

CHAPTER 26
REGULATION OF PHYSICAL
EXERCISE CLUBS

61—26.1(552) Filing. Information required to be filed by the physical exercise club statute, Iowa Code chapter 552, or these rules shall be submitted to the Office of the Attorney General, Consumer Protection Division, Hoover Building, Second Floor, Des Moines, Iowa 50319. When these rules require that a document be filed by a specific time, that requirement is met by delivery to this office, by delivery to an established courier service for immediate delivery, or by mailing within the required time period provided that the document is accompanied by adequate proof of mailing. Adequate proof of mailing includes the following: a legible United States Postal Service postmark on the envelope, a certificate of service signed by an attorney, or a certification in the following form:

I certify under penalty of perjury and pursuant to the laws of Iowa that, on (date of mailing), I mailed a copy of (describe document) addressed to the Office of the Attorney General, Consumer Protection Division, Hoover Building, Second Floor, Des Moines, Iowa 50319, by depositing the same in a United States Post Office mailbox with correct postage properly affixed.

(Date)

(Signature)

61—26.2(552) Definitions. The terms used in these rules have the definitions found in Iowa Code section 552.1.

61—26.3(552) Registration. Rescinded **ARC 5076C**, IAB 7/1/20, effective 8/5/20.

61—26.4(552) Escrow.

26.4(1) *Who must establish escrow accounts.* A physical exercise club or its assignee or agent that accepts prepayments shall deposit all of the funds received as prepayments in an escrow account established with a financial institution located in this state whose accounts are insured by the federal deposit insurance corporation, the national credit union administration, or the federal savings and loan corporation, which shall hold the funds as escrow agent for the benefit of the buyers that prepay. The physical exercise club shall deposit all prepayments received at least biweekly and shall make the first deposit not later than the fourteenth day after the day on which the physical exercise club accepts the first prepayment.

26.4(2) *Material to be submitted.* A physical exercise club or its assignee or agent, as defined in Iowa Code section 552.1(5), that accepts prepayments shall submit to the attorney general's office at the address indicated in rule 61—26.1(552) the following:

a. If an escrow account is established, a notarized statement that identifies the financial institution in which the prepayments are held in escrow, the name and account number in which the account is held, and a copy of the escrow agreement.

b. If a bond is posted in lieu of establishing an escrow account, a copy of the bond.

c. The date the first contract was signed.

d. A customer list with current addresses and telephone numbers shall be submitted biweekly.

26.4(3) *Submission date.* The material as set forth in 26.4(2) shall be submitted not later than the fourteenth day after the first prepayment is received.

26.4(4) *Release of escrow.* The physical exercise club shall give notice to the consumer protection division at least ten days before it plans to request the release of the funds held in escrow. The financial institution shall not release the escrow account without verification from the consumer protection division that it has received this notice. Release procedures shall not begin until after verification from the consumer protection division that the physical exercise club is fully open for business. These release provisions shall be included as part of the escrow agreement.

26.4(5) Buyer's right. The buyer retains ownership of all moneys and interest held in escrow under these rules. These rules do not limit a buyer's right to cancel and receive a refund pursuant to Iowa Code section 552.5, or 537.3310, if applicable.

26.4(6) Hearing. If the escrow agent fails to make full refund to a buyer when required by Iowa Code section 552.13 or either the buyer or seller contests the consumer protection division's determination as to whether or not the physical exercise club is fully opened for business, the attorney general's designee shall hold a hearing and determine whether the physical exercise club has fully opened and has remained open for 30 days, and if not, determine those persons who, as buyers are entitled to a refund and, if appropriate, distribute the escrow proceeds. A hearing can be held on motion by the consumer protection division or a request by other parties. This rule shall not preclude the attorney general from taking other appropriate legal action to protect the interest of the buyer or other parties pending the outcome of the hearing.

26.4(7) Notice of hearing. The physical exercise club shall be provided notice of hearing at its place of business. All buyers who have funds in the escrow account shall be provided notice of the hearing at their last-known address with costs assessed to the physical exercise club. Notice of hearing will include:

- a. The date, time, place and nature of the hearing.
- b. A statement that the party may be represented by legal counsel.
- c. A statement of the legal authority and jurisdiction under which the hearing is to be held.
- d. A reference to the statute or rules involved.
- e. A short and plain statement of the matters asserted.

26.4(8) Conduct of hearings. Hearings under this rule will be conducted as contested case proceedings under the Iowa administrative procedure Act. These hearings will generally be conducted according to the following format, subject to modification at the discretion of the presiding officer:

- a. The representative of the consumer protection division may make an opening statement.
- b. The respondent(s) may make an opening statement or may elect to reserve the opening statement until just prior to the presentation of evidence by the respondent.
- c. The evidence on behalf of the consumer protection division is presented.
- d. The evidence on behalf of the respondent(s) is presented.
- e. Rebuttal evidence, if any, on behalf of the consumer protection division is presented.
- f. Rebuttal evidence, if any, on behalf of the respondent(s) is presented.
- g. Each party may make a closing argument.

26.4(9) Continuances. No ex parte continuance shall be granted to any party.

26.4(10) Discovery and subpoenas. The provisions of Iowa Code section 17A.13 relating to discovery and subpoenas shall govern in contested cases held pursuant to these rules. If the department of inspections and appeals provides an administrative law judge to conduct the hearing, the provisions of 481—4.5(17A) shall not apply.

26.4(11) Proposed decision. The presiding officer will render a proposed decision which shall be in writing or stated in the record. The decision may include any of the following:

- a. Finding that the physical exercise club has fully opened for business.
- b. Finding that the physical exercise club has not fully opened for business.
- c. Finding that the physical exercise club has not remained open for 30 days.
- d. A determination of those persons who, as buyers, are entitled to a refund.
- e. Distribution of the escrow proceeds.

26.4(12) Further review. Any party who is adversely affected by a proposed decision or the consumer protection division may seek further review with the attorney general by complying with the following procedure:

- a. A request for further review must be filed with the attorney general within 20 days of the date of the proposed decision.
- b. Within ten days after filing the request for further review, the requesting party must file written exceptions to the proposed decision and must set forth the specific relief requested as well as all of the grounds upon which the request for relief is based. The party seeking further review may also file a written brief and argument along with its exceptions.

c. The opposing party has 14 days following service of the exceptions to file a responsive brief and argument if desired.

d. In the event that a party does not seek further review, the proposed decision shall become the final decision.

26.4(13) Notification of decision. The physical exercise club shall be promptly furnished with a copy of any final or proposed decision either by personal service or by certified mail. All buyers who have funds in the escrow account shall be furnished with a copy of any final or proposed decision by ordinary mail at their last-known address.

26.4(14) Judicial review. A party who has exhausted administrative remedies may seek judicial review of the decision pursuant to the Iowa administrative procedure Act.

[ARC 5076C, IAB 7/1/20, effective 8/5/20]

61—26.5(552) Bond.

26.5(1) Bond required. A physical exercise club that accepts prepayments and does not establish an escrow account must post a bond in the amount of \$150,000 with the office of the attorney general, in a form deemed acceptable by the attorney general.

26.5(2) Notice. Notice of the existence of the bond must be disclosed to the buyer in the physical exercise club contract.

26.5(3) Collection on the bond. Either the attorney general or a buyer may collect on the bond in the same manner and on the same terms as provided for an escrow account. The aggregate liability of the surety for all refunds shall not exceed the amount of the bond. If refunds exceed the amount of the bond, distribution will be on a pro-rata basis.

61—26.6(552) Certification. Upon application by the physical exercise club, the attorney general may certify that a physical exercise club is fully open for business if substantially all of the promised equipment and services are available for use and the physical exercise club has made a diligent effort to provide the remaining equipment and services.

61—26.7(552) Notification to financial institution. The physical exercise club shall notify the financial institution at the time the escrow account required by subrule 26.4(1) is opened that the escrow account is being established pursuant to Iowa Code chapter 552C. After the material has been submitted by the physical exercise club as required in subrule 26.4(2), the consumer protection division shall notify the financial institution of the release procedures to be followed by the financial institution.

These rules are intended to implement Iowa Code chapter 552.

[Filed emergency 9/23/88—published 10/5/88, effective 9/23/88]

[Filed 9/21/89, Notice 6/14/89—published 10/18/89, effective 11/22/89]

[Filed ARC 5076C (Notice ARC 5030C, IAB 5/6/20), IAB 7/1/20, effective 8/5/20]