

Concise Explanatory Statement
and
Response to Comments
for the adoption of Small
Business Retirement Marketplace
rules

Amendments to Chapter 365-65 WAC –
Small Business Retirement Marketplace



Department of Commerce

September 12, 2017

Introduction to this document

The Washington State Department of Commerce (Commerce) prepared this *Concise Explanatory Statement and Response to Comments* summary to meet requirements of the Washington State Administrative Procedures Act, the law that guides agency rule-making (RCW 34.05.325).

Section I provides a general description of the process and the scope of work on the proposed rules and the agency's reasons for adopting the proposed rules.

Section II responds to the comments received regarding the proposed rules, indicating how the final rules reflect agency consideration of the comments, or why they fail to do so.

Section III summarizes differences between the proposed and adopted rules.

This document is available on the Commerce website at <http://www.commerce.wa.gov/about/LawsandRules/Pages/default.aspx>.

I: Concise Explanatory Statement

Introduction

Small Business Retirement Marketplace

The Washington Small Business Retirement Marketplace (“Marketplace”) is a retirement savings program created to connect eligible employers and their employees with approved plans to increase retirement savings.

Statutory Authority

RCW 43.330.750 requires the director of the Department of Commerce to adopt rules necessary to allow the marketplace to operate.

The scope of the Small Business Retirement Marketplace rule

The purpose of this rulemaking is to incorporate amendments made with the passage of SSB 5675, Chapter 69, Laws of 2017, amending elements of RCW 43.330.735 and RCW 43.330.750. Commerce intends to update the rules in 365-65 WAC in order to incorporate these amendments. The anticipated effects of the rule will be the effective operation of the marketplace.

How the rules were developed

The primary stakeholder group engaged in reviewing draft rule language consisted of stakeholders on record as participating in developing enabling legislation for the Marketplace (ESSB 5826 2015): AARP, Economic Opportunity Institute, National Council of Life Insurers, Independent Business Association of Washington, Russell Investments,

and the Securities Industry and Financial Markets Association. Additional stakeholders engaged in reviewing draft rule language included individuals representing eligible employers, retired workers, and non-profit worker advocates.

Interagency stakeholders consisting of Washington Department of Financial Institutions, Washington Office of the Insurance Commissioner, Attorney General's Office and Commerce convened to develop and review both rule language and program operating protocols.

Throughout the rulemaking, written comments were invited to be submitted to:
Carolyn McKinnon, Policy Advisor
carolyn.mckinnon@commerce.wa.gov
PO Box 42525, Olympia, WA 98504-2525

The following phone and fax numbers, direct to Commerce staff, were provided to the public for questions or to submit comments: Phone: 360-725-3121, Fax: 360-586-8440, TTY: Toll-free, statewide 7-1-1.

Other outreach and public involvement steps taken by Commerce included:

- Rulemaking updates e-mail listserv that kept interested parties updated on progress throughout the rule development process.
- Rulemaking webpage at <http://www.commerce.wa.gov/about-us/rulemaking/>.

Initial Scoping and Petition for Amendment

Commerce filed a Preproposal Statement of Inquiry (Form CR-101) with the Office of the Code Reviser on May 9, 2017 to commence its rulemaking process. This document is linked below:

- [Preproposal Statement of Inquiry: CR-101](#)

Draft Language

Commerce circulated draft language for stakeholder discussion on July 3, 2017 and also invited discussion about the draft language during a meeting of Marketplace stakeholders on July 13, 2017 from 9:30-11am in Olympia, WA.

Proposed Rules

The Department of Commerce filed a Proposed Rulemaking (Form CR-102) with the Office of the Code Reviser on July 19, 2017 with accompanying proposed rules. Commerce posted to its website proposed rule language for public comment from July 19-August 22, 2017.

- [Proposed Rule Making: CR-102](#)
- [Proposed Rule Language July 19, 2017](#)

Public Hearing

Commerce held a hearing on the proposed rules on August 22, 2017, commencing at 1:30 pm in Olympia, WA. Four people attended the hearing, two of whom made oral comments:

- One commenter made general comments to the national significance of the policy underlying the rulemaking (Small Business Retirement Marketplace, a first-in-the-nation state policy model). The commenter then stated support for the proposed rules as a measure to increase the number of financial services firms that provide retirement plans on the Marketplace.
- One commenters made comments specific to the proposed rules and provided written comments to Commerce both at the Public Hearing and by email. Those comments are addressed in Section II: Responsiveness.

Commerce received four written comment letters during the formal comment period and one prior to the formal comment period based on draft language discussed with stakeholders.

Adopted rules

Commerce adopted and filed the final rule in September 2017. As required by the Washington State Administrative Procedures Act (RCW 34.05.325), Commerce prepared this Concise Explanatory Statement and Response to Comments Summary to identify the reasons for adopting the rules, describe differences between the proposed and adopted rule, and respond to all comments received regarding the proposed rule, indicating how each final rule reflects agency consideration of the comments, or why it failed to do so.

II: Responsiveness Summary

Commerce received four written letters commenting on the proposed rule language and one commenting on draft language discussed by stakeholders. Below is a summary of Commerce's response to those comments.

Definitions and Delineations: A commenter posed a number of questions about the nature of a de minimis fee, including timing, amount, and cap. The commenter inquired about the definition of "de minimis fee" and "low-balance account". The commenter suggested a timeline for determining the definition of low-balance should be clarified.

Commerce response: Fee negotiation protocols are a matter of program administration and will be addressed outside of the rulemaking process. The contractual instrument used for establishing negotiated fee agreements specifies details about agreed upon fee amounts, descriptions, and conditions for terminating the fee.

Justification for Additional Fees: A commenter requested clarity on what reasons firms have for seeking additional fees on top of the 100 basis points total annual fee set in statute. The commenter then asked a number of related questions about the timing, scale and impact of de minimis fees.

Commerce response: RCW, WAC and the contractual instrument used for establishing negotiated fee agreements each specify that the Director of the Department of Commerce must limit plans offered on the retirement marketplace to those with total fees the director considers reasonable, based on all facts and circumstances. WAC and the fee instrument further state that those facts and circumstances include:

- the primary mission to increase access to low-cost and low-barrier retirement savings plans for small businesses and their employees;
- the goal of bringing new savers into retirement plans;
- the market conditions faced by financial services firms to establish and service retirement savings plans for new and/or low balance enrollees;
- the goal of maintaining and improving fee transparency and simplicity; and/or
- attempts on the part of the financial services firm to arrive at a low cost fee arrangement without charging a de minimis fee.

We believe these guiding principles will ensure that Commerce attends to the justification, scale, and impacts of fees prior to the director approving any given plan.

Public Disclosure and Oversight: A commenter expressed concern that their good relationships with the current director is not a certainty in the future and that the rules give the director full discretion without much consumer protection. They stated that the purpose of the Marketplace website is to make information disclosure clear and comparable for its users.

Commerce response: Commerce understands and concurs with these concerns. Adopted rules are expanded from proposed rules to provide for an evaluation of the need for de minimis fees no later than September 2020. Adopted rules clarify that agreed upon de minimis fees will be displayed on both the product comparison and product detail pages of the retirement marketplace website.

Standards for Fees: A commenter suggested that the rules include two standards for fees that were discussed at the July 13, 2017 stakeholder meeting. One of those standards was fiduciary. The other was unclear based on Commerce's notes from that meeting. Attempts to reach the commenter for clarification were not successful.

Commerce response: Commerce does not have standing to require and enforce fiduciary standards and obligations between a financial services firm (retirement plan provider) and enrollees (investors).

Ceiling for Fees: Two commenters said a ceiling for de minimis fees should be included.

Commerce response: Commerce did not concur. We do not, at this time, have the information necessary to establish a fee limit and would be concerned that any limit arbitrarily set could result in unintended consequences, including the possibility of artificial fee inflation to the ceiling.

Verification Process Details: Two commenters suggested rules should spell out newly established statutory provisions (per RCW 43.330.732(6)(b)) enabling the Office of the Insurance Commissioner (OIC) to request that the Department of Financial Institutions (DFI) conduct the plan review prior to submitting its verification to Commerce. One of these commenters provided proposed language to amend WAC 365-65-060(a). The commenter explained the importance of consistency between statute and administrative code so that consumers and life insurance and/or annuity companies understand what the verification process for retirement products will be.

Commerce response: Commerce did not concur. Commerce does not have authority to specify in rule the verification processes administered by OIC and DFI. Commerce's rules under 365-65 WAC address administrative policy *after* plans have received verification from OIC, DFI, or both.

Commerce does specify this information in application packets provided to financial services firms and on Commerce's Marketplace webpage, both of which are used to provide prospective financial services firms with information about how to become verified through DFI and OIC.

Factors of a Successful Retirement System: One commenter suggested that the Marketplace program look at Washington's deferred compensation system for factors of a successful retirement system, including ease-of-use, good information, and confidence.

Commerce response: Commerce understands that the factors of success recommended by the commenter are widely demonstrated in the field of behavioral finance and has adopted certain elements of them in its implementation of the Small Business Retirement Marketplace. However, the scope of this rulemaking, and of the retirement marketplace program as it exists in statute, do not allow for adopting the span of practices employed in the state's deferred compensation plan (a qualified IRC section 457 plan).

General Comments

Commerce received one written letter of general comments, summarized below.

Summary of general comment: The commenter supports efforts that encourage employers to adopt workplace retirement plans and increase voluntary worker participation. The commenter supports updating rules to allow a fee to cover costs for new and low balance accounts.

III: Differences between proposed and adopted rule

This section summarizes differences between the proposed rules and the final adopted rules, pursuant to RCW 34.05.340(3). You can also find more about the comments and detail on changes in the relevant section under *II: Responsiveness Summary*.

Section	CR-102	Final	Explanation
365-65-080	<u>(b) A de minimis fee must be negotiated with the department and established as an agreement through a contractual instrument to be specified by the department. Once established, a de minimis fee must be evidenced in the plan agreement provided to enrollees.</u>	<u>(b) A de minimis fee must be negotiated with the department and established as an agreement through a contractual instrument to be specified by the department. Once established, a de minimis fee must be evidenced in the plan agreement provided to enrollees. The agreed upon de minimis fee will be displayed on the product comparison and product detail pages of the marketplace website.</u>	Additional language regarding displaying de minimis fees on the Marketplace website was added in response to commenter concerns that consumers be made abundantly aware of fees.
365-65-080	none	<u>(f) No later than September 2020, the department will evaluate the ongoing need to allow de minimis fees to be charged to enrollees.</u>	A subsection providing for a point-in-time evaluation of the need for de minimis fees was added in response to commenter concerns about limits on fees, the impacts of fees on enrollees' account balances, and the future management of the Small Business Retirement Marketplace.