

BANKING DIVISION[187]

Adopted and Filed

Rule making related to waivers

The Iowa Division of Banking hereby amends Chapter 12, “Uniform Waiver and Variance Rules,” Iowa Administrative Code.

Legal Authority for Rule Making

This rule making is adopted under the authority provided in Iowa Code sections 17A.3 and 524.213.

State or Federal Law Implemented

This rule making implements, in whole or in part, Iowa Code chapters 17A and 524.

Purpose and Summary

These amendments revise the Division’s rules regarding uniform waiver and variance procedures. In 2020, the Legislature enacted House File 2389, which amends Iowa Code chapter 17A to remove the term “variance” and ensures that chapters about waiver procedures refer only to “waivers.” These amendments respond to the changes made by House File 2389 and revise the Division’s existing rules for waiver and variance to refer only to waivers of administrative rules. These amendments also remove a provision authorizing the Superintendent of Banking to propose a waiver on the Superintendent’s own motion.

Public Comment and Changes to Rule Making

Notice of Intended Action for this rule making was published in the Iowa Administrative Bulletin on October 7, 2020, as **ARC 5211C**. No public comments were received.

A change from the Notice has been made in subrule 12.2(1) to strike a provision that authorized the Superintendent of Banking to propose a waiver on the Superintendent’s own motion. The Division is striking this provision because the Iowa Supreme Court has held that this language exceeds the statutory authority delegated to agencies.

Additionally, a change from the Notice has been made to update the catchwords of rule 187—12.11(17A,524) to better reflect the content of the rule.

Adoption of Rule Making

This rule making was adopted by the Superintendent of Banking on December 17, 2020.

Fiscal Impact

This rule making has no fiscal impact to the State of Iowa.

Jobs Impact

After analysis and review of this rule making, no impact on jobs has been found.

Waivers

Any person who believes that the application of the discretionary provisions of this rule making would result in hardship or injustice to that person may petition the Division for a waiver of the discretionary provisions, if any, pursuant to 187—Chapter 12

Review by Administrative Rules Review Committee

The Administrative Rules Review Committee, a bipartisan legislative committee which oversees rule making by executive branch agencies, may, on its own motion or on written request by any individual or group, review this rule making at its [regular monthly meeting](#) or at a special meeting. The Committee's meetings are open to the public, and interested persons may be heard as provided in Iowa Code section 17A.8(6).

Effective Date

This rule making will become effective on February 17, 2021.

The following rule-making actions are adopted:

ITEM 1. Amend **187—Chapter 12**, title, as follows:

UNIFORM WAIVER AND VARIANCE RULES

ITEM 2. Amend rules 187—12.1(17A,524) to 187—12.3(17A,524) as follows:

187—12.1(17A,524) Scope of chapter. This chapter outlines a uniform process for the granting of waivers ~~or variances~~ from rules adopted by the superintendent in situations where no other more specifically applicable law provides for waivers. The intent of this chapter is to allow persons to seek exceptions to the application of rules issued by the superintendent. This chapter shall not apply to rules that merely define the meaning of a statute or other provision of law or precedent if the division does not possess delegated authority to bind the courts to any extent with its definition. To the extent another more specific provision of law governs the issuance of a waiver from a particular rule, the more specific provision shall supersede this chapter with respect to any waiver from that rule.

12.1(1) Definitions.

“*Person*” means an individual, corporation, limited liability company, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, or any legal entity.

“*Superintendent*” means the superintendent of banking appointed by the governor to direct and regulate banks pursuant to Iowa Code chapter 524.

“*Waiver ~~or variance~~*” means an agency action which suspends in whole or in part the requirements or provisions of a rule as applied to an identified person on the basis of the particular circumstances of that person.

12.1(2) Applicability.

a. The superintendent may grant a waiver ~~or variance~~ from a rule adopted by the superintendent only if (1) the superintendent has jurisdiction over the rule; (2) no statute or rule otherwise controls the granting of a waiver ~~or variance~~ from the rule from which waiver ~~or variance~~ is requested; and (3) the requested waiver ~~or variance~~ is consistent with applicable statutes, constitutional provisions, or other provisions of law.

b. No waiver ~~or variance~~ may be granted from a requirement which is imposed by statute.

187—12.2(17A,524) Superintendent discretion. The decision on whether the circumstances justify the granting of a waiver ~~or variance~~ shall be made at the discretion of the superintendent upon consideration of all relevant factors. Each petition for a waiver ~~or variance~~ shall be evaluated by the superintendent based on the unique, individual circumstances set out in the petition.

12.2(1) Criteria for waiver ~~or variance~~. The superintendent may, in response to a completed petition ~~or on the superintendent's own motion~~, grant a waiver ~~or variance~~ from a rule, in whole or in part, as applied to the circumstances of a specified situation if the superintendent finds all of the following:

a. The application of the rule would result in an undue hardship on the person for whom the waiver ~~or variance~~ is requested;

b. The waiver ~~or variance~~ from the requirements of the rule in the specific case would not prejudice the substantial legal rights of any person;

c. The provisions of the rule subject to the petition for waiver are not specifically mandated by statute or another provision of law; and

d. Substantially equal protection of public health, safety, and welfare will be afforded by a means other than that prescribed in the particular rule for which the waiver ~~or variance~~ is requested.

In determining whether a waiver ~~or variance~~ should be granted, the superintendent shall consider the public interest, policies and legislative intent of the statute on which the rule is based. When the rule from which a waiver ~~or variance~~ is sought establishes administrative deadlines, the superintendent shall balance the special individual circumstances of the petitioner with the overall goal of uniform treatment of all similarly situated persons.

12.2(2) *Special waiver ~~or variance~~ rules not precluded.* These uniform waiver ~~and variance~~ rules shall not preclude the superintendent from granting waivers ~~or variances~~ in other contexts if a statute or other rule authorizes the superintendent to do so and the superintendent deems it appropriate to do so.

187—12.3(17A,524) Requester’s responsibilities in filing a waiver ~~or variance~~ petition.

12.3(1) *Application.* All petitions for waiver ~~or variance~~ must be submitted in writing to the Banking Division, 200 East Grand Avenue, Suite 300, Des Moines, Iowa 50309. If the petition relates to a pending contested case, a copy of the petition shall also be filed in the contested case proceeding.

12.3(2) *Content of petition.* A petition for waiver ~~or variance~~ shall include the following information where applicable and known to the requester (for an example of a petition for waiver ~~or variance~~, see Exhibit A at the end of this chapter):

- a. A description and citation of the specific rule from which a waiver ~~or variance~~ is requested.
- b. The specific waiver ~~or variance~~ requested, including the precise scope and operative period that the waiver ~~or variance~~ will extend.
- c. The relevant facts that the petitioner believes would justify a waiver ~~or variance~~ under each of the four criteria specified in subrule 12.2(1).
- d. A signed statement from the petitioner attesting to the accuracy of the facts provided in the petition and a statement of reasons that the petitioner believes will justify a waiver ~~or variance~~.
- e. A history of any prior contacts between the superintendent and the petitioner relating to the regulated activity, license, grant, loan or other financial assistance affected by the proposed waiver ~~or variance~~, including a description of each affected license, grant, loan or other financial assistance held by the requester, any notices of violation, contested case hearings, or investigative or examination reports relating to the regulated activity, license, grant or loan within the past five years.
- f. Any information known to the requester regarding the treatment of similar cases by the superintendent.
- g. The name, address, and telephone number of any public agency or political subdivision which also regulates the activity in question or which might be affected by the granting of a waiver ~~or variance~~.
- h. The name, address, and telephone number of any person or entity that would be adversely affected by the granting of a petition.
- i. The name, address, and telephone number of any person with knowledge of the relevant facts relating to the proposed waiver ~~or variance~~.
- j. Signed releases of information authorizing persons with knowledge regarding the request to furnish the superintendent with information relevant to the waiver ~~or variance~~.

12.3(3) *Burden of persuasion.* When a petition is filed for a waiver ~~or variance~~ from a rule, the burden of persuasion shall be on the petitioner to demonstrate by clear and convincing evidence that the superintendent should exercise the superintendent’s discretion to grant the petitioner a waiver ~~or variance~~.

ITEM 3. Amend rules 187—12.5(17A,524) to 187—12.11(17A,524) as follows:

187—12.5(17A,524) Superintendent’s responsibilities regarding petition for waiver ~~or variance~~.

12.5(1) *Additional information.* Prior to issuing an order granting or denying a waiver ~~or variance~~, the superintendent may request additional information from the petitioner relative to the petition and surrounding circumstances. If the petition was not filed in a contested case, the superintendent may, on

the superintendent's own motion or at the petitioner's request, schedule a telephonic or in-person meeting between the petitioner and the superintendent or the superintendent's designee.

12.5(2) *Hearing procedures.* The provisions of Iowa Code sections 17A.10 to 17A.18A regarding contested case hearings shall apply in three situations: (a) to any petition for a waiver ~~or variance~~ of a rule filed within a contested case; (b) when the superintendent so provides by rule or order; or (c) when a statute so requires.

12.5(3) *Ruling.* An order granting or denying a waiver ~~or variance~~ shall be in writing and shall contain a reference to the particular person and rule or portion thereof to which the order pertains, a statement of the relevant facts and reasons upon which the action is based, and a description of the precise scope and operative period of the waiver if one is issued.

12.5(4) *Conditions.* The superintendent may place any condition on a waiver ~~or variance~~ that the superintendent finds desirable to protect the public health, safety, and welfare.

12.5(5) *Narrowly tailored exception.* A waiver, if granted, shall provide the narrowest exception possible to the provisions of a rule.

12.5(6) *Time period of waiver.* A waiver shall not be permanent unless the petitioner can show that a temporary waiver would be impracticable. If a temporary waiver is granted, there is no automatic right to renewal. At the sole discretion of the superintendent, a waiver may be renewed if the superintendent finds that grounds for a waiver continue to exist.

12.5(7) *Time for ruling.* The superintendent shall grant or deny a petition for a waiver ~~or variance~~ as soon as practicable but, in any event, shall do so within 120 days of its receipt, unless the petitioner agrees to a later date. However, if a petition is filed in a contested case, the superintendent shall grant or deny the petition no later than the time at which the final decision in that contested case is issued.

12.5(8) *When deemed denied.* Failure of the superintendent to grant or deny a petition within the required time period shall be deemed a denial of that petition by the superintendent.

12.5(9) *Service of order.* Within seven days of its issuance, any order issued under this chapter shall be transmitted to the petitioner or the person to whom the order pertains and to any other person entitled to such notice by any provision of law.

187—12.6(17A,524) *Public availability.* All orders granting or denying waivers ~~and variances~~ under this chapter shall be indexed, filed and available for public inspection as provided in Iowa Code section 17A.3. Petitions for a waiver ~~or variance~~ and orders granting or denying a waiver ~~or variance~~ petition are public records under Iowa Code chapter 22. Some petitions or orders may contain information that the superintendent is authorized or required to keep confidential. The superintendent may accordingly redact confidential information from petitions or orders prior to public inspection.

187—12.7(17A,524) *Voiding or cancellation.* A waiver ~~or variance~~ is void if the material facts upon which the request or petition is based are not true or if material facts have been withheld. A waiver ~~or variance~~ issued by the superintendent pursuant to this chapter may be withdrawn, canceled, or modified if, after appropriate notice and opportunity for hearing, the superintendent issues an order finding any of the following:

1. The petitioner or the person who was the subject of the waiver order withheld or misrepresented material facts relevant to the propriety or desirability of the waiver; or
2. The alternative means for ensuring that the public health, safety and welfare will be adequately protected after issuance of the waiver order have been demonstrated to be insufficient; or
3. The subject of the waiver order has failed to comply with any conditions contained in the order.

187—12.8(17A,524) *Violations.* Violation of conditions in the waiver ~~or variance~~ order is the equivalent of violation of the particular rule for which the waiver ~~or variance~~ is granted and is subject to the same remedies or penalties.

187—12.9(17A,524) Defense. After the superintendent issues an order granting a waiver ~~or variance~~, the order is a defense within its terms and the specific facts indicated therein for the person to whom the order pertains in any proceeding in which the rule in question is sought to be invoked.

187—12.10(17A,524) Appeals. Granting or denying a request for waiver ~~or variance~~ is final agency action under Iowa Code chapter 17A. An appeal to district court shall be taken within 30 days of the issuance of the order in response to the request unless a contrary time is provided by rule or statute.

187—12.11(17A,524) ~~Summary reports~~ Submission of waiver information. ~~Semiannually~~ Within 60 days of granting or denying a waiver, the superintendent shall ~~prepare a summary report identifying~~ make a submission on the Internet site established pursuant to Iowa Code section 17A.9A for the submission of waiver information. The submission shall identify the rules for which a waiver has been granted or denied, the number of times a waiver was granted or denied for each rule, a citation to the statutory provisions implemented by these rules, and a general summary of the reasons justifying the superintendent's actions on waiver requests. If practicable, the ~~report~~ submission shall detail the extent to which the granting of a waiver has established a precedent for additional waivers and the extent to which the granting of a waiver has affected the general applicability of the rule itself. ~~Copies of this report shall be available for public inspection and shall be provided semiannually to the administrative rules coordinator and the administrative rules review committee.~~

Exhibit A
Sample Petition (Request) for Waiver/~~Variance~~
BEFORE THE SUPERINTENDENT OF BANKING

Petition by (insert name of petitioner) for the waiver of (insert rule citation) relating to (insert the subject matter).	}	PETITION FOR WAIVER
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A request for waiver ~~or variance~~ from a rule adopted by the superintendent shall include the following information in the petition for waiver ~~or variance~~ where applicable and known:

- a. Provide the petitioner's (person asking for a waiver ~~or variance~~) name, address, and telephone number.
- b. Describe and cite the specific rule from which a waiver ~~or variance~~ is requested.
- c. Describe the specific waiver ~~or variance~~ requested; include the exact scope and operative time period that the waiver ~~or variance~~ will extend.
- d. Explain the important facts that the petitioner believes justify a waiver ~~or variance~~. Include in your answer (1) why applying the rule will result in undue hardship on the petitioner; and (2) how granting the waiver ~~or variance~~ will not prejudice the substantial legal rights of any person; and (3) that the provisions of the rule subject to the petition for waiver are not specifically mandated by statute or another provision of law; and (4) where applicable, how substantially equal protection of public health, safety, and welfare will be afforded by a means other than that prescribed in the particular rule for which the waiver ~~or variance~~ is requested.
- e. Provide a history of prior contacts between the superintendent and petitioner relating to the regulated activity, license, grant, loan or other financial assistance that would be affected by the waiver ~~or variance~~; include a description of each affected license, grant, loan or other financial assistance held by the petitioner, any notices of violation, contested case hearings, or investigative or examination reports relating to the regulated activity, license, grant or loan within the past five years.
- f. Provide information known to the petitioner regarding the treatment by the superintendent of similar cases.
- g. Provide the name, address, and telephone number of any public agency or political subdivision which also regulates the activity in question or which might be affected by the granting of a waiver ~~or variance~~.

h. Provide the name, address, and telephone number of any person or entity that would be adversely affected or disadvantaged by the granting of the waiver ~~or variance~~.

i. Provide the name, address, and telephone number of any person with knowledge of the relevant or important facts relating to the requested waiver ~~or variance~~.

j. Provide signed releases of information authorizing persons with knowledge regarding the request to furnish the superintendent with information relevant to the waiver ~~or variance~~.

I hereby attest to the accuracy and truthfulness of the above information.

Petitioner's signature _____ Date _____

Petitioner should note the following when requesting or petitioning for a waiver ~~or variance~~:

1. The petitioner has the burden of proving to the superintendent, by clear and convincing evidence, the following: (a) application of the rule to the petitioner would result in an undue hardship on the petitioner; and (b) waiver ~~or variance~~ in the specific case would not prejudice the substantial legal rights of any person; and (c) the provisions of the rule subject to the petition for waiver are not specifically mandated by statute or another provision of law; and (d) where applicable, how substantially equal protection of public health, safety, and welfare will be afforded by a means other than that prescribed in the particular rule for which the waiver ~~or variance~~ is requested.

2. The superintendent may request additional information from or request an informal meeting with the petitioner prior to issuing a ruling granting or denying a request for waiver ~~or variance~~.

3. All petitions for waiver ~~or variance~~ must be submitted in writing to the Banking Division, 200 East Grand Avenue, Suite 300, Des Moines, Iowa 50309. If the petition relates to a pending contested case, a copy of the petition shall also be filed in the contested case proceeding.

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EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement 1/13/21.