect to relevant financial statement assertions. ^{2/} Audit documentation must clearly demonstrate that the work was in fact performed. This documentation requirement applies to the work of all those who participate in the engagement as well as to the work of specialists the auditor uses as evidential matter in evaluating relevant financial statement assertions. Audit documentation must contain sufficient information to enable an experienced auditor, having no previous connection with the engagement:

- a. To understand the nature, timing, extent, and results of the procedures performed, evidence obtained, and conclusions reached, and
 - b. To determine who performed the work and the date such work was completed as well as the person who reviewed the work and the date of such review.

Note: An *experienced auditor* has a reasonable understanding of audit activities and has studied the company's industry as well as the accounting and auditing issues relevant to the industry.

7. In determining the nature and extent of the documentation for a financial statement assertion, the auditor should consider the following factors:

- Nature of the auditing procedure;
- Risk of material misstatement associated with the assertion;
- Extent of judgment required in performing the work and evaluating the results, for example, accounting estimates require greater judgment and commensurately more extensive documentation;
- Significance of the evidence obtained to the assertion being tested; and
- Responsibility to document a conclusion not readily determinable from the documentation of the procedures performed or evidence obtained.

Application of these factors determines whether the nature and extent of audit documentation is adequate.

8. In addition to the documentation necessary to support the auditor's final conclusions, audit documentation must include information the auditor has identified relating to significant findings or issues that is inconsistent with or contradicts the auditor's final conclusions. The relevant records to be retained include, but are not limited to, procedures performed in response to the information, and records documenting consultations on, or resolutions of, differences in professional judgment among members of the engagement team or between the engagement team and others consulted.

9. If, after the documentation completion date (defined in paragraph 15), the auditor becomes aware, as a result of a lack of documentation or otherwise, that audit procedures may not have been performed, evidence may not have been obtained, or appropriate conclusions may not have been reached, the auditor must determine, and if so demonstrate, that sufficient procedures were performed, sufficient evidence was obtained, and appropriate conclusions were reached with respect to the relevant financial statement assertions. To accomplish this, the auditor must have persuasive other evidence. Oral explanation alone does not constitute persuasive other evidence, but it may be used to clarify other written evidence.

- If the auditor determines and demonstrates that sufficient procedures were performed, sufficient evidence was obtained, and appropriate conclusions were reached, but that documentation thereof is not adequate, then the auditor should consider what additional documentation is needed. In preparing additional documentation, the auditor should refer to paragraph 16.
- If the auditor cannot determine or demonstrate that sufficient procedures were performed, sufficient evidence was obtained, or appropriate conclusions were reached, the auditor should comply with the provisions of AU sec. 390, *Consideration of Omitted Procedures After the Report Date*.

[The following paragraph is effective for audits of fiscal years beginning on or after December 15, 2010. See PCAOB Release No. 2010-004.]

9A. Documentation of risk assessment procedures and responses to risks of misstatement should include (1) a summary of the identified risks of misstatement and the auditor's assessment of risks of material misstatement at the financial statement and assertion levels and (2) the auditor's responses to the risks of material misstatement, including linkage of the responses to those risks.

DOCUMENTATION OF SPECIFIC MATTERS

10. Documentation of auditing procedures that involve the inspection of documents or confirmation, including tests of details, tests of operating effectiveness of controls, and walkthroughs, should include identification of the items inspected. Documentation of auditing procedures related to the inspection of significant contracts or agreements should include abstracts or copies of the documents.

Note: The identification of the items inspected may be satisfied by indicating the source from which the

items were selected and the specific selection criteria, for example:

- If an audit sample is selected from a population of documents, the documentation should include identifying characteristics (for example, the specific check numbers of the items included in the sample).
- If all items over a specific dollar amount are selected from a population of documents, the documentation need describe only the scope and the identification of the population (for example, all checks over \$10,000 from the October disbursements journal).
- If a systematic sample is selected from a population of documents, the documentation need only provide an identification of the source of the documents and an indication of the starting point and the sampling interval (for example, a systematic sample of sales invoices was selected from the sales journal for the period from October 1 to December 31, starting with invoice number 452 and selecting every 40th invoice).

11. Certain matters, such as auditor independence, staff training and proficiency and client acceptance and retention, may be documented in a central repository for the public accounting firm ("firm") or in the particular office participating in the engagement. If such matters are documented in a central repository, the audit documentation of the engagement should include a reference to the central repository. Documentation of matters specific to a particular engagement should be included in the audit documentation of the pertinent engagement.

[The following paragraph is effective for audits of fiscal years beginning on or after December 15, 2010. See PCAOB Release No. 2010-004. For audits of fiscal years beginning before December 15, 2010, [click here](#).]

12. The auditor must document significant findings or issues, actions taken to address them (including additional evidence obtained), and the basis for the conclusions reached in connection with each engagement. *Significant findings or issues* are substantive matters that are important to the procedures performed, evidence obtained, or conclusions reached, and include, but are not limited to, the following:

- a. Significant matters involving the selection, application, and consistency of accounting principles, including related disclosures. **2A**
- b. Results of auditing procedures that indicate a need for significant modification of planned auditing procedures, the existence of material misstatements (including omissions in the financial statements), the existence of significant deficiencies, or material weaknesses in internal control over financial reporting.
- c. Accumulated misstatements and evaluation of uncorrected misstatements, including the quantitative and qualitative factors the auditor considered to be relevant to the evaluation. **2B**
- d. Disagreements among members of the engagement team or with others consulted on the engagement about final conclusions reached on significant accounting or auditing matters, including the basis for the final resolution of those disagreements. If an engagement team member disagrees with the final conclusions reached, he or she should document that disagreement.
- e. Circumstances that cause significant difficulty in applying auditing procedures.
- f. Significant changes in the auditor's risk assessments, including risks that were not identified previously, and the modifications to audit procedures or additional audit procedures performed in response to those changes. **2C**
- f-1. Risks of material misstatement that are determined to be significant risks and the results of the auditing procedures performed in response to those risks.
- g. Any matters that could result in modification of the auditor's report.

13. The auditor must identify all significant findings or issues in an *engagement completion document*. This document may include either all information necessary to understand the significant findings,

issues or cross-references, as appropriate, to other available supporting audit documentation. This document, along with any documents cross-referenced, should collectively be as specific as necessary in the circumstances for a reviewer to gain a thorough understanding of the significant findings or issues.

Note: The engagement completion document prepared in connection with the annual audit should include documentation of significant findings or issues identified during the review of interim financial information.

RETENTION OF AND SUBSEQUENT CHANGES TO AUDIT DOCUMENTATION

14. The auditor must retain audit documentation for seven years from the date the auditor grants permission to use the auditor's report in connection with the issuance of the company's financial statements (*report release date*), unless a longer period of time is required by law. If a report is not issued in connection with an engagement, then the audit documentation must be retained for seven years from the date that fieldwork was substantially completed. If the auditor was unable to complete the engagement, then the audit documentation must be retained for seven years from the date the engagement ceased.

15. Prior to the report release date, the auditor must have completed all necessary auditing procedures and obtained sufficient evidence to support the representations in the auditor's report. A complete and final set of audit documentation should be assembled for retention as of a date not more than 45 days after the report release date (*documentation completion date*). If a report is not issued in connection with an engagement, then the documentation completion date should not be more than 45 days from the date that fieldwork was substantially completed. If the auditor was unable to complete the engagement, then the documentation completion date should not be more than 45 days from the date the engagement ceased.

16. Circumstances may require additions to audit documentation after the report release date. Audit documentation must not be deleted or discarded after the documentation completion date, however, information may be added. Any documentation added must indicate the date the information was added, the name of the person who prepared the additional documentation, and the reason for adding it.

17. Other standards require the auditor to perform procedures subsequent to the report release date in certain circumstances. For example, in accordance with AU sec. 711, *Filings Under Federal Securities Statutes* , auditors are required to perform certain procedures up to the effective date of a registration statement. ^{3!} The auditor must identify and document any additions to audit documentation as a result of these procedures consistent with the previous paragraph.

18. The office of the firm issuing the auditor's report is responsible for ensuring that all audit documentation sufficient to meet the requirements of paragraphs 4-13 of this standard is prepared and retained. Audit documentation supporting the work performed by other auditors (including auditors associated with other offices of the firm, affiliated firms, or non-affiliated firms), must be retained by or be accessible to the office issuing the auditor's report. ^{4!}

[The following paragraph is effective for audits of fiscal years beginning on or after December 15, 2010. See PCAOB Release No. 2010-004. For audits of fiscal years beginning before December 15, 2010, [click here](#).]

19. In addition, the office issuing the auditor's report must obtain, and review and retain, prior to the report release date, the following documentation related to the work performed by other auditors (including auditors associated with other offices of the firm, affiliated firms, or non-affiliated firms):

- a. An engagement completion document consistent with paragraphs 12 and 13.

Note: This engagement completion document should include all cross-referenced, supporting audit documentation.

- b. A list of significant risks, the auditor's responses, and the results of the auditor's related procedures.
- c. Sufficient information relating to any significant findings or issues that are inconsistent with or

contradict the final conclusions, as described in paragraph 8.

- d. Any findings affecting the consolidating or combining of accounts in the consolidated financial statements.
- e. Sufficient information to enable the office issuing the auditor's report to agree or to reconcile the financial statement amounts audited by the other auditor to the information underlying the consolidated financial statements.
- f. A schedule of accumulated misstatements, including a description of the nature and cause of each accumulated misstatement, and an evaluation of uncorrected misstatements, including the quantitative and qualitative factors the auditor considered to be relevant to the evaluation.
- g. All significant deficiencies and material weaknesses in internal control over financial reporting, including a clear distinction between those two categories.
- h. Letters of representations from management.
- i. All matters to be communicated to the audit committee.

If the auditor decides to make reference in his or her report to the audit of the other auditor, however, the auditor issuing the report need not perform the procedures in this paragraph and, instead, should refer to AU sec. 543, *Part of Audit Performed by Other Independent Auditors*.

20. The auditor also might be required to maintain documentation in addition to that required by this standard. ^{5I}

[Paragraph deleted, effective for fiscal years beginning on or after December 15, 2010. See PCAOB Release No. 2010-004. For audits of fiscal years beginning before December 15, 2010, [click here](#).]

[21.]

^{1I} See paragraph 12 of this standard for a description of significant findings or issues.

[The following footnote is effective for audits of fiscal years ending on or after November 15, 2007. See PCAOB Release No. 2007-005A. For audits of fiscal years ending before November 15, 2007, [click here](#).]

^{2I} Relevant financial statement assertions are described in paragraphs 28-33 of PCAOB Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements*.

[The following footnote is effective for audits of fiscal years beginning on or after December 15, 2010. See PCAOB Release No. 2010-004.]

^{2AI} See paragraphs 12-13 of Auditing Standard No. 12, *Identifying and Assessing Risks of Material Misstatement*, and paragraphs .66-.67 of AU sec. 316, *Consideration of Fraud in a Financial Statement Audit*.

[The following footnote is effective for audits of fiscal years beginning on or after December 15, 2010. See PCAOB Release No. 2010-004.]

^{2BI} See paragraphs 10-23 of Auditing Standard No. 14, *Evaluating Audit Results*.

[The following footnote is effective for audits of fiscal years beginning on or after December 15, 2010. See PCAOB Release No. 2010-004.]

^{2CI} See paragraph 74 of Auditing Standard No. 12, *Identifying and Assessing Risks of Material Misstatement*, and paragraph 36 of Auditing Standard No. 14, *Evaluating Audit Results*.

^{3I} Section 11 of the Securities Act of 1933 makes specific mention of the auditor's responsibility as an expert when the auditor's report is included in a registration statement under the 1933 Act.

^{4/} Section 106(b) of the Sarbanes-Oxley Act of 2002 imposes certain requirements concerning production of the work papers of a foreign public accounting firm on whose opinion or services the auditor relies. Compliance with this standard does not substitute for compliance with Section 106(b) or any other applicable law.

^{5/} For example, the SEC requires auditors to retain, in addition to documentation required by this standard, memoranda, correspondence, communications (for example, electronic mail), other documents, and records (in the form of paper, electronic, or other media) that are created, sent, or received in connection with an engagement conducted in accordance with auditing and related professional practice standards and that contain conclusions, opinions, analyses, or data related to the engagement. (*Retention of Audit and Review Records*, 17 CFR §210.2-06, effective for audits or reviews completed on or after October 31, 2003.)

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Auditing Standard No. 3

Audit Documentation

APPENDIX A

Background and Basis for Conclusions

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Introduction

A1. This appendix summarizes considerations that the Public Company Accounting Oversight Board ("PCAOB" or "Board") deemed significant in developing this standard. This appendix includes reasons for accepting certain views and rejecting others.

A2. Section 103(a)(2)(A)(i) of the Sarbanes-Oxley Act of 2002 (the "Act") directs the Board to establish auditing standards that require registered public accounting firms to prepare and maintain, for at least seven years, audit documentation "in sufficient detail to support the conclusions reached" in the auditor's report. Accordingly, the Board has made audit documentation a priority.

Background

A3. Auditors support the conclusions in their reports with a work product called *audit documentation*, also referred to as *working papers* or *work papers*. Audit documentation supports the basis for the conclusions in the auditor's report. Audit documentation also facilitates the planning, performance, and supervision of the engagement and provides the basis for the review of the quality of the work by providing the reviewer with written documentation of the evidence supporting the auditor's significant conclusions. Examples of audit documentation include memoranda, confirmations, correspondence, schedules, audit programs, and letters of representation. Audit documentation may be in the form of paper, electronic files, or other media.

A4. The Board's standard on audit documentation is one of the fundamental building blocks on which both the integrity of audits and the Board's oversight will rest. The Board believes that the quality and integrity of

an audit depends, in large part, on the existence of a complete and understandable record of the work the auditor performed, the conclusions the auditor reached, and the evidence the auditor obtained that supports those conclusions. Meaningful reviews, whether by the Board in the context of its inspections or through other reviews, such as internal quality control reviews, would be difficult or impossible without adequate documentation. Clear and comprehensive audit documentation is essential to enhance the quality of the audit and, at the same time, to allow the Board to fulfill its mandate to inspect registered public accounting firms to assess the degree of compliance of those firms with applicable standards and laws.

A5. The Board began a standards-development project on audit documentation by convening a public roundtable discussion on September 29, 2003, to discuss issues and hear views on the subject. Participants at the roundtable included representatives from public companies, public accounting firms, investor groups, and regulatory organizations.

A6. Prior to this roundtable discussion, the Board prepared and released a briefing paper on audit documentation that posed several questions to help identify the objectives - and the appropriate scope and form - of audit documentation. In addition, the Board asked participants to address specific issues in practice relating to, among other things, changes in audit documentation after release of the audit report, essential elements and the appropriate amount of detail of audit documentation, the effect on audit documentation of a principal auditor's decision to use the work of other auditors, and retention of audit documentation. Based on comments made at the roundtable, advice from the Board's staff, and other input the Board received, the Board determined that the pre-existing standard on audit documentation, Statement on Auditing Standards ("SAS") No. 96, *Audit Documentation*, was insufficient for the Board to discharge appropriately its standard-setting obligations under Section 103(a) of the Act. In response, the Board developed and issued for comment, on November 17, 2003, a proposed auditing standard titled, *Audit Documentation*.

A7. The Board received 38 comment letters from a variety of interested parties, including auditors, regulators, professional associations, government agencies, and others. Those comments led to some changes in the requirements of the standard. Also, other changes made the requirements easier to understand. The following sections summarize significant views expressed in those comment letters and the Board's responses to those comments.

Objective of This Standard

A8. The objective of this standard is to improve audit quality and enhance public confidence in the quality of auditing. Good audit documentation improves the quality of the work performed in many ways, including, for example:

- Providing a record of actual work performed, which provides assurance that the auditor accomplishes the planned objectives.
- Facilitating the reviews performed by supervisors, managers, engagement partners, engagement quality reviewers, ¹ and PCAOB inspectors.
- Improving effectiveness and efficiency by reducing time-consuming, and sometimes inaccurate, oral explanations of what was done (or not done).

A9. The documentation requirements in this standard should result in more effective and efficient oversight of registered public accounting firms and associated persons, thereby improving audit quality and enhancing investor confidence.

A10. Inadequate audit documentation diminishes audit quality on many levels. First, if audit documentation does not exist for a particular procedure or conclusion related to a significant matter, it casts doubt as to whether the necessary work was done. If the work was not documented, then it becomes difficult for the engagement team, and others, to know what was done, what conclusions were reached, and how those conclusions were reached. In addition, good audit documentation is very important in an environment in which engagement staff changes or rotates. Due to engagement staff turnover, knowledgeable staff on an engagement may not be available for the next engagement.

Audit Programs

A11. Several commenters suggested that audit documentation should include audit programs. Audit programs were specifically mentioned in SAS No. 96 as a form of audit documentation.

A12. The Board accepted this recommendation, and paragraph 4 in the final standard includes audit programs as an example of documentation. Audit programs may provide evidence of audit planning as well as limited evidence of the execution of audit procedures, but the Board believes that signed-off audit programs should generally not be used as the sole documentation that a procedure was performed, evidence was obtained, or a conclusion was reached. An audit program aids in the conduct and supervision of an engagement, but completed and initialed audit program steps should be supported with proper documentation in the working papers.

Reviewability Standard

A13. The proposed standard would have adapted a standard of reviewability from the U.S. General Accounting Office's ("GAO") documentation standard for government and other audits conducted in accordance with generally accepted government auditing standards ("GAGAS"). The GAO standard provides that "Audit documentation related to planning, conducting, and reporting on the audit should contain sufficient information to enable an experienced auditor who has had no previous connection with the audit to ascertain from the audit documentation the evidence that supports the auditors' significant judgments and conclusions."^{2/} This requirement has been important in the field of government auditing because government audits have long been reviewed by GAO auditors who, although experienced in auditing, do not participate in the actual audits. Moreover, the Panel on Audit Effectiveness recommended that sufficient, specific requirements for audit documentation be established to enable public accounting firms' internal inspection teams as well as others, including reviewers outside of the firms, to assess the quality of engagement performance.^{3/} Audits and reviews of issuers' financial statements will now, under the Act, be subject to review by PCAOB inspectors. Therefore, a documentation standard that enables an inspector to understand the work that was performed in an audit or review is appropriate.

A14. Accordingly, the Board's proposed standard would have required that audit documentation contain sufficient information to enable an experienced auditor, having no previous connection with the engagement, to understand the work that was performed, the name of the person(s) who performed it, the date it was completed, and the conclusions reached. This experienced auditor also should have been able to determine who reviewed the work and the date of such review.

A15. Some commenters suggested that the final standard more specifically describe the qualifications of an experienced auditor. These commenters took the position that only an engagement partner with significant years of experience would have the experience necessary to be able to understand all the work that was performed and the conclusions that were reached. One commenter suggested that an auditor who is reviewing audit documentation should have experience and knowledge consistent with the experience and knowledge that the auditor performing the audit would be required to possess, including knowledge of the current accounting, auditing, and financial reporting issues of the company's industry. Another said that the characteristics defining an experienced auditor should be consistent with those expected of the auditor with final responsibility for the engagement.

A16. After considering these comments, the Board has provided additional specificity about the meaning of the term, *experienced auditor*. The standard now describes an experienced auditor as one who has a reasonable understanding of audit activities and has studied the company's industry as well as the accounting and auditing issues relevant to the industry.

A17. Some commenters also suggested that the standard, as proposed, did not allow for the use of professional judgment. These commenters pointed to the omission of a statement about professional judgment found in paragraph 4.23 of GAGAS that states, "The quantity, type, and content of audit documentation are a matter of the auditors' professional judgment." A nearly identical statement was found in the interim auditing standard, SAS No. 96, *Audit Documentation*.

A18. Auditors exercise professional judgment in nearly every aspect of planning, performing, and reporting on an audit. Auditors also exercise professional judgment in the documentation of an audit and other

engagements. An objective of this standard is to ensure that auditors give proper consideration to the need to document procedures performed, evidence obtained, and conclusions reached in light of time and cost considerations in completing an engagement.

A19. Nothing in the standard precludes auditors from exercising their professional judgment. Moreover, because professional judgment might relate to any aspect of an audit, the Board does not believe that an explicit reference to professional judgment is necessary every time the use of professional judgment may be appropriate.

Audit Documentation Must Demonstrate That the Work was Done

A20. A guiding principle of the proposed standard was that auditors must document procedures performed, evidence obtained, and conclusions reached. This principle is not new and was found in the interim standard, SAS No. 96, *Audit Documentation*, which this standard supersedes. Audit documentation also should demonstrate compliance with the standards of the PCAOB and include justification for any departures.

A21. The proposed standard would have adapted a provision in the California Business and Professions Code which provides that if documentation does not exist, then there is a rebuttable presumption that the work had not been done.

A22. The objections to this proposal fell into two general categories: the effect of the rebuttable presumption on legal proceedings and the perceived impracticality of documenting every conversation or conclusion that affected the engagement. Discussion of these issues follows.

Rebuttable Presumption

A23. Commenters expressed concern about the effects of the proposed language on regulatory or legal proceedings outside the context of the PCAOB's oversight. They argued that the rebuttable presumption might be understood to establish evidentiary rules for use in judicial and administrative proceedings in other jurisdictions.

A24. Some commenters also had concerns that oral explanation alone would not constitute persuasive other evidence that work was done, absent any documentation. Those commenters argued that not allowing oral explanations when there was no documentation would essentially make the presumption "irrebuttable." Moreover, those commenters argued that it was inappropriate for a professional standard to predetermine for a court the relative value of evidence.

A25. The Board believes that complete audit documentation is necessary for a quality audit or other engagement. The Board intends the standard to require auditors to document procedures performed, evidence obtained, and conclusions reached to improve the quality of audits. The Board also intends that a deficiency in documentation is a departure from the Board's standards. Thus, although the Board removed the phrase *rebuttable presumption*, the Board continues to stress, in paragraph 9 of the standard, that the auditor must have persuasive other evidence that the procedures were performed, evidence was obtained, and appropriate conclusions were reached with respect to relevant financial statement assertions.

A26. The term *should* (presumptively mandatory responsibility) was changed to *must* (unconditional responsibility) in paragraph 6 to establish a higher threshold for the auditor. Auditors have an unconditional requirement to document their work. Failure to discharge an unconditional responsibility is a violation of the standard and Rule 3100, which requires all registered public accounting firms to adhere to the Board's auditing and related professional practice standards in connection with an audit or review of an issuer's financial statements.

A27. The Board also added two new paragraphs to the final standard to explain the importance and associated responsibility of performing the work and adequately documenting all work that was performed. Paragraph 7 provides a list of factors the auditor should consider in determining the nature and extent of documentation. These factors should be considered by both the auditor in preparing the documentation and the reviewer in evaluating the documentation.

A28. In paragraph 9 of this standard, if, after the documentation completion date, as a result of a lack of documentation or otherwise, it appears that audit procedures may not have been performed, evidence may not have been obtained, or appropriate conclusions may not have been reached, the auditor must determine, and if so demonstrate, that sufficient procedures were performed, sufficient evidence was obtained, and appropriate conclusions were reached with respect to the relevant financial statement assertions. In those circumstances, for example, during an inspection by the Board or during the firm's internal quality control review, the auditor is required to demonstrate with persuasive other evidence that the procedures were performed, the evidence was obtained, and appropriate conclusions were reached. In this and similar contexts, oral explanation alone does not constitute persuasive other evidence. However, oral evidence may be used to clarify other written evidence.

A29. In addition, more reliable, objective evidence may be required depending on the nature of the test and the objective the auditor is trying to achieve. For example, if there is a high risk of a material misstatement with respect to a particular assertion, then the auditor should obtain and document sufficient procedures for the auditor to conclude on the fairness of the assertion.

Impracticality

A30. Some commenters expressed concern that the proposed standard could be construed or interpreted to require the auditor to document every conversation held with company management or among the engagement team members. Some commenters also argued that they should not be required to document every conclusion, including preliminary conclusions that were part of a thought process that may have led them to a different conclusion, on the ground that this would result in needless and costly work performed by the auditor. Commenters also expressed concern that an unqualified requirement to document procedures performed, evidence obtained, and conclusions reached without allowing the use of auditor judgment would increase the volume of documentation but not the quality. They stated that it would be unnecessary, time-consuming, and potentially counterproductive to require the auditor to make a written record of everything he or she did.

A31. The Board's standard distinguishes between (1) an audit procedure that must be documented and (2) a conversation with company management or among the members of the engagement team. Inquiries with management should be documented when an inquiry is important to a particular procedure. The inquiry could take place during planning, performance, or reporting. The auditor need not document each conversation that occurred.

A32. A final conclusion is an integral part of a working paper, unless the working paper is only for informational purposes, such as documentation of a discussion or a process. This standard does not require that the auditor document each interim conclusion reached in arriving at the risk assessments or final conclusions. Conclusions reached early on during an audit may be based on incomplete information or an incorrect understanding. Nevertheless, auditors should document a final conclusion for every audit procedure performed, if that conclusion is not readily apparent based on documented results of the procedures.

A33. The Board also believes the reference to *specialists* is an important element of paragraph 6. Specialists play a vital role in audit engagements. For example, appraisers, actuaries, and environmental consultants provide valuable data concerning asset values, calculation assumptions, and loss reserves. When using the work of a specialist, the auditor must ensure that the specialist's work, as it relates to the audit objectives, also is adequately documented. For example, if the auditor relies on the work of an appraiser in obtaining the fair value of commercial property available for sale, then the auditor must ensure the appraisal report is adequately documented. Moreover, the term *specialist* in this standard is intended to include any specialist the auditor relies on in conducting the work, including those employed or retained by the auditor or by the company.

Audit Adjustments

A34. Several commenters recommended that the definition of *audit adjustments* in this proposed standard should be consistent with the definition contained in AU sec. 380, *Communication with Audit Committees*.

A35. Although the Board recognizes potential benefits of having a uniform definition of the term *audit adjustments*, the Board does not believe that the definition in AU sec. 380 is appropriate for this documentation standard because that definition was intended for communication with audit committees. The Board believes that the definition should be broader so that the engagement partner, engagement quality reviewer, and others can be aware of all proposed corrections of misstatements, whether or not recorded by the entity, of which the auditor is aware, that were or should have been proposed based on the audit evidence.

A36. Adjustments that should have been proposed based on known audit evidence are material misstatements that the auditor identified but did not propose to management. Examples include situations in which (1) the auditor identifies a material error but does not propose an adjustment and (2) the auditor proposes an adjustment in the working papers, but fails to note the adjustment in the summary or schedule of proposed adjustments.

Information That Is Inconsistent with or Contradicts the Auditor's Final Conclusions

A37. Paragraph .25 of AU sec. 326, *Evidential Matter*, states: "In developing his or her opinion, the auditor should consider relevant evidential matter regardless of whether it appears to corroborate or to contradict the assertions in the financial statements." Thus, during the conduct of an audit, the auditor should consider all relevant evidential matter even though it might contradict or be inconsistent with other conclusions. Audit documentation must contain information or data relating to significant findings or issues that are inconsistent with the auditor's final conclusions on the relevant matter.

A38. Also, information that initially appears to be inconsistent or contradictory, but is found to be incorrect or based on incomplete information, need not be included in the final audit documentation, provided that the apparent inconsistencies or contradictions were satisfactorily resolved by obtaining complete and correct information. In addition, with respect to differences in professional judgment, auditors need not include in audit documentation preliminary views based on incomplete information or data.

Retention of Audit Documentation

A39. The proposed standard would have required an auditor to retain audit documentation for seven years after completion of the engagement, which is the minimum period permitted under Section 103(a)(2)(A)(i) of the Act. In addition, the proposed standard would have added a new requirement that the audit documentation must be assembled for retention within a reasonable period of time after the auditor's report is released. Such reasonable period of time should not exceed 45 days.

A40. In general, those commenting on this documentation retention requirement did not have concerns with the time period of 45 days to assemble the working papers. However, some commenters suggested the Board tie this 45-day requirement to the filing date of the company's financial statements with the SEC. One commenter recommended that the standard refer to the same trigger date for initiating both the time period during which the auditor should complete work paper assembly and the beginning of the seven-year retention period.

A41. For consistency and practical implications, the Board agreed that the standard should have the same date for the auditor to start assembling the audit documentation and initiating the seven-year retention period. The Board decided that the seven-year retention period begins on the *report release date*, which is defined as the date the auditor grants permission to use the auditor's report in connection with the issuance of the company's financial statements. In addition, auditors will have 45 days to assemble the complete and final set of audit documentation, beginning on the report release date. The Board believes that using the report release date is preferable to using the filing date of the company's financial statements, since the auditor has ultimate control over granting permission to use his or her report. If an auditor's report is not issued, then the audit documentation is to be retained for seven years from the date that fieldwork was substantially completed. If the auditor was unable to complete the engagement, then the seven-year period begins when the work on the engagement ceased.

Section 802 of Sarbanes-Oxley and the SEC's Implementing Rule

A42. Many commenters had concerns about the similarity in language between the proposed standard and the SEC final rule (issued in January 2003) on record retention, *Retention of Records Relevant to Audits and Reviews*.⁴¹ Some commenters recommended that the PCAOB undertake a project to identify and resolve all differences between the proposed standard and the SEC's final rule. These commenters also suggested that the Board include similar language from the SEC final rule, Rule 2-06 of Regulation S-X, which limits the requirement to retain some items.

Differences between Section 802 and This Standard

A43. The objective of the Board's standard is different from the objective of the SEC's rule on record retention. The objective of the Board's standard is to require auditors to *create* certain documentation to enhance the quality of audit documentation, thereby improving the quality of audits and other related engagements. The records retention section of this standard, mandated by Section 103 of the Act, requires registered public accounting firms to "prepare and maintain for a period of not less than 7 years, *audit work papers, and other information related to any audit report*, in sufficient detail to support the conclusions reached in such report." (emphasis added)

A44. In contrast, the focus of the SEC rule is to require auditors to *retain* documents that the auditor does create, in order that those documents will be available in the event of a regulatory investigation or other proceeding. As stated in the release accompanying the SEC's final rule (SEC Release No. 33-8180):

Section 802 of the Sarbanes-Oxley Act is intended to address the destruction or fabrication of evidence and the preservation of "financial and audit records." We are directed under that section to promulgate rules related to the retention of records relevant to the audits and reviews of financial statements that companies file with the Commission.

A45. The SEC release further states, "New rule 2-06 ... addresses the retention of documents relevant to enforcement of the securities laws, Commission rules, and criminal laws."

A46. Despite their different objectives, the proposed standard and SEC Rule 2-06 use similar language in describing documentation generated during an audit or review. Paragraph 4 of the proposed standard stated that, "Audit documentation ordinarily consists of *memoranda, correspondence, schedules, and other documents created or obtained in connection with the engagement and may be in the form of paper, electronic files, or other media.*" Paragraph (a) of SEC Rule 2-06 describes "records relevant to the audit or review" that must be retained as, (1) "workpapers and other documents that form the basis of the audit or review and (2) *memoranda, correspondence, communications, other documents, and records (including electronic records), which: [a]re created, sent or received in connection with the audit or review and [c]ontain conclusions, opinions, analyses, or financial data related to the audit or review. ...*" (numbering and emphasis added).

A47. The SEC makes a distinction between the objectives of categories (1) and (2). Category (1) includes audit documentation. Documentation to be retained according to the Board's standard clearly falls within category (1). Items in category (2) include "desk files" which are more than "what traditionally has been thought of as auditor's 'workpapers'." The SEC's rule requiring auditors to retain items in category (2) have the principal purpose of facilitating enforcement of securities laws, SEC rules, and criminal laws. This is not an objective of the Board's standard. According to SEC Rule 2-06, items in category (2) are limited to those which: (a) are created, sent or received in connection with the audit or review, and (b) contain conclusions, opinions, analyses, or financial data related to the audit or review. The limitations, (a) and (b), do not apply to category (1).

A48. Paragraph 4 of the final standard deletes the reference in the proposed standard to "other documents created or obtained in connection with the engagement." The Board decided to keep "correspondence" in the standard because correspondence can be valid audit evidence. Paragraph 20 of the standard reminds the auditor that he or she may be required to maintain documentation in addition to that required by this standard.

Significant Matters and Significant Findings or Issues

A49. Some commenters asked how the term *significant matters*, in Rule 2-06, relates to the term *significant findings or issues* in the Board's standard. The SEC's release accompanying its final Rule 2-06 states that "... *significant matters* is intended to refer to the documentation of substantive matters that are important to the audit or review process or to the financial statements of the issuer. ..." This is very similar to the term *significant findings or issues* contained in paragraph 12 of the Board's standard which requires auditors to document *significant findings or issues*, actions taken to address them (including additional evidence obtained), and the basis for the conclusions reached. Examples of significant findings or issues are provided in the standard.

A50. Based on the explanation in the SEC's final rule and accompanying release, the Board believes that *significant matters* are included in the meaning of *significant findings or issues* in the Board's standard. The Board is of the view that *significant findings or issues* is more comprehensive and provides more clarity than *significant matters* and, therefore, has not changed the wording in the final standard.

Changes to Audit Documentation

A51. The proposed standard would have required that any changes to the working papers after completion of the engagement be documented without deleting or discarding the original documents. Such documentation must indicate the date the information was added, by whom it was added, and the reason for adding it.

A52. One commenter recommended that the Board provide examples of auditing procedures that should be performed before the report release date and procedures that may be performed after the report release date. Some commenters also requested clarification about the treatment of changes to documentation that occurred after the completion of the engagement but before the report release date. Many commenters recommended that the Board more specifically describe post-issuance procedures. The Board generally agreed with these comments.

A53. The final standard includes two important dates for the preparation of audit documentation: (1) the report release date and (2) the documentation completion date.

- Prior to the report release date, the auditor must have completed all necessary auditing procedures, including clearing review notes and providing support for all final conclusions. In addition, the auditor must have obtained sufficient evidence to support the representations in the auditor's reports before the report release date.
- After the report release date and prior to the documentation completion date, the auditor has 45 calendar days in which to assemble the documentation.

A54. During the audit, audit documentation may be superseded for various reasons. Often, during the review process, reviewers annotate the documentation with clarifications, questions, and edits. The completion process often involves revising the documentation electronically and generating a new copy. The SEC's final rule on record retention, *Retention of Records Relevant to Audits and Reviews*, 51 explains that the SEC rule does not require that the following documents generally need to be retained: superseded drafts of memoranda, financial statements or regulatory filings; notes on superseded drafts of memoranda, financial statements or regulatory filings that reflect incomplete or preliminary thinking; previous copies of workpapers that have been corrected for typographical errors or errors due to training of new employees; and duplicates of documents. This standard also does not require auditors to retain such documents as a general matter.

A55. Any documents, however, that reflect information that is either inconsistent with or contradictory to the conclusions contained in the final working papers may not be discarded. Any documents added must indicate the date they were added, the name of the person who prepared them, and the reason for adding them.

A56. If the auditor obtains and documents evidence after the report release date, the auditor should refer to the interim auditing standards, AU sec. 390, *Consideration of Omitted Procedures After the Report Date* and AU sec. 561, *Subsequent Discovery of Facts Existing at the Date of the Auditor's Report*. Auditors should not discard any previously existing documentation in connection with obtaining and documenting evidence after

the report release date.

A57. The auditor may perform certain procedures subsequent to the report release date. For example, pursuant to AU sec. 711, *Filings Under Federal Securities Statutes*, auditors are required to perform certain procedures up to the effective date of a registration statement. The auditor should identify and document any additions to audit documentation as a result of these procedures. No audit documentation should be discarded after the documentation completion date, even if it is superseded in connection with any procedures performed, including those performed pursuant to AU sec. 711.

A58. Additions to the working papers may take the form of memoranda that explain the work performed, evidence obtained, and conclusions reached. Documentation added to the working papers must indicate the date the information was added, the name of the person adding it, and the reason for adding it. All previous working papers must remain intact and not be discarded.

A59. Documentation added to the working papers well after completion of the audit or other engagement is likely to be of a lesser quality than that produced contemporaneously when the procedures were performed. It is very difficult to reconstruct activities months, and perhaps years, after the work was actually performed. The turnover of both firm and company staff can cause difficulty in reconstructing conversations, meetings, data, or other evidence. Also, with the passage of time memories fade. Oral explanation can help confirm that procedures were performed during an audit, but oral explanation alone does not constitute persuasive other evidence. The primary source of evidence should be documented at the time the procedures are performed, and oral explanation should not be the primary source of evidence. Furthermore, any oral explanation should not contradict the documented evidence, and appropriate consideration should be given to the credibility of the individual providing the oral explanation.

Multi-Location Audits and Using the Work of Other Auditors

A60. The proposed standard would have required the principal auditor to maintain specific audit documentation when he or she decided not to make reference to the work of another auditor.

A61. The Board also proposed an amendment to AU sec. 543 concurrently with the proposed audit documentation standard. The proposed amendment would have required the principal auditor to review the documentation of the other auditor to the same extent and in the same manner that the audit work of all those who participated in the engagement is reviewed.

A62. Commenters expressed concerns that these proposals could present conflicts with certain non-U.S. laws. Those commenters also expressed concern about the costs associated with the requirement for the other auditor to ship their audit documentation to the principal auditor. In addition, the commenters also objected to the requirement that principal auditors review the work of other auditors as if they were the principal auditor's staff.

Audit Documentation Must be Accessible to the Office Issuing the Auditor's Report

A63. After considering these comments, the Board decided that it could achieve one of the objectives of the proposed standard (that is, to require that the issuing office have access to those working papers on which it placed reliance) without requiring that the working papers be shipped to the issuing office. Further, given the potential difficulties of shipping audit documentation from various non-U.S. locations, the Board decided to modify the proposed standard to require that audit documentation either be retained by or be accessible to the issuing office.

A64. In addition, instead of requiring that all of the working papers be shipped to the issuing office, the Board decided to require that the issuing office obtain, review, and retain certain summary documentation. Thus, the public accounting firm issuing an audit report on consolidated financial statements of a multinational company may not release that report without the documentation described in paragraph 19 of the standard.

A65. The auditor must obtain and review and retain, prior to the report release date, documentation described in paragraph 19 of the standard, in connection with work performed by other offices of the public

accounting firm or other auditors, including affiliated or non-affiliated firms, that participated in the audit. For example, an auditor that uses the work of another of its offices or other affiliated or non-affiliated public accounting firms to audit a subsidiary that is material to a company's consolidated financial statements must obtain the documentation described in paragraph 19 of the standard, prior to the report release date. On the other hand, an auditor that uses the work of another of its offices or other affiliated or non-affiliated firms, to perform selected procedures, such as observing the physical inventories of a company, may not be required to obtain the documentation specified in paragraph 19 of the standard. However, this does not reduce the need for the auditor to obtain equivalent documentation prepared by the other auditor when those instances described in paragraph 19 of the standard are applicable.

Amendment to AU Sec. 543, Part of Audit Performed by Other Independent Auditors

A66. Some commenters also objected to the proposed requirement in the amendment to AU sec. 543, *Part of Audit Performed by Other Independent Auditors*, that the principal auditor review another auditor's audit documentation. They objected because they were of the opinion such a review would impose an unnecessary cost and burden given that the other auditor will have already reviewed the documentation in accordance with the standards established by the principal auditor. The commenters also indicated that any review by the principal auditor would add excessive time to the SEC reporting process, causing even more difficulties as the SEC Form 10-K reporting deadlines have become shorter recently and will continue to shorten next year.

A67. The Board accepted the recommendation to modify the proposed amendment to AU sec. 543, *Part of Audit Performed by Other Independent Auditors*. Thus, in the final amendment, the Board imposes the same unconditional responsibility on the principal auditor to obtain certain audit documentation from the other auditor prior to the report release date. The final amendment also provides that the principal auditor should consider performing one or more of the following procedures:

- Visit the other auditors and discuss the audit procedures followed and results thereof.
- Review the audit programs of the other auditors. In some cases, it may be appropriate to issue instructions to the other auditors as to the scope of the audit work.
- Review additional audit documentation of the other auditors relating to significant findings or issues in the engagement completion document.

Effective Date

A68. The Board proposed that the standard and related amendment would be effective for engagements completed on or after June 15, 2004. Many commenters were concerned that the effective date was too early. They pointed out that some audits, already begun as of the proposed effective date, would be affected and that it could be difficult to retroactively apply the standard. Some commenters also recommended delaying the effective date to give auditors adequate time to develop and implement processes and provide training with respect to several aspects of the standard.

A69. After considering the comments, the Board has delayed the effective date. However, the Board also believes that a delay beyond 2004 is not in the public interest.

A70. The Board concluded that the implementation date of this standard should coincide with that of PCAOB Auditing Standard No. 2, *An Audit of Internal Control Over Financial Reporting Performed in Conjunction with an Audit of Financial Statements*, because of the documentation issues prevalent in PCAOB Auditing Standard No. 2. Therefore, the Board has decided that the standard will be effective for audits of financial statements with respect to fiscal years ending on or after November 15, 2004. The effective date for reviews of interim financial information and other engagements, conducted pursuant to the standards of the PCAOB, would occur beginning with the first quarter ending after the first financial statement audit covered by this standard.

Reference to Audit Documentation As the Property of the Auditor

A71. Several commenters noted that SAS No. 96, *Audit Documentation*, the interim auditing standard on audit documentation, referred to audit documentation as the property of the auditor. This was not included in the proposed standard because the Board did not believe ascribing property rights would have furthered this

standard's purpose to enhance the quality of audit documentation.

Confidential Client Information

A72. SAS No. 96, *Audit Documentation*, also stated that, "the auditor has an ethical, and in some situations a legal, obligation to maintain the confidentiality of client information," and referenced Rule 301, *Confidential Client Information*, of the AICPA's Code of Professional Conduct. Again, the Board's proposed standard on audit documentation did not include this provision. In adopting certain interim standards and rules as of April 16, 2003, the Board did not adopt Rule 301 of the AICPA's Code of Professional Conduct. In this standard on audit documentation, the Board seeks neither to establish confidentiality standards nor to modify or detract from any existing applicable confidentiality requirements.

^{1/} The engagement quality reviewer is referred to as the concurring partner reviewer in the membership requirements of the AICPA SEC Practice Section. The Board adopted certain of these membership requirements as they existed on April 16, 2003. Some firms also may refer to this designated reviewer as the second partner reviewer.

^{2/} U.S. General Accounting Office, *Government Auditing Standards*, "Field Work Standards for Financial Audits" (2003 Revision), paragraph 4.22.

^{3/} Panel on Audit Effectiveness, *Report and Recommendations* (Stamford, Ct: Public Oversight Board, August 31, 2000).

^{4/} SEC Regulation S-X, 17 C.F.R. § 210.2-06 (SEC Release No. 33-8180, January 2003). (The final rule was effective in March 2003.)

^{5/} See footnote 4.

AU Section 210

Training and Proficiency of the Independent Auditor

Source: SAS No. 1, section 210; SAS No. 5.

Issue date, unless otherwise indicated: November, 1972.

.01 The first general standard is:

The auditor must have adequate technical training and proficiency to perform the audit.

[Revised, November 2006, to reflect conforming changes necessary due to the issuance of Statement on Auditing Standards No. 113.]

.02 This standard recognizes that however capable a person may be in other fields, including business and finance, he cannot meet the requirements of the auditing standards without proper education and experience in the field of auditing.

.03 In the performance of the audit which leads to an opinion, the independent auditor holds himself out as one who is proficient in accounting and auditing. The attainment of that proficiency begins with the auditor's formal education and extends into his subsequent experience. The independent auditor must undergo training adequate to meet the requirements of a professional. This training must be adequate in technical scope and should include a commensurate measure of general education. The junior assistant, just entering upon an auditing career, must obtain his professional experience with the proper supervision and review of his work by a more experienced superior. The nature and extent of supervision and review must necessarily reflect wide variances in practice. The auditor charged with final responsibility for the engagement must exercise a seasoned judgment in the varying degrees of his supervision and review of the work done and judgment exercised by his subordinates, who in turn must meet the responsibility attaching to the varying gradations and functions of their work.

.04 The independent auditor's formal education and professional experience complement one another; each auditor exercising authority upon an engagement should weigh these attributes in determining the extent of his supervision of subordinates and review of their work. It should be recognized that the training of a professional man includes a continual awareness of developments taking place in business and in his profession. He must study, understand, and apply new pronouncements on accounting principles and auditing procedures as they are developed by authoritative bodies within the accounting profession.

.05 In the course of his day-to-day practice, the independent auditor encounters a wide range of judgment on the part of management, varying from true objective judgment to the occasional extreme of deliberate misstatement. He is retained to audit and report upon the financial statements of a business because, through his training and experience, he has become skilled in accounting and auditing and has acquired the ability to consider objectively

[As amended, effective for audits of financial statements for periods ending on or after December 15, 1997, by Statement on Auditing Standards No. 82.]

.04 The matter of due professional care concerns what the independent auditor does and how well he or she does it. The quotation from *Cooley on Torts* provides a source from which an auditor's responsibility for conducting an audit with due professional care can be derived. The remainder of the section discusses the auditor's responsibility in the context of an audit. [As amended, April 1982, by Statement on Auditing Standards No. 41. As amended, effective for audits of financial statements for periods ending on or after December 15, 1997, by Statement on Auditing Standards No. 82.]

.05 An auditor should possess "the degree of skill commonly possessed" by other auditors and should exercise it with "reasonable care and diligence" (that is, with due professional care). [Paragraph added, effective for audits of financial statements for periods ending on or after December 15, 1997, by Statement on Auditing Standards No. 82.]

.06 Auditors should be assigned to tasks and supervised commensurate with their level of knowledge, skill, and ability so that they can evaluate the audit evidence they are examining. The auditor with final responsibility for the engagement should know, at a minimum, the relevant professional accounting and auditing standards and should be knowledgeable about the client.³ The auditor with final responsibility is responsible for the assignment of tasks to, and supervision of, assistants.⁴ [Paragraph added, effective for audits of financial statements for periods ending on or after December 15, 1997, by Statement on Auditing Standards No. 82.]

Professional Skepticism

.07 Due professional care requires the auditor to exercise *professional skepticism*. Professional skepticism is an attitude that includes a questioning mind and a critical assessment of audit evidence. The auditor uses the knowledge, skill, and ability called for by the profession of public accounting to diligently perform, in good faith and with integrity, the gathering and objective evaluation of evidence. [Paragraph added, effective for audits of financial statements for periods ending on or after December 15, 1997, by Statement on Auditing Standards No. 82.]

.08 Gathering and objectively evaluating audit evidence requires the auditor to consider the competency and sufficiency of the evidence. Since evidence is gathered and evaluated throughout the audit, professional skepticism should be exercised throughout the audit process. [Paragraph added, effective for audits of financial statements for periods ending on or after December 15, 1997, by Statement on Auditing Standards No. 82.]

.09 The auditor neither assumes that management is dishonest nor assumes unquestioned honesty. In exercising professional skepticism, the auditor should not be satisfied with less than persuasive evidence because of a belief that management is honest. [Paragraph added, effective for audits of financial statements for periods ending on or after December 15, 1997, by Statement on Auditing Standards No. 82.]

³ See section 311, *Planning and Supervision*, paragraph .07. [Footnote added, effective for audits of financial statements for periods ending on or after December 15, 1997, by Statement on Auditing Standards No. 82.]

⁴ See section 311.11. [Footnote added, effective for audits of financial statements for periods ending on or after December 15, 1997, by Statement on Auditing Standards No. 82.]

AU Section 311

Planning and Supervision

[Superseded, effective for audits of fiscal years beginning on or after December 15, 2010. See [PCAOB Release No. 2010-004](#).]

[\(.01 - .02\)](#)

[\(.03 - .10\) Planning](#)

[\(.11 - .14\) Supervision](#)

[\(.15\) Effective Date](#)

Source: SAS No. 22; SAS No. 47; SAS No. 48; SAS No. 77.

See [section 9311](#) for interpretations of this section.

Effective for periods ending after September 30, 1978, unless otherwise indicated.

.01

The first standard of field work requires that "the work is to be adequately planned and assistants, if any, are to be properly supervised." This section provides guidance to the independent auditor conducting an audit in accordance with generally accepted auditing standards on the considerations and procedures applicable to planning and supervision, including preparing an audit program, obtaining knowledge of the entity's business, and dealing with differences of opinion among firm personnel. Planning and supervision continue throughout the audit, and the related procedures frequently overlap.

[The following note is effective for audits of fiscal years ending on or after November 15, 2007. See [PCAOB Release 2007-005A](#). For audits of fiscal years ending before November 15, 2007, [click here](#).]

Note: When performing an integrated audit of financial statements and internal control over financial reporting, refer to paragraph 9 of [PCAOB Auditing Standard No. 5, An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements](#), regarding planning considerations in addition to the planning considerations set forth in this section.

.02

The auditor with final responsibility for the audit may delegate portions of the planning and supervision of the audit to other firm personnel. For purposes of this section, (a) firm personnel other than the auditor with final responsibility for the audit are referred to as *assistants* and (b) the term *auditor* refers to either the auditor with final responsibility for the audit or assistants.

.04 The auditor with final responsibility for the audit may delegate portions of the planning and supervision of the audit to other firm personnel.³ For purposes of this section, (a) firm personnel other than the auditor with final responsibility for the audit are referred to as *assistants* and (b) the term *auditor* refers to either the auditor with final responsibility for the audit or assistants.

Planning

Appointment of the Independent Auditor

.05 Early appointment of the independent auditor has many advantages to both the auditor and the client. Early appointment enables the auditor to plan the audit prior to the balance-sheet date.

.06 Although early appointment is preferable, an independent auditor may accept an engagement near or after the close of the fiscal year. In such instances, before accepting the engagement, the auditor should ascertain whether circumstances are likely to permit an adequate audit and expression of an unqualified opinion and, if they will not, the auditor should discuss with the client the possible necessity for a qualified opinion or disclaimer of opinion. Sometimes the audit limitations present in such circumstances can be remedied. For example, the taking of the physical inventory can be postponed or another physical inventory, which the auditor can observe, can be taken.

.07 Section 315, *Communications Between Predecessor and Successor Auditors*, provides guidance concerning a change of auditors. Among other matters, it describes communications that a successor auditor should evaluate before accepting an engagement.

Establishing an Understanding With the Client

.08 The auditor should establish an understanding with the client⁴ regarding the services to be performed for each engagement⁵ and should document the understanding through a written communication with the client. Such an understanding reduces the risk that either the auditor or the client may misinterpret the needs or expectations of the other party. For example, it reduces the risk that the client may inappropriately rely on the auditor to protect the entity against certain risks or to perform certain functions that are the client's responsibility. The understanding should include the objectives of

³ Paragraphs .14 through .20 of section 314 provide guidance about the discussion among the audit team. The objective of this discussion is for members of the audit team to gain a better understanding of the potential for material misstatements of the financial statements resulting from fraud or error in the specific areas assigned to them, and to understand how the results of the audit procedures that they perform may affect other aspects of the audit, including the decisions about the nature, timing, and extent of further audit procedures.

⁴ Generally, the auditor establishes an understanding of the services to be performed with the entity's management. In some cases, the auditor may establish such an understanding with those charged with governance. The term *those charged with governance* means the person(s) with responsibility for overseeing the strategic direction of the entity and obligations related to the accountability of the entity. This includes overseeing the financial reporting and disclosure process. In some cases, those charged with governance are responsible for approving the financial statements (in other cases, management has this responsibility). For entities with a board of directors, this term encompasses the term *board of directors* or *audit committees* expressed elsewhere in generally accepted auditing standards.

⁵ See paragraph .28 of QC section 10, *A Firm's System of Quality Control*. [Footnote amended due to the issuance of SQCS No. 7, December 2008.]

concerned with matters that, either individually or in the aggregate, could be material to the financial statements. The auditor's responsibility is to plan and perform the audit to obtain reasonable assurance that material misstatements, whether caused by errors or fraud, are detected.

Materiality in the Context of an Audit

.04 The auditor's consideration of materiality is a matter of professional judgment and is influenced by the auditor's perception of the needs of users of financial statements. The perceived needs of users are recognized in the discussion of materiality in Financial Accounting Standards Board (FASB) Statement of Financial Accounting Concepts No. 2, *Qualitative Characteristics of Accounting Information*, which defines *materiality* as "the magnitude of an omission or misstatement of accounting information that, in the light of surrounding circumstances, makes it probable that the judgment of a reasonable person relying on the information would have been changed or influenced by the omission or misstatement." That discussion recognizes that materiality judgments are made in light of surrounding circumstances and necessarily involve both quantitative and qualitative considerations.⁵

Users

.05 In an audit of financial statements, the auditor's judgment as to matters that are material to users of financial statements is based on consideration of the needs of users as a group; the auditor does not consider the possible effect of misstatements on specific individual users, whose needs may vary widely.⁶

.06 The evaluation of whether a misstatement could influence economic decisions of users, and therefore be material, involves consideration of the characteristics of those users. Users are assumed to:

- a. Have an appropriate knowledge of business and economic activities and accounting and a willingness to study the information in the financial statements with an appropriate diligence;
- b. Understand that financial statements are prepared and audited to levels of materiality;
- c. Recognize the uncertainties inherent in the measurement of amounts based on the use of estimates, judgment, and the consideration of future events; and
- d. Make appropriate economic decisions on the basis of the information in the financial statements.

The determination of materiality, therefore, takes into account how users with such characteristics could reasonably be expected to be influenced in making economic decisions.

Nature and Causes of Misstatements

.07 The representation in the auditor's standard report regarding fair presentation, in all material respects, in conformity with generally accepted accounting principles indicates the auditor's belief that the financial statements,

⁵ See paragraphs .59 and .60 for further guidance regarding qualitative considerations in evaluating audit findings.

⁶ When determining materiality in audits of financial statements or other historical financial information prepared for a special purpose, the auditor considers the needs of specific users in the context of the objective of the engagement.

from another, the auditor should determine what additional audit procedures are necessary to resolve the inconsistency.

.12 The auditor may consider the relationship between the cost of obtaining audit evidence and the usefulness of the information obtained. However, the matter of difficulty or expense involved is not in itself a valid basis for omitting an audit procedure for which there is no appropriate alternative.

.13 In forming the audit opinion, the auditor does not examine all the information available (evidence) because conclusions ordinarily can be reached by using sampling approaches and other means of selecting items for testing. Also, the auditor may find it necessary to rely on audit evidence that is persuasive rather than conclusive; however, to obtain reasonable assurance,⁴ the auditor must not be satisfied with audit evidence that is less than persuasive. The auditor should use professional judgment and should exercise professional skepticism in evaluating the quantity and quality of audit evidence, and thus its sufficiency and appropriateness, to support the audit opinion.

The Use of Assertions in Obtaining Audit Evidence

.14 Management is responsible for the fair presentation of financial statements that reflect the nature and operations of the entity.⁵ In representing that the financial statements are fairly presented in conformity with generally accepted accounting principles,⁶ management implicitly or explicitly makes assertions regarding the recognition, measurement, presentation, and disclosure of information in the financial statements and related disclosures.

.15 Assertions used by the auditor (see paragraph .16) fall into the following categories:

- a. Assertions about classes of transactions and events for the period under audit:
 - i. *Occurrence*. Transactions and events that have been recorded have occurred and pertain to the entity.
 - ii. *Completeness*. All transactions and events that should have been recorded have been recorded.
 - iii. *Accuracy*. Amounts and other data relating to recorded transactions and events have been recorded appropriately.
 - iv. *Cutoff*. Transactions and events have been recorded in the correct accounting period.
 - v. *Classification*. Transactions and events have been recorded in the proper accounts.
- b. Assertions about account balances at the period end:
 - i. *Existence*. Assets, liabilities, and equity interests exist.
 - ii. *Rights and obligations*. The entity holds or controls the rights to assets, and liabilities are the obligations of the entity.
 - iii. *Completeness*. All assets, liabilities, and equity interests that should have been recorded have been recorded.

⁴ Section 230, paragraphs .10 through .13, provides guidance on reasonable assurance as it relates to an audit of financial statements.

⁵ See section 110, paragraph .03.

⁶ Reference to generally accepted accounting principles in this section includes, where applicable, a comprehensive basis of accounting other than generally accepted accounting principles as defined in section 623, *Special Reports*.

relationships that are reasonably expected to exist based on the auditor's understanding of the client and of the industry in which the client operates. Following are examples of sources of information for developing expectations:

- a. Financial information for comparable prior period(s) giving consideration to known changes
- b. Anticipated results—for example, budgets, or forecasts including extrapolations from interim or annual data
- c. Relationships among elements of financial information within the period
- d. Information regarding the industry in which the client operates—for example, gross margin information
- e. Relationships of financial information with relevant nonfinancial information

Analytical Procedures in Planning the Audit

.06 The purpose of applying analytical procedures in planning the audit is to assist in planning the nature, timing, and extent of auditing procedures that will be used to obtain audit evidence for specific account balances or classes of transactions. To accomplish this, the analytical procedures used in planning the audit should focus on (a) enhancing the auditor's understanding of the client's business and the transactions and events that have occurred since the last audit date, and (b) identifying areas that may represent specific risks relevant to the audit. Thus, the objective of the procedures is to identify such things as the existence of unusual transactions and events, and amounts, ratios and trends that might indicate matters that have financial statement and audit planning ramifications. [Revised, March, 2006, to reflect conforming changes necessary due to the issuance of Statement on Auditing Standards No. 105.]

.07 Analytical procedures used in planning the audit generally use data aggregated at a high level. Furthermore, the sophistication, extent and timing of the procedures, which are based on the auditor's judgment, may vary widely depending on the size and complexity of the client. For some entities, the procedures may consist of reviewing changes in account balances from the prior to the current year using the general ledger or the auditor's preliminary or unadjusted working trial balance. In contrast, for other entities, the procedures might involve an extensive analysis of quarterly financial statements. In both cases, the analytical procedures, combined with the auditor's knowledge of the business, serve as a basis for additional inquiries and effective planning.

.08 Although analytical procedures used in planning the audit often use only financial data, sometimes relevant nonfinancial information is considered as well. For example, number of employees, square footage of selling space, volume of goods produced, and similar information may contribute to accomplishing the purpose of the procedures.

Analytical Procedures Used as Substantive Tests

.09 The auditor's reliance on substantive tests to achieve an audit objective related to a particular assertion¹ may be derived from tests of details, from

¹ Assertions are representations by management that are embodied in financial statement components. See section 326, *Audit Evidence*. [Revised, March 2006, to reflect conforming changes necessary due to the issuance of Statement on Auditing Standards No. 106.]

analytical procedures, or from a combination of both. The decision about which procedure or procedures to use to achieve a particular audit objective is based on the auditor's judgment on the expected effectiveness and efficiency of the available procedures.

.10 The auditor considers the level of assurance, if any, he wants from substantive testing for a particular audit objective and decides, among other things, which procedure, or combination of procedures, can provide that level of assurance. For some assertions, analytical procedures are effective in providing the appropriate level of assurance. For other assertions, however, analytical procedures may not be as effective or efficient as tests of details in providing the desired level of assurance.

.11 The expected effectiveness and efficiency of an analytical procedure in identifying potential misstatements depends on, among other things, (a) the nature of the assertion, (b) the plausibility and predictability of the relationship, (c) the availability and reliability of the data used to develop the expectation, and (d) the precision of the expectation.

Nature of Assertion

.12 Analytical procedures may be effective and efficient tests for assertions in which potential misstatements would not be apparent from an examination of the detailed evidence or in which detailed evidence is not readily available. For example, comparisons of aggregate salaries paid with the number of personnel may indicate unauthorized payments that may not be apparent from testing individual transactions. Differences from expected relationships may also indicate potential omissions when independent evidence that an individual transaction should have been recorded may not be readily available.

Plausibility and Predictability of the Relationship

.13 It is important for the auditor to understand the reasons that make relationships plausible because data sometimes appear to be related when they are not, which could lead the auditor to erroneous conclusions. In addition, the presence of an unexpected relationship can provide important evidence when appropriately scrutinized.

.14 As higher levels of assurance are desired from analytical procedures, more predictable relationships are required to develop the expectation. Relationships in a stable environment are usually more predictable than relationships in a dynamic or unstable environment. Relationships involving income statement accounts tend to be more predictable than relationships involving only balance sheet accounts since income statement accounts represent transactions over a period of time, whereas balance sheet accounts represent amounts as of a point in time. Relationships involving transactions subject to management discretion are sometimes less predictable. For example, management may elect to incur maintenance expense rather than replace plant and equipment, or they may delay advertising expenditures.

Availability and Reliability of Data

.15 Data may or may not be readily available to develop expectations for some assertions. For example, to test the completeness assertion, expected sales for some entities might be developed from production statistics or square feet of selling space. For other entities, data relevant to the assertion of completeness of sales may not be readily available, and it may be more effective or efficient to use the details of shipping records to test that assertion.

AU Section 339

Audit Documentation

(Supersedes SAS No. 96)

Source: SAS No. 103.

See section 9339 for interpretations of this section.

Effective for audits of financial statements for periods ending on or after December 15, 2006.

Introduction

.01 The purpose of this section is to establish standards and provide guidance on audit documentation. The exercise of professional judgment is integral in applying the provisions of this section. For example, professional judgment is used in determining the quantity, type, and content of audit documentation consistent with this section.

.02 Other Statement on Auditing Standards contain specific documentation requirements (see appendix A [paragraph .36]). Additionally, specific documentation or document retention requirements may be included in other standards (for example, government auditing standards), laws, and regulations applicable to the engagement.

.03 The auditor must prepare audit documentation in connection with each engagement in sufficient detail to provide a clear understanding of the work performed (including the nature, timing, extent, and results of audit procedures performed), the audit evidence obtained and its source, and the conclusions reached. Audit documentation:

- a.* Provides the principal support for the representation in the auditor's report that the auditor performed the audit in accordance with generally accepted auditing standards.
- b.* Provides the principal support for the opinion expressed regarding the financial information or the assertion to the effect that an opinion cannot be expressed.

.04 Audit documentation is an essential element of audit quality. Although documentation alone does not guarantee audit quality, the process of preparing sufficient and appropriate documentation contributes to the quality of an audit.

.05 Audit documentation is the record of audit procedures performed, relevant audit evidence obtained, and conclusions the auditor reached. Audit documentation, also known as working papers or workpapers, may be recorded on paper or on electronic or other media. When transferring or copying paper documentation to another media, the auditor should apply procedures to generate a copy that is faithful in form and content to the original paper document.¹

¹ There may be legal, regulatory, or other reasons to retain the original paper document.

1998 WL 852701 (DOL WAGE-HOUR)

Wage and Hour Division
United States Department of Labor

Opinion Letter Fair Labor Standards Act (FLSA)

February 19, 1998

This is in response to your letter of January 21, 1997, concerning the exempt status under section 13(a)(1) of the Fair Labor Standards Act (FLSA) of legal assistant employees employed by your firm.

Section 13(a)(1) of the FLSA provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in the Regulations at 29 C.F.R. Part 541. An employee may qualify for exemption if all the pertinent tests relating to duties, responsibilities and salary, as discussed in the appropriate section of the regulations, are met. Pursuant to section 541.2(e)(2), an employee who is paid on a salary basis of at least \$250 per week may qualify for exemption as a bona fide administrative employee if the employee's primary duty consists of the performance of office or nonmanual work directly related to management policies or general business operations of the employer or the employer's customers, which includes work requiring the exercise of discretion and independent judgment.

The duties contemplated by the regulations as being "directly related to management policies or general business operations" are those "relating to the administrative operations of a business as distinguished from production" work. 29 C.F.R. 541.205(a). The exemption is limited to "persons who perform work of substantial importance to the management or operation of the business of his employer or his employer's customers." *Id.*

Legal Assistant II

The specific duties of the Legal Assistant II employees are maintaining and/or modifying data bases, drafting routine correspondence, responding to external requests, performing and analyzing factual research, reviewing cases, coordinating files, developing materials for meetings, drafting agendas, preparing drafts of legal documents for attorney use and finalization, finalizing documents incorporating attorney comments, responding to inquiries and requests from clients, researching and analyzing legal issues pursuant to specific direction and/or instruction by an attorney and preparing oral or written summaries for attorneys, and participating in the development and implementation of data bases.

Legal Assistant I

The Legal Assistant I has the same duties as Legal Assistant II with the exception that the Legal Assistant I drafts non-routine correspondence and does not maintain and/or modify databases. When researching legal issues, the Legal Assistant II does not do so pursuant to specific direction and/or instruction by an attorney. In addition, the Legal Assistant I finalizes legal documents without the guidance of attorney comments. The Legal Assistant I also has these additional duties: preparing oral presentations for meetings, client contact, meeting and interviewing clients, discussing issues with clients, drafting factual memoranda to clients for attorney review,

tracking and reporting to attorney on pending legislation and case law that may affect clients, acting as a liaison to outside counsel, and initiating, coordinating and developing new procedures or policies.

Senior Legal Assistant

The Senior Legal Assistant has the same duties as Legal Assistant I with the following additional duties: conducting oral presentations at meetings, conducting basic training of other legal assistants, overseeing work distribution among legal assistants within a Section, supervising individual legal assistants, developing and participating in an orientation program for new legal assistants, participating in performance appraisals for legal assistants, and managing the entire legal assistant function within a Section.

You request an opinion, in light of recent court cases, including Reich v. Page & Addison (U.S. District Court, Northern District of Texas, 3:91-CV-2655-P March 10, 1995), regarding the status of these three classifications of legal assistants. It has long been our opinion that paralegals' and legal assistants' duties do not involve the exercise of discretion and independent judgment of the type required by section 541.2(b) of the regulations. It continues to be our opinion that these employees' duties involve the use of skills rather than discretion and independent judgment. Under section 541.207 of the regulations, the requirement of discretion and independent judgment is interpreted as possibilities have been considered. Furthermore, the term is interpreted to mean that the person has the authority or power to make an independent choice, free from immediate direction or supervision with respect to matters of significance.

The general facts you have presented about these employees indicate that they do not meet these criteria. Rather, as discussed above, they would appear to fit more appropriately into that category of employees who apply particular skills and knowledge in preparing assignments. The steps taken in legal research involve some judgment as to source material to be researched, steps to be taken, parties to be contacted, and the like, but such work does not involve the exercise of discretion and independent judgment at a level contemplated by 29 C.F.R. Part 541. Likewise, drafting documents, excerpting information from files, coordinating correspondence and files, and interviewing clients or witnesses do not require the use of discretion and independent judgment at a level contemplated by the regulations. These duties involve the use of skills and procedures.

In addition, it should be noted that most jurisdictions have strict prohibitions against the unauthorized practice of law by lay persons. Generally, a delegation of legal tasks to a lay person is proper only if the lawyer maintains a direct relationship with the client, supervises the delegated work and has complete professional responsibility for the work produced. The implication of such strictures is that the legal assistant employees you describe would probably not have the amount of authority to exercise independent judgments with regard to legal matters necessary to bring them within the administrative exemption.

Legal Assistants also do not qualify for the professional exemption in section 541.3 of 29 C.F.R. Part 541. One test for this exemption, as set out in section 541.3(a)(1), requires that such an employee perform work which requires knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study. A "prolonged course of . . . study" has generally been defined to mean at least a baccalaureate degree or its equivalent which includes a longer intellectual discipline in a particular course of study as distinguished from a general academic course otherwise required for a baccalaureate degree. It is our general position that although legal assistants may have special training in their field, their duties do not require "knowledge of an advanced type in a field of science or learning" within the meaning of section 541.301 of the regulations.

Finally, you ask whether the Senior Legal Assistant qualifies for the executive exemption. A professional employee who is paid on a salary or fee basis at a rate of at least \$250 a week exclusive of board, lodging or other facilities is exempt if regularly directing the work of at least two or more other employees, and if the employee's primary duty consists of management of the enterprise or a recognized department or subdivision thereof.

A determination of whether an employee has management as the primary duty must be based on all the facts in a particular case. In the ordinary case, it may be taken as a rule of thumb that primary duty means the major part, or over 50 percent of the employee's time. Time alone, however, is not the sole test, and in situations where the employee does not spend over 50 percent of his time in management duties, the employee nevertheless might have management as the primary duty if the other pertinent factors support such a conclusion.

According to your letter, the Senior Legal Assistant regularly directs the work of more than two employees and therefore meets the first criterion of the test. With respect to the second or "primary duty" criterion, you indicate that the Senior Legal Assistant's primary duty consists of management of a "section" of the Legal Department. However, you have provided no information which demonstrates that the Senior Legal Assistants spend more than 50% of their time in management of a recognized department or subdivision. See sections 541.1(f) and 541.103. Therefore, without further information, we must conclude that the Senior Legal Assistant is not an exempt executive employee.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein.

We trust that this satisfactorily responds to your inquiry.

Sincerely,
Michael Ginley
Director
Office of Enforcement Policy

1998 WL 852701 (DOL WAGE-HOUR)

END OF DOCUMENT

2005 WL 3638473 (DOL WAGE-HOUR)

Wage and Hour Division
United States Department of Labor

Opinion Letter Fair Labor Standards Act (FLSA)

FLSA2005-54

December 16, 2005

*** [FNa1]

This is in response to your request for a formal opinion on the application of Section 13(a)(1) of the Fair Labor Standards Act (FLSA) to several paralegals employed by a client's law firm. You request that we evaluate the employees' status under the administrative and professional exemptions in the final implementing regulations that took effect on August 23, 2004. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122 (Apr. 23, 2004) (codified at 29 C.F.R. part 541).

You state that the work of the paralegals is non-manual and that they are paid at least \$455 per week. You refer to *Missouri v. Jenkins*, 491 U.S. 274, 287-88 (1989), and point out that your client's firm bills its customers different hourly rates for work performed by paralegals and attorneys. The fact that courts compute compensation for paralegals' work in attorneys' fee awards at market rates has no bearing on the determination of whether paralegals' job duties meet the particular regulatory criteria that define the FLSA's exemptions for bona fide administrative and bona fide professional employees.

Following is a restatement of the primary duties of the six paralegals you describe:

Paralegal A has a Bachelor of Arts degree and an Associate of Liberal Arts degree and 11 years' experience in the legal field. About 55% of her time is spent "drafting contracts (real estate, stock purchase agreements, acquisitions of entities, corporate mergers and acquisitions, etc.); assisting in the performance of due diligence (preparing corporate resolutions, officer certifications, obtaining various documents needed to meet due diligence requirement, etc.); reviewing abstracts and preparing title notes; and preparing formation and dissolution documents for various domestic and foreign entities."

Paralegal B has worked as a paralegal for 10 years. Her education and training include significant on-the-job training. She spends about 55% of her time "reviewing and analyzing documents received from all parties during the discovery process and assisting in preparing reports and exhibits during the discovery process, as well as assisting in preparing for hearings and trial. She often accompanies attorneys to hearings and trial to aid them in their presentations and the introduction of evidence."

Paralegal C has a Master of Business Administration degree in General Business, a Bachelor of Business Administration degree in Accounting, and an Associate of Applied Science in Legal Assistant Technology. Paralegal C also has passed the Uniform CPA exam. Approximately 75% of her time is spent "preparing and filing documents online, by fax or by mail to form, dissolve or change entities or check name availabil-

ity; drafting documents including partnership agreements, limited liability company regulations, bylaws or minutes; emailing and calling clients for information or to report status; obtaining tax ID number from IRS online, and filling out and filing other IRS forms; conducting Internet research on entity requirements in different jurisdictions; constructing spreadsheets tracking stock transfers, organizational charts, timelines and multi-step reorganization charts of entities; reviewing and interpreting statutes, principally within the business organization codes of Texas and other states; coordinating with registered agents and taxing entities; obtaining checks and sending documents for recording or filing; assisting and conferring with attorneys and other office staff; reading tax and law updates.”

Paralegal D has a Bachelor Degree in Business Administration and spends approximately seventy-five percent of her time “drafting pleadings, discovery, and correspondence; reviewing and organizing document production; and assisting attorneys in preparation for hearing or trial.”

Paralegal E has an Associate of Science degree and a Bachelor of General Studies degree. She “holds Certified Legal Assistant status from the National Association of Legal Assistance, and the *Name* [FNa1] Board of Legal Specialization granted her status as a Board Certified Legal Assistant in Estate Planning and Probate Law.” Approximately 95% of her time is spent “drafting ...wills and codicils, trusts, and powers of attorney; preparing and filing gift tax returns; preparing and filing application for probate; assisting in the valuation and extent of an estate's assets and liabilities; preparing and filing United States estate tax returns and State of *Name* [FNa1] inheritance tax returns; assisting executors and will beneficiaries with estate disputes; conducting online tax research; drafting articles of incorporation and bylaws for partnerships and corporations; and drafting real estate documents and retirement plans.”

Paralegal F holds a Bachelor of Science degree and has Certified Legal Assistant status from the National Association of Legal Assistants. More than 90% of her time is spent “preparing and drafting title opinions dealing with ownership of oil and gas interests (work includes calculating ownership percentages, reviewing conveyances of title, and researching relevant law); assisting attorneys in the preparation of wills and administering an estate in the probate process (work includes contact with clients, and preparing estate inventories and appraisals); drafting documents for the formation of corporate and partnership entities; and drafting real estate documents and overseeing real estate closings.”

Section 13(a)(1) of the FLSA provides a complete minimum wage and overtime pay exemption for “any employee employed in a bona fide executive, administrative, or professional capacity,” as those terms are defined in 29 C.F.R. part 541. An employee may qualify for exemption if all of the pertinent tests relating to duties, responsibilities, and salary are met. Under 29 C.F.R. § 541.300(a) of the final regulations, the term “employee employed in a bona fide professional capacity” is defined as:

any employee: (1) Compensated on a salary or fee basis at a rate of not less than \$455 per week...; and (2) Whose primary duty is the performance of work: (i) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or (ii) Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Under 29 C.F.R. § 541.301(a), the primary duty test under the learned professional exemption includes three elements: “(1) The employee must perform work requiring advanced knowledge; (2) The advanced knowledge must be in a field of science or learning; and (3) The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.” The phrase “work requiring advanced knowledge” means “work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment as distinguished from performance of routine mental, manual, mechanical or physical work.” 29 C.F.R. § 541.301(b).

“The phrase ‘customarily acquired by a prolonged course of specialized intellectual instruction’ restricts the exemption to professions where specialized academic training is a *standard prerequisite for entrance into the profession*. The best prima facie evidence that an employee meets this requirement is possession of the appropriate academic degree.” 29 C.F.R. § 541.301(d) (emphasis added). Conversely, section 541.301(d) further clarifies that “the learned professional exemption is not available for occupations that customarily may be performed with only the general knowledge acquired by an academic degree in *any* field, with knowledge acquired through an apprenticeship, or with training in the performance of routine mental, manual, mechanical or physical processes. The learned professional exemption also does not apply to occupations in which most employees have acquired their skill by experience rather than by advanced specialized intellectual instruction.” 29 C.F.R. § 541.301(d) (emphasis added).

You state you are aware that 29 C.F.R. § 541.301(e)(7) contains the statement that “Paralegals and legal assistants generally do not qualify as exempt learned professionals,” but also state a further belief that this does not appear to be conclusive because “the rule is conditioned on the educational and professional background of each paralegal.” Rather, as the preamble to the final rule explains (at 69 Fed. Reg. 22,150), the revised final regulations for the learned professional exemption, as under the prior rule, essentially require two separate inquiries. “*First*, as in the [previous] existing regulations, the occupation must be in a field of science or learning where specialized academic training is a standard prerequisite for entrance into the profession.” *Id.* Thus, while the learned professional exemption is available for lawyers, doctors and engineers, it is not available for skilled technicians in occupations that do not require “specialized academic training at the level intended by the regulations as a standard prerequisite for entrance into the profession. *Second*, employees within such a learned profession can then only qualify for the learned professional exemption if they either possess the requisite advanced degree or ‘have substantially the same knowledge level and *perform substantially the same work* as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction.’” *Id.* (Emphases in original.)

As your request points out, while some two and four-year colleges offer coursework and certification in paralegal studies, no minimum education or training requirements are established that a person must satisfy before using the occupational title “paralegal.” This indicates that the occupation lacks a requirement of “knowledge of an advanced type ... customarily acquired by a prolonged course of specialized intellectual instruction” as required under 29 C.F.R. § 541.300(a)(2). As further explained in the preamble to the final rule, “[s]ome jobs require only a four-year college degree in any field or a two-year degree as a standard prerequisite for entrance into the field. Other jobs require only completion of an apprenticeship program or other short course of specialized training. The final section 541.301(d), drawn from [previous] existing subsection 541.301(d) and proposed section 541.301(f), makes clear that such occupations do not qualify for the learned professional exemption.” 69 Fed. Reg. at 22,150.

As section 541.301(e)(7) expressly provides, paralegals and legal assistants generally do not qualify for the professional exemption because an advanced specialized academic degree is not a standard prerequisite for entry into the field. *See* Opinion Letter dated January 7, 2005. For example, your letter does not indicate that Paralegal B has had other than on-the-job training. Similarly, Paralegal A has a Bachelor of Arts and an Associate of Liberal Arts degree, Paralegal E has a Bachelor of General Studies degree, and Paralegal F has a Bachelor of Science degree. None of these is evidence that an advanced specialized degree is a standard prerequisite for entry into the paralegal field. Thus, while many paralegals hold four-year degrees, it does not follow that they can qualify for the learned professional exemption. Most specialized paralegal programs are two-year associate degree programs from a community college or equivalent institution. However, the learned professional exemption

is available when a paralegal, who possesses an advanced specialized degree in other professional fields, applies advanced knowledge in that field to the performance of his or her primary duty. For example, if a law firm hires an engineer as a paralegal to provide expert advice on product liability cases or to assist on patent matters, that engineer could qualify for exemption. Paralegal C, who possesses an MBA and an accounting degree and passed the uniform CPA exam, might similarly qualify for exemption if she performed primarily expert work in her advanced fields of study. Paralegal C's primary duties, however, appear to be those of a conventional paralegal. Indeed, consistent with the final rule that states paralegals generally do not qualify as exempt learned professional employees, there is insufficient evidence that Paralegals A through F perform, as their primary duty, work requiring advanced knowledge acquired by a prolonged course of specialized intellectual instruction at the level intended by the regulations, instead of general knowledge acquired through an academic degree in any field or through an apprenticeship or training.

As for the administrative exemption under 29 C.F.R. § 541.200(a), “[t]he term ‘employee employed in a bona fide administrative capacity’ shall mean any employee: (1) Compensated on a salary or fee basis at a rate of not less than \$455 per week...; (2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and (3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.”

“The phrase ‘directly related to management or general business operations’ refers to the type of work performed by the employee. To meet this requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.” 29 C.F.R. § 541.201(a). “Work directly related to management or general business operations includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities.” 29 C.F.R. § 541.201(b). Additionally, “[a]n employee may qualify for the administrative exemption if the employee's primary duty is the performance of work directly related to the management or general business operations of the employer's customers. Thus, for example, employees acting as advisers or consultants to their employer's clients or customers (as tax experts or financial consultants, for example) may be exempt.” 29 C.F.R. § 541.201(c).

“To qualify for the administrative exemption, an employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term ‘matters of significance’ refers to the level of importance or consequence of the work performed.” 29 C.F.R. § 541.202(a).

“The phrase ‘discretion and independent judgment’ must be applied in the light of all the facts involved in the particular employment situation in which the question arises. Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; whether the

employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.” 29 C.F.R. § 541.202(b). Federal courts generally find that employees who meet at least two or three of these factors mentioned above are exercising discretion and independent judgment, although a case-by-case analysis is required. *See* 69 Fed. Reg. at 22,143.

“The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources.” 29 C.F.R. § 541.202(e). As the court noted in *Clark v. J.M. Benson*, 789 F.2d 282, 287 (4th Cir. 1986), it is not sufficient that an employee makes decisions regarding “when and where to do different tasks, as well as the manner in which to perform them.” Nor is it sufficient that an employee may make limited decisions within clearly “prescribed parameters.” *Dalheim v. KDFW-TV*, 706 F.Supp. 493, 509 (N.D.Tex. 1988), *aff’d*, 918 F.2d 1220 (5th Cir. 1990) Rather, there must be true discretion and independent judgment exercised on matters of significance or consequence related to the management or general business operations of the employer or the employer's customers.

Based on the information you provide, it is our opinion that the paralegals you describe do not qualify as bona fide administrative employees under the final regulations at 29 C.F.R. § 541.200. You mention that past Wage and Hour Division opinion letters (August 17, 1979; September 27, 1979; June 12, 1984; April 13, 1995; and February 19, 1998) have taken the position that paralegals are nonexempt, and that often a deciding factor has been the level of judgment and discretion exercised by the paralegal and the amount of supervision the attorneys provide. It continues to be our opinion that the duties of paralegal employees do not involve the exercise of discretion and independent judgment of the type required by section 541.200(a)(3) of the final regulations, thus an analysis of whether their work is related to management or general business operations is not necessary. The outline of the duties of the paralegal employees you provide describes the use of skills rather than discretion and independent judgment. The paralegals typically are drafting particular documents to assist attorneys on a particular case or matter. The paralegals are not themselves formulating or implementing management policies, utilizing authority to waive or deviate from established policies, providing expert advice, or planning business objectives in accordance with the dictates of 29 C.F.R. § 541.202(b). Thus, like the inspectors and investigators described as non-exempt in 29 C.F.R. § 541.203(j), the paralegal employees appear to fit more appropriately into that category of employees who apply particular skills and knowledge in preparing assignments. Employees who apply such skills and knowledge generally are not exercising independent judgment, even if they have some leeway in reaching a conclusion. In addition, most jurisdictions have strict prohibitions against the unauthorized practice of law by laypersons. Under the American Bar Association's Code of Professional Responsibility, a delegation of legal tasks to a lay person is proper only if the lawyer maintains a direct relationship with the client, supervises the delegated work, and has complete professional responsibility for the work produced. The implication of such strictures is that the paralegal employees you describe would not have the amount of authority to exercise independent judgments with regard to legal matters necessary to bring them within the administrative exemption.

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and cir-

cumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor. This opinion is issued as an official ruling of the Wage and Hour Division for purposes of the Portal-to-Portal Act, 29 U.S.C. § 259. See 29 C.F.R. §§ 790.17(d), 790.19; *Hultgren v. County of Lancaster*, 913 F.2d 498, 507 (8th Cir. 1990).

We trust that the above information is responsive to your inquiry.

Sincerely,
Alfred B. Robinson, Jr.
Deputy Administrator

FNa1. *Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. § 552 (b)(7).*

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COURT OF APPEALS, DIVISION I
THE STATE OF WASHINGTON

MARK LITCHFIELD, on behalf of himself and
all others similarly situated

Petitioners/Plaintiffs/Cross-Respondents,

v.

KPMG, LLP,

Respondent/Cross-Petitioner/Defendant.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(07-2-11179-4 SEA)

PROOF OF SERVICE

George E. Greer,
(WSBA No. 11050)
ORRICK HERRINGTON &
SUTCLIFFE LLP
701 Fifth Avenue, Suite 5600
Seattle, WA 98104
Telephone: (206) 839-4300
Facsimile: (206) 839-4301

Michael C. Kelley
(*admitted pro hac vice*)
Jennifer Altfeld Landau
(*admitted pro hac vice*)
SIDLEY AUSTIN
555 West Fifth Street, Suite 4000
Los Angeles, CA 90013
Telephone: (213) 896-6000
Facsimile: (213) 896-6600

Leonard J. Feldman
(WSBA No. 20961)
STOEL RIVES LLP
600 University Street, Suite 3600
Seattle, WA 98101
Telephone: (206) 624-0900
Facsimile: (206) 386-7500

Attorneys for Respondent KPMG LLP

I hereby certify under penalty of perjury under the laws of the state of Washington that on March 18, 2011, I caused a true and correct copy of the ***Brief of Respondent/Cross-Petitioner/Defendant KPMG LLP*** to be served on the following counsel of record via legal messenger at the address below:

Catherine W. Smith
Edwards, Sieh, Smith & Goodfriend, P.S.
1109 First Avenue, Suite 500
Seattle, WA 98101

Stephen K. Strong
Bendich, Stobaugh & Strong, P.C.
701 Fifth Avenue, #6550
Seattle, WA 98104

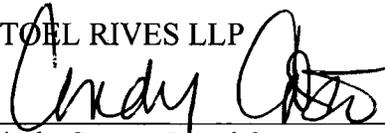
Attorneys for Appellants

I further certify that on March 18, 2011, I caused the original and one copy of the ***Brief of Respondent/Cross-Petitioner/Defendant KPMG LLP*** to be filed with the appellate court via legal messenger:

Court of Appeals, Division I
600 University Street
One Union Square
Seattle, WA 98101

Dated: March 18, 2011.

STOEL RIVES LLP



Cindy Castro, Legal Secretary
600 University Street, Suite 3600
Seattle, WA 98101